

BOSTON COLLEGE LAW REVIEW

VOLUME XXXVI

DECEMBER 1994

NUMBER 1

DECONSTRUCTION, STRUCTURALISM, ANTISEMITISM AND THE LAW†

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I. INTRODUCTION

In 1945, Elie Wiesel was liberated from the Nazi death camps. He had been deported to Auschwitz from his home in Hungary one year earlier, in the spring of 1944. By the time of liberation, his mother and sister had been gassed and his father had died at his side from torture, exhaustion, illness and starvation. Of his initial view of Auschwitz, he writes that he turned to his father in disbelief, and asked for reassurance that they were in the twentieth century, not the Middle Ages. He turned once more to his father, seeking guidance when young Jewish males, newly unloaded from cattle cars, discussed resisting the guards while their fathers counseled docility. When asked by his son what he thought, Wiesel's father replied that he thought that thinking no longer mattered.¹

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¹ ELIE WIESEL, *Plaidoyer Pour les Morts*, in *LE CHANT DES MORTS* 193-94 (1966).

Wiesel's writing has been accused of nihilism and of exemplifying a deconstructionist perspective. Deconstruction similarly has been accused of being nihilistic, defeatist and of constituting a destructive "Holocaust Judaism." Deconstruction and the works of Wiesel are indeed linked, but not by nihilism or defeatism. Instead, both emanate from anti-totalitarianism, reflecting their historical contexts. Both Jacques Derrida, the founder of deconstruction, and Elie Wiesel, chronicler of the holocaust, wrote in France after the Second World War, in the wake of the extermination camps, French collaboration with the Nazis and the gulag of Stalinist Russia.

This essay examines deconstruction from an historical perspective in order to clarify its evolution and to suggest its usefulness for legal analysis. It also addresses the fervent antipathy which deconstruction has aroused in many legal scholars and demonstrates that current criticism fails to assess deconstruction on its merits. The normative nature of legal scholars' attacks against deconstruction masks a refusal to face the possibility that the tenets of our legal system do not assure the perpetuation of our system or provide a reliable safeguard against the horrors which have befallen other societies throughout history and in our own time.

Like Wiesel's writing, and like other modernist movements in literature, painting and music, deconstruction signals the end of the Enlightenment view of human civilization as progressing in tandem with increased scientific discovery. Where the Enlightenment marked the transfer from God to humans of the source of hope for civilization, the cataclysmic events wrought by twentieth-century totalitarianism marked a profound change in the Western intellectual's view of humanity. After Auschwitz and the gulag, absurdity, barbarity, chaos and regression became part of the perception of human progression; a coherent view of mankind required incorporation of profound incoherence.

Deconstruction reflects the Western intellectual's perspective in the second half of the twentieth century by its focus on antinomy and irresolvable, inherent contradictions. This focus provides the framework for a *Weltanschauung* which can incorporate the nonlinear and the absurd. Deconstruction both represents a rejection of the absolutist approach which characterizes totalitarian regimes and implies the need for skepticism in the face of those who claim to possess truth. The historical context permits us to understand deconstruction's location in a pendulum swing veering away from totalitarian absolutism, but not extending as far as nihilism.

On another historical level, deconstruction became known to legal scholars in the United States by way of French literature departments which had been structuralist in approach before becoming

deconstructionist. This essay examines the evolution in the United States from pre-structuralism to structuralism to deconstruction, in order to demonstrate that structuralists adopted deconstruction as a remedy to the absolutist strictures in structuralist theory, and because of its methodological rigor in analysis.

The two historical contexts converge in establishing deconstruction's anti-absolutist perspective. Against this dual historical backdrop, deconstruction's focus on unearthing inherent contradictions embedded within propositions can be better understood as applying to fields like law, in which terms and concepts are fluid and contestable, but not as extending to a generalized denial of the existence of meaning or of truth.

This essay also addresses the thesis of Guyora Binder, published in 1989 in the *Yale Law Journal*, that deconstruction operates as a parasitic theory, always by opposition to something else, and that it is nihilistic through its absence of affirmative presence or identity. Binder concludes that deconstruction is inappropriate to legal analysis and that it is a form of "Holocaust Judaism," best exemplified through Wiesel's writing, and ultimately destructive to Jewish identity. Binder's charge is novel, for traditional criticism has accused deconstruction of affording respectability to holocaust denial through the indiscriminate validation of all interpretations, while Binder accuses deconstruction of dwelling on the Holocaust. Binder's thesis is of interest in that it identifies and explores the seminal historical influences on deconstruction of Lévi-Straussian structuralism and French existentialism. This essay argues a different interpretation of both the nature of structuralism and French existentialism and the nature of their influence on deconstruction, and suggests that, contrary to Binder's interpretation, deconstruction emerges as an affirmative interpretive methodology which enriches textual analysis in law by expanding our perceptions of previously unperceived relationships and levels of signification. In doing so, deconstruction also can promote increased tolerance and effective social and political action.

Contrary to the claims of deconstruction's critics, the view expressed by Wiesel's father in Auschwitz that thinking does not matter is antithetical to deconstructionist analysis. It is also antithetical to Wiesel's outlook, for both focus affirmatively on the future, and are intent on incorporating the lessons of our time, so as to gauge relevant issues with greater insight.

Part I explores the entry of deconstruction into American scholarly circles by way of French literature departments and traces deconstruction's antecedents, pre-structuralism and structuralism, in order to clarify the attributes of deconstruction which caused its adoption as

the interpretive theory of preference. Pre-structuralist critical theory was rejected for its lack of analytical rigor in favor of structuralism, which sought to transform the study of texts into a systematic, scientific inquiry. Structuralism, however, made excessive claims of scientific reliability, and specifically of yielding a unique, correct interpretation for the text under scrutiny. Against the backdrop of structuralism's excesses, deconstruction emerges more clearly as a methodology which rejects structuralism's claims of yielding scientific truths through textual interpretation, but which does not extend as far as some of its critics (and some of its proponents) suggest: namely, to a denial of the possibility of truth or of meaning.

Part II examines deconstruction, exploring its similarity to structuralism as a methodology involving intense scrutiny of all textual phenomena and characterized by analytical rigor, while differing from structuralism in that it announces the coexistence of contradiction at all levels of the text. Deconstruction's focus on inherent paradox is the source of criticism that deconstruction is nihilistic and antifoundationalist, denying the existence of truth. I reject this criticism, arguing that, where structuralism implies the existence of truth, deconstruction takes no position on that issue. I also examine and refute charges that deconstruction is random in application or that it validates all meanings, thereby undermining the concept of meaning. Moreover, the view that deconstruction is nihilistic generally presupposes that it is a philosophy. I argue that deconstruction is, rather, only a methodology, an interpretive tool, and that its usefulness in analyzing legal texts is as such.² Rather than providing, or aspiring to provide, foundational values, deconstruction enables the interpretant to reach a fuller understanding of the analyzed text from which to reach decisions in keeping with his or her values.

Part III explores deconstruction's implications for the legal field and suggests that it is aligned with the Hobbesian view that society is in a permanent state of peril due to problems endemic to human nature, rather than with the Enlightenment view of civilization progressing as a corollary to increased knowledge and understanding. Deconstruction's critics have failed to respond to deconstruction on its merits, dwelling rather on normative arguments. I suggest that much of the criticism of deconstruction by legal scholars stems from a reluctance to face the deconstructionist implication that our laws and

² Although I distinguish between methodology and philosophy, I acknowledge that deconstruction, like all methodologies, is not without philosophical implications. See *infra* notes 42-61 and accompanying text for a discussion of the methodology/philosophy dichotomy.

Constitution are not safeguards for the perpetuation of our system or of the rule of law. I refer to France during the Second World War as a system similar to our own, whose laws and Constitution proved unable to achieve self-perpetuation. I also refer to the antisemitic legislation of the Vichy regime, much of which the French enacted independently of German pressure or coercion, and suggest that deconstructionist analysis would have pierced its surface resemblance to other laws and exposed the underlying discriminatory and, ultimately, murderous, nature beneath the smooth exterior of comfortingly familiar legal discourse.

Part IV challenges the thesis of Guyora Binder that deconstruction is a form of "Holocaust Judaism," a search for identity by opposition to Nazism which Binder characterizes as devoid of affirmative value and therefore defeatist and nihilistic. In his criticism of deconstruction, Binder encompasses a condemnation of holocaust studies as pernicious to Jewish identity, and concludes that deconstruction has no place in legal analysis. I agree with Binder's assessment of the importance of French existentialism and Lévi-Straussian structuralism to deconstruction, but analyze both to show that, contrary to Binder's interpretation, both deconstruction and holocaust studies are affirmative in nature because (1) Lévi-Strauss' structuralism represents a search for universal, objective truths, rather than a theory of relativism; and (2) Sartre's existentialism represents a philosophy of hope, rather than of despair, premised on a belief in human freedom and individual responsibility for ethical social behavior. In keeping with the analysis of prior sections, I dispute Binder's contention that, in Wiesel's writing, Auschwitz signifies the death of God. Rather, Auschwitz signifies the end of the view, cherished since the Enlightenment, that human civilization is perfectible and can be expected to progress in linear fashion, in keeping with scientific progress. Moreover, both deconstruction and holocaust studies are responses to the absolutism of the totalitarian regimes of the twentieth century, but are not restricted to issues concerning Jews. In its illumination of differences within sameness and vice versa, and its expansion of analytical perceptions through the elucidation of unsuspected relations within the text, deconstruction offers a framework for tolerance.

II. DECONSTRUCTION'S ENTRY INTO AMERICAN ACADEMIC CONSCIOUSNESS

Deconstruction was introduced to the United States in the field of literary criticism and largely through the efforts of Paul de Man,

long-time chairman of Yale's French Department.³ Deconstruction is the brainchild of Jacques Derrida, who was frequently a Visiting Professor in Yale's French Department during the 1970s.⁴ Many attributes of deconstruction, such as its intense focus on language and on linguistic and phonic interrelatedness, make the interest of critical literary methodologists in deconstruction easy to understand. It may well be a matter of historical fortuity that philosophers did not first introduce deconstruction to American scholars, given the philosophical underpinnings of Derrida's work.⁵ Others have written about the influence of Hegel, Heidegger and phenomenology in Derrida's writing, and some legal scholars have begun to note the influence of Sartrean existentialism as well.⁶ The large number of refugees from France and other Francophonic countries who taught in the French departments of American universities after the Second World War no doubt heightened the chance that members of French literature departments, rather

³ David Lehman notes in particular the influence of de Man's 1971 book, *Blindness and Insight*, in introducing Derrida to American scholars. See DAVID LEHMAN, *SIGNS OF THE TIMES: DECONSTRUCTION AND THE FALL OF PAUL DE MAN* 145 (1991). Criticism of deconstruction became more vehement after the posthumous discovery that de Man had been a Nazi collaborator in his native Belgium. Not only did de Man succeed in disguising a past which included bigamy as well as collaboration, but, surprisingly, no one seems to have made the connection until after Paul de Man's death in 1983 that Henri de Man, perhaps the most prominent of the Belgian Nazis, was de Man's uncle. I do not address the de Man controversy directly here, but I hope that my analysis of deconstruction provides a framework for assessing the issue of whether the sordid life of one of deconstruction's most influential proponents affects the theory.

⁴ See *id.* at 144. Derrida has remained a much sought-after lecturer in the United States academic community including, in recent years, the legal field. See, e.g., Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority,"* 11 CARDOZO L. REV. 921 (Mary Quaintance trans., 1990) (delivering papers in an October, 1989 colloquy on "Deconstruction and the Possibility of Justice," at which Derrida was the keynote speaker); see also Mitchell Stephens, *Jacques Derrida*, N.Y. TIMES, Jan. 23, 1994, § 6 (Magazine), at 22-24 ("[D]econstruction continues to haunt large numbers of students and faculty. They have packed auditoriums and lecture halls at New York University, the Cardozo School of Law and the New School for Social Research in which Derrida has been speaking during his annual month long stay in New York.").

⁵ I refer to phenomenology and existentialism. Derrida's academic training is in the field of philosophy.

⁶ More will be said later with respect to existentialist implications and influences. Guyora Binder discusses deconstruction's relation to existentialism at some length in *Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie*, 98 YALE L.J. 1321 (1989). Although he is one of the few to detect the importance of existentialism to deconstruction, Binder has reached conclusions different from my own with respect to his reading of existentialist philosophy and his view of its interpretation by, and influence in, French society. See *infra* notes 81-115 and accompanying text. For the influence of Hegel on Derrida, see Michel Rosenfeld, *Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism*, 11 CARDOZO L. REV. 1211, 1219 n.24 (1990), and sources cited therein. For an analysis of phenomenology's application to modernist criticism, see Donald H.J. Hermann, *Phenomenology, Structuralism, Hermeneutics, and Legal Study: Applications of Contemporary Continental Thought to Legal Phenomena*, 36 U. MIAMI L. REV. 379 (1982).

than scholars in other fields, would discover Derrida, particularly because Derrida's writing is notorious for lack of clarity, making access to Derrida even more difficult for non-native readers of French than for native Francophones.⁷

The fact that French literature departments introduced Derrida to the United States is significant in that deconstruction became known to American legal scholars as a critical methodological approach to literary texts.⁸ Deconstruction, commonly referred to as *post-structuralist*, became the prevailing critical methodology in literature departments previously dominated by structuralist literary theory. For a full understanding of deconstruction's significance in the United States, it is necessary to understand the structuralist and pre-structuralist literary criticism which preceded it as well as to examine the significance of structuralism as it was adopted by the literature departments which subsequently became deconstructionist in approach.

A. Structuralism and Pre-Structuralism in Literary Criticism

The scientific rigor of structuralist methodology provided an overwhelming attraction for the French literary scholars in American universities who were structuralists before becoming deconstructionists, for rigor in logic and reasoning were not privileged features of pre-structuralist French literary criticism.⁹

⁷ Balkin relates the theory that the lack of clarity may be an intentional rejection by deconstructionists of the Cartesian clarity of which the French bourgeoisie is enamored, as part of an overall reaction against the bourgeoisie: "[P]ost-structuralist thinkers, most of whom were French, deliberately adopted an obfuscatory style in reaction to the bourgeois French preference for 'la clarté.'" J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L. REV. 743, 745 n.6 (1987) (citing John Sturrock, *Introduction to STRUCTURALISM AND SINCE* 16-17 (John Sturrock ed., 1979)). See ROLAND BARTHES, *CRITIQUE ET VÉRITÉ* 28-29 (1966) for an analysis (and debunking) of French society's view that clarity is intrinsic to the French language and proof of its linguistic superiority as a model of logic. See also Kenney Hegland, *Goodbye to Deconstruction*, 58 S. CAL. L. REV. 1203, 1204 & n.3 (citing Hutchinson, *From Cultural Construction to Historical Deconstruction*, 94 YALE L.J. 209, 236-37 (1984) (book review)), for the principle that clarity is an unworthy goal because it "deradicalizes." According to Lehman, "Michel Foucault once described Jacques Derrida's prose style as an effort at 'obscurantist terrorism.'" LEHMAN, *supra* note 3, at 98. My own view is that Derrida's lack of clarity stems from his reluctance to make absolutist pronouncements. His meandering style (characterized by what is called in French a *va-et-vient*) reflects the humility of his stance vis-à-vis his own conclusions, his reluctance to assume that his explanation has an exclusive propriety over truth.

⁸ See LEHMAN, *supra* note 3, at 145 (referring to the "tailoring of [Derrida's] methods to the exigencies of an American academic specialty: literary criticism"); Arthur Austin, *A Primer on Deconstruction's "Rhapsody of Word-Plays"*, 71 N.C. L. REV. 201, 228 (1992) (referring derisively to deconstruction as "a French fad on literary criticism threatening to change the course of legal education").

⁹ Here it is important to distinguish between French and Anglo-American literary scholar-

The hallmark of French pre-structuralist literary criticism is a discourse more akin to literature than to science, fluid and ambulatory in style. To the extent that pre-structuralist French literary criticism can be categorized as a study, it is a study in which the literary text does not have primacy over the author or author-figure.¹⁰

French pre-structuralists viewed literature as being so indelibly marked by the author that no separate or separable literary text could exist.¹¹ Consequently, French literary scholarship was imbued with speculative comments about a putative presence referred to as the author. The totality of the fusion between the individual personality of the author and the literary text left literary criticism with a task too elusive and unpredictable to amount to much more than an exercise in emotion and appreciation.

Thus, the French literary scholar Jean Gu  henno, famous for his work on Rousseau and Michelet, as well as for the searing portrayal in his memoirs of life in France during the German occupation, manifests a typical pre-structuralist approach in the following passage concerning Rousseau's "Discourse on the Inequality of Arts and Sciences:"

Sacred solitude of just and pure hearts. He [Rousseau] cried, but his tears were tears of joy. He felt himself purified of all taintedness. Twenty years of uncertain battle, so many insults borne, so much misery, so much humiliation; none of it had vanquished him. Jean-Jacques was inaccessible and his soul had not changed in the slightest He was Rousseau. Rousseau, like his father Isaac Rousseau, citizen of Geneva. Not one of those Parisians, without character and faceless, exhausted by politeness and weathered like a pebble rubbed down by the sea. Jean-Jacques Rousseau, citizen of Geneva. He was the faithful son of the new Zion, the man with a country, of a republic where people knew what virtue was. He

ship. The latter did have a pre-structuralist tradition both creative and analytically rigorous. I think in particular of such non-structuralist literary scholars as Lionel Trilling and Northrop Frye. Indeed, like the structuralists, Frye rejects metatextual criticism, considering it as parasitic. See NORTHROP FRYE, *ANATOMY OF CRITICISM* 3 (1957).

¹⁰ It should be noted that my use of "pre-structuralist" in this context refers to the "unstructuralist" criticism against which structuralists reacted, rather than to such precursors of structuralism as Propp or Souriau. See *infra* note 16.

¹¹ The Larousse encyclopedia of the nineteenth century is a repository of contemporaneous academic literary beliefs. The article entitled "Style" reflects the view that the author's presence permeates the literary text. 14 PIERRE LAROUSSE, *GRAND DICTIONNAIRE UNIVERSEL DU XIXE SI  CLE, FRAN  AIS, HISTORIQUE, G  OGRAPHIQUE, MYTHOLOGIQUE, BIBLIOGRAPHIQUE, LITT  RAIRE, ARTISTIQUE, SCIENTIFIQUE, ETC.* 1158-60 (1866-1876). See also Georges Louis Buffon, *Discours Sur Le Style*, in MORCEAUX CHOISIS 1-14 (1906), for the idea that style represents the fusion of the author with the written work.

was still that child who sang the psalms, who, while his father worked, read him every day Plutarch's *Illustrious Men*. Purity, simplicity of the sunny house. Happiness. Aunt Susan embroidered, his father worked, he read. He heard himself still naming Brutus, Agesilas, Aristide, Fabricius. They had known the meaning of virtue. He heard himself reading—it was in the life of Pyrrhus—: Fabricius, a great captain but poor, had come as ambassador to the king and the king fawned on him and offered him much silver and gold, and Fabricius, inaccessible, incorruptible, "sent him far away with his present." His heart melted at those memories. He stopped, sat down under a tree, pulled out a small notebook, a pencil. He wrote: "O Fabricius, what would your great soul have thought" It was his own which was overflowing.¹²

One can see in this passage, for which no historical confirmation exists, the ethos of the pre-structuralist literary criticism of French scholars.¹³ It is evocative, poetic and literary. It functions largely as literature, as a kind of metatext, reflecting the primary source rather than explicating it.

Structuralism radically changed scholarly examination of literature. Like Chomsky's structural linguistics and Lévi-Strauss' structural anthropology, structuralist literary criticism aims to reveal the fundamental principles which govern literariness, systematizing the components of literary discourse in novel categories. Systematization is the fundamental and revolutionary attribute which structuralism introduced into French literary criticism.¹⁴ Although defects in structuralist theory would cause structuralists to turn to deconstruction,¹⁵ the attribute of systematization is as essential to deconstruction as it is to structuralism.

At the foundation of structuralism is the belief in universal laws or structures. The theories of Claude Lévi-Strauss, the structural anthropologist,¹⁶ and N.S. Troubetzkoy and Noam Chomsky, structural lin-

¹² JEAN GUÉHENNO, *JEAN-JACQUES EN MARGE DES "CONFESSIONS"* 281–82 (1948) (my translation).

¹³ The failure to distinguish between text and author is also evident in the titles of such pre-structuralist literary criticism as JEAN FRAPPIER, *CHRÉTIEN DE TROYES, L'HOMME ET L'OEUVRE* (1957) [*CHRÉTIEN DE TROYES, THE MAN AND THE WORK*].

¹⁴ See, e.g., Jonathan Culler, *The Linguistic Basis of Structuralism*, in *STRUCTURALISM* 34 (David Robey ed., 1973) (referring to structuralist literary criticism as characterized "by the novelty of some of [its] categories but primarily by [the] . . . intense desire to systematize").

¹⁵ See *infra* notes 90–102 and accompanying text.

¹⁶ Robert Scholes also discusses precursors of structuralism in literary criticism who exerted considerable influence on modern structuralists. The Russian formalist Vladimir Propp engaged

guists, in large measure inspired critical literary structuralism. Chomsky refers to a universal grammar common to all human beings, allowing people to develop their own languages, and to generate communicative structures as needed in particular subcultures. Audible linguistic phenomena which human beings do not universally share are defined as surface structures, in contrast to deep structures, which are defined as those attributes of language which human beings do universally share.¹⁷ Similarly, Lévi-Strauss describes all human behavior as subject to universal laws.¹⁸ The structuralist dichotomy between surface and deep structures is reminiscent of Freud's distinction between the manifest and latent content of dreams.¹⁹ In both the structuralist and the Freudian undertaking, the interpreter seeks a deep meaning by meticulous attention to the surface attributes, which represent a code, however difficult to decipher, for the underlying truth which it simultaneously leads to and disguises. The structuralist interpretive enterprise, like the Freudian, proceeds from the manifest content—parance, the text as it appears—to the latent content, or deep, underlying

in a structuralist undertaking in the 1920s in his classification of Russian folk tales. Propp has figured prominently in, among others, the writings, lectures and seminars of the structuralist academic Tzvetan Todorov. Perhaps less well known is Souriau, whose *LES DEUX CENT MILLE SITUATIONS DRAMATIQUES* developed a systematizing approach to literary phenomena. See ROBERT SCHOLES, *STRUCTURALISM IN LITERATURE* 50-51 (1977). Scholes also connects the structuralist (and, incidentally, deconstructionist) view of language as "the primary characteristic of human existence" to the nineteenth-century poets Shelley and Coleridge: "[T]here are important connections between romantic and structuralist views of language, and, indeed . . . we should not have a structuralism if we had not had a romanticism." *Id.* at 170. Scholes further asserts that a crucial shift in thinking about language took place between the middle of the seventeenth century and the end of the eighteenth Broadly speaking, it is a shift from an atomistic and ontological view of language (individual words representing things in reality) to a view that is contextual and epistemological (combinations of words representing mental processes). The latter view . . . operates . . . in romantic thought in general, and in all structuralist thinking about language. It is in fact the prevailing modern view of language.

Id. at 173.

¹⁷ See, e.g., NOAM CHOMSKY, *ESSAYS ON FORM AND INTERPRETATION* (1977); NOAM CHOMSKY, *LANGUAGE AND MIND* (1968); NOAM CHOMSKY, *STUDIES ON SEMANTICS IN GENERATIVE GRAMMAR* (1972); see also ROMAN JAKOBSON, *CHILD LANGUAGE APHASIA AND PHONOLOGICAL UNIVERSALS* 11 (1968).

¹⁸ See generally CLAUDE LÉVI-STRAUSS, *STRUCTURAL ANTHROPOLOGY* (Claire Jacobson & Brooke Grundfest Schoepf trans., 1963). Lévi-Strauss also discusses structural linguistics as consisting of the search for general, absolute laws. *Id.* at 33.

¹⁹ See SIGMUND FREUD, *INTERPRETATION OF DREAMS* (1950). Many structuralist and deconstructionist literary critics have a deep interest in Freudian analysis. The semiotician Julia Kristeva became an analyst, working simultaneously as analyst and literary theorist. Jacques Lacan, founder of the Société Française de Psychanalyse and director of the École Freudienne de Paris, has been influential in post-modernist literary criticism. See JACQUES DERRIDA, *OF GRAMMATOLOGY* lxii-lxiii (Gayatri Chakravorty Spivak trans., 1976) (1974), for the affinity between Derrida and Lacan.

meaning, to yield the literary truth through the application of structuralist methodology.

In Part A we have seen that structuralism introduced systematization and analytical rigor in textual criticism. Part B explores structuralist methodology and concludes that flaws of an absolutist and reductionistic nature offset structuralism's assets of systematization and analytical rigor. These flaws were to cause structuralist scholars to adopt deconstruction as a way of continuing to benefit from the high degree of systematization and analytical rigor introduced by structuralism while avoiding its negative attributes.

B. Structuralist Methodology

Structuralist methodology involves the categorization and perception of relations among units previously undifferentiated, thereby enriching the reader's understanding of the analyzed text. The fundamental unit for the literary structuralist is the sign. The Swiss linguist Ferdinand de Saussure originated the notion of the sign in his 1915 *Cours de linguistique générale*, defining it as comprising a signifier and a signified. The signifier is the word itself, the symbol of the concept it represents, while the signified is the concept represented. The signifier, the sound, look and appearance of the word, has a purely arbitrary connection to the signified: *i.e.*, the identical signified is represented by "chair" in one language and by "chaise" or "Stuhl" in another. It could equally well be designated by "zair" or any other signifier.²⁰ Saussure envisioned a systematic study of the interrelation of signs, which he called "semiology," to address the problematic of meaning by scientifically elucidating conventions which can be confused with, and blind one to, meaning.²¹

The point of departure for the structuralist enterprise of discovering literary meaning is the text from which the author and authorial intent have been banished as irrelevant.²² Every aspect of the text is subject to a minute scrutiny, syntactical, semantic and linguistic in nature. Relations which are parts of larger relations are studied as

²⁰ See FERDINAND DE SAUSSURE, *COURS DE LINGUISTIQUE GÉNÉRALE* 100 (1915).

²¹ SAUSSURE, *supra* note 20, at 33. The focus on the interrelation of units is fundamental to structuralist thought. See, e.g., LÉVI-STRAUSS, *supra* note 18, at 211 ("[T]he true constituent units of a myth are not the isolated relations but *bundles of such relations* and it is only as bundles that these relations can be put to use and combined so as to produce a meaning."); see also JAKOBSON, *supra* note 17, at 11 ("What is truly unifying are the relationships of foundation.").

²² See MICHAEL RIFFATERRE, *Problèmes d'analyse du style littéraire*, in *ESSAIS DE STYLISTIQUE STRUCTURALE* 95-112 (1971).

"microcontexts" in "macrocontexts."²³ Above all, literary structuralism aspires to scientific rigor so as to distance itself from pre-structuralist arbitrariness or impressionism: "*Elle se doit, sous peine de sombrer dans l'impressionisme, d'être formelle et structurale.*"²⁴

The "impressionism" to be avoided was, of course, the fluid, artistic literary simulation of pre-structuralist days, in which the indissoluble union of author and text precluded certainty in literary analysis by the inherently impossible attempt to read the author's mind. In the structuralist view, the author is no more than a figment of the critic's imagination which the critic then uses to formulate yet more interpretations, forgetting that the author is only a personal invention.²⁵ Thus, the text is the appropriate subject to study, in all its minutiae, from the devising of novel units to excruciatingly detailed play with permutations and rearrangements of the units. By limiting analysis to the textual, structuralism reifies literature, transforming it into a matter which can be wholly apprehended after dissection, and which, most importantly, is capable of being subjected to the rigors of scientific analysis.

The structuralist concept of intertextuality, however, allows structuralists an escape from a complete confinement to the text under scrutiny. Intertextuality, the interrelatedness of texts, allows the structuralist to incorporate external texts as part of the interpretive process with respect to any given text. In place of the unknowable inner thoughts of the author as an influence to be studied, structuralism indirectly allows for authorial influences by validating prior and contemporaneous writings which the author is likely to have read. Finally, structuralism devised the construct of an archreader, a hypothetical reader defined as possessing cumulative knowledge of all relevant textual-cultural influences contemporaneous to the time of the writing of the text.²⁶ While purely biographical information about the author remains excluded, the literary-cultural climate which the author brings to writing gains admission through the dual fictions of intertextuality and the archreader.²⁷

²³ See *id.* at 68-91.

²⁴ "It owes itself, under penalty of sinking into impressionism, to be formal and structural." *Id.* at 112 (my translation).

²⁵ See, e.g., *id.* at 121 (my translation) ("[W]e use this imaginary construct—the creator at work—to allow ourselves to formulate other interpretations, often forgetting, however, that the author is of our own invention.").

²⁶ This reader, known in French as "*l'architecteur*," has generally been called a "superreader" in English. In my opinion, however, the normative connotations of "super" make "superreader" an inaccurate translation of "*architecteur*," whose primary connotation is quantitative in nature. I therefore use "archreader" to designate "*architecteur*."

²⁷ Although, for the reasons set forth in the following pages, it is my opinion that the

The use of intertextuality and of the archreader mitigates the excesses of structuralism's formalism by validating the influence of prior and contemporaneous texts on the reading of the particular text under scrutiny. The creation of the archreader and intertextuality represents an unavowed acknowledgment of the failure of the scientific approach to literary analysis, however, for it signals that reliance on methodology alone fails to fully illuminate texts. The formulaic categorizations fail to capture literary works.²⁸

In my opinion, the greatest flaw of structuralism in literary analysis is its inherent suggestion of formulaic accuracy, when in fact the value of its application (*i.e.*, the extent to which a text is elucidated through structuralist interpretation) is inseparable from, and dependent on, the skill of the interpreter. Robert Scholes has noted this problem in the context of the disagreement between two great literary structuralists, Michael Riffaterre and Roman Jakobson, concerning the correct interpretation of Baudelaire's "les Chats." Scholes rightly concludes that the superiority of Riffaterre's interpretation does not reflect a better developed theoretical framework but, rather, a superior individual reading.²⁹

constructs of the archreader and intertextuality ultimately signal the failure of the structuralist premise of the ascertainability of truth with respect to literary meaning, it should be remembered that both intertextuality and the archreader are proper to structuralism's focus on relations among units. As Culler has noted, "[s]tructuralists refuse . . . to treat terms as independent entities . . . [and] insist . . . on the primacy of relations between terms." Culler, *supra* note 14, at 22-23; see also SCHOLES, *supra* note 16, at 4 ("Structuralism is a way of looking for reality not in individual things but in the relationships among them."). In this respect, structuralism, like deconstruction, is semiotic in its approach, for the semiotician derives meaning from all possible relations among words.

For a critical view of structuralism as flawed by a conception of linguistic relations based on word units, see RICHARD HARLAND, *BEYOND SUPERSTRUCTURALISM* (1993).

²⁸ Scholes notes in particular that "[a]ll of the attempts of structuralists to derive narrative form from logical categories emptied of semantic content have proved fruitless." SCHOLES, *supra* note 16, at 102.

²⁹ *Id.* at 32. For the Riffaterre/Jakobson debate, see Roman Jakobson & Claude Lévi-Strauss, *Charles Baudelaire's "les Chats" in 2 L'HOMME* 5-21 (1962); Michael Riffaterre, *Poetic Structures: Two Approaches to "les Chats," in STRUCTURALISM* 188-230 (Jacques Ehrmann ed., 1970). In my own experience as a student of Riffaterre, his structuralist interpretations were overwhelmingly persuasive and illuminating, each meticulously reasoned step inexorably leading, in conjunction with all of the others, to the often wholly unexpected deep meaning of the literary text. One had the feeling of reading well-known texts for the first time, of understanding thoroughly and absolutely a palimpsest, entirely new and yet inextricably linked to the familiar surface text. To listen to a presentation by Riffaterre was to become a confirmed believer in structuralism as the methodological key to literary meaning. Colleagues of Riffaterre, however, although equally enthusiastic proponents of structuralist methodology, often interpreted texts in an unenlightening and predictable manner. The difference, again, lay in the incomparably vaster literary and cultural knowledge which Riffaterre *qua* individual reader brought to his interpretive undertakings.

The structuralist problem is that structuralism's claim to *validity* relies on the presumed accuracy of its methodology as the conduit to the single, correct textual interpretation. If the tenets of structuralism are correct, then a dispute as to methodological differences should yield one correct and one incorrect literary interpretation. The Jakobson-Riffaterre conflict is distressing because the methodological frameworks under dispute ultimately appear less relevant to the better interpretation of Baudelaire's work than the individual, irreproducible talents and cultural equipment of the individual interpreters.³⁰ In scientific terms, the problem is not that the application of mathematical formulae yields a more brilliant proof by the mathematician with the more inventive and insightful theorem, but, rather, that, in structuralism, hypothesis and theorem are not linked by a proof at all. In mathematics, such a situation would mean that only hypothesis existed. Structuralism's claimed equivalents to proofs and theorems are thus compromised.

In scientific terms, structuralism in literature suffers from the absence of a control to validate its results.³¹ In structuralism, the only tangible is the literary text which triggers the analysis in the first place. It cannot validate conclusions in any scientific manner. Confirmation of the methodologically-reached interpretation can be derived only from the intuitive sense of the reader that the true meaning has been uncovered.³²

³⁰ Adolf Grünbaum has suggested a similar flaw in psychoanalysis, ascribing its benefits to the therapist's "special vocabulary . . . knowledgeable manner, and the therapist's charisma," rather than to valid attributes of the theory. ADOLF GRÜNBAUM, *THE FOUNDATIONS OF PSYCHOANALYSIS: A PHILOSOPHICAL CRITIQUE* 161 (1984).

³¹ Although Freud's work has been subject to similar criticism by hermeneuticists such as Paul Ricoeur and Jürgen Habermas, Adolf Grünbaum compellingly argues that Freud was correct in categorizing psychoanalysis as a natural science. Grünbaum concludes, however, that epistemic flaws in the psychoanalytic method leave Freud's hypotheses unverified (but not unverifiable). See *id.* For an excellent discussion of the lack of causal connection in Freud's work, and the difference between causal connection and thematic kinship, see Adolf Grünbaum, "Meaning" *Connections and Causal Connections in the Human Sciences: The Poverty of Hermeneutic Philosophy*, 38 J. AM. PSYCHOANALYTIC ASS'N 559 (1989). For a discussion of the role of intuition in scientific discoveries, see VICTOR WEISSKOPF, *THE JOY OF INSIGHT: PASSIONS OF A PHYSICIST* (1991).

³² There is a difference of opinion as to whether literary structuralists admit to the possibility of more than one valid interpretation of a literary text. Here I disagree with Scholes, who interprets structuralist theory as allowing for multiple valid interpretations. See *supra* note 16. In my opinion, the significance of the concepts of "*convergence*" and "*surdetermination*" ("overdetermination"), essential to literary structuralism, is that, cumulatively, the myriad elements of the structuralist analysis must converge to yield one meaning, the sole true underlying meaning of the text, compelled by the text under scrutiny when it is analyzed correctly. See RIFFATERRE, *supra* note 22; MICHAEL RIFFATERRE, *SEMIOTICS OF POETRY* (1978). The philosophical implication of such a methodology is, clearly, the knowability of truth.

The merit of structuralism is the development of novel classifications of literary discourse, successfully transforming literary criticism from ambling, evocative, pseudo-literature into a systematic methodology, which, when applied by an interpreter of creativity and insight, can produce an enriched and enlightening understanding of texts.

The flaw of structuralism is in making excessive claims. The meaning of literary texts is not as absolute as structuralism would suggest. The reader is not the pawn of the text, coerced, by means of latent discursive mechanisms, to a single reading. A structuralist might reply that the Riffaterrean archreader, that repository of the cumulative knowledge of the period in which the text was written, solves the problem of readers with varying degrees of literary familiarity. Since, however, the archreader is a hypothetical construct, the attainment of the single, overdetermined meaning derived from structuralist methodology becomes an exercise in futility, with the corollary that literary meaning ultimately is unascertainable and necessarily unverifiable.

In this section we have examined the positive and negative attributes of structuralist theory. In the next section, we will establish that deconstruction was perceived as perpetuating structuralism's positive qualities and avoiding its flaws.

Studying deconstruction's structuralist roots permits one to better appreciate deconstruction on the one hand as a reaction against absolutism rather than as a rejection of meaning or a denial of the existence of truth, and, on the other hand, as a methodology for interpreting texts, for which it was adopted in the United States, rather than as a philosophy.³³

III. DECONSTRUCTION AND ITS METHODOLOGICAL IMPLICATIONS

Structuralism sought to displace the study of literature from the purely humanistic to the scientific. One of the greatest ironies of current criticism of deconstruction is that deconstruction is accused of being unscientific and antiscientific. In fact, the methodological approach of deconstruction is as scientific in rigor and logic as that of structuralism, and distinguishes both theories from previous literary criticism. By adopting the attributes of scientific discourse, structuralist literary criticism acquired a newly-found seriousness and entered the ranks of the other structuralist fields considered by most scholars to be sciences; namely, linguistics and anthropology.³⁴

³³ For the significance of the methodology/philosophy distinction see *infra* notes 42-61 and accompanying text.

³⁴ This may indeed have been one of the attractions of structuralism to émigré scholars chagrined at the relatively lower value accorded by American society to literature and literary

The deconstructionist technique is similar. It involves intense scrutiny of all textual elements, including a study of textual presences by the evocation of textual absences. It also involves the derivation of meaning through the opposition of textual components to non-textual equivalents which the actual text displaced and whose presence is evoked through their differentiation from the signs selected by the author for textual presence.³⁵ The deconstructionist enterprise differs from the structuralist's in that deconstruction allows for more than

scholars. French or French-trained academics predominated among the original structuralists and deconstructionists in the United States. Significantly, as Alice Kaplan has indicated, "[i]n French the adjective '*scientifique*' is often applied to literary research." ALICE KAPLAN, *FRENCH LESSONS* 121 (1993). For an interesting analogy in legal education, see ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s* (1983), and Myron Moskovitz, *Beyond the Case Method: It's Time to Teach with Problems*, 42 J. LEGAL EDUC. 241, 242 (1992) (explaining the adoption of the case method as a means of introducing the "scientific method" into legal education and thereby upgrading what was, before 1870, legal education's "second-class status in the university community."). See also Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983). For a discussion of larger societal motivations to scientize the law, see MORTON J. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* (1977). For a discussion of the validation of science in Western philosophy and attendant efforts to scientize, see TOM SORELL, *SCIENTISM: PHILOSOPHY AND THE INFATUATION WITH SCIENCE* (1991).

³⁵ As Merleau-Ponty has explained, according to Saussure:

taken singly, signs do not specify anything, and . . . each one of them does not so much express a meaning as mark a divergence of meaning between itself and other signs. Since the same can be said for all other signs, we may conclude that language is made up of differences without terms; or more exactly, that the terms of language are engendered only by the differences which appear among them.

MAURICE MERLEAU-PONTY, *SIGNS* 39 (Richard C. McCleary trans., 1964). For a compelling demonstration of the importance of absence (the subtextual corollary of the primordial "difference"), see Balkin, *supra* note 7, at 746 (noting Derrida's dissatisfaction with Western philosophy for being biased towards "a metaphysics of presence"). See also GEORGE STEINER, *REAL PRESENCES* 122 (1989) (describing absence as deconstruction's "counter-theology").

Structuralism's and deconstruction's debts to Saussure are clearly reflected in the significance which both attribute to the derivation of meaning through difference and absence. According to Saussure, meaning results from both syntagmatic and paradigmatic relations (*i.e.*, the horizontal relations of signs resulting from their position within a group (syntagmatic), and the vertical relations of textual signs to words which, although unexpressed, are evoked by relations such as synonymy or antonymy to unexpressed signs, often with contrasting connotations (paradigmatic)). See SAUSSURE, *supra* note 20, at 170-75. Existentialist philosophy similarly portrays the interdependence of absence and presence, defining each in terms of the other. This concept is developed in *L'ÊTRE ET LE NÉANT*, in which Sartre also presents Heidegger's, Hegel's and Husserl's related theories. JEAN-PAUL SARTRE, *L'ÊTRE ET LE NÉANT* 288-310 (1947). Balkin demonstrates a similarity of approach in Hohfeld, whom he views as the first legal semiotician. See J.M. Balkin, *The Hohfeldian Approach to Law and Semiotics*, 44 U. MIAMI L. REV. 1119 (1990).

For further discussion of the connection between deconstruction and structuralism, see JONATHAN CULLER, *ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM* (1982). Culler goes so far as to conclude that "[a] scrupulous discussion of criticism focusing on the difference between structuralism and post-structuralism would have to conclude that structuralists generally resemble post-structuralists more closely than many post-structuralists resemble one another." *Id.* at 30.

one valid textual interpretation. While structuralist interpretation reveals the immense complexity of textual analysis through the scrutiny of myriad elements of signification, the structuralist interpretation differs from the deconstructionist in that the former yields only one viable interpretation. Where structuralism devalorizes the non-textual, deconstruction valorizes the reader's contribution *qua* interpreter in creating the interpretation from the point of departure of the multitude of relations of signification engendered by the text.³⁶ Both structuralism and deconstruction eschew authorial intention; but, where structuralism views relevant context as finite, deconstruction views it as boundless. Where structuralists believe that their methodology yields the truth of the text, deconstructionists believe that their analysis yields a meaning which is interpretive in nature. Where structuralism puts the self outside of the text, deconstruction places the self within it.³⁷

Where structuralist interpretation yields an absolutist result, deconstructionist analysis constitutes a refusal of absolutism. It is not in scrutinizing and unearthing previously unperceived contradictions that deconstruction differs from structuralism; it is, rather, in announcing the coexistence of contradiction at both the surface and the deep levels of texts. Thus, while the structuralist objective of uncovering the text's underlying meaning through the application of structuralist methodology implies the accessibility of truth,³⁸ the deconstructionist focus on inherent contradiction and paradox does not. Deconstruction does not take a position as to whether truth exists. It is, rather, a dialectical movement.³⁹

³⁶ This does not imply, however, that deconstruction focuses its analytical scrutiny randomly. See *infra* note 48 and accompanying text.

³⁷ See Pierre Schlag, "Le Hors de Texte C'est Moi" *The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO L. REV. 1631, 1640-47 (1990) (arguing that to do otherwise is to decimate deconstruction). I do not agree, however, with Schlag's more general view of deconstruction as far more than an interpretive methodology.

³⁸ The idea was perhaps best expressed by Lévi-Strauss, describing the structuralist enterprise as "an internal cohesion . . . inaccessible if one observes an isolated system, [which] reveals itself in the study of transformations, thanks to which one finds similar attributes in systems which appear to be different." CLAUDE LÉVI-STRAUSS, LEÇON INAUGURALE 27 (1965) (my translation). See also TZVETAN TODOROV, GRAMMAIRE DU DÉCAMÉRON 15 (1959), for the concept of a universal grammar which underlies all language because it is in accordance with the structure of the universe. See also CULLER, *supra* note 35, at 22 ("Structuralists are convinced that systematic knowledge is possible; post-structuralists claim to know only the impossibility of this knowledge."); SCHOLES, *supra* note 16, at 2 (characterizing structuralism as "a response to the need . . . for a 'coherent system' that would unite the modern sciences and make the world habitable for man again.").

³⁹ See Derrida, *supra* note 4, at 931 ("This questioning of foundation is neither foundationalist nor anti-foundationalist.").

Derrida's writings are sufficiently varied and elusive to provide some apparent textual support for the view that deconstruction is antifoundationalist. My conclusion that deconstruction is not antifoundationalist similarly derives from Derrida's writings. I also base my conclusion on my view that deconstruction's entry into American intellectual thought as structuralism's successor puts into historical perspective deconstruction's most significant contribution to both literary and legal analysis: its dual renunciation of structuralism's reductionistic premises of (1) the existence and ascertainability of only one correct textual interpretation; and (2) the devalorization and exclusion of the non-textual.⁴⁰

The admission of not having penetrated to an ultimate truth has been endemic to scientific progress:

Previously the urge for an understanding of the world in which we live met with general mythological, religious, and philosophical ideas that delivered "holistic" answers to . . . fundamental questions . . . The answers were directed at the totality of phenomena, attempting to account for everything.

Then, a few centuries ago, human curiosity took a different turn . . . General questions were . . . replaced by limited ones. However, detailed answers created a framework for the understanding of more general questions. Only a renunciation of immediate contact with the "one and absolute truth," only endless detours through the diversity of experience allowed the methods of science to become more fundamental.⁴¹

The controversy as to whether deconstruction renounces absolutism or whether it denies the existence of truth depends on the resolution of another issue: whether deconstruction is a methodology or a philosophy. Although the concepts of methodology and philosophy cannot be separated in a mathematical manner as if they were distinct sets, devoid of points of intersection,⁴² I believe that deconstruction is

⁴⁰ For the contrary view that structuralism is not reductive, see SCHOLES, *supra* note 16, at 41. My use of "non-textual" here is the traditional one, not the deconstructionist usage embracing everything within the concept of text; pursuant to the latter usage, one could say that deconstruction also excludes the non-textual, since everything is text. Cf. DERRIDA, *supra* note 19, at 163 (my translation) ("*Il n'y a pas de hors-texte*"—"There is nothing outside of the text.").

⁴¹ WEISSKOPF, *supra* note 31, at 314.

⁴² This view has been criticized by those who believe that the two are entirely separable. "Men like Jean Piaget and Roland Barthes insist that structuralism is an activity or a method, not an ideology." SCHOLES, *supra* note 16, at 197. On the whole, I agree with Piaget and Barthes inasmuch as the *appropriate relevance* of both structuralism and deconstruction is concerned. I

a methodology and that its ideological or philosophical implications appropriately extend to a debunking of absolutism, and, equally appropriately, apply to nonscientific fields, but that deconstruction does not deny the existence of truths or the value of logocentrism, which, moreover, it adopts in its own discourse.⁴³

The debate often has been framed in misleading terms by deconstruction's critics, as well as by its antifoundationalist proponents, in that the existence of philosophical implications need not imply a universal applicability to those implications. Owen Fiss premises his criticism of deconstruction as nihilistic on deconstruction's universality of application.⁴⁴ The view that deconstruction's application to legal interpretation can be equated with a nihilistic denial of the possibility of truth incorrectly assumes that the legal field, like the natural sciences, is amenable to verifiable conclusions. Fiss contrasts literature and law, stating that deconstructionist analysis is appropriate only for literature.⁴⁵ Rather, deconstruction *qua* methodology (albeit methodology with philosophical implications) applies to both law and literature because it introduces a logocentric rigor helpful to the elucidation

disagree, however, in that both methodologies are to some extent inseparable from ideological or philosophical implications.

⁴³ I am not alone in this view, although it is hotly contested by deconstruction's critics in the legal field (as well as by some of its antifoundationalist proponents in the legal field). See Balkin, *supra* note 7, at 745-46 ("Derrida and his followers insist that deconstruction is not a philosophical position but rather a practice."). Balkin further notes that "[d]econstruction is . . . an activity of reading which remains closely tied to the texts it interrogates, and which can never set up independently as a self-enclosed system of operative concepts." *Id.* (quoting CHRISTOPHER NORRIS, *DECONSTRUCTION: THEORY AND PRACTICE* 31 (1982)); see also Steven L. Winter, "Bull Durham" and the Uses of Theory, 42 STAN. L. REV. 639 (1990). Pierre Schlag, one of deconstruction's antifoundationalist proponents who disagrees with this view, has written that "[t]he error here is the homogenization and neutralization of the *different subversiveness* of deconstruction through its assimilation with approaches that have already been reduced to the status of mere *theories, techniques, methods*, etc." Schlag, *supra* note 37, at 1657. Even Schlag, however, comes close to acknowledging the logocentrism of deconstructionist discourse: "Derridean deconstruction is a participation in the philosophical enterprise; Derrida writes in a manner cognizable by the discipline of philosophy . . ." *Id.* at 1650. Elsewhere, however, Schlag maintains that the use of logocentrism by postmodernists does not constitute an endorsement, and implies that it need not undermine anti-logocentrism: "Postmodernists are quite likely to take the demonstration of a paradox in their text as in and of itself evidence of weakness or flaw." Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167, 174 n.18 (1990). To borrow nomenclature from Lehman, Schlag is a "hard-core deconstructionist," while Balkin and I are "soft-core deconstructionists." LEHMAN, *supra* note 3, at 118.

⁴⁴ See Owen Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

⁴⁵ See *id.*; see also RICHARD POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 215 (1988) ("The relevance of all this for the law is obscure . . . the purposes and techniques of authors of literary texts are different from those of the authors of legal texts.") (quoted in Schlag, *supra* note 37, at 1636 n.10).

of fields like literature, law, and the social sciences, by producing conclusions in those areas that elude scientific verification.⁴⁶

Where the meaning or content of the terms of a conceptual opposition is in flux, or not fully determined, it is possible to discover within each term possible versions or interpretations of that term that bear similarities to the principles associated with the opposite term. Since legal, ethical, and political concepts have this contestable and incomplete character, it is

Winter discusses the increasing use in legal analysis of ideas from other disciplines as symptomatic of our being in a time of crisis: "At such times [of crisis], the most useful strategy will be to look outside one's interpretive community for models and schemes that might help reconceptualize the problems that have proven recalcitrant to the old paradigm." Winter, *supra* note 43, at 679. My own view is that the tremendous surge in interdisciplinary scholarship reflects the mammoth strides in knowledge of the modern era which, in turn, have elucidated previously unrecognized connections among various disciplines, obfuscating disciplinary distinctions.

⁴⁶ Niels Bohr's concept of complementarity is apposite here. As recorded by Victor Weisskopf, an MIT physicist and former colleague of Bohr's, Bohr originally used the term "complementarity" for the apparent contradiction between two mutually exclusive properties of an electron (wave and particle) which the electron nevertheless displayed under varying conditions. Bohr then "generalized the idea of complementarity to fields of human experience outside of physics, such as ethics, music, art, and religion," signalling "the importance of different, even seemingly contradictory avenues to human experience." WEISSKOPF, *supra* note 31, at 66. Weisskopf concludes that

[e]ach complementary approach has a specific kind of discourse: it appears lucid and concise within its own intrinsic scale of values but fragile and indefinite when judged by the peculiar requirements of a complementary approach We must use them all to understand the full significance of our experience. Unfortunately, most people resist the complementary view of things. There is a trend toward clear-cut, universally valid answers, excluding different approaches.

Id. at 326 (emphasis added). Although the Bohr-Weisskopf approach bears a superficial resemblance to Rorty's idea of multiple discourses, see, e.g., RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979), Rorty, unlike Weisskopf, reduces reason itself to a mere social phenomenon. For an overview of the applicability of Rorty's theory to legal discourse, see John Stick, *Can Nihilism Be Pragmatic*, 100 HARV. L. REV. 332 (1986).

See also Jack M. Balkin, *Nested Oppositions*, 99 YALE L.J. 1669, 1672-73 (1990) (book review), for an excellent discussion of the distinction between conceptual opposition and logical contradiction, refuting the accusation by John Ellis in *AGAINST DECONSTRUCTION* (1989) that a deconstructionist claim of a simultaneous "neither P or not-P" and "P and not-P" constitutes a defiance of traditional logic and an abandonment of logocentrism. As Balkin shows, the above proposition no longer contains a logical contradiction if P signifies properties whose significance is derived from relations of similarity and difference—i.e., whose significance is contextual. Balkin, *supra*, at 1672-78. I am grateful to Steven Winter for suggesting to me the relevance of work in cognitive psychology; in particular, George Lakoff's *Women, Fire and Dangerous Things*, which debunks "the view of reason as the disembodied manipulation of symbols[.]" and proposes a shift from the classical view of categories to a prototype theory of categories arising out of human biological capacities, experience and imagination. GEORGE LAKOFF, *WOMEN, FIRE AND DANGEROUS THINGS* 8 (1987). Lakoff's results echo those of deconstruction: "[N]ot chaos, but an expanded perspective on human reason, one which by no means requires imprecision or vagueness in scientific inquiry." *Id.* at 11.

often possible to discover traces of their opposites in disputes over their meaning and interpretation.⁴⁷

American legal scholars who oppose the use of deconstruction view deconstructionist methodology as random in application: *i.e.*, as being applied to any legal text for no reason other than to debunk and destroy, rather than as focused on texts for discernible reasons generated by textual attributes.

Derrida has made clear that deconstruction is applied in response to textual components: "[Deconstruction is an] incision, precisely [because] it can be made only according to lines of force and forces of rupture that are localizable in the discourse to be deconstructed."⁴⁸ Moreover, in his keynote speech at the 1990 "Deconstruction and the Possibility of Justice" colloquium at Cardozo Law School, Derrida again made clear that the deconstructionist exploration of meaning through hierarchy reversal is not imposed randomly, but, rather, on those word combinations whose juxtapositions draw the attention of the deconstructionist to the likelihood of rich interpretive possibilities.⁴⁹

⁴⁷ Balkin, *supra* note 46, at 1685. See also Arthur Allen Leff, *The Leff Dictionary of Law: A Fragment*, 94 YALE L.J. 1855, 2016 (1985), where Leff writes the following:

First, it is a fundamental tenet of most systems of justice that identical things be treated identically Second, there is no such thing as an identical thing; everything is what it is and not something else. Hence a large part of doing justice consists of trying to treat "similar" things, *i.e.*, things "essentially," or "really" identical the same, *i.e.*, in analogizing one thing to another such that they should be treated *as if* they were "the same."

But what "counts" in the way of similarity or difference? There is always *some* similarity and *some* difference *When* is something so like something else that it should be treated the same, or so unlike that it should not. The key answer is that there is no simple "logical" or "linguistic" answer, no general set of classificatory criteria for making these decisions.

⁴⁸ JACQUES DERRIDA, POSITIONS 41 (1981). Balkin characterizes this attribute of deconstruction as invariably "parasitic on some form of logocentric practice." J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613, 1629 (1990). Balkin's view of deconstruction, like mine, is of "an analytic tool." Balkin, *supra* note 7, at 786.

⁴⁹ Derrida, *supra* note 4, at 939; *see also* DERRIDA, *supra* note 19, at 158 (discussing the necessity of reading in accordance with the "classical exigencies" as the "task of reading"). Thus, for example, in explicating Montaigne, Derrida focuses on the unusual phrase "legitimate fiction" in Montaigne's statement that "our law even has, it is said, legitimate fictions on which it bases the truth of its justice" precisely because the unexpectedness of the juxtaposition of legitimacy and fiction suggest the "line of rupture" which signals to the deconstructionist that critical reading may yield a signifying structure which is not immediately apparent. Derrida, *supra* note 4, at 939 (my translation); *see* DERRIDA, *supra* note 19, at lxxv:

If in the process of deciphering a text in the traditional way we come across a word that seems to harbor an unresolvable contradiction, and by virtue of being *one* word is made sometimes to work in one way and sometimes in another and thus is made to point away from the absence of a unified meaning, we shall catch at that word. If a metaphor seems to suppress its implications, we shall catch at that metaphor.

Derrida unequivocally affirms that law is deconstructible. His reasoning underlines those aspects of law which differentiate it from the natural sciences: "because it is founded on interpretable and transformable textual strata . . . because its ultimate foundation is by definition unfounded."⁵⁰ Thus, it is clear that *not* everything is deconstructible, and that the deconstructionist does not approach a text unless textual components suggest a latent, unperceived correlation between its surface components and its meaning.⁵¹

Equally fallacious is the accusation that deconstruction valorizes all interpretations.⁵² Derrida states that the interpretive process "cannot be executed however one wishes," and that it must follow "protocols of reading."⁵³ Derrida cautions that a failure to respect the "classical exigencies" [which form the "task of reading"] would be valueless because "*critical production would risk developing in any direction at all and authorize itself to say almost anything.*"⁵⁴ Thus, deconstruction's departure from structuralism in validating multiple interpretations does not mean that it sanctions all interpretations, since the text engenders only a certain (or perhaps, rather, uncertain) number of valid interpretations, and since, according to Derrida, "our reading must be intrinsic and remain within the text."⁵⁵

We shall follow its adventures through the text and see the text coming undone as a structure of concealment, revealing its self-transgression, its undecidability.

See also Balkin, *supra* note 7, at 443-44, for the principle that deconstruction is "not simply a fancy way of sticking out your tongue" or a "trashing," but, rather, a method of "teasing out the hidden antinomies in our language and thought."

⁵⁰ Derrida, *supra* note 4, at 943-44. In the same passage, Derrida also refers to "the history of law" as law's "possible and necessary transformation [and] sometimes its amelioration." *Id.*; see also Steven L. Winter, *For What It's Worth*, 26 LAW & SOC'Y REV. 789, 811 (1992) (deconstruction supports undecidability rather than indeterminacy).

Hart defined "the great anomaly of legal language [as] our inability to define its crucial words in terms of ordinary factual counterparts." HERBERT LIONEL ADOLPHUS HART, *DEFINITION AND THEORY IN JURISPRUDENCE* 7-8 (1953). It should be noted that Hart was a formalist who did not view this non-referentiality of legal discourse as emanating from a socio-political context but, rather, considered it part of a self-referential system. My favorite critic of deconstruction, however, is the non-lawyer, George Steiner, who writes that "[d]econstruction can be defined as an elaboration on Gertrude Stein's *boutade*: 'There's no there there.'" STEINER, *supra* note 35, at 121.

⁵¹ See also J.M. Balkin, *Transcendental Deconstruction, Transcendent Justice*, 92 MICH. L. REV. 1131, 1144 (1994) ("[E]very good deconstructor picks his targets carefully."); STEINER, *supra* note 35, at 929 ("[I]t was normal, foreseeable, desirable that studies of deconstructive style should culminate in the problematic of law (*droit*), of law and justice [I]t is even the most proper place for them [*i.e.*, deconstructive studies].").

⁵² See, e.g., Austin, *supra* note 8, at 233, for the criticism that deconstruction undermines stability because "whatever a reader says is 'correct.'"

⁵³ DERRIDA, *supra* note 48, at 63.

⁵⁴ DERRIDA, *supra* note 19, at 158 (emphasis added); see also JACQUES DERRIDA, *LIMITED, INC.* 144-45 (S. Weber trans., 1988) ("I have never accepted saying . . . just anything at all.").

⁵⁵ DERRIDA, *supra* note 19, at 159. The lapse in logic of deconstruction's critics in claiming that deconstruction's valorization of multiple interpretations is an indiscriminate valorization of

Although criticism of deconstruction frequently dwells on its alleged antifoundationalism, the very critics who condemn antifoundationalism call for a repudiation of deconstruction on grounds unrelated to deconstruction's validity.

Thus, Hegland argues that "our world would be made worse if we all came to believe that the Rule of Law is illusion."⁵⁶ And Fiss, equating deconstruction with nihilism, argues that "it threatens our social existence and the nature of public life as we know it in America; and it demeans our lives."⁵⁷ The argument against deconstruction is, thus, that it is undesirable, not that it is invalid, and the proponents of foundationalism eschew logocentric debate as to deconstruction's validity while simultaneously advocating that deconstruction be shunned for its own alleged failure to adhere to foundationalist precepts.

Fiss argues that deconstructionists interpret the Constitution as having no meaning: "The roots of this alternative version of nihilism are not clear to me, but its significance is unmistakable. The great public text of modern America, the Constitution, would be drained of meaning."⁵⁸ Fiss incorrectly equates multiple valid interpretations (which a deconstructionist analysis does yield) with meaninglessness. He also incorrectly interprets deconstruction as conferring unlimited freedom on the interpreter to fabricate any meaning whatsoever.⁵⁹ Rather, deconstruction is an interpretive process carefully applied to texts at their "points of rupture," where textual elements, either express or evoked, trigger the deconstructive analysis; nor, as we have seen, are all meanings equally valid.⁶⁰

all interpretations seems too egregious to require formal refutation. See Rolando Gaete, *Herme-neutical Popperism and the Play of Justice*, 20 REVUE INTERNATIONALE DE SÉMIOTIQUE JURIDIQUE 115, 120 (1994), for the view that, according to Derrida, "there is a threshold of truth beyond which interpretations become excessive." Gaete suggests that the threshold is crossed when an interpretation addresses elements of a text but renders other parts incoherent. He cites Eco's use of an example of bad reading, taken from Borges: "[W]hy not read Kempis' IMITATION OF CHRIST as if it were written by Céline? Because this kind of reading 'offers a suitable "grid" for very few sentences of the IMITATION' while reading the book according to Christian medieval codes makes it fully coherent." *Id.* at 119 (quoting UMBERTO ECO, *THE LIMITS OF INTERPRETATION* 59-60 (1990)).

⁵⁶ Hegland, *supra* note 7, at 1205.

⁵⁷ Fiss, *supra* note 44, at 763.

⁵⁸ *Id.*

⁵⁹ See *id.* at 744.

⁶⁰ See Gary Minda, *Jurisprudence at Century's End*, 43 J. LEGAL EDUC. 27 (1993), for the argument that the dialogue between adherents of traditional and postmodernist jurisprudential approaches will lead to new insights in jurisprudential theory. The deconstructionist fascination with the interplay of words and their multiplicity of meanings has inspired analogies to play. See MICHEL VAN DE KERCHOVE & FRANÇOIS OST, *LE DROIT OU LES PARADOXES DU JEU* (1992); François Ost, *Entre Ordre et désordre: le jeu du droit*, 31 ARCHIVES DE PHILOSOPHIE DU DROIT 133 (1986).

Deconstruction's critics have jumped from the Saussurian premise that language is fluid and inconstant to the conclusion that, for the deconstructionist, it is pointless to search for meaning. The deconstructive approach, however, elucidates the oppositions embedded within propositions. The text becomes a fertile terrain, yielding meaning and more meaning and requiring the interpreter to accommodate incompatible elements of signification. None of this, however, implies an absence of meaning.⁶¹

A still larger historical perspective is necessary for a full appraisal of deconstruction's character as stopping short of antifoundationalism and its role in Western, and, more particularly, French, intellectual tradition despite its focus on antinomy. Deconstruction is a post-World War II phenomenon which signals the end of the Enlightenment belief that human civilization is perfectible through scientific advancement and the progressive acquisition of knowledge. The next section explores deconstruction as symbolizing the end of the Enlightenment and rejects the view of critics that deconstruction is defeatist or nihilistic. Rather, deconstruction illuminates the lack of reliable foundations to our jurisprudential system, a situation which both poses a challenge to the legitimacy of adjudication and implies that the perpetuation of our system is uncertain and insecure.

IV. DECONSTRUCTION AND THE RULE OF LAW

The lesson of Hitler's extermination camps and Stalin's gulag was that the century's enormous advances in knowledge, once envisioned as the underpinnings of an ever more civilized social order, at best had proved irrelevant in preventing human barbarity and carnage of an unprecedented scale, and, at worst, had been subverted to purposes of torture and slaughter.

Deconstruction in essence incorporates nonlinearity into its vision of human progression. Building on the anterior foundations of Freudianism and existentialism, deconstruction represents the acknowledg-

Gaete demonstrates, however, that viewing the interpretation of legal discourse as play does not undermine either the seriousness of the enterprise or its rule-based character. See Gaete, *supra* note 55.

⁶¹ Indeed, "[a]lthough he is often accused of being an apostle of meaningless, what is truly disturbing about Derrida is that he finds *too much* meaning . . ." Stephens, *supra* note 4, at 24. Winter suggests that "[f]rom a postmodern[ist] perspective, the predicament is not that there are no foundations but that there are too many . . . It is the resulting profusion of meaning . . . that leads to the problems of interpretability and undecidability so emphasized by postmodernists." Steven L. Winter, *Human Values in a Postmodern World*, 6 YALE J.L. & HUMAN. (forthcoming 1994).

ment that humankind must rely on itself for advances in civilization, but that, when we fail to apply painstaking scrutiny to surface phenomena, we do so at the peril of blindness to prevarications which may be embedded within propositions. Deconstruction is not synonymous with either nihilism or despair; rather, it is the response of the lucid thinker in the latter half of the twentieth century to the challenge of social progress in a world which only recently emerged from the totalitarian yoke and which still must find its way under the threat of nuclear extinction.⁶²

To say that deconstruction promulgates despair is akin to saying that Picasso's *Guernica* and Schönberg's atonal music promulgate dissonance and cacophony, or that Ionesco's theater and Robbe-Grillet's novels promote absurdity and chaos. Modern intellectual and artistic movements are not a battle against hope, progress and beauty. Rather, they represent reality as it is perceived in our time, lacking in inherent harmony, order and predictability. Deconstructionists do not renounce hopes of justice and civilization; they engage in the task of seeking to reach truth without accepting surface representations in place of reality, an undertaking suited to advancing those goals. In highlighting internal paradoxes and the complexity of subtextual messages, deconstruction reveals the extent to which meaning is complicated and varied and the concomitant need for skepticism in the face of those who claim to possess truth.⁶³

⁶² For a more thorough response to the accusation that deconstruction is a philosophy of despair, see *infra* part IV. For the view of modernity as haunted by the holocaust, see VLADIMIR JANKÉLÉVITCH & BÉATRICE BERLOWITZ, *QUELQUE PART DANS L'INACHEVÉ* 67 (1978) (my translation):

In fact the extermination of six million Jews is the invisible bad conscience of all of modernity: it weighs on all of our contemporaries like an overwhelming secret, whether or not they be aware of it and even if they feel no remorse for it . . . Those who deny that nameless thing or who simulate speaking of other things, those who do not think of it, even those who rejoice about it, if such a kind exists, they are all inhabited by the unavowable secret.

See also RICHARD WEISBERG, *POETHICS: AND OTHER STRATEGIES OF LAW AND LITERATURE* 145 (1992) (eschewing the term "postmodern" in favor of "post-Holocaust," stating the latter to be "a term I prefer to postmodern"). See David Suchoff, *Introduction* to ALAIN FINKIELKRAUT, *THE IMAGINARY JEW* xvii (Kevin O'Neill & David Suchoff trans., 1994) (1980), for

the underlying sense that an absent presence—the Holocaust as ruptural yet unspoken force—stands behind the proliferating images and discourses of postwar cultural thought. It was Theodor Adorno who argued that Auschwitz was the central event of our age; Shoshana Felman, Claude Lanzmann and others have more recently suggested that the need and simultaneous impossibility of narrating the Holocaust remain the informing and unattended event of contemporary culture.

⁶³ In support of this position, see Winter, *supra* note 61 ("Social contingency, therefore, is the precondition for truth—not its enemy.").

The harshest opponents to the use of deconstruction in legal analysis are those who correctly see that it implies an absence of reliable, objectively justifiable, criteria to guarantee justice in our jurisprudential system. If the American jurisprudential system's survival to date cannot be correlated with inviolable, objectively compelled and logically sound principles, not only does the legitimacy of adjudication become questionable, but so too does the future survival of the rule of law. I believe that the furious controversy engendered by deconstruction results from a correct perception (frequently unarticulated and perhaps not always conscious) that, because deconstruction will show the fallibility, the illogic, the contradictions embedded in the tenets of our legal system, we cannot rely on those tenets for the perpetuation of our system.

Such a concept is not new or even radical, but it is painful, for it means that our social order and laws exist in a state of permanent precariousness. It means that our Constitution and system of adjudication do not make us immune from the lawless forces which gained ascendancy in other countries in our century, bringing in their wake a terrifying toll of human misery and waste. Two centuries ago, Hobbes recognized the fragility and contextuality of all governmental systems. In *Leviathan*, Hobbes compellingly describes the inherent precariousness of social orders due to the inalterable complexity of human nature.⁶⁴ In Hobbes' view, the rule of law and states of peace inevitably are transient and insecure phenomena whose preservation must be safeguarded with relentless vigilance.

A corollary benefit to be derived from deconstruction is an appreciation of multiple views. Richard Rorty has criticized deconstruction for its failure to advance utopian alternatives. See RICHARD RORTY, *OBJECTIVITY, RELATIVISM, AND TRUTH: PHILOSOPHICAL PAPERS* 16 (1991). On another level, however, deconstructionist analysis provides an ideal vehicle for promoting the multiculturalism which Rorty believes to be the only hope for transcending contextuality, or as he puts it, one's inability to step outside of one's own mind. See *id.* at 14. The method which Rorty envisages is quintessentially deconstructionist: "Not a process of setting aside our old vocabularies, beliefs and desires but rather of gradually adding to and modifying them by playing them off against each other." *Id.*; see also CLAUDE LÉVI-STRAUSS, *MYTH AND MEANING* 20 (1979) ("It is only through difference that progress has been made.").

⁶⁴ For his conclusion that no specific system can represent a universal ideal, Hobbes has been viewed as a pessimist. See Judith Shklar, *The Liberalism of Fear*, in *LIBERALISM AND THE MORAL LIFE* 21-38 (Nancy L. Rosenblum ed., 1989), for the view that the emphasis on preventing harm from befalling the individual constitutes a "liberalism of fear." In Shklar's view, however, the authoritarianism of Hobbes' proposal precludes liberalism. For the contrary view of Hobbes as a liberal, see DENNIS H. WRONG, *THE PROBLEM OF ORDER: WHAT UNITES AND DIVIDES SOCIETY* (1994); Mark V. Tushnet, *Following the Rules Laid Down—A Critique of Interpretivism and Neutral Principles*, in *INTERPRETING LAW AND LITERATURE* 194-95 (Sanford Levinson & Steven Mailloux eds., 1988).

The Hobbesian view runs counter to the Enlightenment view of Mill⁶⁵ in England and of Montesquieu and Diderot in France, who expected human civilization to be perfectible in tandem with growing scientific understanding.⁶⁶

The Hobbesian view has been borne out by the history of our century.⁶⁷ Nonetheless, the human instinct to search for security and to deny the inevitability of a permanent state of insecurity is as indomitable and intrinsic to human nature as are the forces, equally fundamental to human nature and human societies, which wreak havoc on stability, peace and the rule of law.⁶⁸

The threat of deconstruction is the threat of life without a blueprint. Others have pointed out that deconstruction is a difficult theory.⁶⁹ Yet those who oppose it in the legal field are among the most brilliant of thinkers. Their readiness to condemn deconstruction without engaging in a debate on its merits is just the sort of "point of rupture" which signals to a deconstructionist that more is at stake than what appears on the surface.

Deconstruction does not imply the impossibility of a rule of law. It does, however, imply the absence of objectively valid underpinnings to our jurisprudential system, which would serve as internal safeguards for its perpetuation. In my opinion, the anti-deconstructionist urge to avoid assessing the validity of deconstructionist analysis, *i.e.*, the notable absence of attempts to demonstrate logical fallacies in deconstructionist analyses, stems from a wish to deny the sobering conclusion that

⁶⁵ See JOHN STUART MILL, *ON LIBERTY AND OTHER ESSAYS* (1926).

⁶⁶ See, *e.g.*, OTIS FELLOWS & NORMAN TORREY, *THE AGE OF ENLIGHTENMENT* 12 (1970) ("[T]he idea of progress [was] the dominant spirit of the age."). For an analysis of both Hobbes and Freud as Enlightenment liberals, see WRONG, *supra* note 64.

⁶⁷ In this context, Derrida's comment about deconstruction reflects his sense of the theory's being premised on an apprehension of human nature: "[D]econstruction . . . belongs to the structure of history or events. It started before the academic phenomenon of deconstruction, and it will continue with other names." Stephens, *supra* note 4, at 25 (quoting Jacques Derrida).

⁶⁸ One of those who continues to try to formulate a political philosophy capable of withstanding the vicissitudes of time is John Rawls. See JOHN RAWLS, *POLITICAL LIBERALISM* (1993); JOHN RAWLS, *A THEORY OF JUSTICE* (1971). It should be noted that even Rawls' liberalism, although it strives for an inalterable and secure agenda of fundamental rights, nevertheless approaches the Hobbesian view in espousing a liberalism exclusively political as an ideal; *i.e.*, an ideal which addresses societal structures and can encompass conflicting views of what is beneficial for individuals. For an analysis of the psychological difficulties caused by freedom and the human urge to find safety and reliability through blueprints, see ERICH FROMM, *ESCAPE FROM FREEDOM* (1967), and ERICH FROMM, *THE SANE SOCIETY* (1955).

⁶⁹ *E.g.*, Stephens, *supra* note 4, at 24 ("It's hard to do it well. What it wants is a kind of intense struggle with a text to dig out things the text doesn't know it's saying. People with average imagination . . . couldn't do it. You have to be really smart.") (quoting Leo Damrosch, chairman of Harvard's English department).

it is not our jurisprudential system which has spared the United States the horrors which have befallen so many others in this century. Equally frightening is the conclusion that our jurisprudential system cannot reliably ensure our future safety. The anti-deconstructionist charge that deconstruction is a philosophy of despair is a normative statement, neither establishing its own truth nor justifying the conclusion that deconstruction is invalid. Hegland is typical in framing the issue prescriptively, stating as an argument against deconstruction that he supports the rule of law.⁷⁰ Deconstruction, however, does not oppose the rule of law.⁷¹ Deconstruction suggests, rather, that the contextuality and inherent contradictions of jurisprudential concepts eliminate what appears to be our last bulwark against the tides of lawlessness which often before have swept the forces of humanism into oblivion.⁷²

⁷⁰ Hegland, *supra* note 7, at 1220.

⁷¹ Some of deconstruction's proponents are anti-foundationalists, and would disagree with my characterization of deconstruction and its implications. For the opposing view, see, e.g., Drucilla Cornell, *The Violence of the Masquerade: Law Dressed Up as Justice*, in *WORKING THROUGH DERRIDA* 80 (Gary Madison ed., 1993). See also CULLER, *supra* note 35, at 133, arguing that ultimate indeterminacy need not invalidate analysis:

In mathematics, for example, Gödel's demonstration of the incompleteness of mathematics (the impossibility of constructing a theoretical system within which all true statements of number theory are theorems) does not lead mathematicians to abandon their work. The humanities, however, often seem touched with the belief that a theory which asserts the ultimate indeterminacy of meaning makes all effort pointless.

George Steiner refines this point by noting that meaning may be indeterminate but nevertheless *investigable*:

[T]he mathematical and natural sciences . . . are based on this very distinction. Sub-atomic physics, the cosmology of black holes, can move forward despite, indeed in the playful light of, the indeterminacy principle and the fact that our acts of observation 'dissolve' the observed phenomena. Mathematics and mathematical logic can get on with their high, pure games though they know that no axiomatic system can ever be proved to be fully coherent and consistent from within its own rules and postulates

STEINER, *supra* note 35, at 125. My own view is that deconstruction does not preach indeterminacy, but, rather, as Winter has noted, undecidability. Winter, *supra* note 50, at 811 (citing DERRIDA, *supra* note 54, at 148). In my view, it is applicable to fields which are not amenable to the "purity" in reasoning which Steiner describes. Drucilla Cornell notes that "[t]he asserted impossibility of naming the 'Law' . . . should not be confused with the complete rejection of the ethical. If anything unites deconstructive critics it is, ironically, their insistence . . . on the inevitability of the ethical in reading" Drucilla Cornell, *Post-Structuralism, the Ethical Relation, and the Law*, 9 CARDOZO L. REV. 1587, 1590 (1988); see also Denis J. Brion, *Performing the Constitution*, 49 WASH. & LEE L. REV. 293, 320 (1992) ("The Rule of Law problem of autonomy is not solved by seeking stability in meaning; rather, it is solved by seeking instability in meaning. This is the best guarantee against a tyranny of ideology.").

⁷² Hegland, for one, is aware of his motives, conceding that, although he "hates to admit to being suspicious, fearful and perhaps, even mean-spirited[,] [y]et, we live in a century that has produced Hitler and Stalin." Hegland, *supra* note 7, at 1220. His view is that deconstructionist

France during the Second World War presents a vivid example of a nation, like ours, with a long history of egalitarianism, protection of refugees, religious tolerance and constitutional protection of human rights.⁷³ On July 10, 1940, after the German defeat of France, a century and a half of Enlightenment values instilled in French legal tradition and embodied in its Constitution collapsed. Five hundred and sixty-nine legislators out of six hundred and sixty-six voted to give Marshal Pétain dictatorial powers.⁷⁴ By October of 1940, the first of many anti-Jewish laws had been passed.⁷⁵ The French were to exceed German demands in France and even, occasionally, to pass harsher anti-Jewish laws than their German counterparts.⁷⁶

A focus on surface phenomena, such as interpreting, analyzing, and implementing the law, while ignoring its underlying antidemocratic and, ultimately, murderous reality, was characteristic of the German and French legal professions, bureaucrats and citizenry. The new laws were sanitized as their terms became assimilated into the routine discourse of the legal profession.

Others have noted the importance of language in this context. Weisberg recounts the story of Marc Boegner, a Protestant pastor, who

analysis may increase the likelihood of our being beset by the evils of our century. My view is that deconstruction allows us to heighten our understanding of the phenomena to which it is applied and, through a heightened comprehension of reality, to increase our ability to correctly interpret danger signals, thereby maximizing the chances of effective responses.

⁷³ For an account of France's role at the forefront of such rights in the wake of the French Revolution, and its influence on other European countries to follow suit, see MICHAEL R. MARRUS & ROBERT O. PAXTON, *VICHY FRANCE AND THE JEWS* 27 (1981).

⁷⁴ The National Assembly approved the following article: "The National Assembly gives all power to the government of the Republic under the authority and signature of Marshal Pétain, to promulgate by one or several acts a new Constitution of the French State. This Constitution shall guarantee the rights of work, family and nation." MARC FERRO, *PÉTAIN* 132 (1987) (my translation). The last words of this article "*travail, famille, patrie*" became the slogan of occupied France, imprinted on its currency and ubiquitous on posters plastered throughout the country. This trilogy of work, family and nation was a pointed replacement of the tripartite slogan of the French Revolution: "*liberté, égalité, fraternité*" ("liberty, equality, fraternity").

⁷⁵ See FERRO, *supra* note 74; ANDRÉ KASPI, *LES JUIFS PENDANT L'OCCUPATION* (1991). Marrus and Paxton note a number of prior antisemitic ordinances, which swiftly followed the establishment of Vichy, but which targeted Jews without explicit reference to them. These ordinances restricted the medical and legal professions to people with French fathers and allowed recently naturalized citizens to be stripped of their French citizenship. See MARRUS & PAXTON, *supra* note 73, at 3-21.

⁷⁶ For an excellent discussion of the French anti-Jewish measures as exceeding, and largely independent of, Nazi pressure, see WEISBERG, *supra* note 62, at 127-87. Weisberg cites to MARRUS & PAXTON, *supra* note 73, at 32, for slightly different numbers in the vote of the National Assembly from those which I have given. WEISBERG, *supra* note 62, at 127-87; see also HANNAH ARENDT, *EICHMANN IN JERUSALEM; A REPORT ON THE BANALITY OF EVIL* (1963); FERRO, *supra* note 74; KASPI, *supra* note 75; MARRUS & PAXTON, *supra* note 73.

met with Laval, Pétain's Prime Minister, to tell him about the horrendous suffering of the Jews who had been rounded up and taken to Drancy, a French transit camp in which Jews were kept in horrible conditions before transport to Auschwitz.⁷⁷ Apparently Laval responded that Drancy was an agricultural center. Boegner remarked that he, Boegner, "talked to [Laval] about murder . . . [and] he answered me with gardening."⁷⁸

Bruno Bettelheim discusses the psychology of linguistic sanitization:

Using technical or specially created terms instead of words from our common vocabulary is one of the best-known and most widely used distancing devices, separating the intellectual from the emotional experience. Talking about 'the holocaust' permits us to manage it intellectually where the raw facts, when given their ordinary names, would overwhelm us emotionally—because it was catastrophe beyond comprehension, beyond the limits of our imagination, unless we force ourselves against our desire to extend it to encompass these terrible events Even the Nazis—usually given to grossness in language and action—shied away from facing openly what they were up to and called . . . mass murder 'the final solution of the Jewish problem.' . . . The Nuremberg judges of these Nazi criminals followed their example of circumlocution by coining a neologism out of one Greek and one Latin root: genocide. These artificially created technical terms fail to connect with our strongest feelings.⁷⁹

⁷⁷ For the most thorough account of the Drancy internment camp, see GEORGES WELLERS, *UN JUIF SOUS VICHY* (1991) (originally published in 1973 under the title *L'ETOILE JAUNE À L'HEURE DE VICHY*).

⁷⁸ WEISBERG, *supra* note 62, at 128 (citing MARRUS & PAXTON, *supra* note 73, at 353). Weisberg concludes that, through linguistic displacement, "[t]he French succeeded in avoiding the obvious, cold realities taking place under their very eyes." *Id.*

⁷⁹ BRUNO BETTELHEIM, *The Holocaust—One Generation Later*, in *SURVIVING AND OTHER ESSAYS* 84 (1979). Reflecting on evidence presented at Klaus Barbie's trial, Ted Morgan concludes that

the use of . . . flat and unspecific language was part of the conditioning to do away with any moral reaction. To say that people were "treated" or "taken care of," or that areas were "swept clean," made mass murder impersonal and bureaucratic. It was a way of sidestepping all moral questions by focusing on logistics. The only conceivable way to implement the Final Solution was to convert it into a set of logistical problems, such as crowd control and railroad timetables.

TED MORGAN, *AN UNCERTAIN HOUR: THE FRENCH, THE GERMANS, THE JEWS, THE KLAUS BARBIE TRIAL AND THE CITY OF LYON, 1940–1945*, at 130 (1990). The French intellectual, Alain Finkielkraut, notes that language denoting the murder of Jews went out of the Nazis' vocabulary precisely when they decided to exterminate all Jews: "[M]ass murder demanded the gas Ziklon B and the

Edgar Faure, a French prosecutor at Nuremberg, commenting on a German telegram which he offered in evidence on February 5, 1946, about the successful arrest and deportation of Jewish children from a school in Izieu, France, noted that "[o]ne can say that there is something even more striking and more horrible than the concrete fact of the abduction of these children, and that is the bureaucratic tone of the report, and the conference where several officials are tranquilly discussing it, as one of the normal procedures of their department."⁸⁰

Deconstruction cannot provide foundational values with which to inspire either resistance to tyranny or loyalty to a tradition of justice and fairness. Deconstruction can, however, elucidate just such underlying contradictions as the French ignored in the 1940s. The complexity of reality becomes accessible by locating points of rupture in language, for they are the hallmarks of a split between the signifier and the signified. Deconstruction cannot protect us but it can open our eyes so that, if we have the will and the courage, we can try to use our enhanced understanding to further our values.

mystification of its victims as well. In the gradual transformation of Polish concentration camps into extermination camps, bombast gave way to euphemism A carefully monitored use of terms banished death from the Nazi vocabulary." FINKIELKRAUT, *supra* note 62, at 45.

⁸⁰ Quoted in Morgan, *supra* note 78, at 272. For more on the events at Izieu, see *infra* note 125 and accompanying text. See WEISBERG, *supra* note 62 (identifying "professional discourse" as the vehicle for facilitating atrocity within civilization); see also JANKÉLÉVITCH & BERLOWITZ, *supra* note 62, at 107 (my translation) (referring to the Nazis as "experts in the art of regrouping contradictory theses and playing on the ambiguity which results from such recategorization. Imposture is even inscribed in the name of the Nazis' doctrine: national-socialism."). And see Wiesel's criticism of the ease with which the principals fit into ordinary legal roles in the Eichmann trial and the "play of legality" which falsified it. ELIE WIESEL, *Notre Commune Culpabilité*, in *LE CHANT DES MORTS*, *supra* note 1, at 176. More generally, for the uses and abuses of language by totalitarian regimes, see HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* (1951), and JEAN-PIERRE FAYE, *LANGAGES TOTALITAIRES* (1972). For an excellent analysis of holocaust revisionists' technique of perverting language, see Pierre Vidal-Naquet, *A Paper Eichmann*, in *ASSASSINS OF MEMORY: ESSAYS ON THE DENIAL OF THE HOLOCAUST* 42-50 (Jeffrey Mehlman trans., 1992). Vidal-Naquet ascribes to totalitarian regimes "a common fear in the face of reality, a common masked language." *Id.* at 12. An ironic etymological twist noted by Vidal-Naquet is the fact that the French term "*révisionnisme*" originated in the nineteenth century during the Dreyfus affair, and referred to the movement by Dreyfus supporters to reopen his case and to expose his conviction as a travesty of justice motivated in substantial measure by antisemitism. *Id.* at 54. (It should be noted, however, that, until its modern usage in the context of holocaust denial, the French word generally referred to judicial review. The judicial connotation persists today along with the neologism.). For an examination of the term "revisionism" in the English language, and its adoption by holocaust deniers as representing in and of itself a tactic to gain legitimacy as historians, see DEBORAH LIPSTADT, *DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY* 20-21 (1993).

In the preceding sections, we have seen how the dual historical perspectives of deconstruction's development in the United States from literary structuralism and its origin in France after the Second World War converge in establishing deconstruction as a systematic, highly rigorous methodology useful for interpreting and analyzing legal texts. We have also seen that deconstruction is a modernist phenomenon which signals the end of the Enlightenment but which, far from being a philosophy of nihilism or despair, offers a framework for encompassing the nonlinear view of human progression which characterizes the Western intellectual's perspective in our time.

The next section addresses the thesis of Guyora Binder, under which deconstruction is a form of "Holocaust Judaism" whose primary exponent is Elie Wiesel, and which allegedly is a philosophy of nihilism and despair because it lacks affirmative content, and operates exclusively by opposition to something else. I explore the influences on deconstruction of Lévi-Strauss' structuralism and Sartre's existentialism, both of which Binder correctly views as having a seminal impact on deconstruction, but conclude, contrary to Binder's interpretation, that the nature of their influence confirms that both deconstruction and holocaust studies are affirmative in nature and both are premised on a belief in individual responsibility.

V. DECONSTRUCTION'S RELATION TO INDIVIDUAL RESPONSIBILITY AND TO "HOLOCAUST JUDAISM"

Amid the accusations that deconstruction is nihilistic and defeatist because it preaches relativism, critics have also charged that deconstruction provides intellectual respectability to holocaust denial.⁸¹ In

⁸¹ See LIPSTADT, *supra* note 80, at 17-19; see also Austin, *supra* note 8, at 212 (describing deconstruction as compatible with, and encouraging, Nazism). Derrida has also discussed holocaust revisionism, but attributes it to the "statist objectivity" of Nazism which

paradoxically produced a system in which its logic, the logic of objectivity, made possible the invalidation and therefore the effacement of testimony and of responsibilities, the neutralization of the singularity of the final solution; in short, it produced the possibility of the historiographic perversion that has been able to give rise both to the logic of revisionism (. . . of the Faurisson type) as well as a positivist, comparatist or relativist objectivism (like the one now linked to the *Historikerstreit*) according to which the existence of an analogous totalitarian model of earlier exterminations (the Gulag) explains the final solution, even 'normalizes' it as an act of war, a classic state response in time of war against the Jews of the world, who, would have, in sum [according to the Germans who espouse *Historikerstreit*] like a quasi-state, declared war on the Third Reich.

Derrida, *supra* note 4, at 1042-43. (*Historikerstreit* refers to a debate currently being waged in Germany, one side maintaining that the extermination of Jews was a justified act of war.) For a summary of Derrida's position on the controversy surrounding de Man's antisemitic journalism, see Balkin, *supra* note 51, at 1134-38.

Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie,⁸² Guyora Binder posits that deconstruction is responsible for the transformation of Judaism into an identity defined only in the negative, by opposition to Nazism. Binder's analysis is of particular interest because it constitutes a normative criticism typical of traditional anti-deconstructionist approaches, while simultaneously accurately identifying deconstruction's historical roots in, and debt to, structuralism and existentialism, and also accurately perceiving deconstruction as a post-war response. Binder's conclusion that deconstruction is nihilistic derives from his view of structuralism as a theory of relativism and French existentialism as a philosophy of despair. As discussed below, I interpret structuralism and French existentialism differently and reach a view of deconstruction far different from Binder's even though I share Binder's view of the significance of structuralism and French existentialism to deconstruction.

Binder also presents a novel charge against deconstruction. Unlike the more traditional anti-deconstructionist conclusion that deconstruction affords respectability to holocaust denial, Binder's view is that deconstruction encourages holocaust study, but that focusing on the holocaust is pernicious to Judaism and to Jewish identity.

In Binder's view, Derrida and Elie Wiesel epitomize a perspective of holocaust Judaism which Binder criticizes on dual grounds: (1) for yielding an identity ethically impoverished because it lacks an affirmative self-definition; and (2) for forging a Jewish identity *qua* persecuted victims made in the image of Christianity, rather than of Judaism: "[T]he Jew may now find a place in Christian culture as a Christ symbol in whose death every Christian dies and is reborn."⁸³ This, according to Binder, "compromises Jewish identity by representing it within a Christian framework, and . . . questions the authenticity of Jewish identity by representing it as the product of persecution rather than self-determination."⁸⁴ Binder defines deconstruction "as a form of Holocaust Judaism"⁸⁵ and condemns it as a "culture of despair that paralyzes moral choice in the wake of Nazi atrocities."⁸⁶ Binder sees nothing less than the annihilation of Judaism by deconstruction and its proponents.⁸⁷

⁸² Binder, *supra* note 6, at 1321.

⁸³ *Id.* at 1348.

⁸⁴ *Id.* at 1372.

⁸⁵ *Id.* at 1373.

⁸⁶ *Id.*

⁸⁷ Hannah Arendt notes the converse of Binder's proposition, namely, that *Nazis* derived self-definition from antisemitism: "Nazi propaganda was ingenious enough to transform antisemitism into a principle of self-definition, and thus to eliminate it from the fluctuations of mere opinion." ARENDT, *supra* note 76, at 356.

Binder correctly underscores the importance of viewing deconstruction in an historical perspective; and, more particularly, of realizing that "deconstruction [is] a post war comment."⁸⁸ He correctly identifies Sartrean existentialism and Lévi-Straussian structuralism as formative influences on deconstruction. Binder's interpretation of these theories fundamentally differs from my own, however, and results in his view that they influenced the works of both Derrida and Wiesel in a defeatist and nihilistic manner.⁸⁹

Binder interprets Lévi-Strauss' focus on the relations of units as a deemphasis on the universal when, on the contrary, the study of relations is the analytical method which permits the structuralist to attain the goal of ascertaining deep, universal structures. The structuralist search, like its Freudian counterpart, is not at the surface (or manifest) but at the deep level: "[S]tructural analysis is confronted with a strange paradox well known to the linguist, that is: the more obvious structural organization is, the more difficult it becomes to reach it because of the inaccurate conscious models lying across the path which leads to it."⁹⁰

The structuralist enterprise is to discover universal human tendencies from an analysis of the relations of parts.⁹¹ Thus, Lévi-Strauss refers

⁸⁸ Binder, *supra* note 6, at 1374.

⁸⁹ Although my analysis of existentialism, structuralism, deconstruction and Wiesel's writings is diametrically opposed to Binder's interpretation, I am in complete agreement with Binder that the writings of Derrida and Wiesel are, essentially, variations on a single theme, aptly described by Binder as "a postwar comment," *id.*, although, even with respect to that issue, I see both Derrida and Wiesel as addressing the dilemma of the post-war world, Jewish and non-Jewish, whereas Binder sees their writings exclusively as Jewish responses to the holocaust. Binder makes much of the fact that Derrida, like Wiesel, is a Jewish holocaust survivor and believes that both engaged in a failed attempt to craft a Jewish identity in response to the holocaust. In my opinion, the holocaust and the gulag ended the spirit of the Enlightenment and gave rise to a new system of thought of which both deconstruction and Wiesel's writings are emblematic, but that neither deconstruction nor Wiesel's writing is limited to the plight or identity of Jews.

⁹⁰ LÉVI-STRAUSS, *supra* note 18, at 281. See also CLAUDE LÉVI-STRAUSS, *LE CRU ET LE CUIT* 19-20 (1964), in which Lévi-Strauss compares the myths of various cultures to language, arguing that those who develop and pass on the myths are unaware of their deep structure in the same way that people apply rules of grammar in speech without being aware of their nature. Lévi-Strauss compares his task to that of a linguist seeking language-generative syntactical principles. *Id.* at 15-16.

⁹¹ See MICHAEL LANE, *STRUCTURALISM: A READER* 14 (1970), for the point that the most distinctive point of the structuralist method is the emphasis it gives to wholes, to totalities. Traditionally, in Anglo-American social science, structure has been used as an analytical concept to break down sets into their constituent elements, an essentially atomistic exercise. As structuralists understand and employ the term, a new importance has been given to the logical priority of the whole over its parts. They insist that the whole and the parts can be properly explained only in terms of the *relations* that exist between the parts. The essential quality of the structuralist method, and its fundamental tenet, lies in its attempt to study not the elements of a whole, but the complex network of relationships that link and unite those elements.

to all languages as consisting of "a special code whose terms are generated by a combination of less numerous units which themselves derive from a more general code."⁹² Binder concludes that Lévi-Strauss' study of cultures, and belief that consciousness derives from culture, signify that, in Lévi-Strauss' view, human nature is not universal.⁹³ Lévi-Strauss, however, states that, "notwithstanding the cultural differences between the several parts of mankind, the human mind is everywhere one and the same."⁹⁴ Indeed, at the foundation of structuralism lies the belief in universal human characteristics: "[T]here seems to be general, if implicit, agreement among certain structuralists, notably Lévi-Strauss in anthropology, Roman Jakobson in linguistics, Jean Piaget in psychology and François Jacob in biology, that there is in man an innate, genetically transmitted and determined mechanism that acts as a structuring force."⁹⁵

Lévi-Strauss defines "the ultimate goal of anthropology [as] contribut[ion] to a better understanding of objectified thought and its processes."⁹⁶ Far from rejecting the principle of truth, Lévi-Strauss undertook a scientific search for objectively identifiable truths about human nature, seeking an understanding of the individual through a scientific study of social groups. Lévi-Strauss' conception of the anthropologist is "modelled after the engineer, who conceives and constructs a machine by a series of rational operations . . . for obtaining that final empirical satisfaction for which the physical sciences and the human

⁹² LÉVI-STRAUSS, *LE CRU ET LE CUIT*, *supra* note 90, at 28 (my translation). Richard Rorty relates the search for universal models to the Enlightenment when Newtonian physics was emulated in the social sciences, to bring the social sciences in accordance with increasingly accessible nature. Rorty maintains that, "[e]ver since [the Enlightenment], liberal social thought has centered around social reform as made possible by what human beings are like—not knowledge of what Greeks or Frenchmen or Chinese are like, but of humanity as such. We are the heirs of this objectivist tradition, which centers around the assumption that we must step outside our community long enough to examine it in light of something which transcends it, namely, that which it has in common with every other actual and possible human community." RORTY, *supra* note 63, at 22. Rorty's description of the Enlightenment/liberal social tradition encompasses Lévi-Strauss' objectives as he defines them in LÉVI-STRAUSS, *STRUCTURAL ANTHROPOLOGY*, *supra* note 18, at 85:

I look for common properties by examining these structures, which are all partial expressions, though especially well suited to scientific study, of this entity called French, English or any other society . . . [C]onvergences will be extremely important in understanding the position of a society in relation to others of the same type, as well as the laws which govern its evolution in time.

⁹³ Binder, *supra* note 6, at 1368.

⁹⁴ LÉVI-STRAUSS, *supra* note 63, at 19.

⁹⁵ LANE, *supra* note 91, at 15; *see also* SIMON CLARKE, *THE FOUNDATIONS OF STRUCTURALISM* 4 (1981) ("For Lévi-Strauss . . . systems of meaning are constituted by an unconscious that emerges on a biological foundation.").

⁹⁶ LÉVI-STRAUSS, *LE CRU ET LE CUIT*, *supra* note 90, at 21.

sciences feel an equal necessity. . . .⁹⁷ Lévi-Strauss further discusses the importance of models to describe and account for cultural phenomena: "[I]t is obvious that the best model will always be that which is *true*, that is, the simplest possible model which, while being derived exclusively from the facts under consideration, also makes it possible to account for all of them."⁹⁸ Thus, Lévi-Strauss was interested in general attributes common to all human societies.

Binder cites Lévi-Strauss for the proposition that "all meaning is 'internal' to culture,"⁹⁹ but Lévi-Strauss writes that his study of anthropology "frees me from doubt, since it examines those differences and changes in mankind which have a meaning for all men, and excludes those peculiar to a single civilization"¹⁰⁰ Lévi-Strauss specifically contrasts his own scientific, objective search for meaning from the philosopher's on the basis of its practical application: "The ethnologist does not feel obliged, as does the philosopher, to take as a principle of reflection the conditions of exercise of his own thought, or of a science which is that of his society and time period, so as to extend his local findings to an understanding whose universality is limited to the hypothetical and the tentative."¹⁰¹ Lévi-Strauss defines his own project as the search for a universal and objective meaning: "[S]ince we have undertaken to study the conditions to which systems of truth become mutually convertible, and hence can be simultaneously receivable for numerous subjects, the totality of these conditions acquires the character of an object endowed with its own reality, independent of each subject."¹⁰²

Thus, for Lévi-Strauss, the founder of structuralist anthropology, just as for the literary structuralists, truth exists and is accessible. The exhaustive thoroughness of his methodology also became the hallmark of literary structuralism and of deconstruction.

In addition to viewing structuralism as constituting an influence of relativism on deconstruction, Binder characterizes Sartrian existentialism as defeatist and nihilistic both inherently and as an influence on deconstruction. Binder correctly describes existentialists as "inhabit[ing] a godless cosmos which could only be given normative meaning by an act of human will,"¹⁰³ but he dismisses the role of

⁹⁷ LÉVI-STRAUSS, *supra* note 18, at 16.

⁹⁸ *Id.* at 281.

⁹⁹ Binder, *supra* note 6, at 1368 n.287.

¹⁰⁰ LÉVI-STRAUSS, *TRISTES TROPIQUES* 58 (John Weightman & Doreen Weightman trans., 1977).

¹⁰¹ LÉVI-STRAUSS, *LE CRU ET LE CUIT*, *supra* note 90, at 18-19 (my translation).

¹⁰² *Id.* at 19 (my translation).

¹⁰³ Binder, *supra* note 6, at 1364.

human will in existentialism by stating that existentialism "portrays human beings as passive recipients of meaning, [thus] support[ing] the 'anti-humanism' often attributed to structuralists and post-structuralists."¹⁰⁴

On the contrary, Sartrean existentialism is a doctrine of optimism precisely because it rejects historical determinacy in favor of individual action. It is quintessentially a doctrine of individual responsibility and a call to face one's choices by responding to them with ethical political conduct.¹⁰⁵

The great appeal of Sartrean existentialism to France's post-war generation and to millions of others was precisely that it was not a philosophy of despair. For a generation which had to come to terms with the horrors of the war, the Vichy regime and with collaborators throughout French society, Sartrean existentialism represented the promise that history can be redirected on an affirmative course because history is not predetermined but is created by the acts of free individuals.

Sartre also believed that history has no ultimate meaning, and that its meaning is conferred upon it through subsequent interpretation, but not that historical meaning is random. Of central importance to Sartrean existentialism are the twin concepts of good faith ("*bonne foi*") and active involvement ("*engagement*"). Existentialism holds that each person knows what is right and knows which choice must be made in accordance with one's responsibility to do right. For Sartre, the interpretive role does not signify the ability to pervert history or to deny reality, nor does it condone rationalizing one's failures to behave responsibly. On the contrary, Sartre unequivocally states that representation and reality are distinct, and that events must not be allowed to be deformed by one's consciousness of them, for events are concrete and absolute.¹⁰⁶ Sartre insists that each individual has the responsibility to evaluate legal prescripts and to disobey those which are unethical. One sees in Sartre's plays as well as his philosophical writings condemnation of those who have not risen to life's ethical challenges, who have not become "*engagés*" when life handed them their choices. Sartre uses

¹⁰⁴ *Id.* at 1365.

¹⁰⁵ See SARTRE, *supra* note 35, at 54 ("In no case and in no way can the past by itself produce an act It must be acknowledged that the indispensable and fundamental condition of all action is the freedom of the acting being.") (my translation); see also Viktor Frankl, *Logotherapy in a Nutshell*, in MAN'S SEARCH FOR MEANING 114 (3d ed. 1984) (explaining logotherapy, existentialism-based psychotherapy: "[L]ogotherapy sees in responsibility the very essence of human existence.").

¹⁰⁶ See SARTRE, *supra* note 35, at 21 (my translation) ("[The event] must not fade behind the consciousness . . . of it: it is not a representation, it is a concrete, full and absolute event."). Sartre also distinguishes between objective facts ("*le fait objectif*"), which he views as incontrovertible, and the meaning which one ascribes to facts ("*le sens*"). *Id.* at 101.

the term "*en situation*" to refer to the choices which life inevitably deals one. According to Sartre, one is continually "*en situation*." To deny this and behave as though one had no choice is an act of bad faith.¹⁰⁷ Self-serving rationalizations constitute bad faith or "*mauvaise foi*."

Both the challenge and difficulty of life is to make use of one's freedom, for the Sartrian view is of a humanity completely free to act, perpetually faced with choices, on whose shoulders rests the heavy burden of creating history ethically. For Sartre, that freedom also implies the refusal to be defined by one's own past mistakes, and the struggle to do better in the future; central to Sartrian thought is that one's past need not constitute one's destiny.¹⁰⁸ The hope represented by Sartre's philosophy resides in the power of individuals to create positive historical developments by accepting the challenge to act.¹⁰⁹

At the same time, Sartre appreciates the complexity of historical phenomena and portrays their interpretive possibilities. Sartre's play *Les Mains Sales* provides one of the best illustrations of this complexity. In *Les Mains Sales*, Hugo, a young, French intellectual Communist, is ordered by the party to murder his mentor, Hoederer.¹¹⁰ The protagonist suffers from a politically incorrect bourgeois intellectual background and longs to gain the approval of his tougher proletarian cohorts. Only the targeted Hoederer, currently out of line with the ascendant party dogma, is kind and welcoming to the protagonist, and, despite his orders to kill, the protagonist grows ever closer to Hoederer and cannot bring himself to obey his orders. One day, however, he chances upon Hoederer kissing his (Hugo's) wife, and he shoots Hoederer instantly. In the last scene of the play, Hugo is visited by party representatives who ask him why he committed the murder. Since Hoederer has been reinstated posthumously by the party, Hugo is told that he will be liquidated if he killed Hoederer for political reasons, but that the party will leave him untouched if his motives were personal. When Hugo elects to define his murder as political, the reader is left to ponder the multiplicity of interpretive possibilities of Hugo's acts, both of murder and of interpretation. The fecundity of interpre-

¹⁰⁷ See, e.g., SARTRE, *supra* note 35. For a literary illustration of this theory, see JEAN-PAUL SARTRE, *HUIS CLOS* (1944).

¹⁰⁸ See SARTRE, *supra* note 35, at 104.

¹⁰⁹ See *id.* at 508-642. "To act is to change the face of the world." *Id.* at 508 (my translation) (emphasis omitted). See also Hazel Barnes' interpretation of Sartre's play *LES MOUCHES* (1943), based on his philosophy: "[O]nce men and women know they are free, no oppressive government, no established system is unthreatened." HAZEL E. BARNES, *SARTRE* 23 (1973).

¹¹⁰ JEAN-PAUL SARTRE, *LES MAINS SALES* (1948).

tive possibilities is a testament to the difficulty of the task but implies neither arbitrariness nor universal validity.

The profound influence of Sartre was the ethical challenge existentialism posed to the individual: to change the course of history in an affirmative way through ethical conduct. Because Sartre views history as directed by human acts, existentialism also offers the redemptive possibility of starting anew, of repudiating even one's own past by becoming *engagé* and acting in good faith.

Holocaust literature and studies are characterized by a Sartrean perspective premised on the belief that the course of history can be changed by individual acts and that the study of history can increase social responsibility.¹¹¹ The holocaust underscores the abyss into which human society can fall, but it also exemplifies the extraordinary depth of humanity displayed by those who risked their lives as rescuers.¹¹²

The last paragraph of Hannah Arendt's massive study of the degeneration of societies into terror-driven totalitarianism reveals a Sartrean belief in the power of individuals to change the course of history through ethical conduct:

¹¹¹ See, e.g., SAMUEL P. OLINER & PEARL M. OLINER, *THE ALTRUISTIC PERSONALITY: RESCUERS OF JEWS IN NAZI EUROPE* 260 (1988).

They [*i.e.*, rescuers] also highlight the important truth that interpretations of events are human inventions, and that what and how we choose to see shape our responses—and thus the future. As W.I. Thomas and D.S. Thomas proposed sixty years ago, "Situations defined as real are real in their consequences." If we persist in defining ourselves as doomed, human nature as beyond redemption, and social institutions as beyond reform, then we shall create a future that will inexorably proceed in confirming this view.

Id. (footnote omitted) (quoting in part WILLIAM ISAAC THOMAS & DOROTHY SWAINE THOMAS, *THE CHILD IN AMERICA* 572 (1928)); see also *id.* at xviii ("If we are to live in a world free from the threat of Holocausts, we need to create it.").

¹¹² See JANE MARKS, *THE HIDDEN CHILDREN: THE SECRET SURVIVORS OF THE HOLOCAUST* x (1993) ("It is ironic that the nightmare and horrors of the Holocaust also became a defining moment for courage and decency."); see also LUCIE AUBRAC, *OUTWITTING THE GESTAPO* (1993) (an account of the French resistance movement); LUCIEN LAZARE, *LE LIVRE DES JUSTES: HISTOIRE DU SAUVETAGE DES JUIFS PAR DES NON JUIFS EN FRANCE, 1940-1944* (1993) (an account of French rescuers of Jews); *LES ARMES DE L'ESPRIT* (documentary film by Pierre Sauvage on Chambon-sur-Lignon, a study of a French Huguenot village which saved thousands of Jews); VIKTOR FRANKL, *Ein Psychologe erlebt das Konzentrations-Lager* 68-69 (1947) (my translation). Frankl, a physician, wrote of his own decision to ascribe meaning to his death by volunteering in Dachau to care for patients who were ill with typhus and sure to infect him. He knew that he would die in any case, his alternative being death by exhaustion in a work commando: "If death was inevitable, then my death should have a sense. It seemed clearly more meaningful [to die] as a doctor able to help my comrades somewhat." FRANKL, *supra*, at 68-69. One thinks also of Bruno Bettelheim, whose studies of the disintegration of personality in concentration camp victims led to his groundbreaking work with autistic children, using a system devised to "reverse" the disintegration process which he had observed and studied in Nazi concentration camps. See generally BRUNO BETTELHEIM, *SURVIVING AND OTHER ESSAYS*, *supra* note 79.

But there remains also the truth that every end in history necessarily contains a new beginning: this beginning is the promise, the only 'message' which the end can ever produce. Beginning, before it becomes a historical event, is the supreme capacity of man; politically, it is identical with man's freedom. *Initium ut esset homo creatus est*—'that a beginning be made man was created' said Augustine. This beginning is guaranteed by each new birth; it is indeed every man.¹¹³

In support of his argument that there is no reason to study the holocaust, and that its study is pernicious, Binder attacks the view espoused by many holocaust scholars that the holocaust was unique. While there can be no definitive resolution to the question of whether the holocaust was unique in history, my inclination is to agree with Binder that, in its most material aspects, the holocaust was not unique. The sources which I have found most persuasive are those also cited by Binder: Hanna Arendt's *The Origins of Totalitarianism*,¹¹⁴ and Arno Meyer's *Why Did The Heavens Not Darken: The "Final Solution" in History*.¹¹⁵ Arendt analyzes the holocaust as a preliminary stage in totalitarianism rather than as a culmination of the history of antisemitism. Arendt considers the regimes of Hitler and Stalin fundamentally analogous during their respective totalitarian periods, totalitarianism being defined as government by terror whose logical and necessary consequence is arbitrariness in the imposition of death among its population. Arendt characterizes Stalinist Russia as having reached a more evolved stage of totalitarianism than Germany, and demonstrates that the Nazi regime ended before it could attain arbitrariness in its mechanism of terror, although it was striving for arbitrariness by the progressive vagueness and breadth in its definition of targets for annihilation: *i.e.*, from well-defined, marginal groups, relatively easy to ostracize, such as Jews, Gypsies, homosexuals and political dissidents,

¹¹³ ARENDT, *supra* note 76, at 478-79; see also ANTON GILL, *THE JOURNEY BACK FROM HELL: AN ORAL HISTORY* 3 (1988); PRIMO LEVI, *SURVIVAL IN AUSCHWITZ AND THE REAWAKENING: TWO MEMOIRS* 394 (Stuart Woolf trans., Summit Books 1986). This is less true of Arno Mayer's exhaustive study of the Nazi Judeocide, *WHY DID THE HEAVENS NOT DARKEN: THE "FINAL SOLUTION" IN HISTORY* (1988), which underscores the importance of historical influences on perceptions of, and reactions to, contemporaneous issues.

The Sartrean view of the individual's power to shape history stands in starkest contrast to "the well-known ideology of the Nazi state [according to which] the individual as such was either non-existent or of no importance." BRUNO BETTELHEIM, *Individual and Mass Behavior in Extreme Situations*, in *SURVIVING AND OTHER ESSAYS*, *supra* note 79, at 49 (1980).

¹¹⁴ ARENDT, *supra* note 80.

¹¹⁵ MAYER, *supra* note 113.

Nazism had progressed to targeting the mentally ill, the retarded and those afflicted with heart and lung ailments. According to Arendt, the only two governments in history to have made the transition from dictatorship to totalitarianism were Stalinist Russia and Nazi Germany, although her theory would appear also to encompass Pol Pot's regime in Cambodia (which her book, written in 1951, predated). The French historian Vidal-Naquet implicitly concurs with this view, contrasting "the crimes of France in Algeria, of the United States in Vietnam [to] actual genocides, those of the Armenians, the Jews, the Gypsies, the Khmers [and] the Tutsis of Rwanda."¹¹⁶ In addition to Arendt's analysis of Hitler's killing machine as fundamentally analogous to Stalin's, Arendt gives a detailed account, in *Eichmann in Jerusalem*,¹¹⁷ of the differences with which Nazi policy was implemented against the Jews in the various conquered European countries, demonstrating the critical role of internal responses by local administrations and populations and concluding that it is misleading to characterize Nazi policy as uniform. Arno Mayer concurs with Arendt in his exhaustive study of what he calls the Nazi Judeocide.¹¹⁸

The salient characteristic of holocaust scholars and authors, however, including those, like Wiesel, who believe that the holocaust was unique, is a premise of *non-unicity* as their point of departure: the underlying conviction that, since the holocaust happened once, it can happen again, and the concomitant determination to help to prevent its recurrence.¹¹⁹ Thus, the pervasive agreement among holocaust schol-

¹¹⁶ Vidal-Naquet, *supra* note 80, at 57.

¹¹⁷ ARENDT, *supra* note 76.

¹¹⁸ See MAYER, *supra* note 113. For the contrary argument in support of unicity, see, e.g., VLADIMIR JANKÉLÉVITCH, *L'IMPRESCRIPTIBLE: PARDONNER? DANS L'HONNEUR ET LA DIGNITÉ* (Jean-Pierre Barrou ed., Éditions du Seuil 1986); PRIMO LEVI, *THE DROWNED AND THE SAVED* (Raymond Rosenthal trans., Summit Books 1988); LEVI, *supra* note 113. Jankélévitch not only concludes that the holocaust was unique, but also that antisemitism cannot be defined as an instance of racism. According to Jankélévitch, drawing on Freud's work in *MOSES AND MONOTHEISM* (1939), racism is directed against the other, but antisemitism is directed against the almost-the-same, and the more similar the not-quite-the-same are, the more enraged and unappeasable the fury they engender: "[I]t is minimal otherliness which engenders the most inexpiable hatreds, feeds the most tenacious rancors . . . the similar-different person belongs to the controversial realm of ambiguity." JANKÉLÉVITCH & BERLOWITZ, *supra* note 62, at 1369 (my translation).

¹¹⁹ Hence the widespread slogan "never again." See generally GILL, *supra* note 113; SAMUEL PISAR, *LE SANG DE L'ESPOIR* (1979); Wiesel, *supra* note 1; LEVI, *supra* note 113. Bruno Bettelheim also expresses the motive of coming to a better understanding of human nature, an objective distinct from, but not inconsistent with, that of hoping to prevent a repetition of the holocaust: "The incentive for writing [about the holocaust] . . . can be external or internal; probably most often it is a combination of the two." BRUNO BETTELHEIM, *Trauma and Reintegration, in SURVIVING AND OTHER ESSAYS*, *supra* note 79, at 19. A survivor of the Dachau and Buchenwald camps, Bruno Bettelheim retrospectively attributed his own holocaust scholarship to an "unconscious . . .

ars is that the holocaust, whether or not unique up to the time of its occurrence, is not unique prospectively.

Compelling evidence that holocaust scholarship and literature are acts of hope whose objective is to prevent a recurrence of the holocaust undermines Binder's theory that holocaust scrutiny is an act of despair.¹²⁰ Of particular interest in the present study is Binder's argument that the holocaust should be ignored because its ultimate effect will be to make Jews lose an affirmative sense of identity, for this argument is highly analogous to the proposal that deconstruction should be ignored because it will lead to undermining faith in the United States' jurisprudential system. Both positions are normative; neither addresses issues of substantive merit or of truth.¹²¹ One would ask Binder what the value of Judaism can be if it cannot incorporate the occurrence of the holocaust, and if its perpetuation were to require that its adherents disregard an event of such cataclysmic magnitude.¹²²

attempt to master this shattering experience not just intellectually but also emotionally" and an effort to integrate the experience, to reverse the personality-disintegrating effects of the experience itself. BRUNO BETTELHEIM, *The Ultimate Limit*, in *SURVIVING AND OTHER ESSAYS*, *supra* note 79, at 16-17.

¹²⁰ I do not claim that holocaust scholarship and literature represent solely an affirmative political act on the part of authors to prevent a recurrence of the holocaust. I believe that they represent an affirmative political act in part, and that holocaust studies are a necessary aspect of any serious study of the modern period, capable of shedding light on, and necessary to an understanding of, both human nature and polity.

¹²¹ Binder begins his Commentary with the question "[m]ay we recover knowledge from the ashes of Auschwitz, and walk away enriched?" Binder, *supra* note 6, at 1321-22. The answer provided in the following sentence is phrased normatively, revealing that, even if the correct answer is yes, he will urge otherwise: "*we must not allow ourselves to be edified by atrocity.*" *Id.* at 1322 (emphasis added). Thus, Binder rejects edification on ideological grounds. See *id.*; see also FINKIELKRAUT, *supra* note 62, at 54, criticizing the utilitarian focus:

The partisans of Jewish memory declare: The dead teach the living The enemies of Jewish memory declare: These dead serve no purpose, weigh us down, enfeeble our vision, mystify what's at stake today. Both sides can conceive of the dead only in terms of their *usefulness*.

. . . If the future is for all things the measure of value, memory has no ground: for he who looks to gather the materials of memory places himself at the service of the dead, and not the other way around. He knows that they have only him in the world, and that if he turns his back to the manner in which they lived and died, then these dead Jews who were at his mercy will truly perish, and modernity, in love with itself, absorbed by daily intrigues, will not even notice they have disappeared.

¹²² Ironically, Binder's claim that only a Judaism which discounts the holocaust can be authentic, BINDER, *supra* note 6, at 1344-1355, finds an echo in Wiesel's nostalgic presentation of pre-war Judaism; Wiesel, however, understands that denying reality does not change it. The many crazed characters who appear in Wiesel's fictional works attest to the urgent desire to undo their past, but beneath their distorted layers of phantasmagoria always lurks the inalterable truth of their terrible pasts. In an autobiographical account, Wiesel recounts his own return to Sighet, the village in Hungary from which he and his family were deported in 1944 to Auschwitz. In the town of his childhood, eerily familiar, yet empty of the Jewish life which had thrived there for

As an example of a Jew with an authentic identity, rather than an allegedly impoverished deconstructionist-Wieselian form of identity, Binder evokes Léah Feldblum, a Jewish teacher at a school for Jewish children in Izieu, France. Feldblum carried forged identity papers and would have been able to escape unharmed, if she had not given herself up when the Gestapo arrested the children of Izieu. She accompanied the children to Auschwitz where Nazis murdered all of them except herself.¹²³ Binder views her disclosure of her true identity as proof of the authenticity of her identity: "She did not adopt this identity out of defiance, nor, when it proved costly to her survival, did she give it up. Leah Feldblum needed no holocaust to know who she was."¹²⁴

Binder offers no substantiation for his interpretation of her behavior or, indeed, any evidence that Feldblum did not engage in the same conduct as Wiesel after her return from Auschwitz: *i.e.*, trying to keep alive the memory of the holocaust and its victims, behavior which Binder defines as exemplifying inauthenticity of identity. Indeed, Binder's sole cited source concerning Feldblum is her testimony at Klaus Barbie's trial. Her presence as a witness militates towards the conclusion that, like Wiesel, Feldblum is dedicated to bearing witness in the memory of those who otherwise would be forgotten.¹²⁵ Binder's inter-

centuries, he is shocked to see an old, bearded man in Hasidic attire. He is overcome with joy: "Finally a Jew from before: a Jew whom the cataclysm hadn't touched." ELIE WIESEL, *Le Dernier Retour*, in *LE CHANT DES MORTS*, *supra* note 1, at 171 (my translation). But of course, there was no such Jew. Bearded and dressed as the Jews of his town had been in Wiesel's childhood, the old man who evoked for Wiesel a world which was lost had also been touched by the cataclysm, and the old man is stunned into a long silence when Wiesel addresses him in Yiddish, proof enough of the mutuality of their loss. *See id.* at 171.

¹²³ *See* Binder, *supra* note 6, at 1354; *see also* KASPI, *supra* note 75, at 248, 347.

¹²⁴ Binder, *supra* note 6, at 1354-55.

¹²⁵ The impulse to bear witness is an affirmative political act in more ways than one. It is not only an attempt to keep society vigilant to the dangers of a renewed holocaust, but also the only possibility of salvaging from utter meaninglessness the deaths of millions of innocents. *See, e.g.*, JANKÉLÉVITCH, *supra* note 118, at 17-46; WIESEL, *Plaidoyer Pour les Morts*, in *LE CHANT DES MORTS*, *supra* note 1, at 191-220. Those who survived assumed the dual burden of honoring the dead in their own lives on the one hand and, on the other, of living affirmative, positive lives. To allow themselves to be consumed by despair would be yet another triumph for Hitler; to live a life of lighthearted forgetfulness would be a betrayal of those who died without anyone else to mourn them. *See* BETTELHEIM, *Trauma and Reintegration*, in *SURVIVING AND OTHER ESSAYS*, *supra* note 79, at 26, on the tormenting question of the problem of survivorship and the answer given to a Jewish survivor who asked a Christian rescuer why she was among the few who survived: "So that you prove for the rest of your life that it was worth you being saved." *See also* CLAUDINE VEIGH, *I DIDN'T SAY GOODBYE 20* (Ros Schwartz trans., 1979) ("Having escaped persecution by the Nazis, I have always had the impression that life has been 'granted' to me a second time. And so I had to show that I deserved that life, that I was worthy to live it. It was no longer even mine; I was living, in a way, by proxy."). Similarly, Helen Epstein, a child of survivors born after the war, writes: "I felt an obligation to my family who perished and to my parents who survived . . . I felt

pretation is particularly questionable in that Feldblum's act of surrendering herself to the Gestapo may be seen as suicidal, the ultimate act of despair rather than of self-affirmation, based on a conclusion that to continue living in a world so debased by evil was less desirable than death.

Wiesel has suggested this interpretation for Ernie Levy's voluntary deportation to Auschwitz in his fiancée's transport in André Schwarz-Bart's *le Dernier des justes*.¹²⁶ Schwarz-Bart's book is a fictionalized history of a Jewish family through centuries, intertwined with the talmudic legend that God spared humanity because of the existence of thirty-six just men on earth. In Schwarz-Bart's account, each generation of the Levy family includes a just son, endowed with characteristics of often seemingly dubious worth which, as the book progresses, crystallize into a purity of heart which the reader comes to recognize as the sign of the just. Born in Germany, Ernie emigrates to France with his family. His parents and siblings are deported when the Germans occupy France, but he manages to escape and becomes adept at hiding from the Gestapo. When his fiancée is caught, however, he joins her voluntarily at Drancy and we last see Ernie, caring, with his fiancée, for small children who happen to be on the same transport to Auschwitz. Ernie fulfills the book's title as the last of the just because he will die childless. Wiesel offers the insight that Ernie does not go to his death for love of his fiancée, as it might appear, but because death is preferable to life in the world as it had become.¹²⁷

Wiesel also suggests the more general thesis that, in a totalitarian world, survival itself necessarily becomes tainted, because it requires the survivor's ethical degradation.¹²⁸ Bettelheim concurs, explaining the survivor's inner dilemma as follows: "[T]he reason you had the chance to survive was that some other prisoner died in your stead Some of them died because you pushed them out of an easier place of work; others because you did not give them some help, such as food, that you might possibly have been able to do without.' And the ultimate accusation to which there is no acceptable answer: 'You rejoiced that it was some other who had died rather than you.'¹²⁹

that my life wasn't entirely my own, and I wanted to make the most out of it that I could." HELEN EPSTEIN, *CHILDREN OF THE HOLOCAUST* 302 (1979).

¹²⁶ ANDRÉ SCHWARZ-BART, *LE DERNIER DES JUSTES* (1959).

¹²⁷ See ELIE WIESEL, *Notre Commune Culpabilité*, in *LE CHANT DES MORTS*, *supra* note 1, at 187.

¹²⁸ *Id.*

¹²⁹ BRUNO BETTELHEIM, *Trauma and Reintegration*, in *SURVIVING AND OTHER ESSAYS*, *supra* note 79, at 27; see also FRANKL, *supra* note 112, at 8-9, describing the fights among prisoners

In his admonition against viewing Jews as holocaust victims, Binder fails to grapple with the fact that they were victims, and assumes both that Jews controlled their own destinies and that it is now their fault for presenting an image which has strong resonances in Christian tradition. Binder does not reckon with the fact that the holocaust did not happen because Jews desired it, that the Jewish dead *were* victims, not in order to gain acceptance into Christian society through a Christ-reminiscent martyrdom, but because they were rounded up, deported and annihilated by the Gestapo, the *Einsatzgruppen* or the *milice*; more fundamentally, Binder does not recognize that the holocaust was an event of a magnitude to make most survivors unable to proceed without reference to it.¹³⁰

when some were to be selected for transport from a smaller camp to one furnished with gas chambers and crematories. Frankl concludes that:

[t]he outsider, who was never himself in a concentration camp, the uninitiated, creates a completely incorrect picture of the conditions in the camp . . . inasmuch as he is unable to come near to understanding the tough two-sided struggle for existence . . . Everyone was aware that, for each single person who was rescued another life had to be extinguished, in lieu of the one who was saved.

FRANKL, *supra* note 112, at 8-9 (my translation); see also *id.* at 10 (my translation):

Of the camp prisoners who remained in the camp for many, many years, from one camp to the other and who finally ended up in dozens of camps in all, on the average only those could manage to stay alive who in this struggle for survival were without scruples, who did not shrink even from violence or theft; nor, more generally, from dishonest methods used in the embittered struggle for survival; they did not even shrink from stealing from comrades. All of us who, through thousands upon thousands of lucky coincidences or miracles of God—however one wishes to call them—managed to come through alive, we know and can say without hesitation: the best did not return.

See also WIESEL, *Notre Commune Culpabilité*, in *LE CHANT DES MORTS*, *supra* note 1, at 186-87, for an almost identical view of the camp survivor. See generally Arendt, *supra* note 80, for the manner in which totalitarian regimes incapacitate their populations by coopting them into working for their own destruction. See also DAVID ROUSSET, *THE OTHER KINGDOM* (1947), for the totalitarian state's requiring its population to cooperate voluntarily in its own destruction in the name of the law, for the alleged good of the state.

¹³⁰The psychologists and holocaust survivors Bruno Bettelheim and Victor Frankl have shown that survivors endured a trauma with lifelong effects. Bettelheim in particular studied the complete disintegration of the personality in the concentration camps, a process of dehumanization which eradicated every aspect of the personality normally associated with humankind. See Bruno Bettelheim, *Individual and Mass Behavior in Extreme Situations*, 38 J. ABNORMAL & SOC. PSYCHOL. 417-52 (1943). Recent studies have resulted in similar findings among survivors of Pol Pot's terror. See, e.g., Alec Wilkinson, *A Changed Vision of God*, THE NEW YORKER, Jan. 24, 1994, at 52. Frankl also describes the disintegration process, noting the psychological importance of clinging to the last remnants of human dignity through symbolic acts and discussing the psychological consequences of losing the will to continue such symbolic acts. FRANKL, *supra* note 112, at 29. Frankl, however, disagrees with Bettelheim's ultimate conclusion, maintaining that inner freedom can be an enduring trait, capable of withstanding any onslaught. See *id.* at 98-118. Frankl's work also makes clear, however, that the trauma had lifelong consequences. For a discussion of the continuing effects of the trauma in the lives of holocaust survivors' offspring,

Binder's advocacy of ignoring the holocaust and rejecting a collective memory of persecution, far from leading to authenticity of identity, as he purports, would constitute repression of identity for survivors and, for historians of the modern age, a denial of reality.¹³¹

Binder's thesis depends on the ability to choose one's identity. The truth, however unpleasant it may be, is that Jews could not choose their identity during the Nazi reign of terror and that most had no means of escaping victimization. Victimization was imposed on them, not chosen, and those who survived, as the term "holocaust" implies, although not incinerated at its epicenter, bear its ineradicable and profound scars.¹³²

Despite accurately perceiving the force of existentialist influences in Wiesel's and Derrida's writing, Binder interprets the significance of Auschwitz as the death of God and the harbinger of a deconstruction-

see AARON HASS, *IN THE SHADOW OF THE HOLOCAUST: THE SECOND GENERATION* (1990). Bettelheim has also written extensively about the widespread resistance to facing the proposition that extreme conditions can reduce life to a state in which no human dignity remains. He has ascribed the great popularity of Anne Frank and Helen Keller to the desire to believe that a core of human dignity can persist in the midst of any hardship. See BRUNO BETTELHEIM, *The Ignored Lesson of Anne Frank*, in *SURVIVING AND OTHER ESSAYS*, *supra* note 79, at 246-57.

¹³¹ Binder is right that holocaust survivors have lived in response to Nazism, trying to balance the burden of life-affirming conduct with the wish to honor the dead, and trying to defeat Hitler's agenda by engaging in conduct which they perceive likely to defeat his objectives. Such behavior incorporates reality rather than denies it, however, and evidences an authenticity of identity. See MORGAN, *supra* note 79, at 26 (much of which is based on circa 10,000 pages of depositions and documents compiled over four years by the *juge d'instruction* who indicted Barbie), quoting Klaus Barbie's words after his conviction, urging the burial of the holocaust ("I never had the power to decide about deportations. I fought the resistance, which I respect, sometimes harshly. It was wartime, and today the war is over . . ."), and the author's reaction ("But the war is never over, not for the victims and their families, and not for a nation's collective memory . . ."). Morgan offers yet another reason why the holocaust cannot be relegated to a forgotten past:

After the war Michel Goldberg learned that his father had died at Auschwitz. [Goldberg's father was caught by Klaus Barbie in Lyon; Goldberg went to Bolivia when Barbie's whereabouts were discovered there in the 1960's by Nazi hunter Béate Klarsfeld, intending to murder Barbie and avenge his father's death; he found Barbie, but in the end could not bring himself to pull the trigger.] In his dreams he began to see six blue-black digits on his forearm getting bigger because he was growing. Later, when he had a family of his own, his daughter asked, "Why don't we visit your father's grave?" He had to tell her that there was no grave. His father was a small pile of ashes mixed in with others. Because of his daughter's question, he understood that when there was no grave, there was no mourning, and when there was no mourning, you never stopped mourning.

Id. at 213-14.

¹³² Many survivors dislike the term "holocaust." See, e.g., MAYER, *supra* note 113, at vii (eschewing the term in preference to "Judeocide"). Elie Wiesel rejects the term on religious grounds and Bruno Bettelheim criticizes it as a linguistic cleansing to render the concept emotionally palatable. BRUNO BETTELHEIM, *The Holocaust—One Generation Later*, in *SURVIVING AND OTHER ESSAYS*, *supra* note 79, at 84. I find the signifier well-suited to the signified because of the imagery of fire, suggesting various degrees of burning, depending on one's proximity to the conflagration.

ist-holocaust philosophy of despair. Binder quotes passages from Wiesel's writing to the effect that God, and Wiesel's faith in God, died in Auschwitz.¹³³ Binder characterizes this sentence as "the most memorable passage in Wiesel's writing"¹³⁴

Wiesel's discovery, however, which indeed elucidates his connection with deconstruction, was not the death of God, but the death of man, and not just of man, but of man's concept of man: "In Auschwitz died not only man, but also the idea of man . . . in Auschwitz the world was burning its own heart."¹³⁵ And "it is there that the future of man was killed."¹³⁶

Thus, it was not God who died in Auschwitz. It is of paramount importance to an assessment of the Derrida-Wiesel Weltanschauung to realize that, for both Derrida and Wiesel, the totalitarian systems and their unfathomable horrors signify the end of humankind as conceived in the Enlightenment tradition, but not of God, for God had receded as the locus of progress in the Western intellectual tradition with the rise of theism in the eighteenth century, long before Auschwitz, the gulag or the Cambodian killing fields.

God persisted as the focus of human hope through the seventeenth century. In French intellectual thought, Pascal's wager represents the continued ascendancy of God as a controlling influence.¹³⁷

The following century saw the rise of theism and the transfer from God to humans of hope for the future. The Bible of the theist was accumulated knowledge, and civilization was to be perfected in tandem with increased knowledge and scientific discovery. Diderot undertook the twenty-year project of the *Encyclopédie*. Montesquieu engaged in a study of the laws and social organizations of other cultures, or, as he called it of "the spirit of laws" to formulate a larger vision based on natural law.¹³⁸ Faith in reason is nowhere more visible than in Montes-

¹³³ For example: "Never shall I forget those flames which consumed my faith forever." Binder, *supra* note 6, at 1350 (quoting ELIE WIESEL, NIGHT 4 (1969)).

¹³⁴ *Id.*

¹³⁵ WIESEL, *Plaidoyer Pour les Morts*, in LE CHANT DES MORTS, *supra* note 1, at 210 (my translation).

¹³⁶ ELIE WIESEL, *Moshe-le-fou*, in LE CHANT DES MORTS, *supra* note 1, at 108 (my translation).

¹³⁷ Blaise Pascal (1623-1662), a brilliant mathematician, was also a fervent Jansenist who hoped to convert libertine nonbelievers by appealing to their gambling spirit and inviting them to wager for the existence of God and so attain the possibility of eternal salvation if their wager proved correct. Pascal's wager is characterized by its adoption of reason and self-interest as the bases for persuading libertines to reject reason and science in favor of religious faith. See BLAISE PASCAL, *ŒUVRES COMPLÈTES* 550-52 (1963). While Pascal rejected science in favor of religion, Spinoza's TRACTATUS THEOLOGICO-POLITICUS (1670) already heralded the approaching age of reason by subordinating religion to the Cartesian method of analysis. (It is interesting to note that Pascal's PENSÉES and Spinoza's TRACTATUS were originally published in the same year.)

¹³⁸ See CHARLES DE SECONDAT MONTESQUIEU, DE L'ESPRIT DES LOIS (1748).

quieu: "[T]o the scientific ideal he added a philosophical ideal, a faith in the power of reason to triumph over the legally unreasonable."¹³⁹

This faith in the power of reason and knowledge to perfect society is the hallmark of the Enlightenment system of thought, expressed throughout the Western world by Diderot, Montesquieu, Voltaire, Condillac, Fontenelle, Fénelon, Beccaria, Locke, Jefferson, Franklin and Madison. The spirit of the Enlightenment is a seminal part of the United States' government and legal system.¹⁴⁰

The twentieth century signalled the end of the Enlightenment belief in progress towards a perfectible, rational civilization.¹⁴¹ Before the occurrence of the extermination camp and the gulag, Freud announced that human behavior is subject to the irrational force of the unconscious. Although deconstruction owes much to both Sartrean existentialism and Freud, it is interesting to note that Sartre rejected Freud's theory of the unconscious. Contrary to Binder's view of Sartre as a proponent of ethical paralysis, Sartre's view of individual responsibility did not allow for lapses in ethical choices which might be ascribed to the unconscious by a Freudian. Sartre rejected the unconscious as "bad faith," or an attempt to evade one's social responsibility: "Bad faith implies by its essence the unity of *one* consciousness One does not undergo one's bad faith, one isn't infected by it, it isn't a *state*. But consciousness affects itself on its own with bad faith; this project implies a comprehension of bad faith as such and a pre-reflexive grasp of consciousness as consisting in bad faith."¹⁴²

Sartre criticized Freud directly inasmuch as "psychoanalysis substitutes for the notion of bad faith the idea of a lie without a liar, it allows

¹³⁹ FELLOWS & TORREY, *supra* note 66, at 145.

¹⁴⁰ See, e.g., ROBERT ROSWELL PALMER, *THE AGE OF THE DEMOCRATIC REVOLUTION, A POLITICAL HISTORY OF EUROPE AND AMERICA: THE CHALLENGE (1760-1791)* (1959); ROBERT ROSWELL PALMER, *THE AGE OF THE DEMOCRATIC REVOLUTION, A POLITICAL HISTORY OF EUROPE AND AMERICA: THE STRUGGLE (1789-1800)* (1964); see also RICHARD J. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS* (1983) (ascribing the epithet "Cartesian anxiety" to this phenomenon) (cited in Winter, *supra* note 61); BRUNO BETTELHEIM, *The Ultimate Limit*, in *SURVIVING AND OTHER ESSAYS*, *supra* note 79, at 8 (espousing the theory that the "belief in the unlimited blessings of progress" is "[t]he modern defense against death anxiety"). Richard Rorty points out that the Enlightenment search for truth originated in the Greek ideal of pursuing truth for its own sake, rather than for personal or communal good. See RORTY, *supra* note 63, at 21. The Enlightenment view may best be described as expecting personal and community good to be derived as a byproduct of the search for truth and knowledge. For the thesis that, in the eighteenth century, happiness was not considered worthy to be an avowable goal but was believed to be an assured derivative of virtue, hence the pursuit of virtue for the sake of its by-product, happiness, see ROBERT MAUZI, *L'IDÉE DU BONHEUR DANS LA LITTÉRATURE ET LA PENSÉE FRANÇAISES AU XVIIIÈ SIÈCLE* (1960).

¹⁴¹ See, e.g., JOHN GRAY, *POST-LIBERALISM* (1993).

¹⁴² SARTRE, *supra* note 35, at 87 (my translation).

for how I can, not lie to myself, but *be lied to*, since it places me with respect to myself in the situation of another with respect to myself."¹⁴³ Sartrean bad faith is conscious; the Freudian unconscious has presence at the level of consciousness also, however, in the sense that its transmutations at the manifest level are the keys which unlock the doors to the unconscious. This idea of presence in absence through manifestations which, when appropriately analyzed, are the indicia of underlying meaning is pervasive in structuralist and deconstructionist analysis.

The hostile reception accorded to Freud's theories of the unconscious, like current opposition to deconstruction, no doubt emanated to some extent from resistance to the unwelcome prospects for human society which both theories imply. It is my belief that anti-deconstructionists use the defense of denial as a way to avoid facing facts which they cannot controvert and which they find intolerable.¹⁴⁴ The accusation by anti-deconstructionists that deconstruction is defeatist, and, more particularly, that studying the holocaust is defeatist, is a reaction to the incontrovertibly unpleasant truths which such studies illuminate. Denial, however, paralyzes its practitioners from taking effective action. One would ask of anti-deconstructionists what confidence can be placed in a jurisprudential system if its constituent elements cannot withstand the probing scrutiny of deconstructionist analysis or, for that matter, of any logically sound analytical methodology. The deconstructionist and the holocaust scholar, far from being defeatist, illuminate reality. It is for the enlightened to make positive use of what has been illuminated.¹⁴⁵ Our chances of improving the world diminish to the extent that we do not face reality.

¹⁴³ *Id.* (my translation).

¹⁴⁴ See BETTELHEIM, *The Holocaust—One Generation Later*, in *SURVIVING AND OTHER ESSAYS*, *supra* note 79, at 90, for a definition of denial. Bettelheim explains that, "[w]hen anxiety becomes overwhelming, even normal adults tend to regress to use it. That is why Jews under Nazi domination, in the face of obvious facts but in mortal anxiety, engaged in denial so massive that under other circumstances it would have been considered delusional." *Id.* It should be noted that deconstruction has been accused of denial also—its intense focus on antilogy being equated with denial of objective reality. See LEHMAN, *supra* note 3, at 89–99 (comparing Derrida and deconstruction to the world described in George Orwell's 1984 (1949)). Lehman's parodic comparison of deconstructionist jargon with Orwellian doublespeak, however, ultimately implicates inept followers of Derrida rather than deconstruction itself.

¹⁴⁵ Gary Minda captures the deconstructionist approach:

Postmoderns would resist the idea of a postmodern theory of jurisprudence. They would instead emphasize the incredible degree of freedom that exists in the midst of diversity. They would say that the future of jurisprudence remains in our hands, that it is up to us to build the legal world we wish to inhabit.

Minda, *supra* note 60, at 59.

In his focus on the Jewish aspect of holocaust studies as exemplary of deconstructionist practice, Binder misses a seminal element: holocaust studies do not concern Jews exclusively, and the mission of holocaust studies is not restricted to the perceived good of Jews alone.¹⁴⁶ As scholars such as Arendt and Bettelheim have demonstrated, the holocaust was not so much the most recent manifestation of antisemitism as the first stage of modern totalitarianism.¹⁴⁷

Deconstruction and holocaust studies are connected as responses to the modern age which saw the birth of the totalitarian state. Endemic to the deconstructionist approach is a refusal of absolutism. Its anti-absolutist attribute was its attraction for the structuralist literary theorists who were the first to introduce deconstruction into American academic consciousness. Deconstruction's critics point to the dangers of relativism. Deconstructionists and their intellectual forebears, however, bring to their *Weltanschauung* an all-too-vivid sense of what was wrought by the absolutism preached by this century's totalitarian regimes. The relativism implicit in deconstruction does not constitute a denial of the existence of truth, but a caution against unwarranted conclusions of exclusive propriety over the truth.¹⁴⁸

¹⁴⁶ See, e.g., OLINER & OLINER, *supra* note 111, at xviii.

The world is filled with groups marked for special cruelty. The Holocaust ushered in a new death technology, as awesome in its implications as nuclear technology. Whereas nuclear warfare threatens to burn all of us into ashes, Holocaust technology created a means whereby selected populations could be plucked out from among their neighbors and destroyed. The Holocaust points not only to the fragility of Jews but to the precariousness of any group that might have the misfortune of being so arbitrarily designated. If we are to live in a world free from the threat of Holocausts, we need to create it.

Id.; see also LIPSTADT, *supra* note 80, at 20 ("[T]he Holocaust was not a tragedy of the Jews but a tragedy of civilization in which the victims were Jews . . ."). Of related interest are the results of Aaron Hass' study of the psychological effects of the holocaust on survivors' children. Hass discovered significantly less ethnocentrism among holocaust survivor children who were knowledgeable about the holocaust than in their American non-survivor-related counterparts. HASS, *supra* note 130, at 167 (citing Morton Weinfeld & John J. Sigal, *The Effect of the Holocaust on Selected Socio-Political Attitudes of Adult Children of Survivors*, 22 CAN. REV. SOC. & ANTHROPOLOGY 365-82 (1986)); see also EPSTEIN, *supra* note 125, at 301 (A child of concentration camp survivors, explaining her differences with Israelis who urged her to immigrate on the ground that her parents' experience should have taught her that Israel was the only solution: "My parents' experience had taught me nothing of the sort. On the contrary, it had taught me to distrust ideologies and final solutions of any kind.").

¹⁴⁷ ARENDT, *supra* note 80; BRUNO BETTELHEIM, *Eichmann: The System, The Victims, in SURVIVING AND OTHER ESSAYS*, *supra* note 79, at 265.

¹⁴⁸ Indeed, as Winter so aptly puts it, "[i]t is . . . the insistence on . . . the absolute that is both nihilist and profoundly antihumanist." Winter, *supra* note 61.

VI. CONCLUSION

This article has attempted to clarify our understanding of deconstruction by examining its historical context. Part I traced deconstruction's pre-structuralist and structuralist antecedents in the French literature departments of American universities which were to provide legal scholars with their introduction to deconstruction. Pre-structuralist criticism, characterized by ruminations on authorial intent and a lack of analytical rigor, was rejected in favor of structuralism's systematized scrutiny of texts. Structuralism, however, was flawed by unjustified claims of scientific accuracy and absolutist pretensions of yielding a single, correct interpretation, flaws which led structuralist critics to turn to deconstruction.

Part II explored deconstructionist methodology, arguing that deconstruction does not reject the idea of truth or meaning and that its focus on antinomy makes it appropriate for analysis in fields like law and literature which elude scientific precision and verification. Part II also refuted criticism that deconstruction is random in application and validates all meaning indiscriminately.

Part III explored deconstruction's implications in the legal field; namely, that contradictions embedded in the tenets of our legal system point to the fragility of our jurisprudential system and of the rule of law, and that it is not our jurisprudential system which has spared the United States the horrors which have befallen others this century, or which can be relied on to ensure our future safety. One can see in the collapse of the French constitutional system from 1940 to 1944, and in the antisemitic legislation of the Vichy regime, the inability of systems similar to our own to create internal safeguards for their own perpetuation. The Vichy legislation also provides insight into the usefulness of deconstruction as an analytical tool to elucidate the sort of contradictions which the French were able to ignore, as they failed to differentiate traditional legal measures from the antisemitic laws and decrees, focusing instead on illusory surface similarities of terminology and structure.

In Part IV, we saw that the more traditional criticism that deconstruction provides respectability to holocaust denial has been joined by the novel thesis of Guyora Binder that deconstruction is itself a form of "Holocaust Judaism," nihilistic by existing only in opposition to something else, and destructive because it lacks affirmative content. We examined two formative influences studied by Binder, Lévi-Straussian structuralism and Sartrean existentialism, concluding that Lévi-Strauss' approach sought objective truths and Sartre's offered hope for

historical progress through the ethical action of responsible individuals. Deconstruction reflects the search for understanding the complex nature of observable phenomena, which characterizes structural anthropology, and the belief in individual responsibility which permeates Sartre's philosophy. We also argued that, while signalling the end of the Enlightenment view of humanity, deconstruction and holocaust studies are both affirmative in nature, premised on a Sartrian belief that history can be changed by individual acts.

Deconstruction cannot provide foundational values. It should not be condemned or dismissed for its failure to do so, for its goals lie in elucidating meaning through previously unperceived connections and probing surface representations for underlying signification. Deconstruction is neither a panacea for the despair with which some respond to the modern predicament or to the human condition, nor a cause of or for despair. For those who espouse the scientific tradition of welcoming truth, deconstruction is a helpful tool for the enrichment of our understanding.

The particular light which deconstruction sheds on internal paradox and inherent contradiction offers a framework for tolerance towards those whose conclusions differ from our own, not so that we become paralyzed into inaction or relinquish our stands, but so that our controversies are fought with a maximum of respect for the legitimacy of our opponents' perspectives. Our opponents' perspectives will not necessarily be legitimate nor does tolerance imply sanctioning illegitimate positions. Deconstruction's relation to tolerance is in elucidating connections of similarity in difference and vice versa, in questioning established categories and suggesting novel ones so that our perception can expand. Deconstruction's selective application to textual phenomena which generate interpretive complexity safeguards against a relativism which would condone all interpretations.

The deconstructionist perspective no doubt will continue to evoke in many the profoundly human discomfiture provoked by certain uncertainty. Deconstructionists do not resolve this dilemma, but, as they strive to comprehend life's perplexities and to meet the challenges of action and reaction, they also follow the advice of the poet who believed in loving the questions.¹⁴⁹

¹⁴⁹ See RAINER MARIA RILKE, *LETTERS TO A YOUNG POET* 35 (1934).