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ARTICLES

Who's Afraid of Humpty Dumpty: Deconstructionist References in Judicial Opinions

Madeleine Plasencia*

I. INTRODUCTION [IS DECONSTRUCTION ANATHEMA TO JUDICIAL LAWMAKING?]

This Article examines the treatment of deconstruction in United States judicial opinions.¹ A handful of cases have directly referred to the French philosopher and literary theorist, Jacques Derrida.² In

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1. Two of the cases examined are insurance contract cases; four are statutory construction cases. See *National Org. of Women, Inc. v. Scheidler*, 510 U.S. 249 (1994); *United States v. Members of the Estate of Boothby*, 16 F.3d 19 (1994); *In re Hollaway*, 995 F.2d 1080 (D.C. Cir. 1993); *Voluntary Hosp. of Am., Inc. v. National Union Fire Ins. Co.*, 859 F. Supp. 260 (N.D. Tex. 1993); *Rodriguez v. Secretary of Health and Human Serv.*, 794 F. Supp. 58 (D.P.R. 1992); *Frigalment Importing Co. v. B.N.S. Int'l Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960); *ACL Tech. v. Northbrook Prop. and Cas. Ins. Co.*, 22 Cal. Rptr. 2d 206 (4th App. Div. 1993); cf. *United States v. Robinson*, 958 F.2d 268, 271 n.3 (9th Cir. 1992) (buried in a footnote without further explanation stands the reference to the term "legitimate fiction" and Derrida. Judges Poole, Reinhardt and Fernandez appear to suggest that Derrida's notion of "fiction" and "law" are closely linked, if not foundational.).

2. Jacques Derrida is a French philosopher who made a splash in the philosophical community in 1962 with his translation of Husserl's *The Origin of Geometry*. This work outlined Derrida's critical thinking currently known as post-structuralism or deconstruction. See discussion *infra* Parts II and III. The first text to be translated in the United States, *Structure, Sign, and Play in the Discourse of the Human Sciences*, was delivered by Derrida at Johns Hopkins University in 1966. His writings since then, not including speeches and interviews, have exceeded some 35 works. Works most well-known in the United States include *Limited Inc abc . . .*, *Speech and*

each of these cases, the court has rejected Derrida's philosophy, apparently out of a fear that recognition of any legitimacy of Derrida's thoughts would lead to the self-destruction of the legal world. These courts have misunderstood that consideration or recognition of Derrida's philosophy in the legal context would not unavoidably lead to the end of all meaningful legal discourse in the United States. A discussion of these cases will serve as a springboard for an examination of traditional methods of legal interpretation, and how these methods interact with deconstruction.

Derrida's philosophy, which gave rise to the philosophy known as deconstruction, contends that in Western culture our conception of the world depends upon a logocentric view. One of Derrida's examples of this logocentrism involves the favoring of written communication over verbal communication. The hallmark of Derrida is his discussion of the internal contradictions of language which, undermine any contention that language is capable of uniform meaning.

The question of why judges are concerned with justifying or defending their decisions from the followers of Derrida?, is posed in this Article both generally, as a matter of legal interpretation, and specifically, within the context of the issue(s) presented in the examined cases. By examining the concerns articulated by the judges in these cases and then referring back to the writings of Derrida, this Article describes the likely outcome if Derrida's views of (legal) interpretation are in fact applied in judicial opinion-making.

In Parts II and III, this Article introduces the reader to important concepts in Derridean deconstruction. These concepts include notions of "privileging," "iterability," and the "free" play of text. Derrida's work is presented generally and is examined in light of his writings concerning law, justice, and authority. In Part IV, this Article

Phenomena and Of Grammatology. See Jacques Derrida, *Limited Inc abc* . . . , 2 GLYPH 162 (1977) [hereinafter *Limited Inc abc*]; JACQUES DERRIDA, *SPEECH AND PHENOMENA, AND OTHER ESSAYS ON HUSSERL'S THEORY OF SIGNS* (David B. Allison trans., Northwestern University Press 1973) (1967) [hereinafter *SPEECH AND PHENOMENA*]; JACQUES DERRIDA, *OF GRAMMATOLOGY* (Gayatri Chakravorty Spivak trans., Johns Hopkins University Press 1976) (1967) [hereinafter *OF GRAMMATOLOGY*]. Derrida's significance in the world of philosophy, critical theory and critical legal theory, no doubt, is connected to his use of the term "deconstruction." See discussion *infra* Parts II and III. Its continued viability has been unprecedented. Deconstruction arose as a rejection of the popular philosophy of the sixties called "structuralism." Since the introduction of deconstruction, Derrida's influence has been far and wide. See *id.* Derrida continues to write, lecture and teach at the Ecole des Hautes Etudes en Sciences Sociales (the School of Higher Studies in Social Science) on Paris's Left Bank. He also commutes to the United States to teach a graduate seminar at New York University.

demonstrates the protean nature of law³ by an examination of contract law. Part V examines the relationship of statutory law and common law as a doubling of the difficulties of applying law uniformly and coherently. As this Article demonstrates, the intent of the legislative body in enacting law is thwarted by individual judges' reading and writing of the law in the conjugation of caselaw. Finally, this Article demonstrates that the inherent difficulties in interpreting and applying laws lie in the relationship between the ultimate arbiter of law and the text of the law itself.

II. DERRIDA AND MODERN THOUGHT

Derrida has been hailed as a genius, as evidenced by the confirmation in May 1992 of an honorary degree in philosophy on Derrida by the University of Cambridge. As noted in the press,

One measure of Derrida's influence is revealed by a study of 20th-century authors most cited by other academics. The French philosopher, who has written some 35 works, comes in the top 20, according to the survey by the Institute for Scientific Information, ba[s]ed in Boston.⁴

In the late 1970s and early 1980s, two of his most quoted works, *De La Grammatologie* and *L'écriture et la différence*, were listed as among the top twenty most cited items.⁵ His work has been largely influential in the fields of philosophy and literary criticism.⁶ In the 1980s, his influence expanded into legal scholarship.⁷ Derrida has been considered the origin of the theory called "deconstruction."⁸ Deconstruction has been variously defined and interpreted by legal scholars.⁹ Derrida himself in a recent paper presented at Benjamin N. Cardozo School of Law, in New York, had this to say in hazarding a definition of deconstruction: "Needless to say, one more time, deconstruction, if there is such a thing, takes place as the experience of the impossi-

3. The historical, political, and legal context within which law is decided gives each court decision, and indeed every term used in that court decision, a unique and idiosyncratic meaning. In this sense law is always variable and inheres a protean nature.

4. Charles Hymas, *Cambridge Dons at War over Philosopher's Degree*, TIMES NEWSPAPERS LIMITED, May 10, 1992, available in LEXIS, News Library, Arcnews File.

5. See *id.*

6. See generally JONATHAN CULLER, ON DECONSTRUCTION (1982) (discussing Derrida's influence).

7. See J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 757 (1987).

8. See PEGGY KAMUF, A DERRIDA READER BETWEEN THE BLINDS vii-viii (1991); see also Balkin, *supra* note 7, at 743.

9. See *infra* notes 12, 14, 21, 45-47, and 49.

ble."¹⁰ His works discuss the elusive nature of the correspondence between language as intended and language as interpreted.¹¹ The signature, and the recognized brilliance of Derrida, lie in his discussion of the contradictory quality of all meaning within any written text.

III. DERRIDA ILLREAD OR UNREAD?—THE HIERARCHICAL OPPOSITION OF IDEAS, ITERABILITY, AND THE FREE PLAY OF TEXT

Three prominent concepts permeate the work of Derrida—"privileging," "iterability," and the "free" play of text.¹² Derridean deconstruction involves the practice of investigating signified content and questioning the codes inherited from ethics and politics.¹³ Derrida's project is that of explaining and identifying the hierarchical oppositions that surround language.¹⁴ Hierarchy and opposition in

10. Mitchell Stephens, *Jacques Derrida*. N.Y. TIMES, Jan. 23, 1994, Late Edition-Final, § 6 (Magazine), at 22.

11. See OF GRAMMATOLOGY, *supra* note 2, at 14-15.

12. For a good introduction and overview of Derrida's work, see CULLER, *supra* note 6; Spivak, *Translator's Preface* to OF GRAMMATOLOGY, *supra* note 2. For an excellent presentation of deconstruction as an interpretative strategy for lawyers see Balkin, *supra* note 7. But see Pierre Schlag, "Le Hors De Texte, C'est Moi" *The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO L. REV. 1631, 1641-42 (1990) [hereinafter *Politics of Form*] (stating that deconstruction is not a strategy).

Derrida's work is now largely available in English translation. JACQUES DERRIDA, SIGNSPONGE (Richard Rand trans., Columbia University Press 1984) (1976) [hereinafter SIGNSPONGE]; JACQUES DERRIDA, GLAS (John P. Leavey and Richard Rand trans., University of Nebraska Press 1986) (1974) [hereinafter GLAS]; JACQUES DERRIDA, SPURS: NIETZSCHE'S STYLES (Barbara Harlow trans., University of Chicago Press 1979); JACQUES DERRIDA, MARGINS OF PHILOSOPHY (Alan Bass trans., University of Chicago Press 1982) (1972) [hereinafter MARGINS OF PHILOSOPHY]; JACQUES DERRIDA, POSITIONS (Alan Bass trans., University of Chicago Press 1981) (1972) [hereinafter POSITIONS]; JACQUES DERRIDA, DISSEMINATION (Barbara Johnson trans., University of Chicago Press 1981) (1972) [hereinafter DISSEMINATION]; JACQUES DERRIDA, WRITING AND DIFFERENCE (Alan Bass trans., University of Chicago Press 1978) (1967) [hereinafter WRITING AND DIFFERENCE]; SPEECH AND PHENOMENA *supra* note 2; OF GRAMMATOLOGY, *supra* note 2; Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority"*, 11 CARDOZO L. REV. 919 (1990) (bilingual) [hereinafter *Force of Law*]; Jacques Derrida, *Préjugés Devant La Loi*, in LA FACULTÉ DE JUGER (1986) (French) [hereinafter *Préjugés Devant La Loi*]; Jacques Derrida, *The Law of Genre*, 7 GLYPH 202 (1980); and Derrida, *Limited Inc abc*, *supra* note 2.

Derrida's later works include: ACTS OF LITERATURE (Derek Attridge ed., Routledge 1992); APORIAS: DYING—AWAITING (ON ANOTHER AT) THE "LIMITS OF TRUTH" (Thomas Dutoit trans., Stanford University Press 1993) [hereinafter APORIAS]; THE GIFT OF DEATH (David Wills trans., University of Chicago Press 1995); DECONSTRUCTION IN A NUTSHELL: A CONVERSATION WITH JACQUES DERRIDA (John B. Caputo ed., Fordham University Press 1997).

13. See CULLER, *supra* note 6, at 156 (quoting Derrida).

14. In 1962, Derrida's philosophy was most tightly focused first in his student dissertation introducing and translating Husserl's *The Origin of Geometry*. See Spivak, *Translator's Preface* to

this context involves the recognition of the ethnocentric practice in Western culture of positioning one concept before another, and simultaneously giving supremacy to one concept over that which it is not—said to be its opposite. This is closely related to Derrida's concept of privileging. Privileging is used here to mean the favoring of certain ideas over others. In this sense, certain ideas are secondary to those considered to be relatively primary. An example used by Derrida to demonstrate privileging is where writing usurps the principal role in communication over speech.¹⁵ Writing, the representative version of the spoken or thought-of concept, now has taken over the role of the first, primary, or preferred.

Iterability is the ability of signs to be repeated and to signify the same meaning in different contexts, regardless of the author's intent in using those signs.¹⁶ Hence, iterability equals repeatability or the property thereof.

"Play" in Derrida's philosophy refers to that uncontrollable association or interaction between writing both physically, as in the text on a page and the spaces between text, and temporally, as in the temporal or linear space between the spoken word and its written signifier.¹⁷ A more comprehensive overview of these three concepts follows.

A. Privileging

Privileging is the favoring of one concept over another. One of the easiest ways to understand Derrida's notion of privileging is illustrated through his example of favoring writing over speech. For Derrida, one holds an idea and its opposite in mind simultaneously—when thinking of speech we are simultaneously thinking of what speech is not—writing, and vice versa.¹⁸

In his works *Positions* and *Of Grammatology*, Derrida discusses the "overturning and displacement" of text by the example of the tendency

OF GRAMMATOLOGY, *supra* note 2, at ix. Since that time he has published well over 22 books, not including uncollected essays, forewords, interviews, and other public presentations. See, e.g., sources cited in note 12 *supra*. Indeed, Derrida continues teaching and speaking throughout the world, as well as writing. For a bibliography of Derrida's works refer to KAMUF, *supra* note 8, at 601-12.

15. See OF GRAMMATOLOGY, *supra* note 2, at 8-9; MARGINS OF PHILOSOPHY, *supra* note 12, at 315.

16. See MARGINS OF PHILOSOPHY, *supra* note 12, at 90-91; SPEECH AND PHENOMENA, *supra* note 2, at 50.

17. See OF GRAMMATOLOGY, *supra* note 2, at 56-57, 101-02; SPEECH AND PHENOMENA, *supra* note 2, at 65, 81.

18. See OF GRAMMATOLOGY, *supra* note 2, at 9.

to favor the written word over speech.¹⁹ Derrida postulates that reversing the order—that is, considering the written word as parasitic or dependent upon the speech act—yields new insights when this privileging of one arrangement is reversed or turned on its head.²⁰ Immediacy, physically and temporally, of the speaker and listener accord speech a higher value than writing because, as Balkin so aptly puts it, “[the] immediacy seems to guarantee the notion that in the spoken word we know what we mean, mean what we say, say what we mean, and know what we have said.”²¹ Because of the physical and temporal immediacy of speech, Derrida suggests that perhaps “[w]riting *should* erase itself before the plenitude of living speech, perfectly represented in the transparency of its notation, immediately present for the subject who speaks it, and for the subject who receives its meaning, content, value.”²²

The point made here by Derrida is that speech usually involves the simultaneous physical presence of the speaker and the listener. To this extent, speech should be privileged over writing because the speaker may immediately communicate his or her intention to the listener without the mediation of writing. Speech allows for communication through tone, inflexion of voice, and nonverbal body language—all of which serve to impart the intention of the speaker in what it is he or she is saying. On the other hand, a writer is limited to the alphabetic or phonetic signifiers of language. Also, the writer, usually, would not immediately be present to answer questions from the reader. Thus, ambiguity and ineffectiveness of communication are more likely with writing than with speech.

19. See POSITIONS, *supra* note 12, at 24-27; OF GRAMMATOLOGY, *supra* note 2, at 22-27, 98.

20. See OF GRAMMATOLOGY, *supra* note 2, at 49, 52; POSITIONS, *supra* note 12, at 25; see also Balkin, *supra* note 7, at 747.

21. Balkin, *supra* note 7, at 757 (quoting Barbara Johnson in her Introduction to DISSEMINATION, *supra* note 12, at viii.).

Professor Balkin's article, *Deconstructive Practice and Legal Theory*, was the first article written by an American legal scholar that set out to educate American readers as to the relation between the French philosopher Jacques Derrida and his philosophical practices sometimes referred to as deconstruction. See Balkin, *supra* note 7, at 743. Balkin's article is somewhat controversial in that it first examines deconstruction as a viable practice, not only in philosophy but also in law. See *id.* at 761-64. Secondly, Balkin created a stir in the legal community because his thesis, roughly summed up, argues that deconstruction is not only a *practice* but is also an additional *instrument, technique* or analytical *tool* to add to the arsenal of the lawyer in his everyday practice of law. See *id.* at 743-44, 764-67, 786. As is discussed *infra* at note 45, not all scholars of deconstruction agree that Balkin's thesis is coherent with deconstruction.

22. POSITIONS, *supra* note 12, at 25.

Derrida suggests that speech, like writing, incorporates three basic properties of signification: "(1) the substitution of the signifier for what it signifies; (2) the mediation of the experience of the signified by the signifier, [sic] and (3) the iterability of the signifier at different times and in different contexts."²³ Like the written word, speech stands in as signifier for a particular thought.²⁴ In order for speech to be a signifier, as a sign, speech must be iterable.²⁵ Speech must be able to continue "speaking" long after the speaker has ceased speaking.²⁶ Hence, writing is the introduction of a means of communicating thoughts through marks. The concept of the Derridean "sign" will be revisited shortly. The point here is that the revelation of the lacunae or gaps between that which text represents and that which is represented is the glory of Derrida's work.²⁷ Within that lacunae is the margin of the subjective self interpreting the text itself. Where no meaning may have been intended, the reader "rewrites" the text to have a different meaning than that of the author. The gap in time between the original drafting of the text and the reading of the text allows the reader this "privilege of presence" over the text.²⁸

Deconstruction is "a way of taking a position,"²⁹ questioning signified content, presumptions, and conditions of discourse, the institutional structures that enable practices, competencies, and performances. Deconstruction challenges existing assumptions, conditions, and structures. Privileging is a term used specifically to describe the favoring of one concept relative to another concept. Deconstruction involves the temporary inversion of favored concepts, giving transcendence to the subordinate concept. The inversion is temporary only so that new insights may be derived.³⁰ The (re)reversal to the preexisting order may be done again for a fuller picture of the various meanings hidden within any construct. Thus, any hierarchical opposition may be deconstructed in this manner. In describing, overturning, and displacing text, the aim of deconstruction is to (re)cognize that which is familiar and textualize what was previously marginalized. Derrida says:

23. Balkin, *supra* note 7, at 757-58 (citing *OF GRAMMATOLOGY*, *supra* note 2, at 44-45, 55-57; and *Limited Inc. abc*, *supra* note 2, at 189-90).

24. See *POSITIONS*, *supra* note 12, at 21-22.

25. See *Limited Inc abc*, *supra* note 2, at 189-90.

26. See *OF GRAMMATOLOGY*, *supra* note 2, at 36-37.

27. See *id.* at 138.

28. See *id.* at 11-12.

29. CULLER, *supra* note 6, at 156 (quoting Derrida).

30. See *OF GRAMMATOLOGY*, *supra* note 2, at 12-13.

Of course it is not a question of resorting to the same concept of writing and of simply inverting the dissymmetry that now has become problematical. It is a question, rather, of producing a new concept of writing. This concept can be called *gram* or *différance*. The play of differences supposes, in effect, syntheses and referrals which forbid at any moment, or in any sense, that a simple element be *present* in and of itself, referring only to itself. 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. The gram, then, is the most general concept of semiology³¹—which thus becomes grammatology³²—and it covers not only the field of writing in the restricted sense, but also the field of linguistics.

The gram as *différance*, then, is a structure and a movement no longer conceivable on the basis of the opposition presence/absence. *Différance* is the systematic play of differences, of the traces of differences, of the *spacing* by means of which elements are related to each other. This spacing is the simultaneously active and passive (the *a* of *différance* indicates this indecision as concerns activity and passivity, that which cannot be governed by or distributed between the terms of this opposition) production of the intervals without which the "full" terms would not signify, would not function. It is also the becoming-space of the spoken chain—which has been called temporal or linear; a becoming-space which makes possible both writing and every correspondence between speech and writing, every passage from one to the other.³³

In deconstruction, it is imperative that individuals attempt to overcome the dominant form which governs them. Derrida believes that each person must question the origin of that domination.³⁴ If

31. "Semiology" is the study of "the sign and its correlates: *communication and structure*." POSITIONS, *supra* note 12, at 17.

32. "Grammatology" is the study of the "grammè," the written mark—the name of the sign <sous rature> under erasure. Derrida argues that grammatology is a positive science composed of the deconstruction of the privilege of the spoken word. See OF GRAMMATOLOGY, *supra* note 2, at 74-87.

33. POSITIONS, *supra* note 12, at 26-27 (emphasis added).

34. See OF GRAMMATOLOGY, *supra* note 2, at 179, 207, 216.

humans are to achieve additional clarity in the variable meanings of words, they should question what constitutes their history and what produces transcendence itself.³⁵ The *logos* of each person's existence is reflected in his or her language.³⁶ Derrida argues that Western philosophy assumes that the concept of self must precede any other cognition.³⁷ This solipsistic approach privileges self-identity over difference. In other words, in order to determine self-identity, one must first have a sense of what one is before one can say what one is not.³⁸ To quote Derrida, "[t]he science of linguistics determines language—its field of objectivity—in the last instance and in the irreducible simplicity of its essence, as the unity of the *phonè*, the *glossa*, and the *logos*."³⁹ Every reading catches what other readings have missed.⁴⁰ Every reading is a *true* reading in this sense.⁴¹ By overturning and displacing the original positions of the prescribed order of text, Derrida says:

What is produced in the current trembling is a reevaluation of the relationship between the general text and what was believed to be, in the form of reality (history, politics, economics, sexuality, etc.), the simple, referable exterior of language or writing, the belief that this exterior could operate from the simple position of cause or accident. What are apparently simply "regional" effects of this trembling, therefore, at the same time have a nonregional opening, destroying their own limits and tending to articulate themselves with the general scene, but in new modes, without any pretention to mastery.⁴²

Derrida exalts the hidden implications or perspectives as equal in status with the privileged or primary concept.⁴³ In Derrida's view, this philosophical position of preferring certain concepts over others in order to ground one's theory privileges or elevates subject (self) over object, one concept over another.⁴⁴

35. See *id.* at 13-14.

36. See *id.* at 29.

37. Derrida's exposition of Western thought is referred to explicitly in many of his works. See, e.g., OF GRAMMATOLOGY, *supra* note 2, at 18-19 (identifies the "privilege of presence" as central to Western Tradition). See also SPEECH AND PHENOMENA, *supra* note 2, at 51.

38. See POSITIONS, *supra* note 12, at 26.

39. OF GRAMMATOLOGY, *supra* note 2, at 29.

40. See CULLER, *supra* note 6, at 178.

41. See *id.* ("[T]rue readings are only particular misreadings: misreadings whose misses have been missed.").

42. POSITIONS, *supra* note 12, at 91.

43. See OF GRAMMATOLOGY, *supra* note 2, at 10.

44. See *id.* at 35-36.

In the legal context, social norms result from the favoring or privileging of certain human values. Inherent in any law is the desire to promote certain human conduct. Like any system of concepts, law can be deconstructed. Because lawyers undertake the project of establishing principles of regulatory behavior within various areas, whether in contract or constitutional law, law reflects social norms that must involve privileging of particular conceptions of human behavior. In his article, *Deconstructive Practice and Legal Theory*, Balkin's interpretation of Derrida is very "legal-friendly."⁴⁵ In his own deconstructionist's anthem, Balkin beckons all lawyers to subscribe to his version of Derrida:

Deconstruction is not a call for us to forget about moral certainty, but to remember aspects of human life that were pushed into the background by the necessities of the dominant legal conception we

45. See Balkin, *supra* note 7. Pierre Schlag, however, vehemently and openly disagrees with Balkin's approach to deconstruction. See *Politics of Form*, *supra* note 12, at 1641-42. Schlag's central concern is that Balkin's account of deconstruction places the individual self at the center (and helm) of the deployment of deconstruction. Schlag sums up his critique of Balkin's article *Deconstructive Practice and Legal Theory* by saying,

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

Politics of Form, *supra* note 12, at 1641-42.

More generally, Schlag criticizes Balkin's work as paradigmatic of the critical legal studies movement's formalization of deconstruction. This naive formulation of deconstruction misreads Derrida, according to Schlag, because at bottom, Balkin is urging that deconstruction is just another analytical tool, technique, method, or a type of interpretation "turn[ing] deconstruction into precisely what it seeks to resist and displace. To transform deconstruction into a theory, etc. is to relocate deconstruction and confine it to the already inscribed logocentric matrices of traditional legal thought." *Id.* at 1656. For additional readings of Schlag and critical legal studies, see Pierre Schlag, *Fish v. Zapp: The Case of the Relatively Autonomous Self*, 76 GEO. L.J. 37, 58 (1987) (arguing that Stanley Fish's "interpretive community" thesis lacks closure); Pierre Schlag, *Symposium Foreword: Post Modernism and Law*, 62 U. COL. L. REV. 439 (1991); Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990); and Pierre Schlag, *Pre-Figuration and Evaluation*, 80 CAL. L. REV. 965 (1992). In *Writing for Judges*, Schlag argues that legal academics do not influence the decisions of judges. See Pierre Schlag, *Writing for Judges*, 63 U. COL. L. REV. 419 (1992) [hereinafter *Writing for Judges*]. Judges do not have time (or interest) in reading law review articles. *Id.* at 421. Concurrently, judges and legislators are becoming increasingly less coherent in lawmaking. "Richard Posner sums up these kinds of observations rather succinctly: the opinions of judges and the writings of legislators are, he says, 'essentially mediocre texts.'" *Id.* at 422 (citing David Kennedy, *Critical Theory, Structuralism and Contemporary Legal Scholarship*, 21 NEW ENG. L. REV. 209, 211-12 (1986)); Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 831-32 (1991) [hereinafter *Normativity*] (stating that both realist and critical legal studies (cls) thinkers suffer from nihilism-fear if one questions the orthodox form of legal thought because that "risks destabilizing our normative commitments and the conceptual approaches that sustain them," thus leading to "jurisprudential happy-talk").

call into question. Deconstruction is not a denial of the legitimacy of rules and principles; it is an affirmation of human possibilities that have been overlooked or forgotten in the privileging of particular legal ideas.

Any social theory must emphasize some human values over others. Such categorizing necessarily involves a privileging, which in turn can be deconstructed. But the goal of deconstruction is not the destruction of all possible social visions. By recalling the elements of human life relegated to the margin in a given social theory, deconstructive readings challenge us to remake the dominant conceptions of our society. We can choose to accept the challenge or not, but we will no longer cling to our social vision blindly.

. . . .

[T]he deconstructionist must engage in a process of self-reflection to determine when the insights provided by deconstruction have produced sufficient enlightenment with respect to a view of law, legal doctrine, or human society previously accepted as privileged, natural, or complete. This decision is, of course, a political and moral choice, but it is one informed by insights gained through the activity of deconstruction itself. At the moment the choice is made, the critical theorist is, strictly speaking, no longer a deconstructionist. However, the purposes of engaging in the deconstruction have been served.⁴⁶

In other words, Derrida urges the deconstructionist practice of recognizing that certain concepts or approaches are favored over others. He then urges the temporary reversal of the privileged concept to the position of the disfavored concept. This reversal illuminates hidden assumptions and conditions in any structure.

Balkin articulates what may very well be the fear expressed by judges (and the legal academy), which is that Derrida is unavoidably nihilistic because he appears to deny the existence of objective truth. Yet Balkin appeases these naysayers by assuring them that "Derrida's

46. Balkin, *supra* note 7, at 763, 766. Derrida is explicitly rejected in highly "commercial" or "nonsocial" problem cases as noted here. Consider the deconstruction of law in the areas of race, sex, or sexual orientation. Although there is burgeoning academic scholarship in these areas, judicial opinions squarely presented with these issues have not yet named Derrida in their decisions. See, e.g., *Romer v. Evans*, 116 S. Ct. 1620, 1627, 1629 (1996) (deciding the issue of whether Colorado's Amendment 2, which prohibited all legislative, executive, or judicial action designed to protect homosexuals, was in violation of the equal protection clause). Balkin ultimately contends that deconstruction is an analytical tool for political agendas—for the left and for the right—because this deconstructive reading of legal texts sheds light on "what is privileged and what is excluded in legal thought." Balkin, *supra* note 7, at 786. An interesting example provided by Balkin is that an economic libertarian might attack the modern welfare state by deconstructing the false privileging of certain aspects of human nature. See *id.*

own arguments subtly rely on the notion of truth."⁴⁷ Balkin assures them that what Derrida really means is that deconstruction is an interpretive technique, method, or strategy.⁴⁸ Because each person may never overcome his or her own limited points of reference, all that a deconstructionist may seek to achieve is to further supplement existing (dominant) conceptual apparatus with his or her own idiosyncratic reading and interpretation.⁴⁹ Thus, Balkin declares that "[d]econstruction awakes us from our dogmatic slumber, and reminds us that our 'truth' is only an interpretation."⁵⁰ Deconstruction releases or frees persons to recognize associations and meanings in text which they may have not acknowledged at play before. Literary theorist Jonathan Culler, in his widely known work *On Deconstruction*,⁵¹ identifies what seems to most perturb legal thinkers: that in reading, the inversion or reversal of the dominant order will lead to chaos.⁵² As Culler puts it,

47. Balkin, *supra* note 7, at 760. Canadian scholar Allan Hutchinson and U.S. Professor Pierre Schlag have highly criticized Balkin's (and other American legal scholars') account of Derrida as epitomizing nihilism-fear. See *Politics of Form*, *supra* note 12, at 1631, 1643 n.36 (addition in original). See also *Normativity*, *supra* note 45, at 829 n.80 ("The equation of deconstruction with radical individual subjectivism—a conflation commonly found both within the cls movement and in the work of its critics—is, in one sense, quite surprising. In France, Derridean deconstruction is usually criticized, not as a celebration of unbridled individual subjectivity, but rather on the grounds that it extinguishes or suspends the individual subject."). See also Allan Hutchinson, *From Cultural Construction to Historical Destruction*, 94 *Yale L.J.* 209, 231-32 (1984) (book review).

Mr. Hutchinson aptly describes this cooption of deconstruction in American literary scholarship:

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

Id. at 231-32.

In addition, Hutchinson's insightful critique of the American representation of Derrida's free "play" of text is contained in his acclaimed book *DWELLING ON THE THRESHOLD* (1988). See also A.C. Hutchinson, *Identity Crisis: The Politics of Interpretation*, 26 *NEW ENG. L. REV.* 1173 (1992); A.C. Hutchinson, *Democracy and Determinacy: An Essay on Legal Interpretation*, 43 *U. MIAMI L. REV.* 541 (1989); A.C. Hutchinson, P. J. Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 *STAN. L. REV.* 199 (1984).

48. See Balkin, *supra* note 7, at 744.

49. See STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* (1989).

50. Balkin, *supra* note 7, at 761.

51. CULLER, *supra* note 6.

52. See *id.* at 179.

Like other inversions, the reversal of relations between understanding and misunderstanding disrupts a structure on which institutions have relied. Attacks on deconstructionists and on other critics as diverse as Bloom, Hartman, and Fish frequently emphasize that if all reading is misreading, then the notions of meaning, value, and authority promoted by our institutions are threatened. Each reader's reading would be as valid or legitimate as another, and neither teachers nor texts could preserve their wonted authority. What such inversions do, though, is displace the question, leading one to consider what are the processes of legitimation, validation, or authorization that produce differences among readings and enable one reading to expose another as a misreading. In the same way, identification of the normal as a special case of the deviant helps one to question the institutional forces and practices that institute the normal by marking or excluding the deviant.⁵³

B. Iterability

Another key concept in the writings of Derrida is that of iterability. Iterability is a word used by Derrida to indicate the necessary predicate for written communication. Every written sign or mark cannot be a sign unless it is repeatable and identifiable.⁵⁴ The mark must be capable of repetition in many different contexts and remain legible (iterable) in order to constitute communication.⁵⁵ This communication takes place regardless of "the radical absence of every empirically determined addressee in general."⁵⁶ This quality of the possibility of being repeated, and therefore identified, enables all writing (text) to take on a life of its own.⁵⁷ The act of reading is identical to the act of writing.⁵⁸ Derrida says,

What holds for the addressee holds also, for the same reasons, for the sender or the producer. To write is to produce a mark that will constitute a kind of machine that is in turn productive, that my future disappearance in principle will not prevent from functioning and from yielding, and yielding itself to, reading and rewriting.

. . . .

53. *Id.* at 178-79.

54. See MARGINS OF PHILOSOPHY, *supra* note 12, at 315. The etymology of iterable is linked to Sanskrit: "iter, once again, comes from itara, other, in Sanskrit." *Id.* at 315. Derrida plays on this double meaning. Once a mark is repeated (again) it is a copy of the original, and a copy is never truly identical to the original. *Limited Inc abc*, *supra* note 2, at 200.

55. See MARGINS OF PHILOSOPHY, *supra* note 12, at 315.

56. *Id.*

57. See *id.* at 316.

58. See *id.*

For the written to be written, it must continue to "act" and to be legible even if what is called the author of the writing no longer answers for what he has written, for what he seems to have signed, whether he is provisionally absent, or if he is dead, or if in general he does not support, with his absolutely current and present intention or attention, the plenitude of his meaning, of that very thing which seems to be written "in his name."⁵⁹

Perhaps what is most interesting or significant for the legal scholar is not what Balkin says Derrida says and means, but rather what Balkin says Derrida may not be saying (in the main text of his article): "Note that I am presenting my interpretation of Derrida, which is my own 'dangerous supplement' to his work and my own metaphor."⁶⁰ Balkin argues that the critical shift in Derrida's philosophy occurs at this juncture—the "signifier supplements that which it signifies."⁶¹ In a play on words, Derrida makes up a word "signsponge" to show the inextricable link between a sign and its creator.⁶² The use and abuse of language and meaning is unavoidable, according to Derrida.⁶³ "This signsponge maintains the spongy character, the rather repugnant equivocation of this language which lends itself so economically to so many possible pretenders."⁶⁴

Every signified is actually a signifier in disguise such that the world as we know it is only a world of representations, *ad infinitum*.⁶⁵ Implicit then in Derrida's philosophy is an arching toward what Balkin calls the "Real Thing, Presence Itself."⁶⁶ The Real Thing is the ultimate because it is self-sufficient, requiring no signifier or supplement.⁶⁷ Others also argue that Derrida embraces the concept that we all are slaves to the existing conceptual apparatus and can only supplement these familiar notions and images.⁶⁸ But, as Derrida says, deconstruction is a *general strategy* only to the extent that it aims to "avoid both simply *neutralizing* the binary oppositions of metaphysics

59. *Id.* at 316; see also *Limited Inc abc*, *supra* note 2, at 162.

60. Balkin, *supra* note 7, at 761 n.56.

61. *Id.* at 759; OF GRAMMATOLOGY, *supra* note 2, at 144.

62. See SIGNSPONGE, *supra* note 12, at 100.

63. See *id.*

64. *Id.*

65. See OF GRAMMATOLOGY, *supra* note 2; and see *id.* at 50.

66. Balkin, *supra* note 7, at 760.

67. See *id.* at 761.

68. See, e.g., Drucilla Cornell, *The Violence of the Masquerade: Law Dressed Up as Justice*, 11 CARDOZO L. REV. 1047 (1990).

and simply *residing* within the closed field of these oppositions, thereby confirming it."⁶⁹

Of the "mystical authority" of law, Derrida says law is one more text that is deconstructible:

Even if the success of the performatives that found law or right (for example, and this is more than an example, of a state as guarantor of a right) presupposes earlier conditions and conventions (for example in the national or international arena), the same "mystical" limit will reappear at the supposed origin of their dominant interpretation.

The structure I am describing here is a structure in which law (*droit*) is essentially deconstructible, whether because it is founded, constructed on interpretable and transformable textual strata (and that is the history of law (*droit*), its possible and necessary transformation, sometimes its amelioration), or because its ultimate foundation is by definition unfounded. The fact that law is deconstructible is not bad news. We may even see in this a stroke of luck for politics, for all historical progress.⁷⁰

Our ordering of the world in terms of "abstract right" and morality and the application of these two in a synthesized form leads to a privileged syllogism. In *Glas*, Derrida draws on Hegel to provide an example of the process of the critical displacement of these oppositional normative items:

Its interpretation directly engages the whole Hegelian determination of right on one side, of politics on the other. Its place in the system's structure and development . . . is such that the displacements or the disimplications of which it will be the object could not have a simply local character.⁷¹

Analysis of contract liability and statutory construction provides profound insight into recurring problems for the lawyer and judge in statutory construction because these groups of cases rely so heavily on so-called "controlling" language and the subjective intent of the author. In statutory construction, the plain meaning of language (the statutory word) binds because it purportedly manifests the speaker's intent.⁷² Thus, the statutory word is binding only if it can bind regardless of the legislator's intent. The evolution of legislative law, placing prior

69. POSITIONS, *supra* note 12, at 41.

70. *Force of Law*, *supra* note 12, at 943, 945.

71. GLAS, *supra* note 12, at 4-5.

72. See, e.g., Edwin Meese III, *Toward a Jurisprudence of Original Intention*, 2 BENCHMARK 1, 9-10 (1986).

versions of a statute "sous rature" ("under erasure") so that the reader may see the language which was replaced, is reminiscent of the Derridean and Heideggerian mark of deletion. For Derrida,

That mark of deletion is not, however, a "merely negative symbol." That deletion is the final writing of an epoch. Under its strokes the presence of the transcendental signified is effaced while still remaining legible. Is effaced while still remaining legible, is destroyed while making visible the very idea of the sign. In as much as it de-limits onto-theology, the metaphysics of presence and logocentrism, this last writing is also the first writing.⁷³

Deconstruction is revolutionary because it forces us to question what before was originary. When one asks "what is the sign," the unavoidable response is that its formal essence is *presence*.⁷⁴ Derrida demonstrates this in his own writing, for example, in *Of Grammatology*:

One cannot get around that response, except by challenging the very form of the question and beginning to think that the sign ~~is~~ that ill-named ~~thing~~, the only one, that escapes the instituting question of philosophy: "What is . . . ?"⁷⁵

Deconstruction aims to rise above "the logos and the related concept of truth or the primary signified. . . ."⁷⁶ In allowing the erasure to remain legible, Derrida exposes his overt concern that we are in the predicament of having to refer to the historical (and its attendant heritage) in order to transform any system.⁷⁷

Derrida's notion of iterability, as is demonstrated in this Article, is one that must be recognized if one is to rigorously interpret legal texts. Iterability speaks of the ability to repeat or reproduce an intended image or concept by a mark. Yet there can only be one original of anything. The corruption of the original mark in subsequent copies shows how the original is unique and can never be identically reproduced. The spongy nature of language that Derrida refers to leads to uses and abuses of individual words. In law, the practice of repeating words with the intent of producing an identical signification is even more daunting given the secret nature of signs revealed only later after a thorough investigation of the context of word choice in legal texts. This is most evident in the interpretation of statutory language.

73. OF GRAMMATOLOGY, *supra* note 2, at 23 (citations omitted).

74. *See id.* at 18.

75. *Id.* at 19.

76. *Id.*

77. *See* Spivak, *Translator's Preface to OF GRAMMATOLOGY*, *supra* note 2, at xvii-xviii n.13.

C. Free Play of Text

"Play" of the text is the third key concept in Derrida's work. The text provides the reader with a series of connections in the reader's mind often not anticipated by the author. Derrida refers to this unprecedented reading as the free "play" of text.⁷⁸ The relationship between these unanticipated connections and signs is critical in Derrida.⁷⁹ The essence of a sign is its ability to repeat itself—iterability.⁸⁰ But as we have seen, with each repetition of a sign, new meanings are grafted onto that sign because the sign is used over and over again. The sign takes on new and unexpected meanings both contextually and extracontextually as the reader "rewrites" the text in his mind.⁸¹ Without context there is no text.⁸² Thus, this breaking free from the text by the sign enables the written sign or syntagma (Derrida's word), once created by the author, to let loose upon the world and take on a life of its own in any context in which it is repeated.⁸³ From the moment of creation, the text is in "play."⁸⁴ The systematic "play" of text involves the interaction of signs (words) with other contextual elements—the positioning of text within the page or within the work itself, the correspondences or associations of meaning formed between the words, the traces of different meanings embedded within each word.⁸⁵ Then there are the extra contextual correspondences of text. These refer to all elements off the page, so to speak.⁸⁶ The ecology, culture, and political structures within which the text is read bear upon a reading of any text, including a legal text.

78. See, e.g., *WRITING AND DIFFERENCE*, *supra* note 12, at 292 ("Play is the disruption of presence."). See also *Tympan*, in *MARGINS OF PHILOSOPHY*, *supra* note 12, at ix:

[The text] functions as a writing machine in which a certain number of typed and systematically enmeshed propositions (one has to be able to recognize and isolate them) represent the "conscious intention" of the author as a reader of his "own" text, in the sense we speak today of a mechanical reader. Here, the lesson of the finite reader called a philosophical author is but one piece, occasionally and incidentally interesting, of the machine.

See also *POSITIONS*, *supra* note 12, at 27 ("*Différance* is the systematic play of differences. . .").

79. See *infra* note 80.

80. See *MARGINS OF PHILOSOPHY*, *supra* note 12, at 317.

81. See *CULLER*, *supra* note 6, at 123-28.

82. See *id.*

83. See *Balkin*, *supra* note 7, at 780.

84. See *id.*

85. See *id.*

86. See *id.*

In the legal context, legal proceeding's goal is said to be justice. "Justice" connotes rightfulness and not just an exercise of (judicial) authority. If getting it "right" is the goal of the judicial process, then it seems paramount that legal texts be treated to a rigorous reading. Yet Derrida maintains that a positivist approach to the judicial process is self-defeating because this approach assumes that the judge stands always above the law.⁸⁷ The law, in Derrida's writings, is as elusive as deconstruction itself—it is the experience of the impossible.⁸⁸ Derrida boldly states "[d]econstruction is justice."⁸⁹ Derrida explains,

That is the process, the judgment, *processus et Urteil*, the original division of the law. The law is prohibited [divided]. But this contradictory self-prohibition allows man to self-determine himself "freely", although that freedom annuls itself as self-prohibition not to reside within the law. Before the law, man is the subject of law, as appearing before the law. Most certainly. But, before the law because one cannot enter inside the law, one is also outside of the law. Man is neither under the law nor inside the law. Subject of the law: outside of the law.⁹⁰

Law (and its composite—language), consequently, is not at all concrete or positive. On the contrary, law and language are intangible and entirely determined by the position of the speaker or judge. If the honest judge is then to make law, he will recognize and acknowledge for scrutiny by others his positioning of the law—fully admitting assumptions he has made in reaching his decision, and revealing the ideological framework and value system that form the basis for each step in the judging process.

Law is not self-evident, but is the result of a process of engagement between the narrator, who is truly the essence of the law, and the legal question presented. Without the judge there would be no law. As Derrida explains, law compels an answer to the questions raised in dispute:

87. See *Préjugés Devant La Loi*, *supra* note 12, at 120-21, 125.

88. See Mitchell Stephens, *Jacques Derrida*, N.Y. TIMES, Jan. 23, 1994, Late Edition-Final, § 6 (Magazine).

89. *Force of Law*, *supra* note 12, at 945.

90. Translated by the author from the following text:

Voilà le procès, le jugement, *processus et Urteil*, la division originaire de la loi. La loi est interdite. Mais cette auto-interdiction contradictoire laisse l'homme s'auto-déterminer "librement," bien que cette liberté s'annule comme auto-interdiction d'entrer dans la loi. Devant la loi, l'homme est sujet de la loi, comparaissant devant elle. Certes. Mais, devant elle parce qu'il ne peut y entrer, il est aussi hors de la loi. Il n'est pas sous la loi ou dans la loi. Sujet de la loi: hors la loi.

Préjugés Devant La Loi, *supra* note 12, at 122.

Law is nothing that is present; law summons in silence. Before even moral conscience, insofar as it is similar, law compels that one respond, she destines responsibility and protection. She sets into motion, and the guardian of law and man, that singular couple, are drawn by her towards her and stops them before her. She determines the being poised for death before her. Yet again a tiny displacement and the guardian (Hüter) of the law would resemble a guardian of the being (Hirt). I believe in the necessity of "rapprochement," as one says, but in that nearness, in that metonymy perhaps (law, another name for being, being another name for law; in both cases, the "transcendental," as says Heidegger of being) hides and protects itself perhaps still the chasm of a difference.⁹¹

The relationship between law and the judge is akin to that between deconstruction and the practitioner of deconstruction. The practice of deconstruction requires the engagement of the deconstructionist in order to come into being. The law judge is both governed by and is very close to governing law in the process of judging. Note that law sets into motion the engagement of the judge. The judge's response to the legal question presented, what is the law?, is one that (law) has destined to be responsible and protective, but not just. Justice is the experience of the impossible.

According to Derrida, the "thing" which we believe *we define* as law is, like justice, indefinable.⁹² Law is neither "qui ou quoi" (who or what)⁹³ and therefore is neither self-defining nor definable—neither self-determined nor determinable.⁹⁴ It shifts just beyond our reach like the ever-elusive x-axis to the geometric asymptote. Within that "intervalle"(space) between "law" and "we" as "lawmakers," lies the self-reflexive conjugation of law.⁹⁵ "Law produces itself (without showing itself, thus without producing itself) within the space of this

91. Translated by the author from the following text:

[L]a loi n'est rien qui soit présent[], la loi appelle en silence. Avant même la conscience morale en tant que telle, elle oblige à répondre, elle destine à la responsabilité et à la garde. Elle met en mouvement et le gardien et l'homme, ce couple singulier, les attirant vers elle et les arrêtant devant elle. Elle détermine l'être-pour-la mort devant elle. Encore un infime déplacement et le gardien de la loi (Hüter) ressemblerait au berger de l'être (Hirt). Je crois à la nécessité de ce "rapprochement", comme on dit, mais sous la proximité, sous la métonymie peut-être (la loi, un autre nom pour l'être, l'être, un autre nom pour la loi; dans les deux cas, le "transcendant", comme dit Heidegger de l'être) se cache et se garde peut-être encore l'abîme d'une différence.

Id. at 123-24 (emphasis added).

92. See *Préjugés Devant La Loi*, *supra* note 12, at 125.

93. See *id.* at 125 (trans. by author).

94. See *id.* at 123-24.

95. See *id.* at 125.

not-knowing."⁹⁶ We may be "lawmakers" within deconstruction, but only to the extent that we "feign presence" of our idealized law (justice).⁹⁷

The development of law then delineates or traces the supremacy of one judge's views over others:

and the history of law marks the arching up toward that place *over* others or toward that difference between one position and another position.⁹⁸

What is law? Derrida responds:

Law is neither multiplicity nor, as one believes, the universal generality. It is always an idiom.⁹⁹

Law is nothing more than what he who dons the robes says it is:

Let us be precise. We are *before* this text which doesn't tell us anything that is clear, without presenting any identifiable contents outside of the recitation itself, rather an interminable difference until death, which rests nonetheless rigorously intangible. Intangible: I understand by that inaccessible to contact, impregnable, and finally unseizable, incomprehensible, but also as well as that to which we do not have the *right* to touch. It is an 'original' text, as one says: it is forbidden or illegitimate to transform or deform it, to touch its form. Notwithstanding the nonidentity to itself of its sense or destination, notwithstanding its essential illegibility, its "form" presents itself and performs itself like a sort of personal identity having the right to absolute respect. If someone changes one of its words, alters one of its phrases, a judge could always say that there has been a transgression, violence, infidelity. A bad translation will always be called up to compare before the version said to be the original that *makes reference*, that is, authorized as it is by the author or the author's rightful claimants, designated in its identity by its title, which is its proper name in the civil state, and framed by its first word and its last word. Whosoever could have struck a blow to the original identity of this text could have had a comparison made before the law. This could happen to any reader in the presence of the text, to a critic, an editor, a translator, to the (legal)

96. Translated by the author from the following text: "La loi se produit (sans se montrer, donc sans se produire) dans l'espace de ce non-savoir." *Id.*

97. See *Force of Law*, *supra* note 12, at 993.

98. Translated by the author from the following text: "et l'histoire de la loi marque le surgissement du *sur* ou de la différence de la taille (*Größenunterschied*)." *Préjugés Devant La Loi*, *supra* note 12, at 125 (emphasis on *surgissement* added).

99. "La loi n'est ni la multiplicité ni, comme on croit, la généralité universelle. C'est toujours un idiome. . . ." *Id.* at 128. (trans. by author).

heirs, to professors. All of them, they are thus at the same time civil servant and farmer. From both sides of the extreme.¹⁰⁰

In the identifying of our existing order, Derrida suggests that, in recognizing the normative, linguistic, social, and political realm within which we are operating, we will prevent a "self-conserving repetition" because one's "[p]osition is already iterability."¹⁰¹ That is, the perspective from which one begins is nothing more than the (potentially dangerous) repetition of history.

The judge then must "judge," not merely contend that she is describing *what is*. The judge must take a stab at articulating what should be, "*épokhè*".¹⁰² Justice paradoxically should be aspired to as an "aporia" rather than a projected ideal.¹⁰³ The point made by Derrida here is one made by Montaigne: "laws keep up their good standing, not because they are just, but because they are laws: that is the mystical foundation of their authority, they have no other. . . . Anyone who obeys them because they are just is not obeying them the way he ought to."¹⁰⁴

100. Translated by the author from the following text:

Précisons. Nous sommes *devant* ce texte qui, ne disant rien de clair, ne présentant aucun contenu identifiable au-delà du récit même, sinon une différence interminable jusqu'à la mort, reste néanmoins rigoureusement intangible. Intangible: j'entends par là inaccessible au contact, imprenable et finalement insaisissable, incompréhensible, mais aussi bien ce à quoi nous n'avons pas le *droit* de toucher. C'est un texte "original", comme on dit: il est interdit ou illégitime de le transformer ou de le déformer, de toucher à sa forme. Malgré la non-identité à soi de son sens ou de sa destination, malgré son illisibilité essentielle, sa "forme" se présente et se performe comme une sorte d'identité personnelle ayant droit au respect absolu. Si quelqu'un y changeait un mot, y altérerait une phrase, un *juge pourrait toujours dire qu'il y a eu transgression, violence, infidélité*. Une mauvaise traduction sera toujours appelée à comparaître devant la version dite originale qui *fait référence*, dit-on, autorisée qu'elle est par l'auteur ou ses ayants droit, désignée dans son identité par son titre, qui est son nom propre d'état civil, et encadrée entre son premier et son dernier mot. Quiconque porterait atteinte à l'identité originale de ce texte pourrait avoir à comparaître devant la loi. Cela peut arriver à tout lecteur en présence du texte, au critique, à l'éditeur, au traducteur, aux héritiers, aux professeurs. Tous, ils sont donc à la fois gardiens et hommes de la campagne. Des deux côtés de la limite.

Id. at 128, 129 (emphasis added).

101. *Force of Law*, *supra* note 12, at 997.

102. *See id.* at 961 (the etymology of "*épokhè*" in Greek connotes a fixed, determinate position).

103. *See id.* at 961, 963; *see also* APORIAS, *supra* note 12.

104. "Or les loix," he says, "se maintiennent en crédit, non parce qu'elles sont justes, mais parce qu'elles sont loix: c'est le fondement mystique de leur auctorité, elles n'en ont point d'autre. . . . Quiconque leur obéit parce qu'elles sont justes, ne leur obéit pas justement par où il doit" (*Essais* III, XIII, *De l'expérience*, ed. Pléiade, p. 1203)

Force of Law, *supra* note 12, at 939.

Derrida's experience of deconstruction describes a process in which all readers engage: striving to pin down the "true" intention of the text's author. Derrida encourages the reader to continuously reexamine his presumptions which gloss each reading.¹⁰⁵ This exercise is invaluable because it reveals new readings of the same text, each a misreading because other readings are implicitly rejected. In some ways, Derrida carries the resonance of Arthur L. Corbin's work on the subject of language. In 1965, regarding the ambiguity of language, Corbin wrote:

If we wish to profit by the mistakes as well as by the wisdom of the past, it is necessary to look back over our legal history. Such a look informs us that law never begins with a system of rules and doctrines and principles, each (presumably) eternal, unchangeable, perfect (and perfectly worded with one true meaning). Such a look informs us that law is in a constant process of development and change; that laws are put into words by men—men who are not all-wise and capable of foresight into the distant future—and that these words are repeated by other men for shorter or longer periods of time, *packing new meanings into the words as the exigencies of life require, finally (after a century of confusion) abandoning them altogether.*

. . . .
I shall continue to do my best to clarify the process and the law of interpretation, of both words and acts as symbols of expression; to demonstrate that no man can determine the meaning of written words by merely glueing his eyes within the four corners of a square paper; to convince that it is men who give meanings to words and that *words in themselves* have no meaning; and to demonstrate that, when a judge refuses to consider relevant extrinsic evidence on the ground that the meaning of written words is to him plain and clear, his decision is formed by and wholly based upon the completely extrinsic evidence of his own personal education and experience.¹⁰⁶

105. See POSITIONS, *supra* note 12, at 41-42.

106. Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161, 163-64 (1965) (emphasis added) (adapted from 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS (2d ed. 1960)) [hereinafter *Interpretation of Words*]. Corbin later suggests that "[i]t would have been far better had no such rule ever been stated." 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS 455 (2d ed. 1960) (emphasis added).

Prior to Corbin's criticism of the parol evidence rule, in 1958, two well-known legal scholars, H.L.A. Hart and Lon Fuller, debated whether words have a core or a fixed meaning. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Lon Fuller, *Fidelity to Law - A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958) (debate, in part, over whether a World War II truck was a "vehicle" under a statute forbidding vehicles in a park).

Corbin's referents in discussing the meaning of language uncannily are the same as some of those used by semioticians: words as symbols of expression. This coincidence is too significant to ignore in light of the overall message Corbin delivers in his article, *The Interpretation of Words*. Corbin's view is that words are baggage "packed" with meanings.¹⁰⁷ Once language becomes so overpacked with meaning that it leads to more confusion than clarity in its expression, it is abandoned altogether.¹⁰⁸ Derrida does not see the problem of language and expression of intention as resolvable by abandoning language, or any part of it.¹⁰⁹ On the contrary, deconstruction is a way of unpacking language and adding content to each sign.¹¹⁰

Arthur Corbin, H.L.A. Hart, and Lon Fuller certainly agree that language can be ambiguous and that it can be "plain and clear."¹¹¹ Corbin argues that "relevant extrinsic evidence" adduces the contracting parties' intention.¹¹² The implication is that justice can be rendered by a legal interpretation and court order. In contrast, Derrida argues that the text, once created, cannot, in good faith, ever be said to represent that which the author intended.¹¹³ The interaction of the text with context nullifies any intention of the author.¹¹⁴ Corbin assumes that the intention and understanding of contracting parties can be captured in the words they each use.¹¹⁵ This implies dominion by the parties over the text. Derrida argues that we may attempt to mark our intention, but that the text will not yield to any certain number of meanings.¹¹⁶ This difference is critical as will be seen in the following examples of contract and codified law. Text which is "free" from the author plays upon many meanings not anticipated by the drafter. This phenomenon is often seen in "hard cases" of contract law and statutory interpretation. In legal practice, the lawyer struggles to understand and persuade his audience of sometimes seemingly contradictory notions. The fund of meanings embedded in text, contextually and extra-contextually, make the task of effective communication in legal practice daunting. The "play" of text within

107. See *Interpretation of Words*, *supra* note 106, at 163.

108. See *id.*

109. See OF GRAMMATOLOGY, *supra* note 2, at 56.

110. See *id.* at 179; SPEECH AND PHENOMENA, *supra* note 2, at 88-104.

111. See *supra* note 106.

112. See *Interpretation of Words*, *supra* note 106, at 164.

113. See POSITIONS, *supra* note 12, at 28.

114. See *id.*

115. See *Interpretation of Words*, *supra* note 106, at 164.

116. See POSITIONS, *supra* note 12, at 40.

deconstruction occurs unwittingly. Recognizing this phenomenon as relevant to the development of law is the focus of the next section of this Article.

IV. CONTRACT INTERPRETATION—VARIABLE LAW

A. What Is a "Chicken"? The Case of Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp.¹¹⁷

Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp. is an excellent example of Derrida's notion of iterability at play.¹¹⁸ Iterability and the uncertainty of a single meaning for a single word (at least in the area of contract law) has been grappled with by many in the legal community—particularly in interpreting words in a contract. In *Frigaliment*, the case turned on whether there was a single meaning for the word "chicken."¹¹⁹

The story of *Frigaliment* began at the World Trade Fair in 1957 where a Czech met a New Yorker who spoke German.¹²⁰ They negotiated the export of poultry from New York to Switzerland.¹²¹ Following a series of exchanged cablegrams and telephone conversations carried out predominantly in German,¹²² they confirmed their agreement (in English):

US Fresh Frozen Chicken, Grade A, Government Inspected,
Eviscerated
2 1/2 - 3 lbs. each
all chicken individually wrapped in cryovac, packed in secured fiber
cartons or wooden boxes, suitable for export

117. 190 F. Supp. 116 (S.D.N.Y. 1960).

118. *Id.*

119. *See id.* at 117.

120. The "story" as is told here is recounted from the published decision of the court. To that extent, this understanding of the case is limited to the "facts found" by that court and included in the published opinion. For a discussion of the inherent limitations imposed by imbalances of power and knowledge, between judge and lay person or lawyer, see Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine* 94 YALE L.J. 997, 1000, 1005 (1985) ("The judge can often write an opinion that appears more coherent because of what he is able to leave out. It is always possible to cast doubt on an argument by suggesting that it has been insufficiently proven, or proven only by judicious selection of evidence."). Schlag criticizes Dalton, like Balkin, for assuming that the deconstructionist approach of Derrida is just one more useful "strategy" for the legal advocate. *Politics of Form*, *supra* note 12, at 1642. Dalton, however, cites to Derrida only to quickly dispense with any further discussion of deconstruction. *See Dalton, supra*, at 1007-10.

121. *See Frigaliment Importing Co.*, 190 F. Supp. at 118.

122. *Id.* at 118. The court dismissed the Swiss corporation's explanation that it understood "chicken" to mean young chicken whereas the German word, "Huhn" included both "Brathuhn" (broilers) and "Suppenhuhn" (stewing chicken). *Id.*

75,000 lbs. 2 1/2 - 3 lbs. \$ 33.00
25,000 lbs. 1 1/2 - 2 lbs. \$ 36.50
per 100 lbs. FAS New York
scheduled May 10, 1957 pursuant to the instructions from Penson
& Co., New York.¹²³

When the shipment arrived in Switzerland, on May 28, the Swiss corporation discovered that the cartons and bags contained 2 1/2 - 3 lbs. birds which were not young chickens suitable for broiling or frying, but chickens or "fowl" suitable for stewing.¹²⁴ Following protests (and a second shipment stopped in transit) about the balance of birds ordered, the Swiss corporation sued the New York sales corporation under New York law alleging a breach of warranty and seeking damages.¹²⁵ The opinion of the court begins with "[t]he issue is, what is chicken?"¹²⁶ The answer to this question, according to Judge Friendly, is not obvious.¹²⁷ Because "[d]ictionaries give both meanings, as well as others not relevant here" no single meaning of chicken is the objective meaning of chicken.¹²⁸ "Since the word 'chicken' standing alone is ambiguous, I turn first to see whether the contract itself offers any aid to its interpretation."¹²⁹ The contract as written, however, appeared to cut both ways. Having concluded that the word "chicken" (standing alone) was ambiguous, Judge Friendly examined the extrinsic evidence.

The judge calculated and weighed the evidence in order to rule. The extrinsic evidence added up as the court identified the following six indicia of the special meaning of chicken as probative of the relevant meaning of chicken: (1) dictionaries favored both meanings;¹³⁰ (2) the word of mouth negotiations preceding the contract also favored both meanings;¹³¹ (3) trade usage (at least in the United States) largely militated in favor of the Swiss corporation's meaning—young hen;¹³² (4) witness for the defendant, an operator of a "chicken eviscerating plant in New Jersey" said that "[c]hicken is everything except a goose, a duck, and a turkey";¹³³ (5) the regulation

123. *Frigalment Importing Co.*, 190 F. Supp. at 117.

124. *See id.*

125. *See id.*

126. *Id.*

127. *See id.*

128. *Id.*

129. *Id.* at 118.

130. *See Frigalment Importing Co.*, 190 F. Supp. at 117.

131. *See id.* at 118.

132. *See id.*

133. *Id.* at 119.

of the Department of Agriculture classified chicken as a broiler or fryer, roaster, capon, stag, hen or stewing chicken or fowl, cock or old rooster,¹³⁴ and (6) the conduct ("immediate and consistent protests") of the Swiss corporation upon discovering the "fowl" advanced their meaning.¹³⁵ What was the court to do? It appeared that the evidence of the "objective meaning(s)" of "chicken" is evenly split. The answer lay in the "subjective intent" of the parties.¹³⁶ That is the clincher. The court persuaded itself that it could see through the evidence to the real motive and understanding of the Swiss corporation. Given that the then prevailing market price for broilers and fryers was between 35 and 37 cents per pound, the court imputed knowledge to the Swiss corporation that the New York corporation intended stewing hens because it would expect to make a profit rather than incur a loss.¹³⁷ Apparently as a nod of respect to the Herculean (but cryptic) words of Justice Oliver Wendell Holmes, the court begins the opinion with these words,

Assuming that both parties were acting in good faith, the case nicely illustrates Holmes' [sic] remark "that the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs—not on the parties' having *meant* the same thing but on their having *said* the same thing."¹³⁸

Here, indisputably, the parties *said* the same thing—"chicken."¹³⁹ Thus, the deployment of Holmes's "remark" in the service of rationalizing a lack of integration in this contract contradicted Judge Friendly's opinion. Judge Friendly justified his reasoning in a model characteristic of traditional methods of legal interpretation. He identified the legal rule that must control the outcome of the case, guiding him in his objective review of the evidence.¹⁴⁰ Yet the opinion reveals Judge Friendly's feelings about what he believed was really going on between the parties. The latter reasoning drove the former presentation. He engaged in a wide-ranging review of the relevant community's meaning of "chicken" in order to decide the

134. See *id.* at 121.

135. See *Frigalimont Importing Co.*, 190 F. Supp. at 121.

136. See *id.*

137. See *id.* at 120.

138. *Id.* at 117 (citations omitted).

139. Corbin engages in a fascinating explication of the text of the contract and "integration" as a matter of contract analysis. See *Interpretation of Words*, *supra* note 106, at 166-70.

140. See *Frigalimont Importing Co.*, 190 F. Supp. at 117.

objective meaning of the word "chicken."¹⁴¹ Judge Friendly calculated the evidence and suspected the true intentions of each of the parties.¹⁴² Notwithstanding his caveat that he assumed that the parties were acting in good faith, he held for the defendant because (in the court's mind) the plaintiff appeared to be trying to bamboozle the defendant.¹⁴³ The legal reason given for the holding: "For plaintiff has the burden of showing that 'chicken' was used in the narrower rather than in the broader sense, and this it has not sustained."¹⁴⁴

If the parties' roles had been reversed—that is, if upon the nonacceptance of the second shipment the defendant had brought an action against the plaintiff for compensatory damages, then the burden would have fallen on the New York seller corporation to prove that the "objective" meaning of "chicken" was stewing hen and not broiler or fryer. How could Judge Friendly have squared the prevention of an injustice by the purchaser, knowing that the purchaser knew that the seller intended stewing chicken, by reference to broiler or fryer as the objective meaning of "chicken"? As Corbin has commented on this case, "any meaning is an objective meaning if it is given to the word in any context by any person other than the two contracting parties."¹⁴⁵ The court here, one suspects, would have needed to find that objective meaning somewhere else in the evidence in order to do "justice" to the seller.

In 1968, after the appearance of Corbin's article, *Interpretation of Words*, Chief Justice Roger Traynor decided three cases which virtually eliminated the parol evidence rule in California, *Masterson v. Sine*,¹⁴⁶ *Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co.*,¹⁴⁷ *Delta Dynamics v. Arioto*.¹⁴⁸ Twenty years later, a relatively recently appointed Ninth Circuit Judge, Alex Kozinski, by no stretch of the imagination a judicial activist, felt bound by Traynor's precedent cases and allowed extrinsic evidence in the historic decision *Trident Center v. Connecticut General Life Ins. Co.*¹⁴⁹ Judge Kozinski emphasized that as a result of "the long shadow of uncertainty" cast by *Pacific Gas & Electric Co.*, California contracts were not worth the

141. See *id.* at 118-20.

142. See *id.* at 120-21.

143. See *id.*

144. *Id.* at 121.

145. *Interpretation of Words*, *supra* note 106, at 170.

146. 436 P.2d 561 (Cal. 1968).

147. 442 P.2d 641 (Cal. 1968).

148. 446 P.2d 785 (Cal. 1968).

149. 847 F.2d 564 (9th Cir. 1988).

paper on which they were written.¹⁵⁰ Judge Kozinski asked, "[I]f we are unwilling to say that the parties, dealing face to face, can come up with a language that binds them, how can we send anyone to jail for violating statutes consisting of mere words . . . ?"¹⁵¹

As discussed, within Derridean deconstruction, the meaning of language involves notions of the supplement, context, and external context. Notwithstanding Judge Friendly's apparent focus on the intention of the parties in *Frigaliment*, the outcome of the case turned not on the defendant's subjective meaning of chicken, but instead on its "coincidence" with an "objective" meaning. Paradoxically, *Frigaliment* could be argued to represent an instance of meaning being the product of language and not, as it is usually thought of, its source. Authorial intention in *Frigaliment* is less important, if important at all, than the context in which the parties' intention was hoped to be expressed.

In *Limited Inc abc* . . . , Derrida remarks on the statement: "I forgot my umbrella."¹⁵² Derrida writes, "[a] thousand possibilities will always remain open."¹⁵³ As Culler notes, the possibilities of meaning "remain open not because the reader can make the sentence mean anything whatever but because other specifications of context or interpretations of the 'general text' are always possible."¹⁵⁴ The next example, the case of *ACL Technologies, Inc. v. Northbrook Property and Casualty Insurance Co.*, demonstrates this deconstructionist consideration of context in practice.¹⁵⁵

B. What Is "Sudden"? The Case of *ACL Technologies, Inc. v. Northbrook Property and Casualty Insurance Co.*¹⁵⁶

In *ACL Technologies, Inc. v. Northbrook Property and Casualty Insurance Co.*, the interminable quest for an objective meaning of the phrase "sudden and accidental" in a pollution exclusion in a liability policy was raised yet again.¹⁵⁷ "[D]econstructionists like Jacques

150. See *Trident Center*, 847 F.2d at 569.

151. 847 F.2d at 569. In her recent article, Professor Martin provides the assurance that Judge Kozinski's fears are not warranted. See Susan J. Martin, *Judge Kozinski, There Is A Parol Evidence Rule in California - The Lessons of a Pyrrhic Victory*, 25 SW. L.J. 1 (1995). For more reading on the treatment of the parol evidence rule and the *Trident Center* decision, see A CONTRACT ANTHOLOGY, at 313-16 (Peter Linzer, ed. 1989).

152. *Limited Inc abc*, *supra* note 2, at 201.

153. *Limited Inc abc*, *supra* note 2, at 201.

154. CULLER, *supra* note 6, at 131.

155. 22 Cal. Rptr. 2d 206 (4th App. Div. 1993).

156. *Id.*

157. See *ACL Technologies, Inc.*, 22 Cal. Rptr. 2d at 208.

Derrida, contend that language is inherently equivocal. . . ."¹⁵⁸ Not so, says this court,¹⁵⁹ showing that it is entirely possible that judges fear the results of such debates.

In 1984, unknown to the purchaser of some property in an industrial section of Santa Ana, corroded underground storage tanks contained hazardous substances which had been stored on the property for at least twenty years.¹⁶⁰ Pollutants escaped from the tanks through rusted holes and split seams caused by the corrosion.¹⁶¹ This court proclaimed that "sudden" can never mean "gradual" on various grounds.¹⁶²

Dealing with the "standardized" meaning of the "sudden and accidental" exception to the pollution exclusion contained in the 1973 version of the standard comprehensive general liability insurance policy (CGL), the court affirmed the trial judgment for the insurance company.¹⁶³ Judge Sills, writing for the court, with two concurrences by Judges Moore and Wallin, dismissed as absurdly intellectual and certainly not "judicially sound" any attempt to penetrate the possible meanings in the gap between the words "sudden" and "accidental."¹⁶⁴ Nonetheless, the court engaged in a contextual evaluation of the words surrounding the disputed term.¹⁶⁵ Painstaking attention was given to the immediate linguistic context for meaning:

The most immediate "context" for the word "sudden" is its link, in the pollution exclusion, to the word "accidental." Plainly, for there to be coverage (i.e., for the exclusion not to apply), the release must be both "sudden and accidental." If, in the context of the pollution exclusion, "sudden" meant *merely* "unexpected," then it would have

158. *Id.* at 219 n.49 (quoting *Rodriguez v. Secretary of Health & Human Services*, 794 F. Supp. 58, 60 (D.P.R. 1992)).

159. *See id.* at 219.

160. *Id.* at 208.

161. *See id.*

162. *See id.* at 208-17, 220.

163. *See id.* at 220.

164. *See ACL Technologies, Inc.*, 22 Cal. Rptr. 2d at 217.

165. The court is engaging in a "textualist" approach to interpreting contract language. *See* George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321, 327 (1995), who says:

One of the defining insights of textualism is that it directs attention to the text rather than the text's author. To interpret is to mine the meaning of a text rather than to seek the author's intentions lying behind the text. Between the author and interpreter there is a distance, often historical, that cannot be breached by a claimed leap into the author's mind. Instead, this distance is necessarily mediated by language. In this recognition, textualism allies itself with major insights in twentieth-century hermeneutic and Wittgensteinian philosophy.

no independent meaning, as the idea would also be subsumed within the word "accidental." The word would be reduced to surplusage.

....

Even if, for the sake of argument, there is some "abstract" sense in which the word "sudden" does not necessarily convey a temporal meaning, the context of its placement in the phrase "sudden and accidental" necessarily conveys a temporal meaning. In the context of that phrase, the word *must*, if it is to be anything more than a hiccup in front of the word "accidental", [sic] convey a "temporal" meaning of immediacy, quickness, or abruptness.¹⁶⁶

Some reference to "external context" was provided for good measure—Americana cartoon images were conjured to force the point that "gradual is the opposite of sudden." The court invited readers of the opinion to picture this:

The character Snoopy [from the comic strip, *Peanuts*] is sometimes shown typing out a story beginning, "It was a dark and stormy night. Suddenly a pirate ship appeared on the horizon. . . ." In these two sentences, "suddenly" can mean either unexpected (the pirate ship appeared without warning) or abrupt (one moment there was no ship, the next moment there was). However, in no reasonable sense can Snoopy's sentence be twisted to mean "Gradually a pirate ship appeared on the horizon."¹⁶⁷

The opinion's organizing principle was the "natural" meaning of "sudden" as "not gradual." Relying upon a full page of citations to California cases having nothing whatsoever to do with the pollution exclusion clause of the CGL, Judge Sills concluded that: "[w]hile we recognize these cases do not represent the product of sustained judicial meditation on the subtleties inherent in the word 'sudden,' [sic] they do illustrate what the ordinary person readily knows: gradual is the opposite of sudden."¹⁶⁸ More importantly, the court found little persuasive value in the very fact that a substantial number of courts have considered the word "sudden" ambiguous.¹⁶⁹

Interestingly, the court does not agree with the suggestion that *Pacific Gas & Electric Co.* is an endorsement of "linguistic nihilism."¹⁷⁰ The court says that despite its deconstructionist dictum, the

166. *ACL Technologies Inc.*, 22 Cal. Rptr. 2d at 213-14.

167. *Id.* at 216 n.42. This author does not take issue with the court's decision. This example however raises in my own mind the possibility that sudden may be a synonym for gradual in the context of a sail ship appearing on the horizon.

168. *Id.* at 215.

169. *See id.* at 208-12.

170. *See id.* at 219.

actual holding of *Pacific Gas* is very narrow, allowing extrinsic evidence only when the parties have assigned a special meaning to a term.¹⁷¹ On the other hand, the pollution exclusion clause is not one of those cases—at least to this court, its language is clear and unambiguous.¹⁷²

The references made in these cases to Derrida expose a misapprehension of deconstruction. Again, deconstruction does not propose an end to distinction in language, nor does it propose that meaning be solely the invention of the reader. "The play of meaning is the result of what Derrida calls 'the play of the world,' in which the general text always provides further connections, correlations, and contexts."¹⁷³ References to the text of the insurance policy, the most relevant statute, internal structure of the policy, ordinary usage, and cultural context all play a role in illuminating meaning of the disputed term in *ACL Technologies, Inc.* This wide-ranging inquiry of the court belies its assertion that meaning is intrinsic or "natural."

Nor does Derrida argue that communication will become impossible or wholly subjective as maintained in the next case examined, *Voluntary Hospitals of America, Inc. v. National Union Fire Insurance Co.*¹⁷⁴

C. What Is "Insured?" The Case of Voluntary Hospitals of America, Inc. v. National Union Fire Insurance Co.¹⁷⁵

In another contract interpretation case, *Voluntary Hospitals of America, Inc. v. National Union Fire Insurance Co.*, Judge Kendall found no ambiguity in the term "insured" within the meaning of an insurance contract provision containing an "insured v. insured"¹⁷⁶ exclusion clause:

With apologies to Derrida and de Man, the Court recognizes that an analysis of the pertinent policy language reveals that the definition of "insured" as applied to the insured v. insured exclusion does not deconstruct itself into ambiguity. To read the language otherwise

171. See *ACL Technologies Inc.*, 22 Cal. Rptr. 2d at 219.

172. See *id.*

173. CULLER, *supra* note 6, at 134.

174. See 859 F. Supp. 260 (N.D. Tex. 1993).

175. See *id.*

176. An "insured v. insured" exclusion clause exonerates the insurer from payment for losses arising from claims made by any insured under the policy against another insured. In this case, one of the former directors of the subsidiary of the insured company assisted one of the litigants in prosecuting a lawsuit resulting in losses to the insured company in excess of \$8 million. See *id.* at 261. That the director was a former director of the insured company effectively brought into operation the "insured v. insured" exclusion clause. See *id.*

would be to adopt the textual methodology of the *protodeconstructionist* Humpty Dumpty, for whom words meant what he wanted them to. However the body of anti-Humpty Dumpty jurisprudence is now well established in the courts, both state and federal, from the Supreme court of the United States . . . to, for instance, the courts of South Carolina. . . . The purpose of an insurance policy is to insure. "Insurance policies are written by insurance companies. Like Humpty Dumpty, they have the rare privilege of choosing what their words mean. But, unlike Humpty Dumpty, they should say what they mean in advance, not after the fact." In this instance, the insurance company did say, unambiguously, what it meant in advance.¹⁷⁷

If Derrida is rejected, then why the "apology"? The significance of the judges' "apology" to Derrida could be interrupted in at least several ways. An apology is warranted when one regrets an act.¹⁷⁸ An apology may also be a defense.¹⁷⁹

In the *Voluntary Hospitals of America, Inc.* (VHA) case, the plaintiff, sued the defendant insurer for reimbursement on legal costs exceeding \$8 million incurred in defending certain directors and officers of the plaintiff's subsidiary, VHA Enterprises, in a derivative lawsuit.¹⁸⁰ The derivative lawsuit had been prosecuted with the active assistance of Thomas Reed, a former officer and director of VHA Enterprises.¹⁸¹ The policy defined "Insureds" as "any past, present or future . . . Directors or Officers of the Company [and any Subsidiary thereof]."¹⁸² The insured v. insured exclusion clause in the policy stated that "[t]he Insurer shall not be liable to make any payment for Loss in connection with any claim or claims made against the Directors or Officers . . . which are brought by any Insured or the Company. . . ."¹⁸³ The insurer argued that the critical context of the word insured, preceded by the indefinite article "any" exonerated it from payment under the insured v. insured exclusion.¹⁸⁴ The plaintiff pointed out that use of the global meaning of Insureds

177. 859 F. Supp. at 263 (citations omitted) (emphasis added).

178. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY UNABRIDGED 86 (1975).

179. See *id.* An "apologia" can also be a defense in another sense. See R.E. ALLEN, *SOCRATES AND LEGAL OBLIGATION* 4 (1980). Consider the counterrhetoric of Plato's *Apology*. In his ill-fated trial, Socrates was rumored to have delivered a speech which at once refutes and agrees with his accusers. See *id.* at 37 (1980) (*Speech reproduced*).

180. See *Voluntary Hosp. of Am., Inc. v. National Union Fire Ins. Co.*, 859 F. Supp. 260, 261 (N.D. Tex. 1993).

181. See *id.*

182. *Id.*

183. *Id.* (emphasis added).

184. See *id.* at 262-63.

(indicated by the indefinite article "any") elsewhere in the policy would be nonsensical and result in the insurer escaping responsibility in the policy in toto.¹⁸⁵ The court was immovable.¹⁸⁶ The result of the use of "the" in certain provisions meant that "the Insureds" referred to in those provisions were as a matter of "plain meaning" more specific (and narrow) than that denominated in the exclusion clause.¹⁸⁷

Unfortunately, both deconstruction and Derrida in cases noted here, have been likened to Humpty Dumpty.¹⁸⁸ This erroneous characterization suggests that "deconstruction makes interpretation a process of free association in which anything goes."¹⁸⁹ Quite the contrary is true; Derrida completely rejects this suggestion, or "Humpty Dumpty," even as he rejects plain meaning. According to the strategy urged by Derrida, misreadings are errors but they are also true readings because they bear traces of the truth and catch what other readings have missed.¹⁹⁰ But the essential point of Derrida is that words cannot mean whatever he wants them to mean. They have multiple connections to other meanings. Words can carry the meaning intended and thereby notify the addressee in advance of what is intended. As has been seen, courts routinely deconstruct text in order to investigate significations. The pertinence of the courts' writings, in turn, lies in its ability to identify and subtend the philosophy which supports it.

185. See *Voluntary Hosp. of Am. Inc.*, 859 F. Supp. at 262.

186. See *id.* at 263.

187. See *id.* at 262-63.

188. See, e.g., *id.* at 263.

189. CULLER, *supra* note 6, at 110.

190. See CULLER, *supra* note 6, at 178.

V. STATUTORY CONSTRUCTION—WHO IS THE MASTER OF INTENT, THE JUDICIARY OR CONGRESS?¹⁹¹

One year following his retirement from the Bench Chief Justice Warren E. Burger wrote:

Many statutes are genuinely ambiguous, either because of imprecise drafting or legislative compromise. Ambiguity does not, however, make the effort to respect the division of responsibility between the legislative and judicial branches any less important, for respect of that division is what the Constitution itself requires.¹⁹²

Undoubtedly, judges are the final canonical authority in the exegesis of statutory authority. Experience has shown us that legislators often do not aim to mean what judges say they meant.¹⁹³ This "misreading" places the judge in the dangerous position of (re)authoring legislative law. In statutory interpretation, the individual judge's subjective social and political contexts bear more weight than perhaps anticipated by the tripartite system of government.¹⁹⁴

191. In Lewis Carroll's, *Through the Looking Glass*, Humpty Dumpty in conversation with Alice uses the word "glory" to mean "a nice knock-down argument." In response to her question about the meaning of "glory," Humpty Dumpty responds

"When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you *can* make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that's all."

LEWIS CARROLL, *THROUGH THE LOOKING GLASS* 124 (Books of Wonder, William Morrow & Co., Inc. 1993) (1872).

192. Warren E. Burger, "Foreword" to *Conference on Statutory Interpretation The Role of Legislative History in Judicial Interpretation: A Discussion Between Judge Kenneth W. Starr and Judge Abner J. Mikva*, 1987 DUKE L.J. 361 (1987).

193. Both United States Circuit Judges Kenneth W. Starr and Judge Abner J. Mikva of the United States Court of Appeals for the District of Columbia Circuit have critically commented on overreliance on legislative history.

It is well known that technocrats, lobbyists and attorneys have created a virtual cottage industry in fashioning legislative history so that the Congress will appear to embrace their particular view in a given statute.

....

Substantial monetary costs are also imposed by the accumulated masses of legislative history produced by the Congress on any given measure.

Judge Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 377 (1987); Judge Abner K. Mikva, *Reading and Writing Statutes*, 28 S. TEX. L. REV. 181, 182 (1986) ("The welter, if not to say gaggle, of statutes that currently grace the American legal landscape has inspired a cottage industry of academic proposals for legal reform.").

Schlag, however, attacks this cottage industry on the grounds that it is simply a waste of time. *Writing for Judges*, *supra* note 45, at 422.

194. A heated debate over the various approaches which might be adopted to deal with the problem of statutory interpretation has ensued. See GUIDO CALABRESI, *A COMMON LAW FOR*

A. *Is a Houseboat a House or a Boat? The Case of United States v. Members of the Estate of Boothby*¹⁹⁵

In *United States v. Members of the Estate of Boothby*, the Court of Appeals for the First Circuit, reviewed the decision of District Court Judge Jose Antonio Fuste.¹⁹⁶ Writing for the appeals court, Circuit Judge Seyla succinctly sums up the issue before the court and the conundrum the court so painstakingly sought to avoid:

Is a houseboat a house or a boat? That, in the abstract, is the enigma posed by this case. Fortunately, we need not answer it directly. As a court of law, we leave such metaphysical *rumination* to the disciples of Jacques Derrida, and address ourselves instead to the more tractable question of whether the Army Corps of Engineers (the Corps) properly deemed two particular houseboats to be permanently moored structures within the meaning of section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403 [hereinafter the "Act"].¹⁹⁷

Why are judges afraid of "ruminating" over this question? Would "rumination" about the meaning of "houseboat" within *and without* the (con) text of the Act lead to the "ruination" of principled reasoning?

In this statutory assessment of the meaning of "permanent mooring structure," the court evaluated evidence suggestive of permanence, mooring and structure: the navigability of the houseboat.¹⁹⁸ The vessels had been certified as navigable by the Puerto Rico Department of Natural Resources.¹⁹⁹ The vessels had been outfitted with nautical accoutrements and occasionally raised anchor to

THE AGE OF STATUTES (1982) (urging that statutes be treated as common law); Abner J. Mikva, *The Shifting Sands of Legal Topography* Book Review 96 HARV. L. REV. 534, 544 (1982) ("The legislative process must be reserved for elected representatives and for their constituencies."); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989) (post-*Chevron* assessment of judicial role in lawmaking). RICHARD A. POSNER, LAW AND LITERATURE A MISUNDERSTOOD RELATION 216 ("Even if the particulars of deconstruction have nothing to contribute to law, the broader movement in modern thought of which deconstruction is a part—poststructuralism—might have something to contribute."). For an examination of a hermeneutical approach to statutory interpretation see Cass R. Sunstein, *Commentary on Analogical Reasoning*, 106 HARV. L. REV. 741 (1993); Charles W. Collier, *The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship*, 41 DUKE L.J. 191, 264 (1991).

195. 16 F.3d 19 (1st Cir. 1994).

196. See *id.*

197. *Id.* at 20 (emphasis added).

198. See *id.* at 22-23.

199. See *id.* at 22.

troll La Parguera Bay.²⁰⁰ Notwithstanding the certification, the Circuit court found ample support in the administrative record, the trial transcript, photographs and other documentary evidence to agree that these vessels were not of navigable quality.²⁰¹ And then, so as to complete its legal reasoning, the court focused on the *intent* of the governmental agency administering the Rivers and Harbor Act and on the *intent* of the owners of the houseboats.²⁰²

The Circuit court concluded that the houseboats were "structures"—houses.²⁰³ Presumably then, the court had adroitly avoided the "abstract" exercise of deconstruction, but rather, had calculated fairly and objectively the true and plain meaning of what was meant by "obstruction" to the navigable capacity of the waters of the United States under the regulations. However, the court did indeed deconstruct the term "navigability." If a houseboat is *not* navigable, then it is permanently moored (and is a house and not a boat). If the houseboat does not possess the quality of "navigability" then it is the opposite of navigable (i.e., not navigable or of "doubtful navigability").²⁰⁴ The fact that two separate entities, the Puerto Rico Department of Natural Resources (DNR) and the Corps, concluded differently as to what "navigability" was or was not, allowed the First Circuit to find that the district court had not committed "clear error" in its interpretation of navigability.²⁰⁵ After all, the court admitted "[n]avigability does not have the same meaning for all purposes. . . ."²⁰⁶ What was of paramount importance to the court is that the motives of the houseboat owners rooted in deceit (or at least so the record seemed to show):

the houseboats were put in place to circumvent the ban on stilt-houses; they were primarily intended to serve as vacation homes, pure and simple; the gadgets attached to them over time were meant to camouflage the scheme rather than for seafaring *per se*; and the occasional jaunts about the bay represented perfunctory attempts to satisfy the terms of the statute.²⁰⁷

200. *See id.*

201. *See Members of the Estate of Boothby*, 16 F.3d at 23.

202. *See id.*

203. *See id.* at 22.

204. *See id.*

205. *See id.*

206. *Id.*

207. *Id.* at 23.

So the court ultimately was more concerned with the houseboat owner's intent to navigate rather than capacity to navigate.²⁰⁸ After all, if an owner does not intend to cast off, his or her "boat" can be said to be "permanently moored" in the relevant sense, notwithstanding the theoretical possibility that the "boat" is capable of navigation. The "relevant sense" as the court puts it lies within the intent of some anonymous third persons who saw to it that the Rivers and Harbors Act be "transformed into an instrument of environmental policy."²⁰⁹

The Act itself provides little guidance. Citations to the underlying purpose of the Act are all to decisions of the Supreme Court making vague statements such as the Act must be read "charitably"²¹⁰ because "a river is a treasure."²¹¹ We see how the First Circuit followed the notion that the intent or purpose of the statute, as interpreted by these judges, was the foundation from which the actual words in the text of the statute or implementing regulations should be read. The text must conform to the predetermined and prescribed meaning assigned to the text by the judges. Within the margins of the law, the judges wrote their own law, as it were, and gave supremacy to the context of the law over the text itself.

*B. Where Is Economic Motive? The Case of National Organization for Women, Inc. v. Scheidler*²¹²

National Organization for Women, Inc. v. Scheidler is demonstrative here of the concept of free "play" of text.²¹³ *Scheidler* is one example of how the judiciary, knowing full well the articulated intent of Congress, has steadfastly refused to implement that intent by judicial fiat. The Racketeer Influenced and Corrupt Organizations (RICO) chapter of the Organized Crime Control Act of 1970, was enacted as Title IX of the Organized Crime Control Act on October

208. Under admiralty and maritime law, there is no such animal as a boat (or a houseboat for that matter). Under the federal law, the houseboat is a vessel and is treated as a fictional "person" much in the same sense as is a corporation a "person" under the law. See, e.g., 42 U.S.C. § 782 (West 1997) (vessels charged with liability may be sued in the jurisdiction in which the vessel is found). The full exercise of ascertaining the relevant intentions then would necessarily include the intent of the vessel. Equipped with an operating motor for seaworthiness, the vessel might very well intend to troll. But no one asked the vessel.

209. *Members of the Estate of Boothby*, 16 F.3d 19, 23 (1st Cir. 1994).

210. See *id.* at 23 (citing to *United States v. Republic Steel Corp.*, 362 U.S. 482, 491 (1960)).

211. *Id.* (quoting *New Jersey v. New York*, 283 U.S. 336, 342 (1931)).

212. 510 U.S. 249 (1994).

213. *Id.*

15, 1970.²¹⁴ The language of the statute itself is a patchwork of text cross-referencing disparate sections, including sections of the United States Code pertaining to various criminal acts.²¹⁵ In sum, the courts agree that the civil RICO plaintiff must allege the following (elements) to establish a RICO claim:

- (1) that a person
- (2) has employed a pattern of racketeering activity or the proceeds thereof
- (3) so as to affect an interstate enterprise
- (4) in one or more of the three ways prohibited under Section 1962²¹⁶
 - (i) [by] investing the income derived from a pattern of racketeering in the enterprise, Section 1962(a); [or]
 - (ii) [by] acquiring or maintaining an interest in an enterprise through a pattern of racketeering, Section 1962(b); [or]
 - (iii) [by] conducting the affairs of an enterprise through a pattern of racketeering, Section 1962(c)²¹⁷
- (5) [that the plaintiff has suffered] an injury to his business or property "by reason of" the aforementioned activity.²¹⁸

RICO's legislative history reflects concern over the infiltration of legitimate businesses by "organized crime."²¹⁹ What vexes so many in the application of civil RICO is not so much the language of the statute itself but rather that text read in light of the stated purpose of the statute: "the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce."²²⁰ The courts have not thus limited its application but have applied RICO to a wide variety of persons and situations not envisioned by the enacting Congress.²²¹ The future application of RICO shows no signs of restraint.²²²

214. See JED RAKOFF, RICO: CIVIL AND CRIMINAL LAW AND STRATEGY § 1.01, at 1-3 (1990).

215. See 18 U.S.C. §§ 1961-1968 (West 1997).

216. RAKOFF, *supra* note 214, § 1.02, at 1-8.

217. *Id.* at 1-8 n.1.

218. *Id.* at 1-8.

219. See *id.* at § 1.01, 1-3 (1990).

220. S. REP. NO. 617, 91st Cong., 1st Sess. 76 (1969).

221. See, e.g., *Uniroyal Goodrich Tire Co. v. Mutual Trading Corp.*, 63 F.3d 516, 522 (7th Cir. 1995) ("The murkiness of RICO's parameters coupled with its alluring remedies have led many plaintiffs to take garden variety business disputes and dress them up as elaborate racketeering schemes.").

222. In a recent *en banc* decision, the Third Circuit stated "[w]e recognize that our ruling means that RICO . . . may be applicable to many 'garden-variety' fraud cases. . . . [I]t is for

Ostensibly, the case of *National Organization of Women, Inc. v. Scheidler*, was taken on certiorari in order to settle a dispute among the circuits as to whether or not civil RICO required a showing of economic gain or motive on the part of the RICO defendant.²²³ The Court held "that RICO contains no economic motive requirement."²²⁴ The plaintiff alleged that a coalition of antiabortion demonstrators "conspired to use threatened or actual force, violence, or fear to induce [health] clinic employees, doctors, and patients to give up their jobs, give up their economic right to practice medicine, and give up their right to obtain medical services at the [health] clinics."²²⁵

The opinion of the Court, delivered by Justice Rehnquist for a unanimous Court, admitted that RICO had been applied to persons and situations not anticipated by Congress.²²⁶ Furthermore, the Court stated that, notwithstanding the parties' submissions respecting legislative history, nothing in the holding in *Scheidler* was contrary to RICO's legislative intent.²²⁷ No reference is made in *Scheidler* to any reports, debate records, or other materials which support the Court's finding that the far-reaching implications of the Court's decision was in no way contrary to the intent of the lawmakers who drafted the text

Congress to decide whether to narrow the scope of RICO." *Tabas v. Tabas*, 47 F.3d 1280, 1296-97 (3d Cir. 1995) (citations omitted).

223. 510 U.S. at 255. The split was between the Eighth Circuit in *United States v. Flynn*, 852 F.2d 1045, 1052 (8th Cir. 1988) ("For purposes of RICO, an enterprise must be directed toward an economic goal.") and the Third Circuit with *Northeast Women's Ctr., Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir. 1989) (because the predicate offense of conspiracy to extort the plaintiff's Constitutional right to an abortion did not require economic motive, RICO requires no additional economic motive).

224. *Scheider*, 510 U.S. at 262.

225. *Id.* at 263.

226. *See id.* at 260.

227. *See id.* at 261.

of the law.²²⁸ This, the Court said, demonstrated "breadth" and not ambiguity.²²⁹

The cases examined so far are all linked by a common theme—focus on text and context. In textualism, interpretation of a text involves textuality, textual structure, and textual context. Textual context is internal linguistic context.²³⁰ External context is the cultural, political, and ideological background informing the text. Textualist approaches seem to underscore Derrida's notion of "free" play. In this sense, the cases and Derrida line up with the same school of interpretation.

In the next section there is an overview of how the courts misguidedly accuse Derrida of Humpty Dumpty-like reasoning. Ironically, these courts self-indulgently assign *their own Humpty Dumpty meanings* to words.

C. What Is "Contemptuousness?" The Case of *In re Holloway*²³¹

In the case of *In re Holloway*, the issue was whether the assistant public defender had intentionally and contumaciously ignored an order of the court while examining an adverse witness.²³² The entry of a contempt order against the defense counsel, barring him from setting foot in that courtroom (after the conclusion of that trial) and fining him \$1,000, was the relatively powerless defense counsel's price to pay for what Judge Mikva in his dissenting opinion referred to as an honest "misunderstanding" between counsel and the bench.²³³ Judge

228. Judge Mikva has said, of his own role as a former member of Congress, that he deeply regrets the use of his own words as legislative history in the enactment of the civil RICO statute. See Abner J. Mikva, *Reading and Writing Statutes*, 28 S. TEX. L. REV. 181, 185 (1986).

When the Racketeer Influenced Corrupt Organizations (RICO) provisions of the Organized Crime Act of 1970 came up for floor debate, I expressed my opposition in hyperbolic terms, parading one horrible example after another before the House. Since the managers had the votes, and I was speaking to an empty House, they didn't even bother to answer me. My remarks have been used as legislative history ever since to prove the broad scope of RICO. If I knew then what I know now (that was my first term in Congress), I would have gone to the Committee Chairman and said that I had 36 members who were going to raise a lot of sand unless he agreed to engage in some floor dialogue with me to limit future interpretations of the RICO language. At that point he might well have agreed and I could have made the opposite—and less mischievous—legislative history than I did.

Id.

229. See *Scheidler*, 510 U.S. at 262 (quoting from its decision in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985)).

230. See Taylor, *supra* note 165, at 354.

231. 995 F.2d 1080 (D.C. Cir. 1993).

232. See *id.* at 1082-83.

233. See *id.* at 1096-97.

Johnson presided over a six-defendant drug trial.²³⁴ The trial of the criminally accused, Kelvin Roscoe, involved a charge of possession with intent to distribute crack cocaine.²³⁵ Found in a bedroom with his girlfriend on the second floor of a multidwelling building, Roscoe's defense was that the crack belonged to his girlfriend, Tammy Felton, and that she possessed the crack for her own personal use.²³⁶ In the course of examining one of the police officers involved in the prosecution of Roscoe, counsel for the defendant attempted to weaken the prosecution's case by exposing the police department's practice of having two officers swear to a narrative of facts prepared by each largely copied from the report prepared by the arresting officer.²³⁷ The arresting officer was the only person who had first-hand knowledge of the facts surrounding Roscoe's "possession" of the drugs.²³⁸

The controversial document undoubtedly was triple-level hearsay and the defense counsel sought to communicate that to the jury. Judge Johnson refused to allow defense counsel to question the officer who prepared the second statement, or to have him compare it to the third sworn statement to show that the documents were copies of one another.²³⁹ Counsel for the defendant and the court were speaking at cross purposes when using the same word, "before." The court later argued it intended "ever before."²⁴⁰ The judge believed counsel understood that he could not question the witness about the document if the witness had not seen the document until he was on the witness stand.²⁴¹ Defense counsel understood "before" in a narrower sense to mean "before this examination."²⁴² If he showed the document to the witness on the stand, then after showing it to him, he believed he could question him about the document.²⁴³

234. See *id.* at 1081.

235. See *id.* at 1093 (Mikva, J., dissenting).

236. See *In re Holloway*, 995 F.2d at 1095.

237. See *id.* at 1082-83.

238. See *id.* at 1095 (Mikva, J., dissenting).

239. See *id.* at 1083.

240. See *id.* at 1096 (Mikva, J., dissenting).

241. See *id.* at 1084.

242. See *id.*

243. The transcript reads, in part, as follows:

Mr. Holloway: Is Your Honor—just clarification as to what I can ask or not ask.

The Court: I have already told you the limits.

Mr. Holloway: I cannot ask him to compare the two documents?

The Court: No, no, no.

Mr. Holloway: Why is that improper, Judge?

The Court: If this man has never seen that document before—and that's why I told you you must ask him if he has seen that document, not just those paragraphs contained on it—then he can't testify to it.

In talking over each other's heads, defense counsel and the court engaged in the following colloquy,

The Court: Excuse me, Mr. Holloway. The purpose of our last bench conference in which I ruled on that legal question said that the first thing you must do is determine whether he has ever seen this document *before*, and his answer is no, he has not seen it *before* today.

Was not that your answer?

The Witness: Yes, ma'am.

The Court: You may *proceed*.

By Mr. Holloway:

Q: Do you know what that document is?

Mr. Christian: Objection, Your Honor.

The Court: If he has never seen it *before*, we are not going to ask him if he knows what it is.

By Mr. Holloway:

Mr. Holloway: Well, can he look at it now? I mean, can he look at it now and compare it.

The Court: *He may not compare it until you have made certain determinations*, Mr. Holloway. And I don't know how often I have to say that. That's the third time I have repeated it.

(IN OPEN COURT:)

The Court: Mr. Young [the witness], if you will come back now, please.

....

By Mr. Holloway:

Q: Sir: I'm showing you a document entitled "United States v. Kelvin Roscoe." It is a document dated March 9, 1991.

The Prosecutor: Your Honor, he can identify it if he can recognize it.

The Court: He can say that. Go ahead.

By Mr. Holloway:

Q: It is a document dated March 9, 1991. It is signed by Robert W. Condit, and it has the number 91-0183 on it, and it has a pink paperclip. Would you look at this, please.

The Court: He's asking you to look at it to determine whether or not you have ever seen that document before.

By Mr. Holloway:

Q: Have you had a chance to look at it?

A: Yes, I have.

Q: Okay. Do you know what that document is?

The Court: No, no, no. First of all, we must determine if he's ever seen it before. That's the first step.

Have you ever seen that document before now?

Mr. Holloway: Judge—

The Witness: No, ma'am.

Mr. Holloway: Judge, I would ask the Court to allow counsel to complete his examination.

See *In re Holloway*, 995 F.2d 1080, 1091 (D.C. Cir. 1993) (Appendix A) (emphasis added) (transcript citations omitted).

Q: Have you seen it *now*? Have you looked at it just now?

A: Yeah, I see it now.

Q: Okay. Having looked at it *now*, can you now tell us what it is, what that document is?²⁴⁴

As Judge Mikva said, it is not clear what the "preliminary determinations" were on which Judge Johnson insisted. Obviously, from the record, counsel reasonably assumed that if he was allowed to "proceed" with questioning the witness after the witness had answered that he had not seen the document "before," that he should rephrase his question to establish "certain determinations." The Judge never specified what those determinations were. Counsel understood "proceed" to mean you may proceed with the line of questioning aimed at exposing the police department's practice of allowing officers who have no personal knowledge of events to swear to statements prepared by other officers. This understanding was reasonable in light of the fact that the judge certainly knew that counsel had called this police officer to the stand for the sole purpose of questioning him regarding the preparation of the sworn to documents. In the judge's mind, "proceed" meant counsel could go on to pursue *another* line of questioning, not dealing with the document. Accordingly, counsel then asked the witness if he had seen the document "now."²⁴⁵ The witness answered affirmatively and no objection was entered.²⁴⁶ Counsel reasonably assumed he had met the judge's expectations of establishing "certain determinations" and so continued with the examination. "Okay, having looked at it *now*, can you tell us what it is, what the document is?"²⁴⁷ Immediately following this question, the judge summarily entered the contempt order.²⁴⁸

As is illustrated in *In re Holloway*, a misunderstanding between the judge and counsel can have disastrous results for the criminal justice system. Given the speaker's miscommunications, defense counsel requested that the court allow him to withdraw from representing Roscoe in this trial on grounds of effectiveness.²⁴⁹ The judge denied his request (and did not think of recusing herself) with the following tautological reasoning,

244. *Id.* at 1090-91 (emphasis added).

245. *See id.* at 1091.

246. *See id.*

247. *Id.*

248. *See id.*

249. *See id.* at 1091-93.

He will only be found in contempt of court if his conduct is contemptuous. All of us can be contemptuous from time to time, and that is the only way that he or any other lawyer in this city will ever be found in contempt of court by me is if they are contemptuous. As long as Mr. Holloway is not contemptuous, he has not one thing to worry about, and he knows that. He knows what the law is with respect to contempt, and *he knows that unless he behaves contemptuously, there is no possible way for him to be held in contempt of court.*²⁵⁰

The judge's behavior is very Humpty Dumpty-like—"contemptuous means what I say it means." It was clear to United States District Court Judge Norma Johnson that what she meant by contemptuous was contemptuous. Her judicial conduct placed counsel in the dangerous position of having to take a stab at questions first then have the "contemptuousness" of that question reviewed. The appeals court (in its majority view) conflated this bizarre approach with deconstruction.²⁵¹

What is the lesson this case imparts? That as humans suffering from an imperfect system of communication, misunderstandings are unavoidable. In his scathing dissent, Judge Mikva attacks the majority for forgetting this basic understanding, that the duties of court "inevitably create tremendous conflict and tension between the court and counsel, and misunderstandings borne of impatience and frustration are commonplace."²⁵² Instead, the majority refers to the "Derrida-like" efforts of the defendant-appellant and amici to interject ambiguity into the judge's directions.²⁵³

D. *What Is "Final"? The Case of Rodriguez v. Secretary of Health and Human Services*²⁵⁴

In *Rodriguez v. Secretary of Health and Human Services*, Judge Perez-Gimenez tackled what Congress meant by a "final judgment" within the meaning of the Application for Attorney Fees under the Equal Access to Justice Act (EAJA),²⁵⁵ in light of recent Supreme Court cases dealing with disability benefits.²⁵⁶ The court said,

250. *Id.* at 1092 (citations omitted) (emphasis added).

251. *See id.* at 1084.

252. *In re Holloway*, 995 F.2d at 1097.

253. *See id.* at 1084.

254. *See* 794 F. Supp. 58 (D.P.R. 1992).

255. 28 U.S.C. § 2412 (1985).

256. *See Rodriguez*, 794 F. Supp. at 59.

Mr. Hernandez's reading of the relevant case law is counter-intuitive. In essence, he argues that a court's order which may engender further proceedings—including reconsideration of the same—is a final judgment. This position is evidently untenable. While deconstructionists like Jacques Derrida contend that language is inherently equivocal, the illogical interpretation of statutory and procedural requirements is rightly disfavored.²⁵⁷

By the terms of the Administrative Law Judge's opinion, additional judicial review (and action) could be taken up until sixty days following the computed date of receipt of the judgment by the plaintiff.²⁵⁸ During this time the judgment would still be subject to *motu proprio* review by the Administrative Council.²⁵⁹ Until the expiration of this period, the judgment, noted the court, would not be "final."²⁶⁰ The debate in this case then centered around the comparison of the words in the Disability Act allowing the district court to take action on an administrative judgment, the words contained in the district court's order, and the possible intentions of the court extrapolated from the foregoing language read together.²⁶¹ According to this court, all three funds of evidence pointed to the meaning "not final."²⁶² The court did what many courts did—show that the weight of "evidence" favored its interpretation and dismissed the losing side's argument as untenable. If the advanced interpretation could not be "contended" then why did the court bother to prepare a memorandum opinion explaining that the motion was "illogical," "counterintuitive," and "untenable"?²⁶³ There must have been something tenable, at least on its face, to the lawyer's argument or the court should have summarily denied the motion.

VI. CONCLUSION

As is demonstrated in this Article, judges cast their role as one of pathfinder and arbiter in a challenging but palpable exercise of applying established rules to disputes between people. It is a heroic

257. *Id.* at 60 (emphasis added).

258. *See id.* at 61.

259. *See id.*

260. *See id.*

261. *See id.* at 59-60.

262. *See id.*

263. *See id.* at 60. Denial of applications for fees based on "finality" of judgments do not generally require that the court provide reasons for the disposition of the application. *Cf.* FED. R. CIV. P. 56 (summary judgment order must recite the reasons for the disposition) and FED. R. CIV. P. 65 (injunctive relief orders require same).

role. The role of the philosopher is not nearly as significant or relevant to real (tractable) problems. In this manner, a judge is not far from a calculating machine. Precisely computing the correct answer, if only the correct data is placed in his hands. Cassandra-like Derrida is not the kind of data or material a judge can use. Apparently whatever it is that Derrida has said or is saying might lead to changes in the way law (caselaw or otherwise) is made. As this Article demonstrates, many legal thinkers (judges included) are and have been aware of the powerful relationship between context and text and the position of the reader, author, and interpreter of language. Debates over the many possible meanings of language and intentions embedded in text and their significations on a legal terrain will, in all likelihood, continue.

As subjects (in the object sense) of culture and society, every person is, no doubt, contaminated by the order within which he or she functions. Derrida suggests that each person consider looking outside this order. If deconstruction has been attacked as irresponsible, all persons would indeed be irresponsible not to question the legitimacy of whatever forms guide them even if they do not know where the path will lead.