# Deconstruction

Deconstruction has a broader, more popular, and a narrower, more technical sense. The latter refers to a series of techniques for reading texts developed by Jacques Derrida, Paul de Man, and others; these techniques in turn are connected to a set of philosophical claims about language and meaning. However, as a result of the popularity of these techniques and theories, the verb "deconstruct" is now often used more broadly as a synonym for criticizing or demonstrating the incoherence of a position.

Deconstruction made its first inroads in the United States through departments of literary criticism, which sought new strategies for interpreting literary texts. As a result, deconstruction became associated and sometimes confused with other trends, including reader response theory, which argues that a text's meaning is produced through the reader's process of encountering it.

In Europe, on the other hand, deconstruction was understood as a response to structuralism; it is therefore sometimes referred to as a "poststructuralist" approach. Structuralism argued that individual thought was shaped by linguistic structures. It therefore denied or at least severely deemphasized the relative autonomy of subjects in determining cultural meanings; indeed, it seemed virtually to dissolve the subject into the larger forces of culture. Deconstruction attacked the assumption that these structures of meaning were stable, universal, or ahistorical. However, it did not challenge structuralism's views about the cultural construction of human subjects. Social theories that attempt to reduce human thought and action to cultural structures are sometimes called "antihumanist." Ironically, then, deconstruction suffered the curious fate of being an antihumanist theory that nevertheless was often understood in the United States as making the radically subjectivist claim that texts mean whatever a person wants them to mean. The misunderstandings that deconstruction has engendered are partly due to the obscurity of expression that often distinguishes the work of its adherents.

Despite Derrida's insistence that deconstruction is not a method, but an activity of reading, deconstruction has tended to employ discernable techniques. Many deconstructive arguments revolve around the analysis of conceptual oppositions. A famous example is the opposition between writing and speech (Derrida 1976). The deconstructor looks for the ways in which one term in the opposition has been "privileged" over the other in a particular text, argument, historical tradition or social practice. One term may be privileged because it is considered the general, normal, central case, while the other is considered special, exceptional, peripheral or derivative. Something may also be privileged because it is considered more true, more valuable, more important, or more universal than its opposite. Moreover, because things can have more than one opposite, many different types of privilegings can occur simultaneously.

One can deconstruct a privileging in several different ways. For example, one can explore how the reasons for privileging A over B also apply to B, or how the reasons for B's subordinate status apply to A in unexpected ways. One may also consider how A depends upon B, or is actually a special case of B. The goal of these exercises is to achieve a new understanding of the relationship between A and B, which, to be sure, is always subject to further deconstruction.

Legal distinctions are often disguised forms of conceptual oppositions, because they treat things within a legal category differently from those outside the category. One can use deconstructive arguments to attack categorical distinctions in law by showing that the justifications for the distinction undermine themselves, that categorical boundaries are unclear, or that these boundaries shift radically as they are placed in new contexts of judgment. (Schlag 1988).

Perhaps the most important use of deconstruction in legal scholarship has been as a method of ideological critique. Deconstruction is useful here because ideologies often operate by privileging certain features of social life while suppressing or deemphasizing others. Deconstructive analyses look for what is deemphasized, overlooked, or suppressed in a particular way of thinking or in a particular set of legal doctrines. Sometimes they explore how suppressed or marginalized principles return in new guises. For example, where a field of law is thought to be organized around a dominant principle, the deconstructor looks for

exceptional or marginal counterprinciples that have an unacknowledged significance, and which, if taken seriously, might displace the dominant principle. (Unger 1986; Frug 1984; Dalton 1985; Peller 1985; Balkin 1987).

Sometimes deconstructive analyses closely study the figural and rhetorical features of texts to see how they interact with or comment upon the arguments made in the text. The deconstructor looks for unexpected relationships between different parts of a text, or loose threads that at first glance appear peripheral yet often turn out to undermine or confuse the argument. A deconstructor may consider the multiple meanings of key words in a text, etymological relationships between words, and even puns to show how the text speaks with different (and often conflicting) voices. (Balkin 1990b; Balkin 1989). Behind these techniques is a more general probing and questioning of familiar oppositions between philosophy (reason) and rhetoric, or between the literal and the figural. Although we often see the figural and rhetorical elements of a text as merely supplementary and peripheral to the underlying logic of its argument, closer analysis often reveals that metaphor, figure, and rhetoric play an important role in legal and political reasoning. Often the figural and metaphorical elements of legal texts powerfully support or undermine the reasoning of these texts.

Deconstruction does not show that all texts are meaningless, but rather that they are overflowing with multiple and often conflicting meanings. Similarly, deconstruction does not claim that concepts have no boundaries, but that their boundaries can be parsed in many different ways as they are inserted into new contexts of judgment. Although people use deconstructive analyses to show that particular distinctions and arguments lack normative coherence, deconstruction does not show that all legal distinctions are incoherent. Deconstructive arguments do not necessarily destroy conceptual oppositions or conceptual distinctions. Rather, they tend to show that conceptual oppositions can be reinterpreted as a form of nested opposition (Balkin 1990a). A nested opposition is an opposition in which the two terms bear a relationship of conceptual dependence or similarity as well as conceptual difference or distinction. Deconstructive analysis attempts to explore how this similarity or this difference is suppressed or overlooked. Hence deconstructive analysis often emphasizes the importance of context in judgment, and the many

changes in meaning that accompany changes in contexts of judgment.

Deconstruction's emphasis on the proliferation of meanings is related to the deconstructive concept of iterability. Iterability is the capacity of signs (and texts) to be repeated in new situations and grafted onto new contexts. Derrida's aphorism "iterability alters" (Derrida 1977) means that the insertion of texts into new contexts continually produces new meanings that are both partly different from and partly similar to previous understandings. (Thus, there is a nested opposition between them.). The term "play" is sometimes used to describe the resulting instability in meaning produced by iterability.

Although deconstructive arguments show that conceptual oppositions are not fully stable, they do not and cannot show that all such oppositions can be jettisoned or abolished, for the principle of nested opposition suggests that a suppressed conceptual opposition will usually reappear in a new guise. Moreover, although all conceptual oppositions are potentially deconstructible in theory, not all are equally incoherent or unhelpful in practice. Rather, deconstructive analysis studies how the use of conceptual oppositions in legal thought has ideological effects: how their instability or fuzziness is disguised or suppressed so that they lend unwarranted plausibility to legal arguments and doctrines. Because all legal distinctions are potentially deconstructible, the question when a particular conceptual opposition or legal distinction is just or appropriate turns on pragmatic considerations. Hence, deconstructive arguments and techniques often overlap with and may even be in the service of other approaches, such as pragmatism, feminism or critical race theory.

Deconstruction began to have influence in the legal academy with the rise of critical legal studies and feminism. However, deconstructive scholarship eventually became part of an emerging category of postmodern jurisprudence separate from critical legal studies. (Balkin 1989; Balkin 1993; Schlag 1991b; Cornell 1992). Deconstructive arguments in feminism have been more clearly understood as a development and critique of earlier feminist themes; they are best studied in the context of feminist jurisprudence. This difference may have something to do with the continuing vitality of feminism and the waning influence of critical legal studies at the end of the 1980's.

Critical legal scholars were originally attracted to deconstruction for three reasons. First, because deconstruction claimed that meanings were inherently unstable, it seemed to buttress the thesis that legal decisionmaking was indeterminate. This, in turn, appeared to support the familiar CLS emphasis on the political character of legal decisionmaking. (Dalton, 1984; Frug 1984). Second, because deconstruction discovered instability and indeterminacy everywhere, it seemed to support the notion that social structures were contingent and social meanings malleable and fluid. This supported CLS claims that legal ideology rested on claims of the "false necessity" of social and legal structures that seemed reasonable in theory but were oppressive in practice. (Peller 1985). Third, because deconstruction seemed to show that all texts undermined their own logic and had multiple meanings that conflicted with each other, deconstruction could be used for the purpose of "trashing"-- that is, showing that particular legal doctrines or legal arguments were fundamentally incoherent.

Nevertheless, CLS's appropriation of deconstruction along these lines was problematic. First, the CLS argument seemed to assume an autonomous subject who was manipulating indeterminate language; this was in tension with deconstruction's antihumanist assumptions. (Schlag 1990a). If meaning is beyond the control of the subject, and the subject is socially constructed, it is hard to argue that legal reasoning is a disguise for political reasoning. (Balkin 1991). Second, if the conceptual oppositions of liberal legalism were deconstructible, so too would be the concepts that critical legal studies scholars would offer to replace those of liberal legalism. If deconstruction could be used to show the incoherence of liberal thought, it could equally be used to show the incoherence of any alternative to liberal thought. Third, the contingency and instability are separate concepts, and neither is identical with mutability. Even if legal concepts had multiple and unstable meanings, it did not follow that legal and social structures were easily manipulated and changed.

Similar problems arose in the attempt by British critical legal theorists (Goodrich 1987; Goodrich 1990; Douzinas et al. 1991) to use deconstruction to show how rhetorical figures created ideological support for injustice. Ironically, rhetoric becomes viewed with a certain degree of suspicion in this body of work, because rhetoric and figure grant legal writing and legal theory far more legitimacy than they deserve. The problem is that this

critique does not seem to distinguish the present legal system and its doctrines from alternatives equally dependent on rhetoric and figural language.

A more promising line of attack for CLS rejected the claim that legal doctrine was unstable and easily malleable. It asserted that political and legal ideologies operated as a form of constraint on individuals. These ideologies constructed a way of thinking about society that prevented individuals from considering other alternative orderings of social and legal structures, and thus limited their thought. (Gordon 1982, Gordon 1987, Balkin 1991). From this standpoint, the determinacy of legal doctrine was quite real, but was produced by the social construction of the subject. CLS's use of deconstruction was also more successful when it concentrated on showing how the justifications for specific legal doctrines and legal distinctions undermined themselves, or how the ideologies underlying legal doctrines marginalized or suppressed important features of human life. (Unger 1986).

Like critical legal scholars, feminists also found deconstruction useful as a method of ideological critique, directed in this case at patriarchal thought and institutions. Feminists could use deconstructive arguments to expose and critique the suppression and marginalization of things associated with women and femininity. Moreover, the iterability and instability of social meanings seemed to undermine any potentially pessimistic suggestions in radical feminism that patriarchy was a unconquerable monolith, or that patriarchy's control of social construction had been so successful that women's very desires and identities were nothing more than the products of male power and privilege. Because social meanings are iterable, they are fluid and unstable, and always present possibilities of interpretive variance and play. Thus, the deconstructive theory of meaning seemed to suggest potential avenues of resistance to patriarchy, and seemed to allow if not guarantee the possibility of feminist critique.

Unfortunately, deconstruction tends to destabilize not only patriarchy, but also femininity and feminine identity. Deconstructive arguments that "women's perspectives," "women's interests," or "femininity" have been suppressed or marginalized in existing culture beg two important questions: The first is whether there can be such relatively stable and determinate entities; the second is whether they do not already form nested oppositions with what they are claimed to oppose. Thus, feminists employing

deconstructive critiques have been faced with two important yet potentially conflicting goals: to identify and honor the feminine that has been suppressed or marginalized, and to recognize the instability and contested nature of the identity so honored (Cornell 1991).

In 1987 a major academic scandal erupted when Paul De Man's wartime journalism for a pro-Nazi newspaper was discovered. The revelations raised anew the question of deconstruction's relationship to ethics and politics. In literary circles, deconstruction had often been accused of political quietism, because no clear moral or political consequences could be drawn from an interpretive theory that asserted that all meanings were unstable and seemed to deny the certainty of all truths. Some critics even accused De Man of turning to obscurantism to assuage his guilty conscience over collaboration. These accusations particularly affected his close friend Derrida, a Jew who was a teenager during World War II. Whether directly or indirectly as a result of the de Man affair, Jacques Derrida began to explore the question of the normative uses of deconstruction. In subsequent work (Derrida 1990) he asserted that deconstruction had always been concerned with normative questions, and cryptically insisted that "Deconstruction is justice." (Ibid.).

The connections between deconstruction and social justice were hardly questioned in earlier critical legal studies and feminist scholarship because it was simply assumed that deconstruction was an impressive analytical weapon that could be used to criticize politically regressive positions and "trash" liberal legal thought. Nevertheless, it was not difficult to see that deconstructive arguments could as easily be used by the political right as by the political left, and that they could serve many different political positions. (Balkin 1987, 1990b). By the 1990's several legal scholars began to examine the relationship between deconstruction and social justice more carefully.

Drucilla Cornell (1992) has addressed these questions through a combination of deconstructive and feminist legal theory. Basing her work on an synthesis of Derrida and Emmanuel Levinas, Cornell argues that deconstruction necessarily presupposes an ethical relationship to others; deconstruction requires us not only to recognize others as others but also to be open to them and their perspectives. Thus, deconstruction contains an ethical imperative both to question our own beliefs and to

understand the situation and views of others. Cornell's redefinition of deconstruction as a "philosophy of the limit" attempts to make sense of Derrida's claim that deconstruction is justice by arguing that justice is an unpassable difficulty or paradox for any legal system rather than a transcendent ideal.

My own work (Balkin 1994) argues that Derrida's attempted equation of deconstruction and justice is unsatisfactory. In order for deconstruction to be used for purposes of social and political critique, it has to presume a transcendent value of justice--an inchoate and indeterminate longing for justice that is never fully articulated or satisfied in human law, culture, or convention. Deconstruction is useful as a critical tool because it exposes the gap or inadequation between the transcendent value of justice and its concrete instantiations in human culture.

Pierre Schlag offers a marked contrast to these approaches; he emphasizes deconstruction's antihumanism. Schlag criticizes CLS's use of deconstruction as an intellectual tool employed to promote a normative agenda (Schlag 1990a, Schlag 1991b) because it assumes that CLS scholars choose how deconstruction can be wielded. In fact deconstruction is not a tool but a predicament: legal doctrines are already deconstructed without any human choice or intervention. Moreover, Schlag argues that all normative legal theory-- legal theory that purports to offer normative prescriptions about how society should be organized and regulated-- is intellectually bankrupt. The rhetorical style of normative legal scholarship assumes that people are in control of what and how they think about normative problems, and that people offer normative directives to others who are persuaded by their cogency and coherence, and who carry them out because of the normative justifications given. Poststructuralism has already shown that this picture of human agency and human reason is inadequate; the goal of legal scholarship should henceforth be to study the stylistics of legal rhetoric and how they have contributed to the perpetuation of the fantasy of rational autonomy (Schlag 1990b; Schlag 1991a).

At first glance, Schlag's attack on normative legal scholarship seems puzzling and even self-defeating, because Schlag appears to be employing the rhetorical form of normative prescription in his own writing. Moreover, if legal scholars are socially constructed to articulate their scholarship in normative rhetoric, why does their obedience to this social construction pose

any difficulty? Schlag's position would have critical bite only if he assumed that there is something wrong about this way of thinking from which legal scholars should and could be liberated. In fact, Schlag's point seems to be more sociological and predictive than critical: He thinks that social forces are causing the enterprise of normative legal discourse to disintegrate before our eyes; hence he predicts that legal scholars will be increasingly unable to engage in normative legal dogmatics without an increasing sense of dislocation. (Schlag 1990b; Schlag 1991a).

As the examples in this essay suggest, Deconstruction has proven to be a surprisingly adaptable concept serving many different purposes and supporting many different types of legal scholarship. It first appeared in the American legal academy as an esoteric weapon of critical legal scholars. By the 1990's it had been instrumental in the rise of postmodern jurisprudence and some critiques of critical legal studies. Along the way it has fostered debates about ideological and social construction, the connections between post-structuralism and justice, the role of rhetoric in legal thought, the nature of feminine identity, and the health and direction of normative legal scholarship. The deconstructive dictum that "iterability alters" seems to apply particularly to deconstruction itself, for the meaning and importance of deconstruction in legal theory has continually changed as it has been employed in different contexts and situations. As a result, its future and its future applications in the legal academy remain-- as a deconstructionist might say-- indeterminate.

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