

# LAW, DECONSTRUCTION AND RESISTANCE: THE CRITICAL STANCES OF DERRIDA AND FOUCAULT

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## I. INTRODUCTION

Derrida and Foucault currently stand for two powerful modes of criticism, and their power has not gone unrecognized among critical legal scholars.<sup>1</sup> This Article disentangles these two modes of criticism or critical stances. By doing so, one may begin “to think about law in a way that will allow one to enter into it, to criticize it without utterly rejecting it, and to manipulate it without self-abandonment to *their* [the liberal legalist culture’s] system of thinking and doing.”<sup>2</sup> The critical stances of Derrida and Foucault are two ways of not abandoning one’s “system of thinking and doing,” but of operating powerfully from within the very premises of liberal legality, of lifting out of legal texts the submerged metaphorical aspects of legal reasoning and legal legitimation.<sup>3</sup> Ultimately, and if approached gingerly, the critical stances discussed here can empower one to gain control over legal discourse so as to realize its transformative possibilities. One direction such empowerment may take us is towards showing that the world is constituted of competing visions of social life; that the established order, with its own metaphor of free market initiative, is no less utopian than other more radical visions.

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<sup>1</sup> See, e.g., Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987); Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984); Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984); Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151 (1985).

This Article follows the lead of Tiefenbrun, *Legal Semiotics*, 5 CARDOZO ARTS & ENT. L.J. 89 (1986). Whereas Tiefenbrun engages in an exegesis of wide-ranging topics within semiology and the philosophy of language, this Article is confined to a detailed account of two exponents of post-structuralist thought. See *infra* notes 4-10 and accompanying text.

<sup>2</sup> Kennedy, *Legal Education as Training for Hierarchy*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 40, 50 (D. Kairys ed. 1982) (emphasis in original).

<sup>3</sup> For an example of this type of critique, see Peller, *supra* note 1.

Part II of this Article will embark on an exegetical tour of Derrida's deconstructive methodology and Part III will tour Foucault's genealogical approach. The differences between these two critical stances will be noted throughout. Frug's methodology, most notably his use of Derridean insights, used in his article, *Ideology and Bureaucracy in American Law*, will also be examined. In Part IV, there will be an inquiry into the political implications of this methodology and how these implications fit with Frug's overall thesis. Finally, this Article will return to Foucault and assess Frug's research in Foucaultian terms.

## II. DERRIDA

The writings of Derrida are both a continuation and a critique of structuralism. Structuralism<sup>4</sup> stands counterpoised to Husserlian phenomenology<sup>5</sup> in its refusal to acknowledge any meaning outside or beyond the constraints of a preexisting language. Any notion of "deep structure" within a text can be surpassed by the variety of meaning which marks a text.<sup>6</sup> That is, the very idea of structuralism contains within it its own contradiction, for structuralism makes it possible for meanings to emerge in new and unforeseeable ways. Structuralism, therefore, maintains a schizophrenic quality: the movement toward complete closure by virtue of discovering ultimate meaning or truth within a text, and the propagation of multiple meanings within a text.

Deconstruction is avowedly "post-structuralist" neither in its attempt to do away with structuralism nor to render it irrelevant, but in its resistance to the claim that the schizophrenia can be denied.<sup>7</sup> Deconstruction is the attempt to save structuralism

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<sup>4</sup> For an overview of structuralism, see T. EAGLETON, *LITERARY THEORY: AN INTRODUCTION* 91-126 (1983); T. HAWKES, *STRUCTURALISM AND SEMIOTICS* (1977); F. JAMESON, *THE PRISON-HOUSE OF LANGUAGE* (1972); PETTIT, *THE CONCEPT OF STRUCTURALISM: A CRITICAL ANALYSIS* (1977); *STRUCTURALISM: A READER* (M. Lane ed. 1970); *THE STRUCTURALISTS: FROM MARX TO LEVI-STRAUSS* (R. De George & F. De George eds. 1972); *THE STRUCTURALIST CONTROVERSY* (R. Macksay & E. Donato eds. 1972). See also Heller, *Structuralism and Critique*, 36 *STAN. L. REV.* 127 (1984). For an actual application of structuralism, see C. LEVI-STRAUSS, *THE RAW AND THE COOKED* (1969); J. PIAGET, *STRUCTURALISM* (1970).

<sup>5</sup> See E. HUSSERL, *CARTESIAN MEDITATIONS* (1960); HUSSERL, *IDEAS: GENERAL INTRODUCTION TO PURE PHENOMENOLOGY* (1931). For an overview of Husserlian phenomenology, see M. BUBNER, *MODERN GERMAN PHILOSOPHY* 11-68 (1981). For a brief discussion of Husserl within the context of literary theory, see EAGLETON, *supra* note 4, at 54-71.

<sup>6</sup> For the most interesting and lucid illustration of this concept, see R. BARTHES, *S/Z* (1970); Barthes, *Textual Analysis of Poe's 'Valdemar,'* in *UNTYING THE TEXT* 133-61 (R. Young ed. 1981).

<sup>7</sup> See Young, *Post-Structuralism: An Introduction*, in *UNTYING THE TEXT* 1-28 (R. Young ed. 1981).

from falling into the trap of the Western metaphysical tradition of closure and unity.<sup>8</sup>

Many of Derrida's most penetrating essays are devoted to the task of dismantling a concept of "structure" that serves to immobilize the play of meaning in a text and reduce it to a manageable product. If interpretation, structuralist or otherwise, is understood to be an endeavor to find order, unity, intelligibility, or meaning within a text, then deconstruction must be taken as anti-interpretationist. Instead of being a controlled technique for finding meaning, deconstruction is a "positive technique for making trouble; an affront to every normal and comfortable habit of thought."<sup>9</sup> Nevertheless, deconstruction implicitly harbors an optimism toward structuralism. We are, says Derrida, still inside structuralism insofar as structuralism constitutes "an adventure of vision, a conversion of the way of putting questions to any object."<sup>10</sup> Any deconstructive critique then must be made from within the structuralist system.

This point is crucial to understanding Derrida's unique critical stance. Derrida emphasizes the need for careful reading and attention to the traditional modes of analysis, such as phenomenology and structuralism. But, what is distinctive about his critical stance is the way it tries to avoid the self-abandonment to the dominant culture's system of thinking and doing while still taking its assumptions seriously.

#### A. *The Deconstructive Method*

The relevance and power of deconstruction as a critical stance lie in its insight that we are all—critical legal theorists included—absorbed within certain social practices and linguistic

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<sup>8</sup> Speaking of Derrida's relationship to structuralism, Christopher Norris, in a widely read book on deconstruction, notes:

[Derrida's] object is not to deny or invalidate the structuralist project but to show how its deepest implications lead on to a questioning of method more extreme and unsettling than these [structuralist] thinkers wish to admit. The very notion of "structure" is shown to be a metaphor dependent, at the limit, on a willed forgetting of its own rhetorical status.

C. NORRIS, DECONSTRUCTION: THEORY AND PRACTICE 79 (1982).

<sup>9</sup> *Id.* at xi.

<sup>10</sup> J. DERRIDA, *Force and Signification*, in WRITING AND DIFFERENCE 3 (1978); see also Young, *Post-Structuralism: The End of Theory*, 5 OXFORD LITERARY REVIEW 3 (1982).

It seems to me that whether we like it or not, we haven't gone beyond structuralism. We're still within it insofar as structuralism and post-structuralism inhabit each other. The reason is that if we want to go beyond structuralism because of its metaphysical assumptions, we find that it is precisely metaphysics beyond which we cannot go.

*Id.* at 4-5.

and metaphorical frameworks;<sup>11</sup> that we can no longer delude ourselves into thinking that a God's-eye point of view by which we can assess the progress and virtue of our culture is possible.<sup>12</sup> Thus, the importance of deconstruction as a critical stance is not so much its effectiveness—towards what end is it effective?—but its inevitable necessity. How then does it operate?

For Derrida, deconstruction is the practice of inverting textual hierarchies and systems

which brings low what was high, and the irruptive emergence of a new "concept," a concept that can no longer be, and never could be, included in the previous regime.<sup>13</sup>

Derrida performs such inversions by finding what he calls the "center" of the text, the signifier which orients the text by virtue of its purported connection to a transcendental signified, and exposes it as also containing linguistic or philosophical conventions.<sup>14</sup> That is, the "center" of the text, the anchor of meaning, has nothing transcendental about it. It deserves or merits no more privileged status than any other aspect of the text. Stated baldly, Derridean deconstruction demystifies the "center." There is no "center" which organizes and authorizes any single determinant meaning. All we have is a multiple "play" of meaning, free of the strictures imposed by the authorial and mythical "center."

By decentering the text, shattering all notions of a transcendental signified, Derrida shows that epistemological preferences based on self-evidence or rational justification conceal a linguistic and metaphysical infrastructure that undermines all truth claims. The

<sup>11</sup> Derrida insists on this point:

There is no sense in doing without the concepts of metaphysics in order to shake metaphysics. We have no language—no syntax and no lexicon—which is foreign to this history; we can pronounce not a single destructive proposition which has not already had to slip into the form, the logic, and the implicit postulations of precisely what it seeks to contest.

J. DERRIDA, *Structure, Sign, and Play in the Discourse of the Human Sciences*, in *WRITING AND DIFFERENCE* 278, 280-81 (1978).

<sup>12</sup> The point could very well be stated negatively. The absence of a God's-eye point of view can be seen as a blow to radical politics insofar as radical critiques rely upon the existence of some external vantage point by which one can critique the dominant culture. This point will be discussed in Part IV of this Article.

<sup>13</sup> J. DERRIDA, *POSITIONS* 42 (1981); see also Balkin, *supra* note 1, at 146-52.

<sup>14</sup> Possible examples of "centers" are notions like the "Family," "God," the "Market," "Freedom," etc. These notions, capacious in their connotations, yet pointed in their emotive impact, anchor a text. That is, other less grand notions get their meaning and connotations from these "transcendental signifiers." The purpose of the center in interpretation is to limit the play of opposing elements in the text, protecting it from deconstruction. "Humankind's common desire is for a stable center, and for the assurance of mastery—through knowing or possessing." Spivak in J. DERRIDA, *OF GRAMMATOLOGY* xi (1976).

reader of Derrida finds frequent references to Western metaphysics,<sup>15</sup> to a philosophy of presence and all that it entails, and to explanations about a fairly wide variety of texts—from Plato through Descartes, Hegel, Kant, Rousseau, Heidegger, and Levi-Strauss. On the other hand, the reader will also find Derrida's unrelenting attention to the minutiae of a text and the inadvertent elisions, confusions, and circumspections on certain key points. What Derrida uncovers in these texts is silent complicity between the superstructural pressures of metaphysics and the ambiguity immanent to the details of the text at the level of base. Derrida does not say what mediates between the level of detail and the level of superstructure. The obvious implication is that the various texts chosen to be deconstructed elude the problems sprung on them by their own verbal behavior, suggesting the writers were being pressured *involuntarily* by the superstructural and teleological biases of metaphysics. That is, Derrida posits a metaphysical, logocentric world view, and situates these writers within that world view, writing from within, and involuntarily trapped and warped by, that tradition.<sup>16</sup>

More generally, Derrida's deconstructive method spotlights the tensions within a text, the tensions between that which tradition has considered central or essential to a text, and that which is excluded, suppressed, or deemphasized within a text. Whereas traditional interpretative strategies find meaning and closure by denying the tensions within a text, deconstruction opens a text to a plurality of meanings by parading the tensions by showing how the text unavoidably undercuts its own stated themes or theses. Decentering a text is simply one way of describing this strategy. The phrase, "the dangerous supplement,"<sup>17</sup> is another shorthand description.

### B. *The Elements of This Critical Stance: Writing and "Differance"*

The foregoing was highly schematic, only to give one a fla-

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<sup>15</sup> For Derrida, metaphysics is thought of as "Presence" which excludes "Absence." Metaphysics is the constitution of this antinomy, and all associated antinomies: objective-subjective, external-internal, essence-appearance, etc. Derrida views metaphysics as the strategic operation by which one attempts to think the first term of these oppositions in such a way as not to implicate the second term. But, the second term can be conceived of as being derived from the first by privation. These antinomies are not merely oppositions. They are hierarchically arranged in such a way that the first term dominates the second.

<sup>16</sup> This is not to say that Derrida obliterates all notions of the subject. From a purely logical standpoint, the existence of a signifier presupposes the existence of a subject. So to deny the existence of the subject is to leave nothing to deconstruct. Derrida has found the notion of the *sovereign* subject to be problematic. In other words, Derrida calls into question the coherence of any theory of the subject. See J. DERRIDA, *Freud and the Scene of Writing*, in *WRITING AND DIFFERENCE* 196 (1978).

<sup>17</sup> J. DERRIDA, *OF GRAMMATOLOGY* 141-64 (1976).

vor of Derrida's complex critical stance.<sup>18</sup> Nevertheless, one may legitimately wonder what the scope is for deconstruction. Is this critical stance simply a fancy technique to be applied to canonical literary texts? The answer is clearly no. The subjects of Derrida's meticulous unravellings illustrate the conventional breakdown of the boundaries between literature and other more "privileged" modes of discourse (i.e., philosophy, science, and law). His point is that certain ambiguities, dichotomies, antinomies and paradoxes are laden with all discourses. "There is no language so vigilant or self-aware that it can effectively escape the conditions placed upon thought by its own prehistory and ruling metaphysic."<sup>19</sup>

The effect of deconstruction is to take philosophy, science and law off their cultural pedestal as superior forms of discourse; superior in the sense that they are ways of talking which mirror "reality" more accurately, or provide one with an unmediated access to truth. They share the same open-ended quality as literature and poetry. The only difference is that philosophical, scientific and legal discourse have been successful in suppressing their rhetorical and metaphorical elements, whereas literature and poetry have celebrated them. The language of a legal document impresses or intimidates lay persons because they do not see how the language got there in the first place or how it took the shape that it did. The documents do not allow the reader to see how the facts it contains were selected, what was excluded, why these facts were organized in this particular way, etc. The very power of law to lay persons who encounter wills and contracts lies in the ability of legal texts to suppress their own "literary" status; that is, their own incorporated metaphors about the nature of the self, social life and social conflict.<sup>20</sup>

The epistemological power of privileged discourses resides in maintaining the illusion that language is a tool for representa-

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<sup>18</sup> Describing Derridean deconstruction was necessary in order to become familiar with the vocabulary used to describe this critical stance. However, to acquire this vocabulary involves having some understanding of the general framework of deconstruction. This dilemma makes reading Derrida extremely difficult.

<sup>19</sup> C. NORRIS, *supra* note 8, at 22.

<sup>20</sup> It is important to note that the power of legal texts, like the power of philosophical and scientific texts, constitutes within themselves a delusion over their superior status. Once alerted to the *rhetorical* nature of philosophic arguments, the critic is in a strong position to reverse the age-old prejudice against literature as a debased or merely deceptive form of language. It now becomes possible to argue—indeed, impossible to deny—that literary texts are *less deluded* than the discourse of philosophy [or law or science], precisely because they implicitly acknowledge and exploit their own rhetorical status.

*Id.* at 21 (emphasis added).

tion; something that we have control over. Derrida reiterates the Heideggerian point that man resides in language: "Man acts as though *he* were the shaper and master of language, while in fact *language* remains the master of man."<sup>21</sup> Language is the root of being, as opposed to the logocentric conception that being creates and precedes language. Language is not a tool but a constitutive framework for the development of the subject. It is in this way that Derrida problematizes the sovereignty of the subject.

Having abandoned the traditional, logocentric conception of language—language as representational and referential—how does one assess language at all? What exactly is meant when one says that meaning, far from preceding language, is an effect produced by language, produced by the infinite play of textual differences? The posing of these questions leads to a discussion of the central idea of Derrida's critical stance: *differance*. As a first cut, it can be said that Derrida employs the term in opposition to logocentrism of any kind. The term is of Derrida's own coinage and is deliberately ambiguous being derived from the French word *differer* meaning both "to defer, postpone, delay" and "to differ, be different from."<sup>22</sup> This ambiguity perhaps needs some elaboration.

The first sense of *differance* may be taken up in its spatial aspect, as differing, the act of being different from. This is a reincorporation of Saussurean linguistics into the Derridean critical stance. Saussure introduced the idea that signs have the capacity for harnessing meaning by virtue of their differential character.<sup>23</sup> The word "cat" gets its meaning because it is not the word "mat" or "bat." The word "man" gets its meaning in part by virtue of the word "woman." "Man" is what "woman" is not. This differential character of signs is discussed with Frug's *The Ideology of Bureaucracy in American Law*<sup>24</sup> ("Frug's article") in Part IV of this Article. For the moment, suffice it to say that the Saussurean insight is that words get their meaning from their relationship to other words.

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<sup>21</sup> M. HEIDEGGER, *Building Dwelling Thinking*, in POETRY, LANGUAGE, THOUGHT 146 (1971) (emphasis in original).

<sup>22</sup> What is unnameable here is not some ineffable being that cannot be approached by a name; like God, for example. What is unnameable is the play that brings about the nominal effects, the relatively unitary or atomic structures we call names, or chains of substitutions for names.

J. DERRIDA, *SPEECH AND PHENOMENA* 159 (1973).

<sup>23</sup> "The idea or phonic substance that a sign contains is of less importance than the other signs that surround it." F. DESSAÛSURE, *COURSE IN GENERAL LINGUISTICS* 120 (1959).

<sup>24</sup> Frug, *supra* note 1, at 1276.

The second sense of *differance*, its temporal sense, is captured in the notion of deferral. The sign operates as a communicative device because the thing to which it refers is *absent*. “The sign represents the present in its absence.”<sup>25</sup> But more than that, the sign is a “deferred presence”—a deferral of “the moment in which we can encounter the thing itself.”<sup>26</sup> Given this semiological account of the sign, the source of the logocentric assumption that writing is a defiled form of speech can be seen. Writing is only a substitution of the purity and naturalness of Presence. Speech, on the other hand, is the embodiment of Presence.

The effect of Derrida’s deconstruction of the speech-writing hierarchy is to make deferral the characteristic of all language, not just written language. Language is deferral, for the whole notion of a Presence which will give language a foundation is shown to be a big metaphysical error.

To get the full force of this idea Derrida calls *differance*, one must conjoin the spatial and temporal sense of the term. The sign is a deferred presence of that which is absent. Rather than produce the object to which one can refer (the referent), a sign can be used. The use of the sign allows postponement or deferral of presenting the referent. But, simultaneously, the sign itself is never really there to be fully grasped. This is simply because the sign is itself neither substance nor presence, but only a play of *differences* (“trace”). Derrida states the same point this way: “What is written as *differance*, then, will be the playing movement that ‘produces’—by means of something that is not simply an activity—these differences, these effects of difference.”<sup>27</sup> In effect, the sign cannot do what we wish it to do, that is stand in for the absent referent as a stable entity. Indeed, the sign is no longer an entity at all, but a “trace.” Note how Derrida’s deployment of *differance* takes Saussurean linguistics to its extreme by undermining the presence-absence dichotomy.

These two senses of *differance*—the spatial and the temporal sense—serve to highlight both the fact that any term of language relates to other terms in a text, and the fact that it is distinct from them. The meaning of a particular term is never fully present because it depends on its relationship with other terms to which it harks back and refers forward. But, at the same time, the very existence of the term presupposes that it be distinct from other

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<sup>25</sup> J. DERRIDA, *Differance*, in MARGINS OF PHILOSOPHY 1, 9 (1982).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 11.



terms. *Differance* is the force behind language. It produces the *effects* of difference which make up language. Since *differance* is imminent to the text, it has a quite different status and function from that of, say, "truth," which is external to language or extra-linguistic, in logocentric modes of thought.

The fight against closure, so characteristic of deconstruction, is harnessed in an odd way in Derrida's use of the word *differance*. The intentional misspelling creates instability at the level of the signifier, symbolizing all that resists identity.<sup>28</sup> It is worth pointing out that, in a variety of ways and from a variety of perspectives, Derrida shows that nothing escapes *differance*, that there are no inviolate entities (which Derrida calls on varying occasions, "transcendent[al]" signifiers, "center," or "origin"), and that everything becomes a part of what he calls the "play" of differences.<sup>29</sup> "[D]ifferance instigates the subversion of every kingdom."<sup>30</sup>

It is instructive to stop the above excursion into the elements of Derrida's critical stance and assess its significance. Fundamentally, the Derridean insight most relevant to legal theorists is that so long as it is believed that language is mainly a representation of something else, what language *does* cannot be seen. Far from being transparent to its own representations, its own referential capacity, language is the embodiment of the permanent deferring of representation. As such, language—the very idea of language—marks the inauguration of writing as an activity all its own.<sup>31</sup>

Many readers coming from within the literary tradition will not find Derrida's own strategies of writing and deconstructing intrinsically unfamiliar or surprising *as applied to literature*, how-

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<sup>28</sup> In some sense, this deliberate misspelling is an example of Derrida's wit. Recall that Derrida expends much of his energy to subvert phonocentrism by noting that "difference" and "*differance*" are distinguishable only when read and cannot be detected in speech. Thus, Derrida is illustrating his point about the falsity of the speech-writing hierarchy.

<sup>29</sup> Derrida, *supra* note 25, at 11-12. Terry Eagleton succinctly makes the same point: There is no concept which is not embroiled in an open-ended play of signification, shot through with the traces and fragments of other ideas. It is just that, out of this play of signifiers, certain meanings are elevated by social ideologies to a privileged position, or made centres around which other meanings are forced to turn.

T. EAGLETON, *supra* note 4, at 131.

<sup>30</sup> Derrida, *supra* note 25, at 22.

<sup>31</sup> Perhaps the most enjoyable and rewarding aspect of wrestling with Derrida's elusive works is witnessing how he uses his own writings to refer to and to represent certain ideas of presence at work in a whole series of texts. Then, in representing these texts, he rereads and rewrites them, enabling the reader to see them not as representations of something external, but as texts representing only themselves.

ever defined. Derrida brings with him an attitude towards the texts he is writing about. Since writing can never be governed by the intention and avowed aims of its authors, Derrida says of Rousseau, for example, that what he actually writes is quite different from what he means to say. That is, Rousseau is bound, as we all are, to say something quite other than what he would intend to say.<sup>32</sup> Literary criticism has often taken precisely this assumption as its starting point and has presumed that a literary text is not necessarily saying what it intends to say or even what it appears to say. Indeed, it is this presumption that creates the need for critical interpretation in literary studies.

All of this is well and good until one applies the issue of Derrida's critical stance to legal (or philosophical or scientific) texts. These "more rigorous," "less playful" texts require that the reader is to suppress ambiguities in the name of "interpretation" and "understanding." Indeed, liberal legalism operates on the assumption that the judge *qua* decision-maker will not abandon the task of making a decision, even when the formal rules give out (i.e., when sterile deductive logic does not mandate a particular result). To assume the role of judge in a liberal legalist culture is to refuse to take the idea of indeterminacy seriously.<sup>33</sup> That is not to say that ambiguity and indeterminacy are never recognized. It is to say that ambiguity and indeterminacy are debarred as ruling ethics or animating ideas within legal liberalism. Thus, even when ambiguity and indeterminacy become so intense as to be undeniable by even the staunchest interpretivist, the liberal legalist culture enjoins the judge to make a decision, to render an interpretation of a statute or other provision, and to proffer a *meaning*. Moreover, the liberal legalist culture not only mandates that a meaning be found, but that the meaning be harmonized with other aspects of the law. Constraint in the act of interpretation comes through the requirement that a precedent or statutory provision be read in light of other precedents and/or provisions, and that the judge be sensitive to the need for harmony within law.<sup>34</sup>

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<sup>32</sup> See generally J. DERRIDA, POSITIONS (1981).

<sup>33</sup> Barbara Johnson, in a perceptive essay on Herman Melville's *Billy Budd*, concludes with this very point. "[L]aw is thus defined in terms of its repression of ambiguity." B. JOHNSON, *Melville's Fist: The Execution of Billy Budd*, in THE CRITICAL DIFFERENCE 79, 106 (1985). In the same vein, Owen Fiss commented that, "in legal interpretation there is only one school and attendance is mandatory." Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 746 (1982).

<sup>34</sup> See H. BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS (1896); see also J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES

Correlative to these cultural requirements, the entire premise to law is that language itself will illustrate meaning in a direct and immediate way. On this level, the Derridean critical stance is clear. To deconstruct a text is to show how it incorporates a *metaphysical* structure which suppresses its own *metaphorical* characteristics.<sup>35</sup> What generates this type of critical stance is the prior argument that any metaphysical structure relied upon to anchor meaning is built upon language. Since all language, not just literary language, is informed by the play of signification, of *differance*, all writings, even those built upon purported metaphysical structures, are literary. Thus, legal discourse and legal writing, which appear to be entirely directed towards some external referent and whose intelligibility would seem to depend on their interpretive transparency, are simply an effect produced by language. Stated another way, legal discourse and legal writing are just a certain type of writing in which the signifying element of language has been illusorily repressed in favor of the signified.

To recapitulate, what Derrida argues is that any discourse which parades itself as scientific is bound to be logocentric. That is, it will assume that it is transparent to its object and that the object is a stable entity. But, neither language, literature, nor legal discourse is a stable object because neither the language of the texts nor the language of the discourse can escape *differance*.

This critique took as its point of attack a very specific, but powerful and pervasive premise that legal writing is transparent to its own referentiality. The above description arguably does not undermine liberal legalism *in toto*. It was carefully pointed out in the brief discussion of liberal legalism that within a liberal legalist culture, ambiguity and indeterminacy are unabashedly suppressed, not taken seriously. One could still conceivably argue that, notwithstanding that legal writing cannot escape *differance*, the entire liberal regime of the rule of law need not topple.

Owen Fiss makes such a claim in a very spirited way.<sup>36</sup> He acknowledges the force of the deconstructionist point that meaning does not lay dormant within a text, waiting to be discovered. Fiss is quick to argue though, that he does not leave us with the multiple play of signification, as Derrida would have it. Inter-

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(1833); Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975); cf. J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

<sup>35</sup> Derrida labels as "metaphysical," any "such thought-system which depends on an unassailable foundation, a first principle or unimpeachable ground upon which a whole hierarchy of meanings may be constructed." T. EAGLETON, *supra* note 4, at 132.

<sup>36</sup> See Fiss, *supra* note 33.

preting a text takes two: a text and a reader. The reader contributes to stability in the enterprise by virtue of her membership within an interpretive community. The stability resulting from an interpretive community, Fiss calls, "bounded objectivity."<sup>37</sup> This notion is important to Fiss' scheme. "Bounded objectivity is the only kind of objectivity to which the law . . . ever aspires."<sup>38</sup> And, as Fiss continues to note, bounded objectivity is real, for "[i]n law the interpretive community is a reality."<sup>39</sup> That is, judges are trained and acculturated in such a way as to cultivate a cohesive and coherent interpretive community.

Fiss' constructive efforts will not be challenged point-by-point. Simply note that Fiss is unwittingly attempting to sidestep the full implications of *differance*. The reader, as an external force, is the mechanism by which the play of differences within a text are to be arrested. Positing such an external force displays Fiss' naivete over the notion of *differance*. Quite simply, Fiss falls into the trap of logocentrism by assuming a sovereign subject prior to the text. Fiss suggests that the reader can operate as a constraint over an unruly text. However, Derrida teaches that this notion of a "reader" is a myth. The "reader" is a textual being, itself constituted by *differance*. *Differance* places language prior to being.<sup>40</sup> The "reader" can never be a sovereign subject, but only a purely linguistic subject shot through the same indeterminacies and ambiguities as a text.<sup>41</sup> Fiss' attempt to transcend *differance* by positing a constraining force in the name of the "reader" is an example of another misinformed apologia.

There is, however, a sense that Fiss is on to something. Even if the full implications of *differance* are accepted, the task of interpretation will still be carried out. The judge will still render her decisions as best she can by simply disregarding or "screening" certain messages which usher in ambiguity and indeterminacy. What messages (i.e., legal arguments) are "screened" will de-

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<sup>37</sup> *Id.* at 745.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 746.

<sup>40</sup> See *supra* note 21-22 and accompanying text.

<sup>41</sup> There is a sense of similarity between deconstruction and Freudian psychoanalysis. Derrida seeks to destabilize a text by exposing immanent contradictions within the text. The stability of the text depends upon the suppression of the unruly elements. By disrupting this suppression, the irruption is witnessed by the dissemination of the text. Freud makes a similar point with respect to the unconscious mind. The unconscious permits contradictions within us to persist without making us mad. S. FREUD, *THE BASIC WRITING OF SIGMUND FREUD* (A. Brill trans. 1938). So long as the unruly elements of our own selves are suppressed within the crevices of our subconscious, we remain as stable subjects. Unlock the unconscious and there is an explosion into the netherworld of madness.

pend upon the framework of legal decision and the values of the interpretive community.

It has thus far been established that legal discourse is a mode of writing meaning that it too is marked by *differance*. As a mode of writing, legal discourse has no real connection to a signified, an external reality. Everything is immanent to a text—which is to say that legal discourse, like all discourse, is supported by metaphysical structures which get their meaning from other such structures. For example, visions of property rights as a necessary requisite to freedom and autonomy get their content not from some signified, that is from some vision of what the world is *really* like—the world is not *really* like anything. Rather, such visions derive content from contrary notions of collectivism as a threat to selfhood. Suppressed, but “always already there” within a text, are alternative metaphorical notions of collectivism as a means to liberated selfhood.<sup>42</sup> The suppression is necessary to preserve stability and legitimacy within law in a capitalist economy. But more than that, the very power of the law as a hegemonic force within our culture is rooted in this form of suppression. Taking another slant on all this, it can be said that within liberal legalism, stability means isolating legal discourse from true political discourse—that is, ideological debates over the terms of social life. To have a legal regime where legal discourse is coextensive with political discourse is to write into the fabric of the legal culture the legitimacy of deconstructive readings. Fiss’ point can be taken to suggest that the current legal community *qua* interpretive community has decided not to opt for that sort of legal regime. Putting aside the obvious problems with the point so stated, one can see that Fiss wants to say that the constituted cultural rules of our legal system enjoin certain approaches to reading a text. To challenge those rules is an entirely different argument from the one which claims legal discourse is shot through with debilitating indeterminacy. If it is accepted for the moment that cultural rules do mandate suppression (“Screening”), that deconstruction is ruled out, then a state of stability may be arrived at.<sup>43</sup>

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<sup>42</sup> See Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

<sup>43</sup> The statute strikes me as ambiguous only in the sense that any statement may be termed “ambiguous” on the theory that the utterer may have meant something other than what he said. Such a nihilistic view of linguistic interpretation may be fashionable in some circles, but it hardly provides an adequate basis for statutory construction.

*Lindahl v. Office of Personnel Management*, 470 U.S. 768, 801 (1985) (White, J., dis-

Of course, one may well question how stable this state of affairs can really be. The suppressed elements within legal doctrines always pose a threat. This issue shall not be pursued here because it is too far astray from the point to be made. The critical thrust of deconstruction resides in its capacity to constantly remind one of the falseness of stability. That stability is violence, masking a whirlwind of instability beneath the layer of cultural rules for our legal system. The critical stance shows how certain metaphorical supports come to have a grip on our consciousness, constraining our imagination and the range of acceptable discourse.

Incorporating this critical thrust into a legal setting serves to expose how certain metaphorical and rhetorical supports act as a "screen" within legal argument. Those supports narrow the range of acceptable appeals to social facts and social theories. Arguments of policy and principle, to be effective must legitimate and justify the extant rules in force. This mandates that arguments of policy and principle be consistent and reconcilable with the rhetorical and metaphorical supports implicit within legal doctrine or the legal system generally.

A Derridean critical stance can be an effective technique for exposing the *legitimation* function of law and legal argument. It can show the contingency and limits of legal doctrine, the justificatory character of all legal argument, and the persistent exclusion of competing visions of social life, both as it is seen to be and as it is believed ought to be. The Derridean critical stance is therefore a technique which may serve to highlight the suppressed transformative possibilities of law.

### C. *Derrida in Context*

For those who can better understand philosophical ideas by situating them within the historical schematic of philosophical discourse, it is suggested that Derrida be viewed as the latest in a line of non-Kantian, dialectical thinkers, starting with Hegel<sup>44</sup> through Heidegger<sup>45</sup> and on through Neitzsche and to some extent Lacan. Not surprisingly, the overarching thrust of this tradi-

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senting). Ronald Dworkin makes an analogous point. He argues in favor of the thesis that *one* right theory can be fashioned to justify the morass of extant doctrine. He does so by pointing out that "within the ground rules of the [legal] enterprise," an overarching theory can be, and always is, fashioned which is unique in its justificatory power. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 284 (1977).

<sup>44</sup> G. HEGEL, *PHENOMENOLOGY OF THE MIND* (1967).

<sup>45</sup> M. HEIDEGGER, *BEING AND TIME* (1962).

tion has been a sustained attack on the concept of referentiality; the idea that humankind, through reason, can bring themselves to accurately represent how things *really* are. To Derrida, and one may say to Nietzsche as well, language is the last refuge of the Kantian tradition. It is the final battleground where the deepest and most problematic issues of Western metaphysics will be fought. Richard Rorty distills Derrida's relationship to other philosophers in the following way:

The attitude [of Derrida], roughly, is that most twentieth-century concern with language is Kantian philosophy in extremis, a last desperate attempt to do on a pathetically small scale what Kant (and before him Plato) attempted to do on a large scale—show how the atemporally true can be contained in a spatio-temporal vehicle, regularize the relation between man and what man seeks by exhibiting its “structure,” freezing the historical process of successive reinterpretations by exhibiting the structure of all possible interpretation.<sup>46</sup>

The urge toward structuralism as suggested by Rorty has indeed impelled the type of critical stance that has been described. For Derrida, writing poses itself as a direct challenge to structuralism.<sup>47</sup> This idea can be generalized. Derrida's essays pose as a direct challenge to, and a vigorous assault on, what he considers to be the mainstays of philosophical thought: the idea of an authorizing presence as “substance/essence/existence,”<sup>48</sup> the ever-guiding notions of Platonic ideas, teleological processes like Hegelian synthesis or Marxist materialism, and all grand theorizing which seek closure and totalization. The thrust of Derrida's disruptive enterprise is to show that these mainstays have reigned for too long over Western consciousness and must be seen as having been valorized not by some “outside” power but both by a *misreading of texts* and a misconception of writing. The two, of course, are related. Texts can only be misread because texts embody the open-ended play of signification, and endless differing and deferring captured in the notion, *differance*.

The result of Derrida's critical stance is to reduce everything that is thought of as having some extratextual function within a text to purely textual function.<sup>49</sup> Texts are to be seen only as comment-

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<sup>46</sup> Rorty, *Philosophy as a Kind of Writing: An Essay on Derrida*, 10 *NEW LITERARY HISTORY* 141, 144 (1978).

<sup>47</sup> See Peller, *supra* note 1.

<sup>48</sup> See *supra* note 15.

<sup>49</sup> Stated another way:

For Derrida, . . . language is “originally” figurative, or rather, since in the

ing on other texts. Their textuality transgresses even their own explicit statements about their affiliations with reality. For Derrida, the term “text” is unthinkable and undecidable. Texts are not associated with any phenomenological presence or constituted simply of spaced out black marks on a white surface. The text is the embodiment of *differance*.<sup>50</sup>

[R]eading . . . cannot legitimately transgress the text toward something other than it, toward a referent (a reality that is metaphysical, historical, psychobiographical, etc.) or toward a signified outside the text whose content could take place, could have taken place outside of language, that is to say, in the sense that we give here to that word, outside of writing in general . . . . *There is nothing outside of the text [il n’y a pas de hors-texte]*.<sup>51</sup>

With his cryptic passage, and particularly with this astonishing last sentence, one comes to the heart of the matter. In what sense can Derrida say with a perfectly straight face, “there is nothing outside of the text”? One is likely to respond, upon reading this passage, with disbelief or cavalier indifference. Derrida cannot mean that his very paper on which these words are printed does not exist. What then, is Derrida *saying*? Before attempting to posit an answer, consider the following statement regarding Derrida’s reformulation of language as a conceptual notion: The Derridean insight most relevant to legal theorists is that so long as it is believed that language is mainly a representation of something else, what language *does* cannot be seen. This Derridean insight should be taken seriously by applying it to Derrida’s cryptic passage. Thus, to phrase the initial question—what is Derrida *saying*?—is to lead one nowhere. The appropriate tack here is to inquire into what Derrida is *doing*. One should not feel disturbed at the prospect that Derrida

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absence of literal or “unique” naming the distinction between literal and figurative breaks down, each word is seen as a link in an endless chain of substitutions and displacements, with nowhere a fixed extra linguistic beginning or ending. . . .

Miller, *Deconstructing the Deconstructors*, 5 *DIACRITICS* 29-30 (Summer 1975).

<sup>50</sup> Consider the passage below in light of Appendix A:

Whether in the order of spoken or written discourse, no element can function as a sign without referring to another element which itself is not simply present. This interweaving results in each “element”—phoneme or grapheme—being constituted on the basis of the trace within it of the other elements of the chain or system. This interweaving, this textile, is the *text* produced only in the transformation of another text. Nothing, neither among the elements nor within the system, is anywhere ever simply present or absent. There are only, everywhere, differences and traces of traces.

J. DERRIDA, *supra* note 13, at 26 (emphasis in original).

<sup>51</sup> J. DERRIDA, *supra* note 17, at 158 (emphasis in original).



has no interest in asserting a thing which corresponds to common sense. This is because Derrida is *not* being ontological. He is not giving an account of anything which can remotely be called programmatic or system-building.<sup>52</sup> Instead, Derrida is playing the familiar role of troublemaker by debunking the very essence of Western metaphysics, referentiality. Derridean deconstruction refuses to link what is in a text to an outside because, as mentioned throughout, texts are constituted by *differance*, and *differance*, in its spatial sense, incorporates the Saussurean notion of words getting their meaning from other words. Hence, the very definition of "text" precludes an outside, a signified to which one connects a signifier. A text can never be hemmed in, duplicated by way of commentary or criticism.<sup>53</sup> Something always escapes.

Perhaps the most lucid explanation of what Derrida is doing comes from Richard Rorty.

Derrida is in the same situation in regard to language that many of us secularists are in regard to God. It isn't that we believe in God, or don't believe in God, or have suspended judgment about God . . . ; it is just that we wish we didn't have to have a view about God . . . . We just regret the fact that the word is used so much. So it is for Derrida with the vocabulary of Kantian philosophy.<sup>54</sup>

Just as the secularist (on Rorty's account) seeks to root out notions of God and supreme beings, Derrida seeks to root out notions of referentiality as the essence of language. So to say there is nothing outside the text is simply one's way of asserting one's critical stance. It is a refusal to play by the rules handed down by the guardians of a particular form of metaphysical discourse. It is at its root, a *transformative* effort,<sup>55</sup> a shorthand expression of how things might

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<sup>52</sup> See Rorty, *supra* note 46. This is one contrasting difference between Derrida and Quine, the great analytical philosopher. Quine's famous assertion, "there is no fact of the matter," at first blush seems to correspond with Derrida's slogan, "there is nothing outside the text." There is, however, a significant difference in the import of these statements. Whereas Derrida refuses to be ontological, Quine is asserting something wholly ontological; that all ontological schemes are relative to some further background linguistic framework. See W. V. QUINE, *ONTOLOGICAL RELATIVITY* 26-68 (1969).

<sup>53</sup> Viewing judicial opinions as "texts" (using the term as Derrida does) suggests that any effort to distill or codify an opinion as standing for some fixed rule or principle is disingenuous. One can always dig within an opinion to undermine its presumed fixity. This exercise is common fare for not only critical legal scholars, but for creative lawyers as well, although being practiced in the art of deconstruction may improve one's skill in this department. An examination of Frug's article discloses that the critical thrust of deconstruction rests with its capacity to expose the method by which judicial opinions and legal doctrines are able to hang together as ostensibly coherent bodies of law.

<sup>54</sup> Rorty, *supra* note 46, at 148.

<sup>55</sup> See *infra* text accompanying notes 91-154.

look without these Kantian notions of representation. Just as the secularist has no argument or evidence against the existence of God, Derrida has no arguments or evidence for the proposition that there is nothing outside texts.<sup>56</sup> Neither has arguments because neither wishes to play by the rules established by the tradition.<sup>57</sup>

Thus, Derrida looks for ways to talk about language such that he does not commit himself to the whole conceptual framework of referentiality. That is why there are strange words such as “trace” and “*differance*.” The critical point about language is that words take their meaning from other words rather than by virtue of their representative character. And, as shall be shown in Part IV, in a discussion of Frug’s article, arguments generated from certain dualities (like the objective-subjective dichotomy) may themselves take their meaning from other arguments and not from their avowed ability to capture or refer to anything that is real or can be characterized as reality. In sum, when Derrida talks of writing as an activity marked by excess and *differance*, he is striving for a complete deconstruction of the illusions which philosophy has created for itself by assuming that *meanings* exist outside and prior to the process of signification.

#### D. *The Politics of Deconstruction*

Perhaps the most charitable way of conceptualizing Derrida’s political significance is to adopt the view that politics and the struggle over the terms of social life are inseparable from the rethinking of language. Significantly, it is the activity of rethinking language that justifies Derrida’s strategy of interventionist reading.<sup>58</sup> Aside from the inseparability of politics and language, the strategy of interventionist reading discloses a second political im-

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<sup>56</sup> To attempt such an argument would place one in the Cartesian skeptical tradition of doubting all external reality to find a true foundation for knowledge. See R. DESCARTES, *MEDITATIONS* (trans. L. Lafleur 1951); W. V. QUINE, *supra* note 52; B. STROUD, *THE SIGNIFICANCE OF PHILOSOPHICAL SKEPTICISM* (1984); L. WITTGENSTEIN, *ON CERTAINTY* (ed. G.E.M. Anscombe & G.H. von Wright 1969).

<sup>57</sup> When Derrida is asked, “what arguments can you proffer for the proposition that all is immanent to texts?” one puts him in a position he wishes not to be in because the question incorporates the very metaphysical tradition he wishes to undermine. It is interesting that Heidegger was often put in an analogous position. Heidegger devoted much of his life to arguing that philosophers had ignored the “ontological difference” between beings and Being (*Dasein*). He finally suggested that one write the word *being* under erasure (i.e., as being). Cf. M. HEIDEGGER, *THE QUESTION OF BEING* (1958). Nevertheless, Heidegger was never able to preempt the inevitable request that given the ontological difference, what is the content of this notion, Being?

<sup>58</sup> Rethinking sex roles and human relationships has spawned a highly charged body of work which adopts a very interventionist reading strategy known as feminist literary criticism. Examining the connections between deconstruction and feminism is a fruitful line of inquiry for gaining insight into the issue under discussion here. However, such a discussion would be too voluminous and beyond the scope of this Article.

plication, one which is much more powerful in its potential for generating an effective radical politics. Derrida's critical stance intrudes itself on the text, upsetting its illusions of stability. Derrida does this by exposing certain dualities hidden within the text and abruptly inverts the hierarchy established by the dualities. Recall that this is but the first stage of a two stage strategy, and it is the second stage which houses the second political implication. Again, recall that the second stage involves reconceptualizing the suppressed term within the hierarchy so as to prevent the reconstitution of that hierarchy. The point here is that this critical strategy presents itself as a way of overcoming the conservative tendency of what could be called "absorption."

The idea of absorption is a familiar one among the followers of the post-war Frankfurt School, though the term "absorption" is that of this Author. The idea is that the system under critique is often resilient to the intellectual armaments used against it and that it is able to "absorb," or, to use another term, institutionalize, the opposition.<sup>59</sup> The post-war Frankfurt School took, as one of its central themes, the need to search for a way of resisting the ability of corporate capitalism to absorb, and thereby neutralize, dissent and radical critiques.<sup>60</sup> Derrida seems to offer a vocabulary and a critical method for carrying out this resistance. However, it is not clear that Derrida's *textual* method can be seen as a blue-print for resisting *institutional* absorption. The relationship between the critical stance of deconstruction and the possibilities for radical political action still remains one of analogy and Derrida has adamantly eschewed any *program* of political action.<sup>61</sup>

Implicit in the issue of whether Derrida's text-centrism paves the way for institutional resistance is the more fundamental concern over whether a critical stance can be concerned exclusively with the theoretical practice of the text.<sup>62</sup> This fundamental con-

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<sup>59</sup> Certainly this idea is not unfamiliar to critical legal theorists who see the rise of the legal process movement as an example of liberal legalism's "absorption" of legal realism's critical insights. Duncan Kennedy has recently expressed concern about the possibility of the Critical Legal Studies (CLS) movement being absorbed into the mainstream. See Kennedy, *Psycho-Social CLS: A Comment on the Cardozo Symposium*, 6 CARDOZO L. REV. 1013 (1985). For an interesting discussion of this phenomena, see Bittner, *Radicalism and the Organization of Radical Movements*, 28 AM. SOC. REV. 928 (1963).

<sup>60</sup> See, e.g., H. MARCUSE, *ONE DIMENSIONAL MAN* 12 (1964). For another Marxist critique of the phenomena of "absorption," see R. OHMANN, *ENGLISH IN AMERICA* (1976).

<sup>61</sup> This author wants to be careful not to be misconstrued. It is not being asserted that Derrida is indifferent to politics, but merely uncommitted to any program of political change. This stance is consistent with the logic of deconstruction insofar as deconstruction is anti-programmatic. See J. DERRIDA, *supra* note 13.

<sup>62</sup> Cf. C. Buci-Glucksmann, *Deconstruction et Critique Marxiste de la Philosophie*, 54 L'ARC 20 (1973) (arguing that one can distinguish between a political reading of a text and a

cern is confronted squarely by Foucault in his response to the Derridean critical stance.<sup>63</sup> What generated the response was Derrida's critique of Foucault.<sup>64</sup>

Derrida accuses Foucault of misreading Descartes. Whereas Foucault claims that Descartes instigated a break between reason and madness, Derrida insists that no such break occurred at such a late date. Derrida, in a remarkable piece of deconstruction, charges Foucault with a reinauguration of the metaphysics of presence (i.e., logocentrism). That is, by reading Descartes as creating a rift between reason and madness, Foucault commits himself to the logocentric view that there was once a preexisting *unity* between reason and madness. Derrida asserts that this commitment causes Foucault to "run[] the risk of being totalitarian."<sup>65</sup>

Foucault's response is telling, both in its content and in its polemical style. First, Foucault points out that Derrida's naive text-centrism caused him to misread Descartes by employing an inaccurate French translation. Second, Derrida, on Foucault's account, fails to grasp the extratextual (read: institutional and discursive) forces at work on the text. "But he [Derrida] is wrong not to have seen that Descartes' text plays on the gap between two types of determinations of madness (medical on the one hand and juridical on the other)."<sup>66</sup>

One can thus readily see that Foucault objects to that aspect of the Derridean critical stance which reduces reading to a purely textual activity ("*il n'y a pas de hors-texte*"). But, to recognize this is only to see a partial difference. The more crucial point seems to be that Derrida's text-centrism makes no provision for the role of discursive practices, of networks of power and domination, which constrain the author and, in many undetermined ways, dictates the textual product.

I shall say that what can be seen here so visibly is a historically well-determined little pedagogy. A pedagogy which teaches

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Derridean reading; the latter being characterized as empty intellectualism). See also F. JAMESON, *THE PRISON-HOUSE OF LANGUAGE* 182-83 (1972).

<sup>63</sup> Foucault, *My Body, This Paper, This Fire*, 4 OXFORD LITERARY REV. 9, 27 (1979).

<sup>64</sup> J. DERRIDA, *Cogito and the History of Madness*, in WRITING AND DIFFERENCE 31 (1978) (criticizing Foucault's *Madness and Civilization*).

<sup>65</sup> *Id.* at 57. On another level, Derrida is charging Foucault with a certain duplicity. Foucault claims that he is letting "madness speak for itself." But, once Foucault reduces to writing whatever articulations find their source in madness, he refutes his very aim to let madness speak for itself, for writing is the negation of madness. What upsets Derrida is Foucault's unwillingness to problematize his own writing.

<sup>66</sup> Foucault, *supra* note 63, at 17. Thus, Derrida's text-centrism has the effect of reducing "discursive practices to textual traces." *Id.* at 27.

the pupil that there is nothing outside the text, but that in it, in its gaps, its blanks and its silences, there reigns the reserve of the origin; that it is therefore unnecessary to search elsewhere, but that here, not in the words, certainly, but in the words under erasure, in their *grid*, the "sense of being" is said. A pedagogy which gives conversely to the master's voice the limitless sovereignty which allows it to restate the text indefinitely.<sup>67</sup>

Heavy stuff, no doubt. Foucault is saying nothing less than that, by elevating the undecidable "traces" *within a text* at the expense of the identifiable power *of a text*, the Derridean critical stance amounts to an immensely disempowering and disengaging praxis for reading. The initial liberation from reading Derrida, the discovery of infinite textual openness, of plurality unbounded, when pondered, turns out to be a treasure chest emptied of trinkets, for assessments of class interest, power, and oppression. Discourse and ideology are sapped of all utility and critical bite. Thus, from a standpoint of critical legal theory, Foucault's dispute with the Derridean critical stance is one that must be taken seriously for the textual strategies offered by Derrida may amount to a critical backfire. At bottom, all of this comes back to the notion of absorption. What must be assessed is the possibility that the absorption of deconstruction—its institutionalization as a "fancy" reading method—within the dominant culture may fashion a movement not unlike the pragmatic, consensus oriented form of politics which characterized post-war America.<sup>68</sup>

These issues will be taken up in Part IV of this Article. They are raised here only to situate Foucault as a potentially central figure for critical legal theory.

### III. FOUCAULT

Foucault's answer to Derrida's text-centrism is captured within his notion of *discourse*. Within the broad sweep of this notion is the entire problem of how the will to exercise dominance and manipulative control in society operates *invisibly*, but with systematic regiment and relentlessness. For Foucault, this sheer will to domination can maintain its status as an invisible force by asserting itself within the language of Truth, Rationality, Knowledge, Utility, Morality, etc.

As a first cut to understanding this problem, Foucault's no-

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<sup>67</sup> *Id.* at 27 (emphasis in original).

<sup>68</sup> See generally E. PURCELL, *THE CRISIS OF DEMOCRATIC THEORY* 235-72 (1973).

tion of discourse should be viewed as standing opposed to the teleology of Hegelian synthesis and Marxist materialism. Thus, discourse operates not at the level of superstructure, but at the level of the base. Its richness as a concept resides in its character as an *object* of struggle and not, as paradoxical as it may seem, as the tool by which political struggle is conducted. Discourse, as an object of, as opposed to a tool for, political struggle, survives by couching its content within a speciously neutral communicative framework.

As a second cut, Foucault's use of the term discourse must not be confused with a metaphysical idea of referentiality. Discourse is not *about* external objects; discourse constitutes them. So, if one were to approach Foucault's *Madness and Civilisation* expecting a discussion of the history of madness, where madness is taken to be the *object* of study, one would undoubtedly come away disappointed. According to Foucault:

[W]e are not trying to find out who was mad at a particular period, or in what his madness consisted, or whether his disturbances were identical with those known to us today. . . . whether witches were unrecognized and persecuted madmen and madwomen, or whether, at a different period, a mystical or aesthetic experience was not unduly medicalized.<sup>69</sup>

As a critical stance, Foucault wants to dispense with the signified (the external referent) as an overt object of study so that discourse itself can be analyzed as something other than a signifier. In other words, the center of Foucault's concern—at least in his early writings<sup>70</sup>—is the operation of discourse within society, not as a mechanism of communication, but as an activity which informs institutional structuration, and as a device for isolating such structuration from ideological conflict.

A Foucauldian critical stance adopts as its project the investigation of the laws operating behind a signified, like madness, to get at the hegemonic character of the discursive practices which surround that signified. A critical stance of this type, for example, would parse any particular discursive practice to find: (1) the *status* of those most capable of making statements within a discursive practice; (2) the *sites* from which statements are made (in courtrooms, behind prison bars, in hospital beds, etc.); and (3) the *positions* of those made subject within a particular discursive practice (the insane

<sup>69</sup> M. FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* 47 (1972).

<sup>70</sup> See, e.g., M. FOUCAULT, *THE BIRTH OF THE CLINIC* (1973); M. FOUCAULT, *THE ORDER OF THINGS* (1970); M. FOUCAULT, *MADNESS AND CIVILIZATION* (1967).

within the discourse of reason, the criminal within the discourse of morality, social utility and normality, etc.). The generating idea supporting this critical stance is the desire to expose the pretentiousness of those forms of discourse which parade themselves as embodying norms of science, neutrality, and objectivity. Foucault's critical stance demystifies that aspect of a discursive practice which makes its individual statements appear to be speaking for, about, and in, truth. It operates at that juncture where discursive practices are shown to develop its own canons of truth, relevancy, and regularity. The critical thrust of all this consists in the recognition that the entire regime of, say, legal discourse—what one feels comfortable writing as a practicing lawyer or law professor (i.e., form, shape, content)—is made appropriate, consistent, and acceptable by a set of governing rules of discourse unique to the legal field. As shall be shown, what results from this critical stance is an approach to textuality which posits regional (but productive) constraints upon the writing and the interpreting of texts. Thus, the process of reading is made very different from the process discussed in Part II of this Article.

#### A. *Defamiliarization*

The Foucauldian critical stance, as elaborated thus far, demands bracketing any conception of discourse as merely a steady stream of textual signifiers for the far more unusual task of investigating the role of discourse itself. What makes this task "critical" is the methodological assumption that discursive practices operate invisibly and thus what becomes necessary is the exposing of the connection between power and discourse. That there is a connection is never questioned. The effectiveness of discourse to order disparate bodies of knowledge—that is, its power—lies in its invisibility, for it is only through that status that discourse could be used to practice a more subtle, more insidious form of control over institutions (e.g., asylums, prisons) and its subjects (e.g., the mad, the criminal). Moreover, texts and interpretive strategies struggle for domination within a fully constituted network of power relations. In post-Enlightenment Western thought, that struggle has been for the brass ring of science. For Foucault, science means exclusion. To be scientific, a discourse must exclude. Thus, science gets its power not from neutrally validated methods which usher forth statements with undisputed truth-value, but from its ability to demarcate bold boundary lines around its regime of discursive practices. The

bolder the boundary lines, the more forceful the domination.<sup>71</sup> Since the boundary lines themselves do not exist in a visible sense, the critical Foucault suggests that they ought to deploy the “status-sites-positions” approach to deconstruct the illusions of scientific objectivity and neutrality characterizing dominant discursive practices.

What should be obvious at this point is the critical desirability of digging within a particular text to find, not so much what it says, but what it does not say.<sup>72</sup> Set against the prevailing theory, the invisible or “subjugated” elements of the text problematize the security of unity upon which grand, totalizing theories rely. By taking, as another aspect of the critical task, the negative approach of problematizing its hidden or excluded elements, that which has been taken for granted has begun to become “defamiliarized.”<sup>73</sup>

For Derrida, everything is in the text—perhaps, one may say, even the devices for its own deconstruction.<sup>74</sup> But for Foucault, the issue of what is *not* in the text, what has been excluded, is the critical concern. The real difference between the critical stances described here comes down to how one is to deal with hidden elements of a text. For Derrida, the exposure of certain dualities which exist in a textual hierarchy leads to the task of inverting those hierarchies and denying the privilege one element of the duality has over the other. For Foucault, the critical task is not to invert the textual hierarchies, but to juxtapose the hidden elements of a text to the articulated, documented, and accepted elements, thereby “defamiliarizing” the object of his study. So, the object of study—be it madness, incarceration, language, sexual-

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<sup>71</sup> Cf. Heller, *supra* note 4, at 174-75 n.83; E. SAID, *ORIENTALISM* (1978) (critical analysis of how Occidental reason maintained its power as a hegemonic intellectual force by contra-distinguishing itself from the “exotic” irrationalism of Oriental thought).

<sup>72</sup> What is suggested here is something more general than Foucault’s notion of “subjugated knowledge,” but that notion captures the flavor of the more general point. By “subjugated knowledge,” Foucault is talking about “the historical contents that have been buried and disguised in a functionalist coherence or formal systemisation.” Foucault, *Two Lectures*, in *POWER/KNOWLEDGE* 81 (C. Gordon ed. 1980).

<sup>73</sup> Contrasting Foucault with other historians, Hayden White describes Foucault’s project in precisely these terms:

Unlike the conventional historian, who is concerned to clarify and thereby to “refamiliarize” his readers with the artifacts of past cultures and epochs, Foucault seeks to “defamiliarize” the phenomena of man, society, and culture which have been rendered all too transparent by a century of study, interpretation, and conceptual overdetermination. In this respect, Foucault represents a continuation of . . . Romanticism.

H. WHITE, *Foucault Decoded: Notes from Underground*, in *TROPICS OF DISCOURSE: ESSAYS IN CULTURAL CRITICISM* 230, 256 (1978).

<sup>74</sup> Cf. P. DEMAN, *ALLEGORIES OF READING* (1979).



ity—is no longer seen as a stable referent.<sup>75</sup> Foucault would say that no reward awaits you because to go beneath an array of varied discursive formations in quest of a unitary and stable referent, a signified is capable of being forever identified through time and across cultures.

By excavating the rules that form a particular discourse and exclude others—rules that have more to do with power strategies than truth value—Foucault purports to situate knowledge and the subject within an entire discursive regime, a regime which is constitutive of a whole network of power relations.<sup>76</sup> Whereas traditional theoretical approaches regard difference, discontinuity, and lack of harmony as methodological failures to be eradicated by further research and theory modification, Foucauldian criticism takes as its operational cue those very discontinuities and disunities.

In sum, Foucault insists on instability as something to be studied, not overcome by grand theorizing which, in its efforts at totalization and scientific unity, represses resistant elements of a discourse.<sup>77</sup> Being attuned to those resistant elements, listening to voices long relegated to illegitimacy, one finds one's stable habits of thought, one's fixed conceptions of what *is*, and what *ought* to be, jarred to the point of nonrecognition.<sup>78</sup> That is the essence of Foucault's strategy of defamiliarization. Often, Foucault defamiliarizes by demonstrating that things which have been casually regarded as eternally given, are in fact, recently constituted objects. Thus there are statements such as, "man is only a recent invention," "a figure not yet two centuries old, a new wrinkle in our knowledge," and "he will disappear again as

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<sup>75</sup> Foucault has criticized his own work, *Madness and Civilization*, for lapsing into the assumption of there being a stable referent, in this case, madness. Foucault notes that the group of "statements different in form, and dispersed in time . . . [which] all seem to refer to an object that emerges in various ways in individual or social experience and which may be called madness" does not in fact refer "to a single object, formed once and for all" but serves to constitute a series of different objects. M. FOUCAULT, *supra* note 69, at 32.

<sup>76</sup> At the time Foucault was using this archaeological method, the vocabulary of power and knowledge was conspicuously absent. As Foucault states:

When I think back now, I ask myself what else it was that I was talking about, in *Madness and Civilization* or *The Birth of the Clinic*, but power? Yet I'm perfectly aware that I scarcely ever used the word and never had such a field of analyses at my disposal.

Foucault, *supra* note 72, at 115.

<sup>77</sup> See *supra* note 72.

<sup>78</sup> This aspect of Foucault's critical stance seems very attractive to those interested in feminist theory or the possibility of cultivating a working class literary voice. Intellectuals with privileged backgrounds may find themselves questioning their own beliefs in holding the golden key to pristine knowledge.

soon as that knowledge has discovered a new form.”<sup>79</sup> In this same vein, Foucault situates the signified, “sexuality,” within the same vintage as “man;” “sexuality” having been “produced” or “constructed” only as early as the Eighteenth Century.<sup>80</sup>

Foucault’s critical stance is a defacto rejection of Marxist materiality. A Marxian approach to establishing a link between discursive and non-discursive practices would be centered on *causality*. Taking the history of legal consciousness as an example, a Marxist would try to discover to what extent socio-political or economic processes could determine the consciousness of the practicing elite lawyer: the horizon and direction of their interest (professionally and personally); their system of values; their legal ontology; their perceptions of their own subjectivity and the facticity of others; the style and content of their rationality; and so on.<sup>81</sup>

The Foucauldian analysis would situate the problem differently. Causality is ignored. What is analyzed is not how political or economic practices have *determined* the meaning and form of legal consciousness and discourse, but how, and in what form, such practices take part in the conditions of emergence and functioning of legal discourse. The critical stance would induce one to investigate the appearance of this relation of politico-economic practices to legal discourse through the status of the lawyer. The lawyer has become not only the privileged, but also virtually the exclusive enunciator of this specialized form of discourse. The lawyer is the enunciator not only to the client via an institutionalized relationship between lawyer and client, but also to each other as community guardians of that discourse via the modalities of teaching within the law schools. The critical stance would also have one grasp this relation in the function that is attributed to legal discourse or in the role that it must assume. When does legal discourse assume the role of judging individuals as factitious subjects within a collectivity? When does it assume

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<sup>79</sup> M. FOUCAULT, *THE ORDER OF THINGS*, *supra* note 70, at xxiii.

<sup>80</sup> M. FOUCAULT, *1 THE HISTORY OF SEXUALITY* 103, 105 (1978).

<sup>81</sup> Of course, this painting is being done with a very thick brush. The purpose here is to give one a sense of the direction of Foucault’s thought. A complete account of materialism would discuss the alternative model used by theorists on the Left to discuss consciousness of the self and non-discursive practices—that is, existential ontology. Moreover, there is a kind of meta-debate which concerns differing conceptions of the relation of the self to nature, the state, the other, and itself that is conspicuously neglected here. Compare G. HEGEL, *PHILOSOPHY OF RIGHT* 122, ¶ 182 (1967) with K. MARX, *TOWARD A CRITIQUE OF HEGEL’S PHILOSOPHY OF RIGHT* 71 (1977). Compare J. SATRE, *BEING AND NOTHINGNESS* 720-26 (1956) with SIMONE DE BEAUVOIR, *THE ETHICS OF AMBIGUITY* 113-29 (1948).

the role of social engineer within a bureaucratic state? When does it lay down norms of a society? And finally, how does legal discourse maintain its appearance of coherence despite its deployment in a myriad of settings?<sup>82</sup>

What this all amounts to is that Foucault's critical stance does not question social practices (capriciously defined to include political and economic practices) of a given society constituted or shaped of legal concepts and informed of the theoretical structuration of legal discourse. Rather, it questions how legal discourse as a practice in its own right, concerned with a particular field of objects (e.g., the tax code, penal institutions, housing, etc.) constituted by a certain number of statutorily designated individuals having a certain function within society, is articulated on practices that are external to it and which are not themselves categorized as discourse.<sup>83</sup>

### B. *Foucault's Genealogical Approach*

Foucault's work, up to and including *The Archaeology of Knowledge*, had revealed a primary concern with discourse and an implicit concern with knowledge and power. Foucault's subsequent studies of punishment and sexuality explicitly centered on the relationship between knowledge and power.<sup>84</sup> From an archaeo-

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<sup>82</sup> This last question confronts one with the issue of power and its relation to discourse.

<sup>83</sup> Foucault offers this summary:

If in this analysis archaeology suspends . . . a causal analysis, if it wishes to avoid the necessary connexion through the speaking subject, it is not in order to guarantee the sovereign, sole independence of discourse; it is in order to discover the domain of existence and functioning of a discursive practice. In other words, the archaeological description of discourses is deployed in the dimension of a general history; it seeks to discover that whole domain of institutions, economic processes, and social relations on which a discursive formation can be articulated; it tries to show how the autonomy of discourse and its specificity nevertheless do not give it the status of pure ideality and total historical independence; what it wishes to uncover is the particular level in which history can give place to definite types of discourse, which have their own type of historicity, and which are related to a whole set of various historicities.

M. FOUCAULT, *supra* note 69, at 164-65.

<sup>84</sup> Foucault signalled the shift in emphasis in the summary of a course he gave at the College de France. There, he delineated his plans of transition from *The Archaeology of Knowledge* to the works involving penality and sexuality.

Empirical studies relating to psychopathology, clinical medicine, natural history, and so forth, have allowed us to isolate the distinctive level of discursive practices. Their general characteristics and the proper methods for their analysis were delineated under the heading of archaeology. Studies conducted in relation to the will to knowledge should now be able to supply the theoretical justification for these earlier investigations. For the moment, we can indicate in a very general way the direction in which this study should proceed: establishing a distinction between knowledge and the rules neces-

logical methodology, Foucault moved closer towards Nietzsche by employing a genealogical methodology.<sup>1</sup> This methodology reveals the contingency and fragility surrounding historical events, identifying:

the accidents, the minute deviations . . . the errors, the false appraisals, and the faulty calculations that gave birth to those things that continue to exist and have value for us; it is to discover that truth or being do not lie at the root of what we know and what we are, but the exteriority of accidents.<sup>85</sup>

Foucault continues:

[Genealogy] is not the erecting of foundations: on the contrary, it disturbs what was previously considered immobile; it fragments what was thought unified; it shows the heterogeneity of what was imagined consistent with itself.<sup>86</sup>

Genealogy is an analytical approach which preconceives social progress not as the tail end to a string of events, or as the end of a process of development, but as a particular momentary manifestation of the "hazardous play of dominations."<sup>87</sup>

The genealogical approach led Foucault to characterize social life as a series of contests and struggles over the control of the system of rules.<sup>88</sup> More importantly, the appropriation of a system of rules is really the appropriation of the institution of *interpretation*. The upshot is that social life as historical facticity is a series of inter-

sary to its acquisition; the difference between the will to knowledge and the will to truth; the position of the subject and subjects in relation to this will.

M. FOUCAULT, LANGUAGE, COUNTER-MEMORY, PRACTICE 201 (1977) (footnote omitted).

<sup>85</sup> See Nietzsche, *Genealogy, History*, in M. FOUCAULT, *supra* note 84, at 139, 146 (footnote omitted).

<sup>86</sup> *Id.* at 147.

<sup>87</sup> *Id.* at 148 ("Genealogy . . . seeks to reestablish the various systems of subjection: not the anticipatory power of meaning, but the hazardous play of dominations.").

<sup>88</sup> Foucault is at his most Nietzschean when he takes this aspect of genealogy seriously. Foucault is quick to argue that Man has not progressed from war to a more humane system of the rule of law, but from one form of domination to another. Foucault is blunt about the matter.

Following traditional beliefs, it would be false to think that total war exhausts itself in its own contradictions and ends by renouncing violence and submitting to civil laws. On the contrary, the law is a calculated and relentless pleasure, delight in the promised blood, which permits the perpetual instigation of new dominations and the staging of meticulously repeated scenes of violence. The desire for peace, the serenity of compromise, and the tacit acceptance of the law, far from representing a major moral conversion or a utilitarian calculation that gave rise to the law, are but its result and, in point of fact, its perversion. . . . Humanity does not gradually progress from combat to combat until it arrives at universal reciprocity, where the rule of law finally replaces warfare; humanity installs each of its violences in a system of rules and thus proceeds from domination to domination.

*Id.* at 150-51.

pretations, and it is the task of genealogy to record this series, to let the myriad of interpretations speak in the voice of the present. What is encountered from genealogy, then, is a record of dispersion, disparity, difference, contingency and domination. One is thrust into a world of endless interpretation where there are no hidden meanings or foundations which promise to expose the essence of things.<sup>89</sup> There are merely endless layers of interpretation which through accretion have achieved a status of truth, self-evidence, and necessity. The mode of historical sense and analysis is one where there are no universals, no constants to provide fixity or stability of understanding.

Once again, pause to see the point of divergence between Foucault and Derrida. By adopting a genealogical approach as a central element to a critical stance, the critical legal scholar assumes a position between the power and hegemony of the dominant bourgeois culture and the overarching system of discursive practices which marks a particular epoch or time period. While a Derridean deconstructive strategy works vigorously within the confines of the text to free the signifier from any obligation to a transcendental signified, Foucauldian critical stance delegitimizes the relevance of the signifier *qua* signifier and seeks a description of the signifier's place within a particular discursive practice. How, within a particular discursive practice, does the signifier occupy the place that it does? By what mechanisms of power? Or, to state the question as Foucault might have in *Discipline and Punish*, how did the discourse animating penology around the nineteenth century assign felons to their place in the structural, administrative, psychological and moral economy of the prison's panoptical architecture?

Note the shrewdness of Foucault's critical stance and the way in which it deepens the Derridean conception of textuality. At the most basic level, it can be seen that Foucault's historicization of the signifier adds a temporal dimension to Derridean textuality. More fundamentally, Foucault's critical stance deepens Derridean textuality by recognizing that the signifier occupies a place within the text, that the facticity of that occupation is worthy of investigation and scrutinized attention, and that the *contingency* of that occupation is a product of an act of will, not reason—a will to knowledge and a will

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<sup>89</sup> [I]f the genealogist refuses to extend his faith in metaphysics, if he listens to history, he finds that there is "something altogether different" behind things: not a timeless and essential secret, but the secret that they have no essence or that their essence was fabricated in a piecemeal fashion from alien forms.

to truth. Moreover, and this is the heart of this whole discussion, that very act of will contains within it ascertainable political consequences—consequences relating to a strategic desire to administer and comprehend a vast and detailed field of “knowledge.” What Foucault is in a position to do, and what the Derridean deconstructionist is not able to do by virtue of his text-centrism, is to link, systematically, knowledge and truth to power, and to see culture—legal, scientific, or popular culture—as a body of disciplines having the effective force of knowledge.

To state the difference another way, whereas the Derridean critical stance may operate to expose the metaphorical strictures which screen certain delegitimizing forms of legal argument, the Foucauldian perspective goes further. Reading Owen Fiss once again, it was hypothesized that he was arguing that cultural rules within a liberal legal order delimit the free play of signification with a text. True, the problematic nature of his argument was recognized insofar as it sought constraint in the interpretive activity within a sovereign subject who becomes acculturated by way of those rules. However, for the moment, continue to read Fiss charitably and simply focus on the notion of cultural rules as an interpretive constraint. Reformulating Fiss’ argument in this way is useful because it correlates rather closely with Foucault’s critical stance. Foucault would see Fiss’ argument as disempowering rather than dismantling a Derridean approach. Like Fiss, Foucault would investigate the regulative power of those cultural rules in the production, dispersal and interpretation of legal texts. However, whereas Fiss finds comfort against the onslaught of “nihilism,” Foucault reels at the violence immanent within the operation of those rules, its inveigled vigilance to maintain power by exclusion and suppression. Thus, Foucault attacks Derrida for allowing Fiss’ argument to have such force against it. Derrida offers no vocabulary for responding to Fiss’ argument *on its own terms*. That there are cultural rules—disciplinary rules, as Fiss ironically calls them—is something only the most blind textualist would fail to see. For Foucault to recognize the existence of these rules is to spur on an entire critical approach which would expose not simply the content of those rules, but their mode of operation and their link to institutions and professions.

#### IV. IMPLICATION: POLITICS

The difficult terrain crossed in Parts II and III of this Article were mere propadeutic for further investigations. It is superfluous to say that the exposé was less an articulation of what post-

structuralism *is*, and more a construction of two critical stances which stand as markers within a vast array of possibilities for critical consciousness. The foregoing ought to be seen as a "construction of two critical stances." This simply means that enough of Derrida's and Foucault's textual approaches have been pieced together so that one can see the rough contours of their positions, and to put one in a position of being critical readers of CLS texts which purport to deploy post-structuralist thought. Two premises have informed the foregoing exposé: (1) legal theorists ought to be familiar with powerful critical movements which influence the direction of intellectual endeavors in other fields; and (2) naive commitment to intellectual movements may, at best, render one's work mildly incoherent, or at worst, debilitate serious efforts for radical political change. This Part examines the second premise explicitly as a way of tying much of the earlier discussion together. Subsection A will be a close look at Frug's methodology in his article, *Ideology and Bureaucracy in American Law*.<sup>90</sup> Subsection B will be a brief look at the implications of Frug's methodology. Subsection C will be a Foucauldian assessment of Frug's article with an elaboration of Foucauldian politics.

#### A. *Derrida Bureaucratized?*

Frug's article is too long to engage in a textual analysis of his elaboration of the four apologetic models of bureaucracy.<sup>91</sup> Instead, his "general methodology for exposing deceptive argumentation"<sup>92</sup> will be discussed. There are two justifications for focusing exclusively on the methodology. First, Frug invites one to do so.<sup>93</sup> Second, his analysis purports to be informed by a Derridean critical stance.<sup>94</sup>

Frug's story of the repeated failure to justify bureaucracy as a form of social organization centers on the objective-subjective dichotomy. Frug maintains that his dichotomy mediates the two contradictory strands which constitute the justificatory rhetoric

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<sup>90</sup> Frug, *supra* note 1, at 1276.

<sup>91</sup> Frug constructs four models which, taken as a whole, "encapsulate all the principal themes of corporate and administrative law." Frug, *supra* note 1, at 1281. The models are: (1) the Formalist model; (2) the Expertise model; (3) the Judicial Review Model; and (4) the Market/Pluralist model.

<sup>92</sup> *Id.* at 1295. See Stick, *Can Nihilism Be Pragmatic*, 100 HARV. L. REV. 332, 381 n.210 (1986) (holding Frug accountable to his methodology).

<sup>93</sup> "Indeed, one purpose of this Article is to present a general methodology for exposing deceptive argumentation elsewhere in the legal system." Frug, *supra* note 1, at 1295.

<sup>94</sup> "The explanation that I shall offer *relies* on the term 'a dangerous supplement' found in the work of Jacques Derrida." *Id.* at 1288 (emphasis added) (footnote omitted).

of bureaucracy. On the one hand, managerial domination is feared. On the other hand, what is longed for is personal autonomy and the opportunity for self-expression. The contradiction between the two strands is not difficult to see. Managerial control serves efficiency but threatens to asphyxiate the assertion of individuality. Fostering self-expression is necessary to maintain the plausibility of democratic rhetoric of freedom in the United States but may disrupt unity of purpose and collegiality within an organization.<sup>95</sup>

On Frug's account, objectivity is a form of constraint against exercises of sheer will and power. In this capacity, objectivity protects the possibilities for flourishing subjectivity. But objectivity, by protecting the subjectivity of some, squelches the subjectivity of others. That is, objectivity is necessary because rampant subjectivity brings with it chaos and domination. Too much objectivity, however, is not a protection at all, but rather a threat to the very thing that was sought to be initially protected—subjectivity.

This phenomena can be diagrammed the following way:

	GOOD	BAD
OBJECTIVE	Constraint against domination. Neutrality.	Threat to individual autonomy.
SUBJECTIVE	Freedom and individual expression.	Arbitrariness and will to power.

This scheme illustrates the indeterminate nature of objectivity and subjectivity. Either term can be characterized as a good thing or a bad thing. When one term is characterized as a good thing, the other term is seen as bad. Hence, objectivity and subjectivity are not only inextricably tied, they are irreconcilable.

Frug used the indeterminate nature of objectivity and subjectivity for critical effect. He argues that legal doctrine is constituted by the dichotomy, and that therefore, legal argument itself

<sup>95</sup> The story of contradiction pervades CLS literature. See Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980); Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); but see Kennedy & Gabel, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984).



is indeterminate. "Instead of providing a way to decide whether a concrete bureaucratic activity should be approved or condemned," Frug avers, "legal doctrine simply presents a structure that lawyers can use to formulate arguments for and against the activity under review."<sup>96</sup> The nature of legal argument, in effect, is the decision to emphasize one of the four boxes above.<sup>97</sup> The body of Frug's analysis is devoted to proving this to be the case as an empirical phenomenon—one that a duly reflective lawyer would recognize.

Frug decries this state of affairs as one which is "deceptive" to both the enunciators of legal discourse and their audience.<sup>98</sup> Hence, Frug's task, as he sees it, is to *analyze* and *expose* the deception. Frug is clear that his task is not a mere "academic" exercise, but "one step" toward his version of utopia, a version as of yet undefined. All that can be said of it is that it is a utopia where people enjoy full democratic participation in all aspects of American life.<sup>99</sup>

Where does Derrida come in? In fact, Derrida plays a rather tangential role in all this. One need not have read *Of Grammatology* to generate this critique illustrated here. Nevertheless, Frug calls Derrida to his aid, with consequences that will be flagged later.<sup>100</sup> Frug employs the term "dangerous supplement" as a short-hand expression to describe the irreconcilability of the objective-subjective dichotomy.<sup>101</sup> The term "dangerous supplement" is another way of recalling that *differance*. Recall that *differance* is a direct attack on the logocentric notion of language as a referential tool.<sup>102</sup> Frug is true to the term "dangerous supplement" by denying the ability of either term of the objective-subjective dichotomy to refer to anything. As Frug notes, "the categories themselves [i.e., the objective and subjective categories] lack specific content."<sup>103</sup> The idea is that one side of the dichotomy "supplements" the other side because each side is al-

<sup>96</sup> Frug, *supra* note 1, at 1292.

<sup>97</sup> To be sure, Frug's analysis is a bit more complex in that he notes the reassertion of the objective-subjective dichotomy within each of the boxes. Nothing is lost for our purposes by eliding this added wrinkle.

<sup>98</sup> Frug, *supra* note 1, at 1278. The nature of the deception is simply that legal argument, by presenting "an artificially partial view of the world as if it were complete," seems to legitimate bureaucratized forms of life. But the legitimization is deceptive. "[A] system that can be used to legitimate so much can hardly be convincing in its effort to legitimate anything." *Id.* at 1292.

<sup>99</sup> *Id.* at 1295-96.

<sup>100</sup> See *infra* notes 125-137 and accompanying text.

<sup>101</sup> Frug, *supra* note 1, at 1291.

<sup>102</sup> See *supra* text accompanying note 27.

<sup>103</sup> Frug, *supra* note 1, at 1291.

ways, itself, insufficient and inadequate as a communicative device. To understand the term objective requires the existence of the term subjective, and vice versa. Or, to take another example closer to home, to conceive of "man" requires that there be a conception of "woman" and vice versa. Conceptions of "man" as symbols of strength and as breadwinners generate, and is generated by, conceptions of "woman" as symbols of weakness and docility, and as child-rearers. Altering that conception of woman, as must be done, effectuates a changed conception of man. Precisely the same goes for the objective-subjective dichotomy. Thus, the terms objective and subjective do not get their meaning by virtue of their representational status. They do not occupy that status at all. Each gets its meaning from the other.<sup>104</sup>

At this point, perhaps what Frug is going to say next after describing the "dangerous supplement" can be predicted without even reading his article. All that is needed is reflection back on Rorty's explanation of Derrida's "*il n'y pas de hors-texte*."<sup>105</sup> Just as Rorty describes the secularist as wanting to root out conceptions of God from human consciousness and Derrida wanting to root out notions of language as referentiality, Frug wants to root out the objective-subjective dichotomy. "I suggest that we should abandon the attempt to understand the world in terms of the subjective/objective dichotomy; we should deal with the problems of human association in other ways."<sup>106</sup> Frug says that one need not be a slave to the objective-subjective dichotomy,<sup>107</sup> nor to the attendant metaphors which inform legal argument, any more than one must be a slave to the metaphysics of presence or the metaphors of mind as mirror.<sup>108</sup>

This idea of liberating ourselves from the false structures that have been created is a mainstay of critical legal studies literature,<sup>109</sup> and there is no need to pursue the point here. Frug's

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<sup>104</sup> "All of these concepts can be understood only in terms of their relationships to each other; each takes on meaning only through those relationships." *Id.* at 1381. That a "supplement" is dangerous merely reflects the corollary notion that, because words get their meaning from other words, meaning is always never really present. It is always deferred, always threatening to erupt or slip away. Subjectivity is both a helpful supplement to objectivity by giving content to an otherwise empty term, and a dangerous supplement by threatening to undermine the stability of the term objectivity.

<sup>105</sup> See *supra* text accompanying note 51.

<sup>106</sup> Frug, *supra* note 1, at 1291.

<sup>107</sup> One wonders whether Frug considered the possibility that subjectivity itself is a deeply felt, perhaps universal, human experience and that the fundamental contradiction is therefore truly "fundamental" to human experience. See Kennedy, *The Structure of Blackstone's Commentaries*, *supra* note 95.

<sup>108</sup> See R. RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979).

<sup>109</sup> See Gordon, *New Developments in Legal Theory*, in *THE POLITICS OF LAW: A PROGRES-*

idea that, "we should deal with the problems of human association in other ways," should be highlighted. Although Frug nowhere conjures up the notion of "screening" as a phenomena of legitimation in legal discourse,<sup>110</sup> it is implicit through the article, particularly in this statement. The suggestion is that the objective-subjective dichotomy is inhibiting, perhaps prohibiting, one from imagining alternative forms of social life. The term "screening" is used here to conjure up this image of inhibition or prohibition. The term "screening" has also a more particular, more critical implication; the screening is not arbitrary. What is screened are those forms of legal argument which constitute a delegitimizing thrust against the legal doctrines at issue, or against legalism in general. Therefore, what is allowed as acceptable discourse is certain justificatory arguments. Frug, rather colloquially, puts it this way: "Each model of bureaucratic legitimacy is a story designed to tell its listeners: 'Don't worry, bureaucratic organizations are under control.'" <sup>111</sup>

When Frug says his task is to expose the "deception" of legal argument, therefore, he means two quite independent things. First, he wants to expose the intrinsic indeterminacy of legal argument, that legal argument can legitimate practically any form of social organization. Second, he wants to expose the constraining quality of legal discourse—the quality of not allowing legal argumentation to open itself up as a truly transformative, discursive practice. To believe in argumentation in this confined way is to live in "false consciousness,"<sup>112</sup> for it amounts to a belief that what *is*, is the "natural" state of affairs and what *ought* to be.<sup>113</sup> Frug's dual task seems to overlap with Derrida's work insofar as Derrida also exposes the indeterminacy ("un-

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SIVE CRITIQUE 281, 289 (D. Kairys ed. 1982) ("[People] build structures, then act as if [and genuinely come to believe that] the structures they have built are determined by history, human nature, economic law."); Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 583-86, 660-62 (1983); R. Unger, *Politics* (1987) (unpublished manuscript at Harvard Law School Library); D. Kennedy, *International Legal Structures* 35-102 (1987) (unpublished manuscript at Harvard Law School Library).

<sup>110</sup> See *supra* text following note 44.

<sup>111</sup> Frug, *supra* note 1, at 1284.

<sup>112</sup> "Critical theory seeks to undermine this ideology by exposing the *false consciousness* through which people understand the world." *Id.* at 1295 (emphasis added).

<sup>113</sup> False consciousness is the negation of human liberation. Frug asserts:

Only by continually overcoming the structures that falsify her/his human potential could the individual engage in the self-transforming, self-creating process of freedom. Thus, the very project of bureaucratic theorists—finding a structure that is necessary to promote and defend human freedom and relying on the device of reification to make such a structure intelligible—is itself an impediment to human liberation.

decidability”) within a text and the constraining quality of metaphysical discourse. To be sure, Frug is *not* engaged, at least in a Derridean sense, in an exercise of deconstruction.

Where Frug and Derrida are closely allied is in their belief that human inquiry must not be informed by the ineffable search for foundations.<sup>114</sup> Such a search, Frug claims, is a “futile and empty project.”<sup>115</sup> The reason offered for the futility and vacuity is telling.

If subjectivity can be understood only as the dangerous supplement of objectivity and objectivity only as the dangerous supplement of subjectivity, each of these concepts is based on the other. If so, neither concept can possibly be the “foundation” of the other. No foundation can support an item it rests on.<sup>116</sup>

As can be seen from this passage, Frug’s strong anti-foundationalism is rooted in a commitment to the power of *differance*. Posit an idea as a foundation upon which to build a theory, Frug means to say and it can be shown how that foundationalist notion is implicated by other ideas within the text. All that is had is the perpetual fluidity or movement of meanings, the play of signification, within a text. There can be no center or foundation to put a stop to that play.

As Derrida would have it, *differance* is an all encompassing idea—nothing escapes. Frug, interestingly enough, hedges from this implication. The force of *differance* seems too much for him. True, Frug insists that new forms of social life which replace the old must also be subject to the “same critique.”<sup>117</sup> But, his otherwise apodictic stand is curiously and cryptically mollified by his unwillingness to commit himself explicitly to the implications. Frug says that, “this critique has its limits—there is a stopping place.”<sup>118</sup> When Frug goes on to explicate, there is no stopping place at all to be found. In Frug’s view, the stopping place is “reached when people abandon[] abstract arguments that seek to defend some form of life *as a structure* that can protect human individuality.”<sup>119</sup> That is, once it is realized that human liberation comes through establishing a

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<sup>114</sup> “[I]f my critique is convincing, bureaucratic theorists must abandon their relentless search for a foundation on which to construct a viable defense of bureaucracy.” *Id.* at 1381.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 1295.

<sup>118</sup> *Id.* Apparently, Frug is sensitive to the attack of being a nihilist. “There is, in short, nothing in this essay that smacks of ‘nihilism.’” *Id.* at 1296 n.56.

<sup>119</sup> *Id.* at 1295 (emphasis added).

form of social life perpetually open to transformation, deconstructive methodology can be put away. But, this plainly will not do. The reason why Frug's "stopping place" is really no stopping at all is that transformation presupposes critique. What Frug is really attempting is an institutionalization of the Derridean stance. The *structure* of his utopia is the process of embedding within the community consciousness an amenability towards non-teleological restructuration.<sup>120</sup>

The inability to find a true "stopping place" is really a minor point, and should come as no surprise for a "stopping place" is in effect—if not in essence—a foundation of some sort. The real problem is the obvious contradiction Frug has found himself in. One must wonder from what vantage point Frug is able to assess the desirability of this utopian vision.<sup>121</sup> Indeed, he claims those not in tune with his utopian vision are living in "false consciousness." That may very well be true, but is "Frug the post-structuralist" really in a position to make that sort of claim? To raise the Marxist banner of "false consciousness" is to bury the methodology of Derridean deconstruction. Moreover, what Frug is putting forth is an *alternative* to the current bureaucratic status quo. But, will his methodology allow him to do that? Is not the articulation of a social vision, by definition, an advocacy of a certain structuring, a privileging of a particular form of social life, itself able to be deconstructed?<sup>122</sup> And finally, within his utopia, one finds that social life is marked by a competition over other forms of social life. This

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<sup>120</sup> One may say this utopia is "governed by a radical scepticism with regard to every stopping place that is suggested; it is suspicious of every attempt to limit the enquiry." Oakeshott, *The Concept of Philosophical Jurisprudence*, 3 *POLITICA* 345, 348 (1938).

<sup>121</sup> Michael Ryan states the point more generally.

By problematizing the very structure of opposition, deconstruction neutralizes the specific oppositions which sustain radical political practice—conservative/radical, fascist/socialist, reactionary/revolutionary—and it thus theoretically, and for all practical purposes, suspends the possibility of radically opposing any system from a position outside that system.

Ryan, *Anarchism Revisited: A New Philosophy*, 8 *DIACRITICS* 75-76 (1978). See also J. HABERMAS, *What is Universal Pragmatics?*, in *COMMUNICATION AND THE EVOLUTION OF SOCIETY* 1 (1979).

The depoliticizing impact of deconstruction is indeed a concern, as was seen in the discussion of Foucault's response to Derrida's critique of *Madness and Civilization*.

<sup>122</sup> Given the methodological alliance between Frug and Derrida, it is unsurprising that Derrida has been subject to a similar critique. Frederick Jameson charges Derrida with belying his own methodological presuppositions.

In the very act of repudiating any ultimate or transcendental signified, any concept which would dictate the ultimate or fundamental content of reality, Derrida has ended up inventing a new one, namely that of the script itself.

F. JAMESON, *THE PRISON-HOUSE OF LANGUAGE* 182-83 (1972). As applied to Frug, this critique suggests that to advocate a "structure of no structure" is still the advocacy of a particular structure. And, that structure is privileged—being not subject to revision itself.

competition mandates the projection of alternative visions. Thus, it can be again asked, is such projection possible in a world committed to *differance*?

The purpose here is not to criticize Frug for engaging in his own form of deception, but to point out a certain fundamental incoherence in his project. At bottom, Frug wants to have it all. He wants an uncommitted stance towards any structure or foundation (the Derridean stance) coupled with some relatively undefined utopian call for participatory democracy where structuration itself is a fluid, ongoing process.<sup>123</sup> If Frug's Derridean stance is taken seriously, one must wonder whether it is at all possible to put forth any vision of social life and still maintain a coherent critical methodology. One must wonder, that is, whether the Derridean critical stance amounts to a refusal to talk at that level of abstraction at all.<sup>124</sup>

#### B. Choices: Unger and Frug

One can speculate that Frug's repeated references to "human liberation" is a gesture of desperation, a fear of the abyss ("There is nothing in this essay which smacks of 'nihilism.'"). But recourse to visions of liberation is precisely what Derrida will not let you have. Derrida says that there is no recourse to a "transcendental principle that can *govern* a theoretical discourse."<sup>125</sup> Derrida denies the very possibility of "governability," and Frug is with him much of the way. Frug wants to expose the "ungovernability" of the metaphoricities attendant to the objective-subjective dichotomy. However, incoherence slips in as the fear surfaces. He betrays Derrida as he seeks to govern his own program of local democracy with the metaphor of liberation. However, Derrida always has the last

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<sup>123</sup> Purcell makes a similar point to the one that is being made here. Purcell argues that American intellectuals, wishing to avoid any totalizing systems of thought, embraced a form of pragmatism that was naturalized and pluralistic. But Purcell notes that: [b]y identifying ideology with abstract, a priori rationalism and comprehensive, authoritarian systems of thought, the relativist theory blinded itself to the fact that the theory itself—pragmatic, empirical, pluralistic—had in fact become an ideology.

E. PURCELL, *supra* note 68, at 272.

<sup>124</sup> The possibility that the Derridean critical stance forecloses abstract talk of social visions makes Frug's criticism of the "modest realists" rather awkward. Frug characterizes modest realists as only valuing "instrumental, programmatic thinking; they want to discuss not your vision of the world . . . but only your plan of action." Frug, *supra* note 1, at 1384. If Frug is assiduously anchored to his methodology, it is found, ironically, that the possibility that Frug, too, must become a modest realist to maintain some semblance of coherence. Indeed, for Derrida, as well as for Foucault, there can be only action. Visions are too metaphysical, too totalitarian.

<sup>125</sup> Derrida, *supra* note 25, at 6.

word. "[D]ifférance instigates the subversion of every kingdom."<sup>126</sup>

If Frug betrays Derrida right at the point where the going gets tough, where commitment is too heavy, then where does he seek refuge? Frug says:

[T]he object of this transformation would not be merely to find the right structure or to replace one structure with another but permanently to alter the relation of structure with freedom.<sup>50</sup> Only by continually overcoming the structures that falsify her/his human potential could the individual engage in the self-transforming, self-creating process of freedom.<sup>127</sup>

Footnote 50 is to none other than Roberto Unger. The drama to be witnessed here is unparalleled in any other Harvard Law Review article. Flirting with the anti-humanism implicit in Derrida's *differance*, Frug latches onto the one who presents the most spirited affirmation of the human essence.<sup>128</sup> The schizophrenia of a Derridean methodology and an Ungerian program is too much to take.

For Unger, liberalism is plagued by irreconcilable antinomies. At the psychological level, there is the reason and desire.<sup>129</sup> At the political level, there is the antinomy between rules and values.<sup>130</sup> Unger argues that the existence of these antinomies mark the central defect of liberalism, the historical disruption of the essential unity of moral and political life.<sup>131</sup> *Knowledge and Politics* is Unger's claim that these antinomies can be transcended, the descriptive would merge with the prescriptive. That is, a *description* of the self, human nature, may *prescribe* a particular form of social life.

Unger's prescription has already been given, albeit in highly schematic form. Social life and institutions would be subject to perpetual revisability and restructuring.<sup>132</sup> No aspect of social life would be immune from revision or complete upheaval. The Unger-

<sup>126</sup> *Id.* at 22.

<sup>127</sup> Frug, *supra* note 1, at 1295 (footnote in original).

<sup>128</sup> See Chaffin, *Passion and the Ethic of Empowerment*, 6 CARDOZO L. REV. 989 (1985). Chaffin explicitly situates Unger in opposition to post-structuralism embodied in Derrida, Foucault and Althusser.

<sup>129</sup> R. UNGER, *KNOWLEDGE AND POLITICS* 38-55 (1975).

<sup>130</sup> *Id.* at 67.

<sup>131</sup> One can easily see the point of disagreement between Unger and Derrida. Like Foucault, Unger is lapsing into the logocentric assumption of a preexisting unity between reason and desire. Derrida's deconstruction of Unger would likely be similar to that performed on Foucault's *Madness and Civilization*. See *supra* notes 62-84 and accompanying text. Recall that Foucault also posited a preexisting unity, but in his case, the unity was disrupted into the reason-madness dichotomy.

<sup>132</sup> See Unger, *The Critical Legal Studies Movement*, *supra* note 109.

ian ideal is to “wage perpetual war against the tendency to take the workings of a particular social world as if they defined the limits of the real and the possible in social life.”<sup>133</sup> Enough of Unger’s prescription for a new society has been fleshed out to make the point here. The *prescription* is derived from Unger’s *description* of human nature. According to Unger, Man is a “context-transcending agent,”<sup>134</sup> able to breach all forms of practical or conceptual activity.<sup>135</sup> Thus, true freedom is attained in a society that opens the way for revision, never allowing itself to solidify. It is only in such a society can Man achieve complete *unity* between his moral and public life.

Of course, this is a hasty recapitulation of Unger’s project. However, it will suffice for its limited purposes here. Even a brief look at Unger’s project exposes its diametric opposition to post-structuralism.<sup>136</sup> Not only does Unger imply a primordial unity of the human essence, he vigorously argues for the possibility of its instauration. However, Derrida’s dangerous supplement idea (i.e., *differance*) stands as the *bete noire* to this insatiable urge to unity.

The curiosity of Frug’s position is clear. A naive commitment to the Derridean methodology becomes cancerous with the Ungerian program he wishes to affirm. Frug is torn between the pragmatist implications of his methodology and his urge to go transcendental. He constantly talks in terms of human liberation as if he has, hidden somewhere, a worked-out theory of the self which allows him to assert sweepingly how liberation can come about. Indeed, Frug does have a theory which is borrowed from Unger and incorporated into his essay by reference. But to have such a theory is to succumb to the yearnings of those Frug criticizes. It is to be metaphysical, transcendental, and foundational.<sup>137</sup>

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<sup>133</sup> *Id.* at 665.

<sup>134</sup> *Id.* at 651.

<sup>135</sup> See generally R. UNGER, *PASSION: AN ESSAY ON PERSONALITY* (1984).

<sup>136</sup> At some level, Unger seems very post-structuralist. He seems so only when he critiques liberal institutions. Unger, like Derrida and Foucault, searches for “disharmonies” and takes them seriously, at least analytically.

His critique, in short, roots out the “conflicts between principles and counter-principles that can be found in any body of law.” Unger, *The Critical Legal Studies Movement*, *supra* note 109, at 578. Unger takes these “disharmonies” seriously by recognizing that they expose the fact that law contains competing visions of social life. Where Unger ceases to be post-structuralist is his unwillingness to see its insights as not merely transient or context-specific; that *differance* shatters all illusions of unity.

<sup>137</sup> The premise to this critique of Frug is that pragmatism is not the Ungerian ideal. Insofar as pragmatism paves the way for social transformability, it communes with the Ungerian ideal. But there is a difference, and that difference has deep theoretical significance. For Unger, his social ideal is generated from a descriptive given about the nature of the self. For pragmatism, the form of social life cannot be generated from any theory. How we organize ourselves is an ethnocentric activity which takes as its creed, “do what



C. *A Foucauldian Look at Frug*

On the positive side, deconstruction affirms the existential call on humanity to take responsibility for choosing its project.<sup>138</sup> On the down side, using Frug as the point of departure, political difficulties raise from a commitment to deconstruction. The political difficulties stem from the fact that deconstruction is a purely parasitic activity. Deconstruction thrives on the work of those who attempt to build systems of thought and construct programs for action. Deconstruction affirms nothing other than that proposition. That is, it affirms the non-affirmability of metaphysical discourse.<sup>139</sup>

The analysis of Frug's article was designed to show that these political difficulties put the critical stance of those who hope to deploy Derrida in a curious position. On the one hand, there is an effective device for exposing the false necessity of certain dichotomies and the indeterminacy of legal argument. But, on the other hand, the unrelenting attack on objectivity, meaning

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works." See R. RORTY, *Solidarity or Objectivity?*, in *POST-ANALYTIC PHILOSOPHY* 3 (1985). Thus, pragmatism does not prescribe anything, not even a society committed to transformability. What works in a particular community may very well be a highly structured, hierarchical system.

Another premise to this critique is that the Derridean critical stance takes one down the road to pragmatism. It is in this sense that Frug's critical stance, and not his Ungerian reconstructive posture, is entirely consistent and indeed affirms a particular aspect of Rawlsian liberalism. See J. RAWLS, *A THEORY OF JUSTICE* (1971). Rawls, like Derrida and Frug, eschews any commitment to metaphysical presuppositions.

Although Rawls does proffer a method of moral reasoning called reflective equilibrium, *A Theory of Justice* is an elaboration of a *political* conception of justice. What this means in Rawlsian terms is that the conception of justice worked out in the text is framed so as to apply to what he calls the "basic structure" of a modern constitutional democracy. By the phrase "basic structure," Rawls wants to encompass all of society's main political, social and economic institutions. That Rawls eschews metaphysical commitments is, as he says, an "essential point." When making decisions about social and political institutions (i.e., the basic structure), the discourse must be *political*, not metaphysical, for "as a practical political matter no general moral conception can provide a publicly recognized basis for a conception of justice in a modern democratic state." J. RAWLS, *Justice as Fairness: Political, not Metaphysical*, in *14 PHILOSOPHY AND PUBLIC AFFAIRS* 223, 225 (1985). The thrust of Rawls' point is that what form social life ought to take—at least at the level of basic structure—is a matter of conversation, not metaphysical foundation. The search is for agreement, not a priori justification. Moreover, the import of Rawls' writings is their call for privatization of metaphysics.

Rawls and Derrida share a curious form of naturalized Hegelianism. That is, Rawlsian political theorizing and Derridean deconstruction are constitutive activities which proceed via Hegelian negation and synthesis, but abjure teleology (i.e., the Hegelian *Aufhebung*). Derrida, unlike Rawls, is explicit on this point. "[W]ere [there] a definition of *differance*, it would be precisely the limit, the interruption, the destruction of the Hegelian *relieve wherever* it operates." J. DERRIDA, *supra* note 13, at 40-41 (emphasis in original) (footnote omitted).

<sup>138</sup> See J. SARTRE, *BEING AND NOTHINGNESS* 216-18, 617-28 (1956).

<sup>139</sup> Hilary Putnam argues, with questionable success, that this position is self-refuting. See H. PUTNAM, *REASON, TRUTH, AND HISTORY* 119-26, 150-73, 201-16 (1981). For a response to Putnam's general line of attack, see Rorty, *supra* note 137.

and unity creates a sense of cognitive atheism where the assertion of any program for action can be duly deconstructed. The curiosity and political difficulties for the critical legal theorist arise precisely at this intersection. While liberal legalism—to the extent it relies on the determinacy of the rule of law—is shattered from inside by deconstruction, the very premise of liberalism proper are affirmed with a vengeance. Deconstruction suggests the inevitability of the privatization of metaphysics, and thereby maintains politics in its liberal guise. With metaphysics joining theology as *private* matters for which *public* institutions particularly the State have no role, politics can only be liberal in the sense that society will be seen as constituted by subjects prone to disagree fundamentally over notions of the good life. In this context, the goal of politics is to mediate the resulting conflicts without suppressing individual autonomy. Deconstruction, to state the matter differently, confronts the intellectual left with the disturbing possibility that social life is no longer merely a matter of the temporary inability to arrive at a shared understanding of a common end, but the radical *impossibility* of articulating any unifying end which will embrace and glue a community together (outside of the liberal premises of choice and moral autonomy). The result is to make justice the first virtue.

Not surprisingly, these political difficulties—imminent to deconstruction—make it a target of attack from both the Right and the Left. The Right sees it as a subversion of authoritative tradition, an affront to thought itself. The Left, mainly Marxists, see it as intellectualism, at best, and as disempowering, at worst. The disempowerment comes from the fact that deconstruction renders political *commitment* incoherent. That was the point behind Foucault's haunting polemic against Derrida.

### 1. Foucault Revisted: Power and Resistance

The discussion of Foucault was left by completing a sketch of his genealogical method. What implications does Foucault's work have on political action? The above discussion gives this question a sense of urgency.

Foucault's genealogical method illuminates the process of discourse formation, providing a richer understanding of presently constituted knowledge and of its deployment as an instrument of power to promote authoritative pronouncements within a socially-constructed economy of truth and falsity. This permits Foucault to see power as immanent in social relations. Something

that is exercised from a variety of points in the social body rather than something that is acquired, shared or seized. Foucault puts it the following way:

Power must b[e] analysed as something which circulates, or rather as something which only functions in the form of a chain. It is never localised here or there, never in anybody's hands, never appropriated as a commodity or piece of wealth. Power is employed and exercised through a net-like organisation . . . . [I]ndividuals are the vehicles of power, not its points of application.<sup>140</sup>

This view of power as local and relational leads to the abandonment of any theory of sovereignty as central to a conception of power. This is significant because such theories—presupposing that power is possessable—animate the debates between Marxist and liberal thinkers.

Under liberalism, power is reformulated into a “right” which one possesses. Power implicit in a right finds its source in the sovereign in that the right-holder can invoke the sovereign to initiate and manifest his/her will. Stated more formally, the possession of rights is maintained by contractual obligations, of a legal or political kind, which are universally binding and, if broken may be remedied by the state. Marxism, too, sees power as a possession, but it is a possession one class holds over another in maintaining the relations of production for its own benefit. The vision of class struggle is the struggle to wrest that possession from the dominant class.

However, the strategy for political action is not so easily formulated under a critical stance which takes power to be non-possessable. Indeed, the possibility that what this critical stance holds out is the inarticulability of devising any grand strategy for political action, cannot be ruled out. Struggle, perhaps, is a local phenomena precisely because *power* is a local phenomena which is exercised everywhere in the social network.<sup>141</sup>

That power is conceptualized as a field of force which directs

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<sup>140</sup> Foucault, *supra* note 72, at 98. Foucault also carefully points out that it is a mistake to view power as equivalent to repression. In *Discipline and Punish*, Foucault urges us to cease once and for all to describe the effects of power in negative terms: it “excludes”, it “represses”, it “censors”, it “abstracts”, it “masks”, it “conceals”. In fact, power produces; it produces reality; it produces domains of objects and rituals of truth.

M. FOUCAULT, *DISCIPLINE AND PUNISH* 194 (1977).

<sup>141</sup> Accept for the moment that the local character of power operates ubiquitously throughout a social network. Thus, the critical stance becomes a way of experiencing the felt necessities of social life, different from that of traditional ways of experiencing it. That is, perceptual emphasis shifts from institutions and state apparatuses to the body. It is the body that is the receptacle of power, the entity through which power is exer-

human interaction, as opposed to a property possessed by a free subject, amounts to a *denial* of any radical political potential for the ideal of the autonomous subject. Thus, Foucault can be situated, provisionally at least, as a counter-symbol to the Marxist tradition (inherited from German idealism) which posits a philosophical link between consciousness, self-reflection and liberation—the link being captured in the notion of “false consciousness.” That is, whereas traditional left or liberation theorists harbor an optimism for a freely flourishing subjectivity, Foucault denies the dialectical character of Enlightenment altogether. Instead, he articulates a descriptive scheme whereby subjects are constituted entirely by the operation of power.

Since the subject is always situated within a network of power relations, the aim of political struggle cannot be to enhance or expand this autonomy. The suggestion which pervades Foucault’s later works is that social life is masked combat—power and resistance. “Should we turn the expression around, then, and say that politics is war pursued by other means?”<sup>142</sup> War is the norm, the state of affairs we find ourselves in. And if that is so, political action cannot be teleological, not even for only the intellectual, but also for the spontaneous.

The spontaneous political action Foucault has in mind is captured in his notion of “resistance.” “Where there is power, there is resistance.”<sup>143</sup> And, to flip the formulation, there is no power without resistance. Indeed, points of resistance within a social fabric constituted by the networking of power are themselves related to the operation of power. That is to say, resistance is the irreducible opposite of power relations. While Foucault never loosens his commitment to anti-humanism insofar as he insists that escaping power relations is inconceivable, he does not wish to imply that resistance

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cised. That is why Foucault takes the politics of the body seriously and uses it as the lens through which to understand the rise and establishment of capitalism.

Foucault cites several hidden aspects to capitalism: the investment of the body with properties making it pliable to new technologies of control; the emergence of normalization; the divestment of power from an absolute sovereign to a multitude of regulative agencies located throughout the social body; and the emergence of the human sciences making possible these new technologies of control. Power, the imagery runs, circulates throughout the social network investing bodies with the productive capacity to make the capitalist system run. Since the health, welfare and productivity of bodies is the aim of power with capitalism, social welfare policy in Twentieth Century capitalist America became one of the main apparatuses of the state for harnessing and circulating power. Critiquing the rise of the social welfare state from within our critical stance, one sees that the body is made pliable and amenable to disciplinary norms that no longer operate on simple binary injunctions of permission or prohibition.

<sup>142</sup> M. FOUCAULT, *supra* note 80, at 93.

<sup>143</sup> *Id.* at 95.

is purely pro forma, and thus futile.<sup>144</sup>

Foucault argues that power must constantly confront the provocation of “the recalcitrance of the will and the intransigence of freedom.”<sup>145</sup> What Foucault is suggesting is that the field of power relations—that fluid network which informs and produces social interaction—is constituted by resistance. This is a crucial point: That we all interact within a network of power relations, that we exercise power during the course of those interactions, in no way implies a disempowered self.<sup>146</sup> The shape of that network—the way power is exercised—is determined by the nature of resistance. The point is that power relations are not social givens, solidified and invariable. Rather, they are in constant flux, in perpetual reorientation and that reorientation is produced by the character of one’s resistance. Hence, it is not surprising to see Foucault arguing that every relationship of power implies a potential “strategy of struggle.” Moreover, the force of Foucault’s point that intellectuals must not struggle on a grand scale can be understood more deeply. Grand strategies informed by grand totalizing theories are of dubious value because they presume it possible to break loose from networks of power. Local resistance is not simply valorized as more productive in some heuristic sense, but is seen as the essence of political action.<sup>147</sup> That there is residence in a network of power suggests that there ought to be resistance in such a way as to transmute that network.

That this formulation of resistance may be unsatisfying—and perhaps, Sisyphian—may result from the cultural urge to have teleology inform political struggles. However, the post-structuralism of

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<sup>144</sup> Marxist critics of Foucault’s work are quick to jump on the lack of grounding for resistance. Marxists argue that power must be grounded on class division and struggle thereby generating a strategy of resistance rooted in class conflict and the seizure of the state apparatuses. But if power constitutes social relations, then, the argument runs, resistance is a vacuous notion. “[W]hy should there ever be resistance? From where would resistance come, and how would it even be possible?” N. POULANTZAS, *STATE, POWER, SOCIALISM* 149 (1978) (emphasis omitted).

<sup>145</sup> Foucault, *Afterword* to H. DREYFUS & P. RABINOW, *MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS* 221-22 (1982).

<sup>146</sup> Foucault insists that we are all “inside power,” but he goes on to say that: [T]his does not entail the necessity of accepting an inescapable form of domination or an absolute privilege on the side of the law. To say that one can never by [sic] “outside” power does not mean that one is trapped and condemned to defeat no matter what. . . .

. . . .  
 . . . Resistance to power does not have to come from elsewhere to be real, nor is it inexorably frustrated through . . . being in the same place as power; hence, like power, resistance is multiple and can be integrated in global strategies.

Foucault, *supra* note 72, at 141-42.

<sup>147</sup> See Gandal, *Foucault: Intellectual Work and Politics*, 67 *TELOS* 121 (1986).

Derrida and Foucault stands opposed to a teleological view of history and practice. This does not mean that Foucault sees resistance as an activity to be engaged in for itself. Self-conscious resistance, although non-teleological, must be directed at stripping the cloak of science from notions of truth, rationality, and knowledge, thus situating such notions within a regime of power. As Foucault states:

The intellectual's role is no longer to place himself "somewhat ahead and to the side" in order to express the stifled truth of the collectivity; rather, it is to struggle against the forms of power that transform him into its object and instrument in the sphere of "knowledge," "truth," "consciousness," and "discourse."<sup>148</sup>

But more than this, resistance and struggle against existing forms of power must seek to foster the insurrection of subjugated knowledges, to fight against the silencing of excluded voices by virtue of judgments of legitimacy, and illegitimacy which necessarily result from global theorizing. "The discourse of struggle is not opposed to the unconscious, but to the secretive."<sup>149</sup>

Derrida's critical stance castrates itself at the point where it refuses to transcend its text-centrism (which itself amounts to a privileging of *differance*) and to offer an account of resistance. As shown in contrasting Derrida with Unger, Derrida's critical stance cripples the attempt to offer descriptive accounts of the self, oppression and liberation, thereby foreclosing all prescriptive talk once and for all. It is this disturbing implication which raises the ire of Foucault and many radical critics, and it is this implication which many legal scholars are naively missing.

## 2. A Last Look at Frug: The Foucauldian Lacuna

As Foucault would see it, Frug parallels Derrida in his non-self-conscious views of bureaucracy. Frug tells what has been constraining imagination, but he does not tell by what mechanisms of *power* it has been able to maintain itself. He never attempts to show why alternative modes of argumentation outside the confines of the objective-subjective dichotomy are not articulated.<sup>150</sup> And, if alternative argumentative modes are never culti-

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<sup>148</sup> M. FOUCAULT, *supra* note 84, at 207-08.

<sup>149</sup> *Id.* at 214 (the "secretive" here being forms of knowledge and discourse excluded or suppressed by global theorizing).

<sup>150</sup> Foucault would applaud Frug's use of the four models as ideal-types. The construction of these models offer a way of conceptualizing certain discursive practices which, at various times, hold sway over legal consciousness. Also, it avoids the reductive and humanist tendency to see the enunciator of a statement within a discursive regime

vated because such arguments would be illegitimate, then we must ask, what dispersed control mechanism regulates the line between legitimacy and illegitimacy?

Moreover, a Foucauldian critique would take issue with Frug's excessive emphasis on the confining aspects of the dichotomy. What of its productive aspects? How has the objective-subjective dichotomy as a powerful argumentative framework within a liberal legalist culture generated positive courses of action? How has it served certain institutions, classes, or the State itself? One wonders, having read Foucault, whether leaving these issues not only unanswered, but untouched and completely ignored within the entire economy of Frug's critical analysis. This renders one more alienated and more confused about what to *do*.

For a brief moment, consider Frug's four models of apologia: the formalist; the expertise; the judicial; and the market/pluralist. To continue the Foucauldian inquiry, how have these models, historically speaking, produced certain enunciators of a particular discourse such that they see themselves as saying something relevant about a particular signified, in this case, bureaucracy? In what ways do these models reinforce the fixity of that signified (in much the same way that psychiatry reinforces the fixity, the historical "givenness" of madness)? Indeed Foucault's questions concerning "sexuality" as a signified can be reformulated in terms of "bureaucracy": why has bureaucracy/sexuality been so widely discussed?; what were the effects of power generated by what was said?; and what knowledge (savior) was formed as a result? Finally, it may be asked what is perhaps the most pointed question: what institutional bond(s) hold these models—and thus the entire discourse of bureaucracy and its legitimation—together, and what gives them the power to put borders around legal discourse?

Foucault teaches that to pursue such questions without expecting grand answers, to put power, resistance, and subjectification at the forefront of one's intellectual endeavors is to become sensitized, to know the work of intellectuals confirms the operations of the dominant cultural community they find themselves in. It sensitizes one to the fact that psychoanalysts, anthropologists, poets, artists, homemakers, and blue collar and clerical workers are excluded from the whole discourse of justifying bu-

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as a sovereign subject in control of the myriad of discursive possibilities. As Frug wants one to see it—and as Foucault suggests it ought to be seen—the various participants of the game of apologia operate within a discursive regime and exercise their justificatory power within that generative framework.

reaucracy. Whether the exclusion is itself justifiable is another question. The point is that the process of exclusion and what makes such exclusions palatable is a manifestation of exercised power and authority, and that ignoring this phenomena as such a manifestation confirms that very network of power and authority.<sup>151</sup>

The final Foucauldian lacunae in Frug's work which should be pointed out is somewhat of a gloss on what was said above. Frug would be the first to tell you—and he does via the practice of footnoting—that his work is an inscription on an already heavily inscribed terrain, and that fact constrains the infinitely vast field of possibly articulable statements one can make about the existence of bureaucracy in America. Given that this is uncontroversial, the question a reader of his essay confronts when stimulated by an idea (say, of local participation) is not whether to register that idea within that terrain, but *where* to register it. This involves judgments as to how one sees Frug's statements relative to others *vis a vis* bureaucracy as an object of study. It also leads to questions about how Frug's notion of local participation will be communicated. Will it generate a new vocabulary or will it merely reconstitute the old? How will that vocabulary be preserved and taught? Can the institutional acceptability of this discourse be assessed? What about the possibilities for absorption?

These are difficult questions, but they are made more difficult by Frug's irreconcilable schizophrenia. Frug's programmatic urgings are at war with his post-structuralist methodology. This internal internecine war itself produces a particular indeterminacy, an indeterminacy the dominant legal regime—once sophisticated and aware of the nuances of post-structuralism—will seek to exploit for its own political purposes. If it sounds as if those in the CLS movement are at war with mainstream jurisprudence, it is because they are. Why hide it?<sup>152</sup>

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<sup>151</sup> Edward Said, in characteristically Foucauldian fashion, puts the point the following way:

Our interpretive worldly-wisdom has been applied, in a sense, to everything except ourselves; we are brilliant at deconstructing the mystifications of a text, at elucidating the blindness of a critical method, but we have seemed unable to apply these techniques to the very life of texts in the world, their materiality, their capacity for the production of misery or liberation, their monumentality as Foucault has spoken of it. As a result we are mesmerized by the text, and convinced that a text is only a text, without realizing how saying that is not only naive, it is worldly-blind.

Said, *Interview*, 6 DIACRITICS 41 (Fall 1976).

<sup>152</sup> Consider this comment from Duncan Kennedy:

[T]here are lots of things that the liberal center and the right in academia can and will do to limit the growth of radical left intellectual movements. It is



What all this comes down to is the proposition that Frug's insistence on using Derrida's "dangerous supplement" notion, even if only for tactical purposes, blinds him to two things; first, to his own complicities with presently constituted networks of power; and second, to the possibility that tactical deployment may be confused with strategic commitment. But there is a more fundamental aspect. Frug's insistence on demonstrating in rigorously reductive fashion the metaphorical impact of the objective-subjective dichotomy conceals the multiple bases of power which produce and protect such discourse and isolates the social structures which thrive off of, and make possible, the manipulation of that discourse. All Frug wishes to do, naively believing it to be a first step to something more grand, is to "expose" textual indeterminacies and supplementaries. Frug's article is—to use Foucault's phrase—an innocuous "commentary" on a powerful discursive mode.<sup>153</sup> To "expose" is not to resist. It is not even a first step to resistance, but rather, without more, an illusion making acquiescence. This is not to say that exposure, and the other devices of deconstruction, are useless. On the contrary, it is to affirm the proposition that resistance is self-reflection fueled by critical exposure.<sup>154</sup> Resistance is awareness that one's actions and inactions are always tied to some network of power. To be caught unaware, to non-relectively critique texts from within the culture, is to risk (but only risk?) confirming the economy of that network.

Thus, as a final message to Professor Frug: It is never too late to resist to live within the ascesis of rebellion.

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just fantasy to think ideological conflict occurs only in an imaginary marketplace of ideas, that institutional power plays no part in it.

Kennedy, *Psycho-Social CLS: A Comment on the Cardozo Symposium*, 6 *CARDOZO L. REV.* 1013, 1029 (1985).

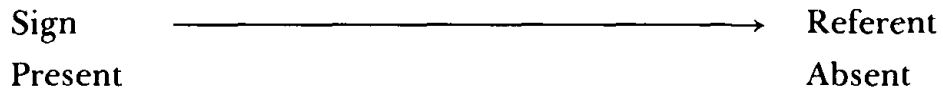
<sup>153</sup> [W]hatever the techniques employed, commentary's only role is to say *finally*, what has silently been articulated *deep down*. It must . . . say, for the first time, what has already been said, and repeat tirelessly what was, nevertheless, never said. The infinite rippling of commentary is agitated from within by the dream of masked repetition : . . . Commentary averts the chance element of discourse by giving it its due: it gives us the opportunity to say something other than the text itself, but on condition that it is the text itself which is uttered and, in some ways, finalised.

M. FOUCAULT, *supra* note 69, at 221.

<sup>154</sup> Cf. D. KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY* (1983).

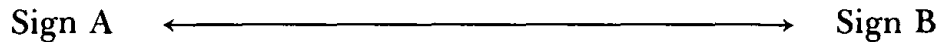
## APPENDIX A

## TEMPORAL STRAND—



Under traditional semiology, the sign is a tool by which one refers to an external object, a referent. The sign is necessary because the referent is absent from the scene. The valorization of speech over writing is premised on the view that having the object present to directly point to is a superior form of communication than using a sign as a substitute. The sign has a deferred presence in that it only stands in the place of the referent until the referent can actually be produced.

## SPATIAL STRAND—



The Spatial aspect of *differance* is the Saussurean ideal that a sign gets its meaning (content) from its relationship to other signs. This insight breaks the link between sign and referent. Moreover, the sign is never fully “present” in that the sign never takes on full representational status.

$$\text{SPATIAL} + \text{TEMPORAL} = \text{SIGN} = \text{Trace}$$

The joining of the two strands produces a different notion of the sign, now called a “trace.” This is the heart of *differance*. The sign cannot take on the role assigned to it under traditional semiology; that is, it cannot have a deferred presence because, like the referent, it too is never fully present.



APPENDIX C

