Book Reviews

Nested Oppositions

Against Deconstruction. By John M. Ellis.* *Princeton, N.J.:*
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Deconstruction has become a prominent force in legal theory in the last
few years, especially through its use by feminist scholars and members of
the Critical Legal Studies movement. Yet its appearance on the critical
scene has not been greeted with universal acclaim; many persons are
greatly concerned by the pervasive influence of deconstruction. However,
no matter how great a furor deconstruction has caused in legal circles, it
has caused even greater controversies in literary circles for the last decade
and a half.

John Ellis describes his new book, *Against Deconstruction,* as an at-
tempt to provide what has heretofore been lacking in literary theory—an
intellectual case against deconstruction.[1] By subjecting deconstruction to
"the tools of reason and logical analysis," Ellis hopes to expose the flaws
of deconstructive writing. More importantly, he hopes to generate a rea-
soned debate about the philosophical underpinnings of deconstruction, a
debate which he sees as never having quite gotten off the ground.[2] In
many respects, Ellis is superbly qualified for this task. In addition to be-

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versity of Texas. My thanks to Tom Seung for his comments on a previous draft and for our many
conversations on continental philosophy.

1. J. ELLIS, AGAINST DECONSTRUCTION (1989) [hereinafter cited by page number only].
2. Pp. vii–x.

ing a noted scholar of German literature, he has written a book applying methods of analytic philosophy to traditional problems of literary criticism,[3] and has also attempted to bring the insights of Ludwig Wittgenstein's philosophy to literary theory.[4]

Nevertheless, Ellis does not quite succeed in his endeavor, for his book quickly degenerates into a polemic against deconstruction and its foremost exponent, the French philosopher Jacques Derrida.[5] Rather than beginning a dialogue based upon the strongest and most plausible versions of deconstructive arguments, Ellis is rather too eager to show the reader that what he is writing about is absurd. Derrida can justly be blamed for not being the clearest of writers, but he is hardly different from many other philosophers in the Continental tradition who write in a metaphoric and hyperbolic style. This way of arguing necessitates paraphrase and retranslation if it is to be understood and evaluated in the rather drier format of Anglo-American analytical philosophy. Such a project requires considerable patience and sensitivity, and Ellis shows a marked lack of both traits. Thus, whenever Ellis has a choice between a charitable reading of Derrida and a wooden or patently foolish reading, he invariably chooses the less plausible and more ridiculous reading. He thus ends up betraying the very values of dispassion, precision, and avoidance of hyperbole that he complains are lacking in the work of deconstructionists.

Nevertheless, even if Ellis cannot quite manage to avoid the sort of polemicizing that he purportedly disdains, his book has considerable value. Even a polemic can raise important issues that deserve response. Although it is nominally an attack on the work of deconstructive literary theorists, Ellis' book is quite relevant to lawyers and legal theorists because it shares many of the concerns and misunderstandings of mainstream legal academics about deconstructive arguments made by feminists and Critical Legal Studies scholars.

In Ellis' work one quickly perceives that what has most disturbed crit-

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3. J. ELLIS, THE THEORY OF LITERARY CRITICISM: A LOGICAL ANALYSIS (1974).

4. Ellis, *Wittgensteinian Thinking in Theory of Criticism*, 12 NEW LITERARY HIST. 437 (1981).

5. *See e.g.*, pp. 43-44 (suggesting that Derrida has deliberately failed to mention Wittgenstein's work in order to make his own seem more original and revolutionary; his failure to discuss these matters raises questions that are "unanswerable"); pp. 80-82, 138-41 (deconstruction always argues for opposite of whatever it believes to be received tradition, thus producing an interpretation as simplistic as its target); p. 82 (deconstruction advocates "an indiscriminate response to authority," of same sort as "the slogan of the younger generation in the 1960s: 'Don't trust anyone over thirty' "); pp. 111-12 (deconstructive claim that "all interpretation is misinterpretation" is "an empty piece of posturing," and "an *illusion* of intellectual tour de force, which is not backed up by any theory of substance" (emphasis in original)); pp. 141-42, 151 (deconstructive "[f]ormulations are chosen not for their logical or intellectual appropriateness but, instead, for their drama and shock," or their "psychological appeal"); p. 144 (deconstructionists always view their opponents in "the role of the naive believer who must be denounced"); pp. 148-50 (deconstructive critics dislike Jonathan Culler's explanations of deconstruction because they can easily be understood by non-deconstructionists; however, Culler's clarity makes it obvious he has nothing interesting or important to say); pp. 151-52 (deconstruction gives its adherents a way of being revolutionary and shocking without doing any important theoretical work).

ics of deconstruction is what they see as deconstruction's apparent denial of conceptual distinctions thought essential to much literary, legal, and political discourse. An example of an important distinction in literary theory might be the distinction between interpretation and misinterpretation. Important distinctions in legal and political theory include the distinctions between law and politics, public power and private power, interpreting law and making law, and coercion and consent. Critics have also worried that deconstructive theory claims that semantic distinctions between words are incoherent, thereby precluding any possibility of meaningful discourse.[6] Most troubling of all is the claim that deconstruction rejects the laws of logic itself, thus suggesting that all intellectual discussion must come to an end.[7]

This essay argues that these fears are ungrounded. To be sure, some deconstructionists do talk loosely and imprecisely about total incoherence and indeterminacy, and are often not completely clear about the nature of the claims that they are making. However, the form of deconstructive analysis that I advocate does not involve any of the above-mentioned claims of radical incoherence or indeterminacy. This version of deconstruction is the type most suitable for use by legal and political theorists. It is also, I contend, the interpretation that is most charitable to Derrida's often obscure texts and that makes the most sense of the type of arguments found within them.

Properly understood and properly used, deconstruction offers theorists a set of techniques and arguments involving the concepts of similarity and difference. Because the logic of law is to a large degree the logic of similarity and difference, these issues are of obvious concern to lawyers. As I shall explain in detail, deconstructive arguments concerning similarity and difference involve the reinterpretation of conceptual oppositions as what I shall call "nested oppositions"—that is, oppositions which also involve a relation of dependence, similarity, or containment between the opposed concepts. A nested opposition, however, is not a denial that a conceptual opposition is coherent, real, or useful in some contexts. It is rather a resituation of the opposition that allows us to see both difference and similarity, both conceptual distinction and conceptual dependence.

The recurring confusion of nested oppositions with claims of false opposition or nonopposition has caused immense problems for philosophical as well as legal argument. It has led to the fears about deconstruction described above, and has generated misunderstanding both among persons who use deconstruction and among those who criticize its use. I shall argue that many if not most of Ellis' misunderstandings about deconstruction arise from this confusion.

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6. Pp. 54, 122-24, 127-28, 133-34.
7. *See, e.g.,* pp. 3-11.

The remainder of the book contains Ellis' attack on the reader-response school of literary criticism, his views on the declining state of literary criticism today, and deconstruction's place in hastening that decline.[8] In keeping with the style of the book, these chapters are sharp and provocative; although they will be quite interesting to literary scholars, I omit discussion of them here. Nevertheless, I will have something to say about Ellis' defense of linguistic conventionalism,[9] which does have some relevance to legal issues, and to the question of conceptual oppositions.

I. DECONSTRUCTION AND THE LAWS OF LOGIC

Ellis' agenda is clear from the title of the opening chapter of his book: "Analysis, Logic, and Argument in Theoretical Discussion." Ellis is concerned that some deconstructionists have claimed that their work is not susceptible to traditional forms of logical analysis because it relies upon a different form of logic.[10] In traditional logic, the propositions P and not-P are mutually exclusive. Ellis believes that the adherents of deconstruction reject this in favor of a logic which asserts "[n]either/nor, that is, *simultaneously* either *or*."[11] No doubt for someone to insist simultaneously that "neither P or not-P" and "P and not-P" seems contrary to ordinary principles of logic, and it is not surprising that Ellis, who prides himself on his rigorous analytical approach, is skeptical of such claims. He argues that "[t]his kind of rhetoric does not advance serious thought or inquiry but gives an impression of profundity and complexity without the effort and skill that would be required to make a substantial contribution to the understanding of the matter under discussion."[12] Moreover, he believes it smacks of religious mysticism, of which he also disapproves.[13] Ellis complains that

> [p]erhaps the most common claim of all here is simply the most general of all: that logic, reason, and analysis are insufficient to discuss Derrida. But . . . this is a claim made with great regularity throughout human history; attacks on rational thought have occurred with regularity by mystics, visionaries, and others who were similarly impatient with the constraints of reason.[14]

Ironically, *neither* Ellis *nor* the targets of his criticism are quite right about the logical status of "neither/nor and both/and," although *both* Ellis *and* his targets are right to some degree. Of course, once we use the

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8. Pp. 113–36, 153–59.
9. Pp. 45–66.
10. Pp. 3–4.
11. P. 6 (quoting J. DERRIDA, POSITIONS 43 (1981) (emphasis in original)).
12. P. 7.
13. Pp. 7–8, 8 n.2.
14. P. 9.

phrase as I have used it in the last sentence, it should become clear that deconstructive claims of "neither/nor and both/and" do not necessarily involve any abandonment of rationality. Rather, these claims are based upon a form of rationality that is very familiar to us, and which in fact is essential to the practice of legal and ethical argument. This form of reasoning is concerned with establishing the similarity or difference between objects, concepts, or any other entity.

It is important to understand how this type of reasoning and propositional logic often talk past each other. The key idea in propositional logic (and Aristotle's syllogistic logic) is that statements like "Fetuses are Persons" can be translated into symbols that can be manipulated without regard to what they stand for. Thus, one might argue with perfect logical validity that if all F are P, and if murder is defined as killing a P, then killing an F is also murder. The formal character of the symbols guarantees that the result is logically valid, regardless of the substantive content of the symbols. Thus, if we translate "Fetuses are Persons" into "All F's are P's," or "$(x)(F(x) \rightarrow P(x))$," we no longer care what F and P stand for in our logical calculations. What we prove is logically correct whether F stands for fetuses or fandango dancers.[15]

The rationality of similarity and difference, however, is concerned with the conditions under which we can classify things as being F's or being P's. Are fetuses enough like the other things we call persons to count as persons? They have human DNA, they share certain bodily functions of adult humans, and they are composed of living cells. On the other hand, all these characteristics are true of one's liver or one's appendix. Are fetuses more like persons or more like your appendix? Are *all* fetuses equally like persons, or are some of the things within the category we call "fetus" more person-like and some more appendix-like, for example fetuses that are eight months old and fetuses that are three weeks old? These types of questions are the object of the rationality of similiarity and difference. Here we must patiently compare what things are alike or unalike, to what extent or for what purpose they are alike or unalike, and (most importantly) *why* we want to treat them as alike or unalike. Those reasons may have little to do with the overt physical characteristics of the fetus—for example, whether it is composed of a few cells or many—but may stem from a range of social policies or theories of rights that we think important to enforce. Thus, we treat the fetus as a person or not as a person, or as a person in some respects but not in others, because of those important social policies or theories of rights.

What I have just said must sound obvious to most lawyers. The ration-

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15. Note that the statement "all F are P" is true if we replace "fetuses" with "fandango dancers." If F stands for "forest fires," the statement is not true, but logical inferences based upon the formal statement "all F are P" continue to be logically valid even if their ultimate conclusion is false.

ality of similarity and difference *is* what we mean by legal reasoning in many respects. It is quite close to what Edward H. Levi meant when he spoke of legal reasoning as reasoning by analogy.[16] And such reasoning is always a matter of degree—things are always alike to some extent, and always unalike to some extent. Thus, when Derrida and his followers tell us that things are neither/nor *and* both/and, we know that they are not talking nonsense—they are talking like lawyers. (I am, of course, acutely aware of the question that I have just begged).

Deconstruction offers a general view about the rationality of similarity and difference, a view that provides a useful set of analytical techniques for law as well as for the other human sciences. However, to understand this view, we must first clarify a number of concepts and relate them to the problem of similarity and difference. They are logical contradiction, conceptual opposition, and nested opposition.

Logical contradiction is a property of *propositions*. A logical contradiction involves two terms, a proposition and its logical denial. For example, if *P* is a proposition, then a logical contradiction is involved in asserting simultaneously that *P* and not-*P* are both true. A conceptual opposition, on the other hand, is a property of a relation between *concepts* in a particular context—it therefore need not involve a logical contradiction between propositions. A conceptual opposition consists of three elements—the first term, the second term, and the context or relationship by which they are opposed.[17]

If we say that red and green are opposite colors in a traffic light, we are not saying that they logically contradict each other. Rather, they are opposed with respect to the meanings these colors are given in traffic signals. The context of conventions concerning traffic signals makes them opposites. In another context, they may be seen as similar to each other. For example, red and green are both colors of the natural spectrum, or colors associated with Christmas, while lavender and brown are not. Thus red and green are seen as different in some contexts, and are seen as having similar properties in others.

Conceptual oppositions are thus intimately related to questions of similarity and difference. A conceptual opposition between *A* and *B* is an implicit statement of similarity and difference—an implicit claim of similarity among the things associated with *A* (or among those associated with *B*) and an implicit claim of difference between these two groups. These implicit claims of similarity and difference are made in the context of the relation that opposes the two poles of the opposition.

A recurring problem in theoretical argument is the confusion of concep-

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16. E. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949).

17. For an excellent discussion of this point, see T. SEUNG, STRUCTURALISM AND HERMENEU-TICS 10-14 (1982).

tual opposition with logical contradiction. The problem arises because we often forget that what produces a conceptual opposition is context and relation and not logical contradiction. This mistake is easy to make because many conceptual oppositions look and act like logical contradictions in particular contexts. Our cultural practices make red and green conceptual opposites in the context of a traffic light. It is also true that the same object cannot be at the same time wholly green and wholly red. Thus it appears as if statements of the form "This object is red" and "This object is green" might be logically contradictory, and that to predicate both properties (red and green) of the same object might involve logical contradiction.

Nevertheless, statements of logical contradiction are statements that are inconsistent and also admit of no third alternative. It is not true that everything must be either green or red, nor is it true that nothing can be both green and red. Green and red are mutually exclusive in some contexts, but they do not use up the entire spectrum of color—a sweater can be purple or grey. And in still other contexts green and red are not even mutually exclusive, for a green and red striped sweater can be both green and red.[18] Thus, conceptual oppositions like red and green only give rise to statements of logical contradiction in specific contexts.[19]

The confusion between logical contradiction and conceptual opposition is related to another problem— the mischaracterization of properties that depend upon context or relation as being acontextual properties of things. A good example is the property of number. Suppose we have two married couples. How many are there? There are two couples, but there are four persons. The property "two" is not a property of them, but of the way in which they are considered—that is, of the context in which the question is asked or the property ascribed.

The idea of contextual and relational properties is quite important when we discuss questions of similarity and difference. For similarity and difference are the quintessential relational or contextual properties. To say that two things are the same is always to beg the question, "in what respect?" or "in what context?"[20] The contextuality of similarity and difference means that conceptual oppositions are only opposed in certain con-

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18. So can a traffic signal which is not working correctly.

19. For examples of the recurrent confusion of logical contradiction and conceptual opposition in philosophy, see T. SEUNG, *supra* note 17, at 12-17.

20. This may seem at odds with at least one type of identity—self-identity. It might appear that self-identity is an acontextual property. Yet in fact this is not the case. For example, consider the self-identity of persons. A person is a child and then she becomes an adult. In one respect she is the same, but in another she may be quite different, both psychologically and physically. Even inanimate objects change over time, yet we still say that they are identical. The famous statement of Heraclitus—that one can never step into the same river twice—is simply another version of this point. Heraclitus argued that the same is always in the process of becoming different from itself. This metaphorical language makes sense only when similarity and difference are understood as contextual or relational properties.

texts. In other contexts, the terms of the opposition have similarities and are not opposed.

This brings us to the third and most important concept necessary to understanding the connection between deconstruction and logic: that of nested opposition. A nested opposition is a conceptual opposition each of whose terms contains the other, or each of whose terms shares something with the other. The metaphor of "containing" one's opposite actually stands as a proxy for a number of related concepts—similarity to the opposite, overlap with the opposite, being a special case of the opposite, conceptual or historical dependence upon the opposite, and reproduction of the opposite or transformation into the opposite over time. These possible versions of what I call containment share what Wittgenstein called a "family resemblance"—they all bear similarities to each other, although we cannot point to one single property that they all have in common.[21]

Deconstruction makes a basic claim about the logic of similarity and difference: All conceptual oppositions can be reinterpreted as some form of nested opposition. This follows from the contextual and relational nature of conceptual oppositions. Because opposition depends upon context and relation, recontextualization of a conceptual opposition may reveal similarities where before we saw only differences, or historical or conceptual dependence where before we saw only differentiation. Thus, to deconstruct a conceptual opposition is to reinterpret it as a nested opposition. It is to observe *simultaneously* the similarity and difference, the dependence and differentiation, involved in a relation between concepts. Deconstructive argument is simply the means by which this reinterpretation is achieved. Moreover, because claims of similarity and difference can be reinterpreted as conceptual oppositions, it follows that claims of similarity and difference can also be reinterpreted as forms of nested opposition.

The deconstructive concepts of *différance* and "trace" implicitly rely upon notions of nested opposition. *Différance* is used by Derrida to describe the mutual dependence and differentiation of concepts.[22] Mutual dependence and differentiation, however, is simply one form of nested opposition. Trace is the retention of absent concepts in our understanding of other concepts;[23] the trace involves a form of conceptual or historical dependence between the present and absent concepts, and thus a nested opposition between what is nominally present and what is absent. Finally, deconstructive readings implicitly make use of nested oppositions. For example, a standard form of deconstructive reading attempts to invert hierarchies of concepts found in a text. The deconstructive analysis proceeds by demonstrating that the opposition between the favored and the disfa-

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21. L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 67 (G. Anscombe trans. 3d ed. 1953).

22. *See* Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 752-53 (1987).

23. *Id.*

vored term in the opposition is really a nested one. In other words, the goal is to show that the favored or dominant term bears some form of conceptual dependence to the disfavored or subordinated term.

One might well wonder whether deconstructive theory really claims that *all* conceptual oppositions can be reinterpreted as nested oppositions. Such a translation would not be possible if there were a conceptual opposition where neither pole bore any element of similarity or conceptual or historical dependence with respect to its opposite. However, it is always possible to create a context, no matter how artificial, in which two things are said to be alike in some respect.[24] Indeed, we might note that the very fact that we see the two concepts as opposed, rather than as completely irrelevant to each other, indicates some basis of similarity or some conceptual relation between them.[25]

It is important to understand that the deconstructive claim that all conceptual oppositions can be reinterpreted as nested oppositions is not a claim that all conceptual oppositions are incoherent or false oppositions. For this involves a confusion of similarity with identity. To say that A and B form a nested opposition is not to say that A is identical with B, or that it is impossible to tell A and B apart in a particular context. Indeed, the concept of a nested opposition only makes sense if we assume that there are points of difference between A and B; otherwise we could not see these concepts as opposed. Therefore it is a misuse of deconstructive argument to claim that one can abolish all distinctions and demonstrate that all forms of intellecutal endeavor lack coherence. For deconstructive argument itself rests upon the very possibility of those distinctions and those coherences.

I believe that the richness and utility of the concept of nested opposition clarifies many of the debates surrounding deconstruction and the accusations of indeterminacy regularly levelled at it. But this idea, which depends so heavily upon contextualization, is itself best encountered in context. Moreover, the concept of nested opposition is rich because it is actually a cluster of interrelated concepts. For these reasons, a few exam-

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24. For example, even logical contradictions, such as that between P and not-P, can be interpreted as nested oppositions, if we shift our focus from the opposed meanings of the two propositions to the opposition between the propositions themselves. We might note that both propositions have in common the property of being propositions, both involve a statement about a state of affairs P, and each is dependent for its truth value upon the truth value assigned to the opposite proposition.

25. Nevertheless, this answer suggests that at least some reinterpretations of conceptual oppositions as nested oppositions will be trivial or uninteresting. We might then ask if there is any way of demarcating in advance those conceptual oppositions that will produce interesting forms of nested opposition from those that will produce only trivial or uninteresting ones. But we cannot compile such a list in advance, for triviality and interest, like similarity and difference, are highly contextual properties. In other words, although deconstructive techniques can be explained formulaically, the actual practice of deconstruction is not formulaic—it requires sensitivity and creativity on the part of the deconstructor in discovering interesting or relevant points of similarity or conceptual dependence between conceptual opposites.

ples are necessary in order to show how the different forms of nested opposition work in practice.

A. *Nested Oppositions in History and Culture*

First, consider a nested opposition of intellectual themes. Suppose a historian asserts that Thomas Jefferson and Alexander Hamilton had opposed political philosophies. She might point out that Jefferson stood for the preservation of the yeoman farmer, for individual equality and opportunity, for local power as opposed to national power, and that Jefferson's thought emphasized revolutionary flexibility in order to preserve individual liberty. In contrast, she might argue that Hamilton stood for the growth of American industry, was complacent about natural and social inequalities, sought increased centralization of governmental power, and emphasized the preservation of social order in order to enhance economic growth.[26]

The example of Jefferson's and Hamilton's philosophies is paradigmatic of a nested opposition because it is an opposition of cultural or value-oriented themes. The most common forms of nested opposition arise in oppositions between historical movements or events, interpretive statements, claims of value, or other products of culture. This is not to say that nested oppositions cannot occur elsewhere, but merely that these are the most interesting and important examples.

We might understand this opposition as nested in several different ways. First, we might recognize that there is considerable overlap between the philosophies of the two men, as the consensus historians of the 1940's and 50's argued.[27] Both thinkers stated their views against a background of assumptions involving a capitalist economic system and a liberal democratic political system. More particularly, both men believed in natural aristocracies of talent and the institution of private property, and both objected to government interference with individual initiative.[28] We might say metaphorically that there is a little of Jefferson's philosophy in Hamilton and a little of Hamilton's philosophy in Jefferson. This would not justify the claim that their philosophies were identical, but it would be a useful corrective to the notion that they were in all respects opposed.

Second, we might note the degree to which Jefferson's thought came to resemble Hamilton's after Hamilton's death and Jefferson's ascension to the presidency. The similarities between Jefferson and Hamilton might tend to explain why, during his presidency, Jefferson took many steps that would have been consistent with Hamilton's views on government and

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26. *See* 2 D. MALONE, JEFFERSON AND HIS TIME: JEFFERSON AND THE RIGHTS OF MAN 286-87 (1951); M. PETERSON, THOMAS JEFFERSON AND THE NEW NATION 434-35 (1970).

27. *See, e.g.*, L. HARTZ, THE LIBERAL TRADITION IN AMERICA (1955); R. HOFSTADTER, THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT (1951).

28. R. HOFSTADTER, *supra* note 27, at 46-49.

with the early Federalist position in general.[29] Of course, these policies can be explained on the grounds that Jefferson changed his mind about these things as he got older, or that he was simply unprincipled. But these policies are also partially explained by the fact that, as the historical context changed, the similarities between Jefferson's views and Hamilton's emerged more clearly—that alteration of political and historical context allowed us to see similarities where before we saw only differences.[30]

We can see another form of nested opposition between Jefferson's and Hamilton's philosophies emerge when we attempt to create cultural themes, or ideal types of Jeffersonianism and Hamiltonianism.[31] For example, in his famous work, *Main Currents in American Thought*,[32] Vernon Parrington argued that American intellectual history can be seen as a dialectic between Jeffersonian and Hamiltonian philosophies.[33] Jeffersonianism might be seen as a belief in egalitarianism, equality of opportunity, fluid social and political institutions, and decentralized decision-making, while Hamiltonianism might stand for promotion of wealth at the expense of equality, stable social and political institutions, and centralization of power in national as opposed to local government. Indeed, once we create these abstractions, it might even make sense to say that a particular person was more Jeffersonian than Jefferson himself with respect to some issues—imagine a member of Congress who thought that some of the proposals and acts of the Jefferson Administration were beyond Jefferson's authority as President because that person had a narrow conception of Federal national power or Federal executive power.

The nestedness of a nested opposition often becomes apparent when we attempt to understand what each of the terms in the opposition means. Debates over the meaning or content of each side of a nested opposition replicate the debate over the terms of the original opposition. The struggle over the meaning or the content of the concept as it is introduced into new contexts is a struggle that recapitulates the original struggle of differentiation.

Thus, if we imagine a political debate in 1815 between "radical" Jeffersonians and "moderate" Jeffersonians over the constitutionality of an internal improvements bill, it would not be at all surprising to hear the moderate Jeffersonians calling for somewhat looser construction of Federal constitutional powers, or paying somewhat greater attention to the

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29. *Id.* at 43-45, 46, 51; M. PETERSON, *supra* note 26, at 689, 700-01, 775-76; L. WHITE, THE JEFFERSONIANS: A STUDY IN ADMINISTRATIVE HISTORY 6, 35, 111, 131, 146-47, 547-48, 550-51 (1951).

30. In this light, Jefferson's famous remark in his first inaugural address that "[w]e are all republicans, we are all federalists," takes on a new meaning. R. HOFSTADTER, *supra* note 27, at 43.

31. *See generally* M. PETERSON, THE JEFFERSON IMAGE IN THE AMERICAN MIND (1960) (recounting history of differing interpretations of Jefferson and uses made of concept of Jeffersonianism). The term "cultural theme" is taken from T. SEUNG, CULTURAL THEMATICS x, *passim* (1976).

32. V. PARRINGTON, MAIN CURRENTS IN AMERICAN THOUGHT (1930) (three volumes).

33. *See* 3 *id.* at xxiii-xxiv.

need for a national policy of stimulating business.[34] The moderate Jeffersonians' more radical siblings might accuse them of sounding like members of the Federalist party of the late Alexander Hamilton, and in a limited sense they would be quite right. In this example the contestants are not debating the meaning of the term "Jeffersonianism." Rather, this is a debate among persons who claim all to be Jeffersonians as to what the principles they believe in truly are.[35] It is less a struggle over the meaning of a word than the content of a principle associated with a word.[36]

This imaginary debate[37] might end in any number of ways, in each case manifesting a different version of the nested opposition. First, the radical Jeffersonians might win and, arguing that they were the true disciples of Jefferson's thought, kick the moderate Jeffersonians out of their party. The radicals would then interpret this event as the preservation of the true meaning of Jeffersonian principles, and the exclusion of Hamiltonian influences, while the excluded moderates would argue that true Jeffersonian principles had been betrayed and perverted in the service of an unhealthy radicalism. Second, the moderate Jeffersonians might prevail, label their beliefs as Jeffersonianism, and the disgruntled radicals would be forced to call themselves something else. In that case, from the perspective of the moderates the true essence of Jeffersonianism would have been preserved from dangerous contamination, while from the perspective of the radicals Jeffersonianism would have become just the latest form of Hamiltonianism.[38] Third, the two sides might reach some compromise and refer to this compromise as the essence of Jeffersonianism, while disgruntled losers on the left and on the right now accuse the resulting compromise of being too Hamiltonian on the one hand and too radical

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34. Note that Jefferson himself supported an internal improvements bill, despite his concerns about its constitutionality, 5 D. MALONE, *supra* note 26, at 553-60, and many of his staunchest Republican followers would later oppose it on the same grounds.

35. In this light, consider the election of 1824, in which such different political personalities as Henry Clay, John Quincy Adams, William Crawford, and Andrew Jackson all claimed to be Jeffersonian Republicans. *See* A. SCHLESINGER, THE AGE OF JACKSON 19 (1945).

36. *See* 3 V. PARRINGTON, *supra* note 32, at xxvii (rival visions of politics, originally instantiated as Jeffersonianism and Hamiltonianism, both underwent subtle changes due to demands of practical politics).

37. I have referred to this as an "imaginary" debate, although something like this did in fact happen to Jefferson's party in the 1820's, a split that led to the eventual replacement of the Federalist and Republican Parties with two branches of the Republican Party—the National Republicans and the Democratic Republicans. S. MORISON, H. COMMAGER & W. LEUCHTENBERG, A CONCISE HISTORY OF THE AMERICAN REPUBLIC 183-85 (2d ed. 1983). However, the political situation in the years from 1805 to 1824 is very complicated, and cannot be reduced to a debate over Jeffersonian and Hamiltonian principles—for example, this perspective does not take into account the alliances formed and broken because of the issue of slavery. In order to make my point about nested oppositions more clear, I have framed my discussion in terms of a hypothetical debate over a limited number of issues, which is nevertheless confirmed by historical examples.

38. *Cf.* 3 V. PARRINGTON, *supra* note 32, at xxviii (Jeffersonian principles of democracy have been made to serve many different masters, and through this process their true meaning has been "lost out of the reckoning," except in fringe radical and third party movements).

on the other. In each case, no matter which side prevails in calling its principles the "true" version of Jeffersonianism, the original struggle between Jeffersonianism and Hamiltonianism has been recapitulated at a different level. The opposition is nested no matter in which direction history moves, because a version of the thematic opposite is involved in the struggle over the meaning of the cultural theme.

An analogous phenomenon arises when historians or other theorists attempt to give concrete meaning to theoretical terms like "Jeffersonianism" or "individualism." This is not like a debate among Lutherans as to what Lutheranism consists in, but rather a definitional debate about a theoretical term or ideal type that will be used in theoretical discussion. Yet because the concept of Jeffersonianism depends upon a conceptual opposition that arises in a particular context, its contours are not fully defined in all other contexts. The moment that we start to fix the contours of the concept in new contexts, we will note that its opposite has made an appearance "within" the concept. The nested nature of the opposition between Jeffersonianism and Hamiltonianism will reassert itself as we attempt to flesh out the meaning of either cultural theme.

Imagine a dispute about what the Jeffersonian position on a national progressive income tax might be. Someone might argue that Jeffersonianism is inconsistent with a progressive income tax, because Jefferson himself believed in the sanctity of private property,[39] while someone else might argue that as an egalitarian measure, such a tax is clearly in the spirit of Jeffersonianism.[40] We cannot solve this controversy by saying that Jeffersonianism is always the more egalitarian position,[41] unless we wish to say that Jeffersonianism is simply a synonym for egalitarianism. (At that point we would begin a further debate over the theoretical term "egalitarianism," and the difficulties would begin anew.) Suppose that we decide that the progressive income tax, although more egalitarian than its opposite, is nevertheless inconsistent with Jeffersonianism. If we focus on the reasons why we think that the line separating Jeffersonianism from other forms of egalitarianism has to be drawn at the progressive income

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39. For example, in a 1816 letter Jefferson wrote that redistribution should not be pursued too aggressively, because "the first principle of association [is] 'the *guarantee* to everyone [of] a free exercise of his industry and the fruits acquired by it.' " R. HOFSTADTER, *supra* note 27, at 47–48 (emphasis in original).

40. *Cf.* Cincone, *Land Reform and Corporate Redistribution: The Republican Legacy*, 39 STAN. L. REV. 1229, 1232–35 (1987) (arguing that Republicanism and Jeffersonianism viewed government as existing not so much to protect property as to promote equal access to property); M. PETERSON, *supra* note 31, at 355–76 (arguing that New Deal appropriated Jefferson as symbol of egalitarianism).

41. *Cf.* A. SCHLESINGER, *supra* note 35, at 57–58 (noting increasing divergence between western Jeffersonians, who saw democracy as best served by emphasizing decentralization and states' rights, and eastern Jeffersonians, who emphasized economic equality); *id.* at 510–18 (anti-statist element of Jeffersonian philosophy came into conflict with egalitarian element as it became clear that stronger state was necessary to reign in increasing concentrations of private power, and to check ambitions of business interests).

tax, we may discover that these reasons recapitulate some of the themes of Hamiltonianism—for example, that respect for individual autonomy can only be achieved by recognizing and rewarding individual differences in talent and ambition.[42] We now see that our concretized conception of Jeffersonianism has a little Hamiltonianism in it, even though we originally defined the two cultural themes by their opposition. Of course, we may decide the other way in this case. We may decide that the progressive income tax *is* consistent with Jeffersonianism. But even in that case, the debate over the contours of what Jeffersonianism means will call up in an uncanny way the original debate between Jeffersonianism and its opposite.[43] And at some point—when we begin to consider the issue of national health insurance or a theory of comparable worth—we will begin to see the Hamiltonian aspects emergent in our concept of Jeffersonianism.[44]

The opposition between Jefferson's and Hamilton's political philosophies might be nested in still another way. Perhaps similarities between the two philosophies will emerge as history progresses—we witness Jefferson and his followers taking positions more like those of Hamilton and his followers as time goes on. Or imagine that as a result of a generation of Jeffersonian political reforms, a reaction is produced which results in a strongly Hamiltonian politics. In this version of the nested opposition, one term produces its opposite or comes to resemble its opposite.[45] This last version of nested opposition sounds vaguely like Hegel's theory of history, and the resemblance is not accidental—it is one of the debts that deconstructive argument owes to Hegelianism.[46]

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42. This view is the converse of the Jeffersonian principle that every person should have an equal opportunity to become an independent proprietor who could provide for his or her wants or needs through the exercise of his or her own labor. The Hamiltonian element emerges as the Jeffersonian principle is applied to defend the interests of the profit-maximizing captain of industry.

43. This recapitulation will occur in two senses. On the one hand, the arguments for the tax being Jeffersonian will recapitulate the egalitarian strain of Jeffersonian thought in opposition to the Hamiltonian. On the other hand, the argument that the Federal government has the power to levy such a tax rests upon a conception of stronger national powers that is unmistakably Hamiltonian. Indeed, one of the "Hamiltonian" elements of Jefferson's own thought was his increasing recognition—during the years of his presidency and afterward—that increased national power was necessary to achieve his other political goals. Thus, the conflict about the meaning of Jeffersonianism is a conflict between two different notions of Jeffersonianism—the decentralization aspect versus the egalitarian aspect—each of which in turn has its own "Jeffersonian" and "Hamiltonian" elements.

44. We will see this both with respect to debates about the meaning of equality of opportunity and with respect to debates about the appropriate degree of government intervention.

45. In the case of Jeffersonianism, changing historical circumstances split the egalitarian component of Jeffersonianism from its anti-statist and pro-decentralization component as the need to check private power, and especially the power of business interests, increasingly called for a stronger national regulatory apparatus. Opposition to slavery on egalitarian grounds (or on the less altruistic grounds that the spread of slavery would drive down the wages of the ordinary white working man) also conflicted with a states' rights position. The confrontation between the two strains of thought came to a head both during the Civil War and the New Deal. Thus both the states' rights advocates who abandoned economic and social egalitarianism, and the economic and social egalitarians who abandoned states' rights, could claim that they were the true heirs of Jefferson, even though each group's philosophy actually became a little more like Hamilton's as history progressed.

46. T.K. Seung has offered an interpretation of Hegel along these lines. *See* T. SEUNG, SEMIOTICS AND THEMATICS IN HERMENEUTICS 199-203 (1982) (interpreting Hegelian dialectic as clash of

B. *Nested Oppositions in Legal Doctrine*

The dialectic of Jeffersonianism and Hamiltonianism is a good example of the nested opposition of cultural themes, but one might nevertheless object that this example relies too much on the paradoxical nature of individual human personalities. Consider now an example taken from tort law—the choice between negligence and strict liability. We are all familiar with the opposition between the two principles of liability represented by these rules—the fault principle and the compensation principle—and the constant struggle between these principles in the law of accidents. Indeed, Harry Kalven once said that negligence and strict liability "cannot be made to sleep together except by fiat. The history of tort law has been made up out of the tension between the two principles."[47]

In one sense, Kalven was surely right. Negligence does appear to be the opposite of strict liability. On the other hand, if we look closely at the law of negligence, we will see subdoctrines that can only be justified by the same sorts of arguments that one uses to justify strict liability. Such examples include the use of objective standards for determining fault, the adult activity rule for children, res ipsa loquitur, negligence per se, and the rule that in measuring damages the defendant takes the plaintiff as she finds her.[48] If we look at the doctrines of strict liability, we will similarly find pockets of negligence—that is to say, we will find doctrines that make demonstrations of the defendant's fault or culpability essential to liability. For example, in strict products liability one must still show a defect in design or construction (and in some jurisdictions there is a state of the art defense); causation in strict liability torts still requires that the defendant could have foreseen the plaintiff's injury; extrasensitive plaintiffs cannot recover for injuries cased by ultrahazardous activities if an ordinary plaintiff would not have been injured by the activity, and so on. From a still broader perspective, we might note that existing doctrines of negligence and strict liability are both inconsistent with a position that no duty is

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opposing cultural themes which nevertheless depend upon and are transformed into different versions of each other).

47. Kalven, *Tort Law—Tort Watch*, 34 J. AM. TRIAL L. 1, 43 (1972).

48. For example, an objective standard of negligence holds some persons liable even if they did not understand their conduct was unreasonable and even if they could not have met the standard of reasonableness. *See, e.g.*, Jolley v. Powell, 299 So. 2d 647 (Fla. 1974) (defending general rule that permanently insane persons are held to standard of reasonable person on grounds that it compensates injured victims, creates additional deterrence, and is easier to apply than an individuated inquiry into insanity). Similarly, the adult activity rule holds children engaging in adult activities to the standard of adults even if the child could not reasonably be expected to achieve that standard of care; the rule that the defendant takes the plaintiff as she finds her allows recovery of damages that were not foreseeable from defendant's standpoint even if a risk of some harm was foreseeable. For a fuller discussion of the pockets of strict liability in negligence doctrine, *see* Balkin, *The Crystalline Structure of Legal Thought*, 39 RUTGERS L. REV. 1 (1986) [hereinafter Balkin, *Crystalline Structure*]; Balkin, *Taking Ideology Seriously: Ronald Dworkin and the CLS Critique*, 55 U. Mo. KANSAS CITY L. REV. 392, 409-15 (1987) [hereinafter Balkin, *Taking Ideology Seriously*].

owed at all to injured parties, or a position of absolute liability regardless of causal responsibility.

It is very important to understand that this is not a claim that negligence *is* strict liability, anymore than our earlier discussion claimed that a moderate form of Jeffersonianism *is* Hamiltonianism. In a nested opposition, the opposed terms bear a relation of similarity but not identity to each other. The similarity in this case is a similarity of the principles which justify one rule (strict liability) and the subdoctrines which form part of the opposite rule (negligence). To see this recapitulation is not to defy logic, but rather to identify recurrent thematic elements of one within what is nominally its opposite, elements which emerge as the context in which the opposition is considered changes.

One might object that the nested opposition between negligence and strict liability is contingent in the sense that it happens to be the case that most jurisdictions have an objective standard of negligence. Some jurisdictions have a state of the art defense in products liability, while others do not. Perhaps in a different jurisdiction the forms of nestedness I have identified would not appear at all. However, this opposition is nested in a more important way. The arguments used to justify the choice between negligence and strict liability reappear whenever we consider subrule choices that flesh out the meaning of the concepts of negligence and strict liability. For example, one principle which supports strict liability is that one should be compensated for injuries caused by another; the corresponding principle supporting negligence is that one should not be held liable without fault. The debate between these principles is replicated within each debate over the content of negligence and strict liability doctrine. Thus, the argument for a state of the art defense to strict products liability is that the manufacturer should not be held responsible for defects that could not have been prevented even by the use of state of the art technology; the argument against the defense is that one should be compensated for injuries caused by a product even if the manufacturer could not prevent them by exercising due care. The argument against the adult activity rule in negligence law is that children who perform adult activities should still be held to the lesser standard of children because they still cannot conform their actions to those of a reasonable adult; the argument for the adult activity rule is that children should be held to the adult standard because the plaintiff has been no less injured even though the child could not conform to that standard. No matter which way a particular jurisdiction holds on these issues, the original debate over negligence and strict liability is recapitulated in each decision. I call this phenomenon of recurring forms of argument in the development of legal doctrine a "crystalline

structure," because certain forms of crystals manifest identical internal structures when viewed at macro and micro levels.[49]

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 often possible to discover traces of their opposites in disputes over their meaning and interpretation.[50]

This phenomenon is partly explained by the differences between logical contradiction and conceptual opposition. When we accept the truth of the proposition P, we thereby also accept the falsity of the proposition not-P. We therefore think it ridiculous that not-P could be used as a justification in our subsequent arguments. This exclusivity, however, does not necessarily hold true of conceptual oppositions, especially when the oppositions involve questions of value. When we accept a negligence standard over strict liability on the grounds that people should not be held liable without fault, we have not foreclosed for all time the argument that a person who causes harm to another should be held liable, even though these two propositions seem to be opposed in the context of the choice between negligence and strict liability. This is because the principle that persons should not be held liable without fault does not have a completely definite scope of application. Whereas the logical value (true or false) given to the proposition P always simultaneously determines the logical value to be given to the proposition not-P, the acceptance of the ethical proposition "No Liability Without Fault" does not determine the moral status in all cases

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49. Balkin, *Crystalline Structure*, supra note 48, at 36–40. My study of recurring forms of legal argument builds on earlier work by Duncan Kennedy. *See* Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1981); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). Very appropriately, Kennedy calls this phenomenon "nesting." Kennedy, *A Semiotics of Legal Argument*, in 3 LAW & SEMIOTICS (B. Kevelson ed. forthcoming 1990). We can view this phenomenon in two different ways. First, we can look at it semantically, as we did in the case of the philosophies of Jeffersonianism and Hamiltonianism. We are trying to work out what the concept of negligence means as a concept. In choosing between different possible interpretations we find ourselves recapitulating the original debate between negligence and strict liability. Second, we can look at the phenomenon pragmatically. We are not trying to define the word negligence, because we realize that there are many possible regimes of rules that might collectively be termed negligence doctrine. We are simply trying to choose subdoctrinal rules that best serve society's needs or otherwise seem most just. In creating a system of negligence rules and subrules we will find ourselves recapitulating our original policy arguments about the choice between negligence and strict liability at a more discrete level. Legal debate about rules and the application of rules to facts is often both semantic and pragmatic at the same time. For example, we may see the adult activity rule as merely a subdoctrine of negligence, and not analytically required by the word "negligence." Yet we may be interested in whether operating a snowmobile *is* an adult activity. Similarly, we may think that the question whether the reasonable person standard takes into account certain mental or physical attributes is a matter of the best rule under the circumstances, or we may view it as an inquiry into what reasonableness means in that context.

50. Again, since what is "the opposite" concept depends upon context, one can find the traces of more radical alternatives as well as more moderate ones.

of the opposite proposition that "One Who Causes Harm Should Pay" (a proposition whose scope is equally indefinite). The proposition rejected in one context may yet live to fight another day. Indeed, because it is never fully eliminated, it remains relevant to the struggle over the meaning of the concept of "fault" within its opposite number. Of course, this is not true of logical contradictions. One cannot argue that terms in the true proposition P mean such and such because not-P is true. However, one can argue that the standard of negligence should be that of a reasonable person because a person injured by the defendant is no less harmed and no less deserving of compensation because the defendant who caused her harm sincerely though unreasonably believed that she was acting prudently.[51]

The impossibility of fully eliminating certain ethical or political principles from legal discourse leads to a well-known phenomenon in legal argument. When we present the same case to judges of different political and ethical persuasions, they are often able to see very different principles emanating from existing bodies of doctrine. As a result both judges can sincerely believe that the best interpretation of existing legal materials produces opposite results in the case before them. For example, in a jurisdiction in which a state of the art defense is proposed by one of the litigants, one judge might note correctly that cases have held that the defendant is not an insurer of the plaintiff's safety under all circumstances, that products liability requires a showing of defect, and that one cannot justly be blamed for placing a defective product on the market if it was constructed according to the state of the art. Another judge might note, equally correctly, that the jurisdiction's acceptance of the doctrine of strict products liability is acceptance of the principle that compensation will be awarded regardless of defendant's moral blameworthiness, that a product is no less dangerous because it was constructed according to the state of the art, and that the plaintiff harmed by such a product is no less deserving of compensation. Even though the case must be decided one way or the other, both judges could sincerely believe that their interpretation of the principles behind existing legal materials was the best one. Moreover, even if the court holds that there is a state of the art defense in the relevant jurisdiction, new disputes will arise concerning the interpretation of the defense, and different judges may again find within the same materials reasons for opposing interpretations. Again, the reason why this occurs is not because one of the judges or the other is unwittingly involved in logi-

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51. For a philosophical argument along the same lines, see T. Seung & D. Bonevac, Constrained Indeterminacy (1989) (unpublished manuscript on file with author). For the classic legal argument for objective standards in tort law, see O.W. HOLMES, THE COMMON LAW 85-89 (M. Howe ed. 1963).

cal contradiction. It is because legal doctrines and distinctions invariably involve conceptual oppositions that are also nested oppositions.[52]

C. *Nested Oppositions in Critical Scholarship*

Many of the arguments made by feminists and by members of the Critical Legal Studies movement rely upon demonstrating a nested opposition between legal concepts traditionally thought separate and distinct. For example, one of the most famous and well known of these arguments deconstructs the distinction between public power and private power. Such arguments are often misunderstood, both by those persons criticizing them and also by those making them. The problem arises from a confusion of similarity with identity, or a confusion of a claim of nested opposition with a claim that there is no opposition at all.

The deconstruction of the conceptual opposition between public and private power, for example, is easily confused with the claim that there is no difference between public and private power, or that private power is public power, or vice versa. Such uncompromising statements might have limited value as a useful shorthand, or as a corrective to a tendency to overemphasize the differences between the two terms, but they are not accurate, because one can further deconstruct them to make the distinction between public and private reappear. Public and private form a nested opposition, which means that they are similar in some respects while different in others, and that they have a mutual conceptual dependence even though they are nominally differentiated.

To cast out the public/private distinction therefore involves its own form of nested opposition, which subordinates analyses that recognize the distinction to those that do not. Yet it should be obvious that as soon as one tries to articulate any policy judgment based upon the abolition of the public/private distinction, one will reinscribe it in another form. For example, suppose that we argue that the state has a duty to prohibit private acts of racial and religious discrimination. Because the government protects its citizens from other economic and social harms produced by individual choice (for example, through minimum wage legislation), the government's failure to protect individuals from racial and religious discrimination is a value-laden regulatory choice for which the state is ultimately responsible. Suppose we then consider whether the state has a duty to create a civil action for persons who were spurned by a prospective spouse or lover because of racial or religious differences. We might well decide that the government is not responsible for such acts of discrimination, because the selection of one's spouse or lover is a matter of individual choice with which the government should not interfere. Yet at this

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52. For further discussion of this point, see Balkin, *Taking Ideology Seriously, supra* note 48.

point our justification has simply restated the public/private distinction in a new form.[53]

The lesson to draw from this example is that arguments based upon the reinterpretation of a conceptual opposition as a nested opposition must be made sensitively and carefully lest they create misunderstanding. They must not be confused with claims of false opposition or identity.[54]

A second point concerning CLS and feminist arguments which rely upon nested oppositions is that such arguments are occasionally claimed to exemplify or emanate from a countervision which is opposed to the dominant vision enforced by the law. Yet at the same time the critical or feminist scholar may claim that the countervision is exemplified by particular doctrines or policy considerations already found in the law itself, or found in modified form.[55] No doubt this way of talking leads to considerable confusion. How can something be at one and the same time representative of a revolutionary countervision and a generalization of the status quo? The answer is supplied by understanding the critique in terms of a nested opposition. The new vision of legal practice is opposed to the traditional vision. Yet, in fact, each vision contains a little of the other. The critical or feminist scholar locates this point of similarity in marginal or exceptional doctrines within the status quo, and attempts to expand their influence until they become the paradigmatic examples of how problems of regulation should be approached. For example, constitutional law recognizes a relatively strict division between public and private action. Nevertheless, a few cases like *Shelley v. Kraemer*[56] deal with exceptional situations or

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53. We could continue by deconstructing this argument. The claim that the government should not interfere with one's choice of spouse or lover is problematic because the government is always doing this by the content of its legal regulations and non-regulations. The failure of the government to proscribe racial and religious discrimination in the choice of spouses and lovers when it does proscribe such discrimination in the area of employment can be said to be a governmental choice that does affect the conditions under which people choose their spouses and lovers. The same can be said for the government's failure or choice to pursue educational programs in the public schools to break down traditional barriers and prejudices against interracial or interfaith marriages. One can see that the collapse, reseparation, and recollapse of the public/private distinction could go on indefinitely. Indeed, this is one of the characteristic features of a nested opposition.

54. Similarly, radical feminist critiques of rape law, *see, e.g.*, C. MACKINNON, TOWARDS A FEM-INIST THEORY OF THE STATE 171–83 (1989), which point out that both rape and normal heterosexual relations may involve coercion of females by males, and the legal realist critique of laissez-faire contract doctrine, which argues that both duress and "normal" contractual relations involve forms of coercion between the parties, *see* Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923), are best expressed as claims of nested opposition, and not as claims of false opposition or identity.

55. *Cf.* Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (doctrine of good faith performance as limited representation of altruist conception of social life); Minow, *Justice Engendered*, 101 HARV. L. REV. 10, 14–16, 58–61, 71–74 (1987) (noting that sporadic attempts by Supreme Court Justices to view constitutional questions from perspective of different groups are examples of alternative approach to questions of difference); Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983) (deviationist doctrine proceeds by expansion of exceptional case into mainstream doctrine).

56. 334 U.S. 1, 14–18 (1948) (holding that enforcement of private racially discriminatory covenant constituted state action).

specially demarcated areas in which the general rules do not seem to work well. The critic's goal, then, is to expand the principles underlying the unusual or special cases until they begin to swallow up some of the paradigmatic situations in which the usual rules are thought to apply. One can then speak of the expanded doctrine as symbolizing a countervision, which is immanent in existing doctrine, yet suppressed or marginalized.[57]

This sort of analysis leads to an obvious question: What value is there in postulating a countervision of politics or law, when the results one is arguing for could be achieved through manipulation of marginal areas of existing doctrine? The answer is that once the logic of a nested opposition is grasped, one can see that these are really two different ways of describing the same phenomena. It is really a matter of how one wishes to talk about it. Often it makes more sense to emphasize that the countervision one proposes is always immanent in the vision one is critiquing. On the other hand, one might wish to downplay similarity to the extent that one wants to emphasize the distance between politics and legal doctrine as one currently sees them, and politics and doctrine as they would become if the marginalized or suppressed principles were expanded or recognized. But whichever way a critical or feminist scholar expresses such insights, both she and her audience should understand that the logical basis of the argument is not logical contradiction or denial but the elaboration of a nested opposition within politics and legal doctrine.

II. THE NESTED OPPOSITION OF SPEECH AND WRITING

Our previous discussion of nested oppositions has shown how conceptual oppositions—of cultural themes like Jeffersonianism and Hamiltonianism, of legal doctrines like negligence and strict liability, and of political concepts like public and private—behave according to a deconstructive logic. The poles of each conceptual opposition have a simultaneous relationship of differentiation and dependence. Ellis' major mistake throughout *Against Deconstruction* is failing to recognize this relationship between conceptual opposition and nested opposition, and thus the important differences between nested opposition and false opposition. Because, as explained above, almost all deconstructive arguments can be understood to depend upon some form of nested opposition, it is clear that much of what Ellis has to say about deconstruction is affected by this flaw in his analysis.

A good example is Ellis's critique of Derrida's claim in *Of Grammatology* that Western thought has privileged speech over writing.[58] To begin with, Ellis misunderstands the claim that Derrida is making. Be-

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57. In rough form, this is the method of deviationist doctrine espoused by Roberto Unger in Unger, *supra* note 55, at 577–83.
58. J. DERRIDA, OF GRAMMATOLOGY 3 (1976).

cause Derrida uses the term "ethnocentrism" to describe the Western preference for speech, Ellis assumes that Derrida is making a political claim—that Western cultures improperly look down on or ignore primitive societies. Ellis argues that an ethnocentric approach would tend to valorize or emphasize things Westerners have (such as writing) that more primitive cultures lack. Thus, the ethnocentrism of Western linguists, for example, involved focusing exclusively on "cultures and languages with long written traditions."[59] Ellis points out that this is very hard to square with Derrida's claim that Western thought debases writing.

Derrida's claim of ethnocentrism, however, is much more subtle than Ellis's version. Derrida argues that Western civilization's attitude towards writing reflects a more general approach towards issues of truth and representation that has not been universally shared in all cultures. The Western tradition, Derrida argues, sees writing as a representation of a representation, and speech as something closer to or more directly representational of reality.[60]

Thus, in *Of Grammatology*, Derrida is not concerned with whether linguists examined written languages more than spoken ones, or whether Western cultures looked down on illiterate societies. Rather, he is interested in the rhetoric that Western thinkers have used when describing the relationship of speech and writing to reality. Derrida gives dozens of examples of rhetoric by Western figures from Plato to Saussure which indicate that for them speech is much closer to truth, or to what the speaker means, or to reality itself, than is writing. Thus, Derrida notes "the Aristotelian definition . . . [that] '[s]poken words are the symbols of mental experience and written words are the symbols of spoken words.' "[61] The Western "ethnocentrism" of which Derrida speaks is the recurrent theme in Western thought that the very writing which distinguishes Western civilization from more "primitive" cultures is nevertheless viewed by Westerners as an abstraction from, and an imperfect representation of, speech. Speech, on the other hand, is seen as the true reflection of reality, or the speaker's actual present meaning. Thus, even though Western thinkers might have seen writing as evidence of their superiority, the semiotic

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59. P. 19.

60. The difference among cultures on this issue may stem from the fact that many cultures used written hieroglyphics or picture symbols, which might arguably have a more direct resemblance to reality than spoken words. For example, a picture symbol of a bird might seem to represent a bird more closely than the phonetic sounds of the word for "bird" in a particular spoken language. But since Western thought no longer has a tradition of hieroglyphic writing, and now views such hieroglyphics as odd or impractical, see J. DERRIDA, supra note 58, at 3, 24–26 (discussing Hegel's ambivalence toward Chinese hieroglyphics and his preference for Western alphabets), it cannot imagine writing as being more direct a representation of reality than speech. A careful reading of Derrida reveals this to be his point, and it is confirmed by the cover of *Of Grammatology* itself, which is a picture of hieroglyphic writing—that is, the kind of writing that is thought to be more directly representational than speech.

61. *Id.* at 30.

properties of writing always disturbed them. Writing is debased as *mere* representation of truth, reality, or present meaning, as if something other than representation were available, or could be sought after. That thing, Derrida argues, is a form of "presence"—of direct, unmediated experience with what really is.[62]

Because Ellis misunderstands the claim Derrida is making, he also fails to give a correct account of Derrida's key argument in *Of Grammatology* that writing is prior to speech. Ellis claims that there are obvious "logical" problems with Derrida's position.[63] Yet the "logical" problems Ellis identifies are really assertions that Derrida is empirically wrong about the priority of writing over speech. Ellis points out that speech existed long before the invention of writing, that there still exist languages in the world that are spoken but not written, that many people can speak but not write a language, and so on.[64]

At this point Ellis feigns bewilderment—"[g]iven the fact that most of this is obvious," he asks, "what is Derrida's argument trying to do, and why does he not explain the fact that (presumably, in his view) none of these points are relevant to it?"[65] But since these facts are obvious, it does not take very much effort to see that Derrida cannot mean "prior" in the sense of historical or numerical priority. He means that writing is *conceptually* or *ontologically* prior to speech—that speech is already a kind of writing. Just as one might say of a political figure that she is a closet conservative or a closet liberal, Derrida is arguing that speech is a type of "closet" writing—that it already shares all of the characteristics of writing for which Western thinkers have debased writing and elevated speech.

Derrida's argument is that speech and writing form a nested opposition. When Western thinkers oppose speech to writing they imagine properties in which the two are thought to differ. Speech is viewed as being more direct a presentation of meaning or truth, more present to consciousness. Writing is seen as more indirect and representational, more mediated, more of an interposition between reality and the observer—in short, writ-

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62. This interpretation of Derrida also explains Derrida's statement that the Swiss linguist, Ferdinand de Saussure, continued the ethnocentrism of the West. Ellis is mystified by this claim because "Saussure's importance was to turn linguistics away from this prevailing *ethnocentric concern with the written* and toward the spoken languages of that part of the world outside the Western tradition." P. 20 (emphasis in original). However, Derrida is concerned with the ethnocentric assumption that writing is only an imperfect representation of a truer meaning that is given by speech. Saussure's very concern with spoken language (which Ellis thinks makes him less ethnocentric) is based upon Saussure's view that

Writing, though unrelated to [the] inner system [of language], is used continually *to represent* language. . . . We must be acquainted with its usefulness, shortcomings, and dangers.

. . . .

Language and writing are two distinct systems of signs; the second exists *for the sole purpose of representing the first*. . . . [T]he spoken forms alone constitute the [linguistic] object.

F. DE SAUSSURE, COURSE IN GENERAL LINGUISTICS 23-24 (1959) (emphasis added).

63. P. 21.
64. P. 21.
65. P. 21.

ing appears more "sign-like" than speech. But the nested opposition be-
tween writing and speech means that from another context we can see
that speech already has these "written" characteristics. Speech is also only
a set of signifiers; speech can be just as misleading or just as indirect a
representation of the world as writing. Indeed, if we focus on the proper-
ties in the speech/writing opposition that we assigned to "written-
ness"—being sign-like, mediating, indirect, representational—we will see
that speech has all of these properties. Indeed, these are all properties of
semiosis—of being a signifier standing for or representing a signified.
Thus, speech and writing are both special cases of a more generalized
form of "writing," that is, semiosis.

Ellis is dissatisfied with this argument because, at the end of it, the
word "writing" means something different from the "writing" that was
opposed to speech.[66] At the beginning of the argument "[w]e begin with
three terms: language, speech, and writing. The first contains the second
and third."[67] At the end of the argument we have a second
triad—writing-in-general, phonic writing (speech), and graphic writing
("writing" proper).[68] But, claims Ellis, the nature of writing has not
changed. We have simply redefined our terms—we have not proven that
speech is a form of writing. He calls this "a very well known logical mis-
take," and a "misuse of English."[69]

Of course, Derrida is not trying to do anything illegitimate by his re-
definition. He is simply making use of the properties and logic of a nested
opposition. Starting with the opposition of speech and writing, he notes
what their difference is thought to consist in. Derrida calls the purport-
edly differential properties of writing-as-opposed-to-speech "writ-
ing"—they are the "written" features of writing in its traditional opposi-
tion to speech. Yet it turns out (and this is Derrida's point) that these
features are features of all semiotic representation—of being a sign that
stands for something else. This is because Western thought has suppressed
the semiotic (sign-like) characteristics of speech and projected them onto,
or identified them with, written language. Thus, when Derrida says writ-
ing is prior to speech, he means that those properties of writing that have
traditionally been thought to distinguish it from speech—the semiotic
characteristics of writing—are those properties that also allow speech to
function, because speech is nothing more than a different form of repre-
sentation, and therefore must function as all other signs do in order to
signify. When Derrida talks about the general form of "writing" at the
end of the argument, therefore, he means "semiotic representation" (not
just "language" as Ellis thinks). "Writing" (or as Derrida sometimes calls

66. Pp. 23-25.
67. P. 24.
68. P. 24.
69. P. 24.

it, "arche-writing") is now being used to stand for the (purportedly) differential properties of writing as opposed to speech.

This way of talking is admittedly metaphorical, and, as Ellis notes, Derrida often reverts to the previous meaning of "writing" in later passages in *Of Grammatology*.[70] However, because Ellis reads Derrida's texts in a relentlessly literal manner, he does not see the importance of "writing-as-opposed-to-speech" as a general metaphor for the distance between signs and what they stand for, or as a metaphor for a general distinction between what is merely representational and what is directly comprehended or experienced. This distinction is central to Western thought, which seeks to go past mere representation, and approach (to the degree humanly possible) things-as-they-really-are. Thus, Ellis does not understand Derrida's claim that the continuing acceptance of the superiority of speech over writing is a special case of a more general approach to philosophical problems. He states bluntly that "this entire fallacious argument about the priority of speech and language is found to be unnecessary for the main course of his thought: It could be dropped without loss."[71] Yet it is precisely Derrida's point to show that the way that Western thinkers have conceptualized the virtues and vices of writing replicates the characteristic moves of Western metaphysics, moves that he collectively refers to by the term "logocentrism."

III. LOGOCENTRISM AND ESSENTIALISM

Ellis has done us a great service by noting the connection between Derrida's "logocentrism" and previous theories of language.[72] Ellis identifies logocentrism with the philosophical position known as essentialism, which he describes as "the belief that words simply label real categories of meaning existing independently of a language."[73] Ellis has criticized essentialism in his own writing, basing his attacks upon the earlier work of Ludwig Wittgenstein.[74] Yet Ellis is mistaken that Derrida's target,

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70. P. 25 & n.12.
71. P. 27.
72. Pp. 35-37.
73. P. 35. Essentialism is usually thought to be opposed to the philosophical position of nominalism, which argues that meanings are a product of conventions, rather than pointing to preexisting essences of things already in the world. There are, in fact, many different versions of both views, and confusion of the different versions is quite common. For a modern discussion of essentialism and nominalism, and related theories concerning universals and particulars, see D. ARMSTRONG, UNIVERSALS: AN OPINIONATED INTRODUCTION (1989); B. BLANSHARD, REASON AND ANALYSIS (1962). Ellis also associates logocentrism with what he calls a "referential" theory of language—which argues that "language simply refers to things in the world and labels them." P. 37. Ellis thus appears to conflate essentialism with a referential theory of language; nevertheless, the two philosophical positions are distinct. A nominalist who believes that what we call a "cat" is not determined by reference to a preexisting essence of "catness," but is only a matter of linguistic convention, might still adhere to what Ellis calls a "referential" theory of language. The nominalist might hold that the word "cat" points or refers to those things that fall under the governing linguistic convention.
74. J. ELLIS, *supra* note 3, at 12-16; Ellis, *supra* note 4, at 441-42.

logocentrism, is nothing more than essentialism. This mistake colors the entire analysis that follows, leading him to make a number of misleading accusations against Derrida.

Ellis points out that if logocentrism is essentialism, many philosophers have attacked it previously, and Derrida would simply be the last in a long line.[75] Indeed, Ellis remarks, essentialism is a "view of meaning that by now would have to be considered a very naive and uninformed one."[76] As a result, Ellis concludes that Derrida's unclear descriptions of logocentrism must be part of a deliberate ruse or a form of intellectual dishonesty, for "if the logocentric error were stated in any clearer way it would be far too obviously an unoriginal discovery."[77]

Ellis' interpretation of Derrida is a particularly good example of the sort of unfortunate misunderstandings produced by the historical separation of the Anglo-American and Continental traditions of philosophy. Ellis, who is very much influenced by Wittgenstein and ordinary language philosophy, naturally assumes that what Derrida must be concerned with is a familiar problem on the agenda of American and British philosophy. In fact, Derrida's attack on "logocentrism" speaks to a different set of concerns within the Continental tradition.

Although I am somewhat disturbed by the recurrently patronizing attitude of Ellis towards Continental philosophy in general and Derrida in particular,[78] I believe that this particular misunderstanding of the term "logocentrism" is not wholly Ellis' fault. Derrida's prose is often simply quite unclear. Ellis is not the first person to assume that logocentrism is identical to essentialism,[79] although I believe that a careful reading of

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75. P. 37.
76. P. 38. I should note in passing that not all persons agree with Ellis' assessment of the naivete of essentialism. *See, e.g.,* Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?,* 41 STAN. L. REV. 871, 879 (1989) (defending essentialism and related position of "full-blooded" metaphysical realism). Thus, it is important to understand that when Ellis criticizes Derrida, he is speaking from the perspective of a devoted Wittgensteinian, and thus may not speak for the present scholarly consensus as to the status of essentialism, either in literary theory, philosophy, or law.
77. P. 37. Ellis points out that the essentialist view of language "has been dismembered in various ways, with varying emphases, by analytic philosophers such as Wittgenstein . . . by linguists such as J.R. Firth, by anthropological linguists working in the tradition of Edward Sapir and Benjamin Lee Whorf, and by countless others." P. 38. Ellis blames Derrida's isolation from these thinkers on his fixation with texts of thinkers in the Continental tradition of philosophy, "[f]or Heidegger, Freud, Nietzsche, and Lévi-Strauss . . . are nowhere near being central figures in the debate on this particular issue. . . . To mention such figures in this context only makes the absence of the many really central figures who deal directly and in a major way with essentialist thinking all the more obvious." P. 40.
78. *See, e.g.,* p. 39 ("it [is] impossible for Derrida and his followers to see themselves as other than, first and foremost, iconoclasts and liberators"); p. 40 (complaining that "Heidegger, Freud, and Lévi-Strauss all had a most unskeptical attitude to the sanctity of their own terminological innovations and the concepts they embodied"); pp. 43–44 (criticizing Derrida for not acknowledging Wittgenstein's work, implying that Derrida fails to do so because he wishes to be thought philosophically and politically revolutionary, criticizing essentially "rhetorical and emotional stance" of deconstruction, and arguing that Derrida's failure to cite Wittgenstein raises "unanswerable questions" which "cast a considerable shadow on the value of Derrida's contribution").
79. *See, e.g.,* pp. 35–36 (quoting Lentricchia, Jameson, and others).

Derrida's work establishes that essentialism is merely a special case of logocentrism.

"Logocentrism," as its name implies, is the centering of *logos*, a richly evocative Greek word that means, among other things, "word," "reason," and "true account."[80] The connections between all of these different concepts resonate deeply in Western thought. For example, from *logos* we get words such as "logic" (the laws of reason). *Logos* also connotes the Word of God, divine unmediated truth and the truth of revelation, as in the famous Biblical passage: "In the beginning was the Word, and the Word was with God . . . ."[81]

Derrida sees all of Western philosophy as a search for *logos*—by which he means the directly comprehensible and unmediated experience of truth, of which Divine revelation is the most powerful example. Unmediatedness and instantaneousness are very important to this conception, because if one receives the Truth mediated by something, say, through the explanations of a prophet, the prophet might have gotten it partly wrong, and if one hears about it later on, one might get less than the whole experience. The goal of philosophy (and of many other intellectual endeavors) is to cut through illusion and disguise, mediation and deferral of What-Really-Is, and come to know and experience The Real Thing. The characteristic move of philosophy is to fasten upon some thing or concept X, and assert that it is closer to The Real Thing than its opposite Y. Simultaneously one asserts that Y is farther away, that Y somehow blocks or obscures direct unmediated experience or understanding, while X does not, or does so to a lesser degree. Thus, the act of philosophical distinction is the primordial act of logocentrism.[82] Moreover, the act of philosophical distinction is also, it turns out, the creation of a conceptual opposition.

It should now be quite obvious what Derrida's next move is going to be. He will argue that each conceptual opposition between X and Y is actually a nested opposition. Thus each philosophical conception of The Real Thing—whether it be Truth, Justice, or some other value—will ultimately bear a relation of similarity to or dependence upon that which it subordinates or suppresses. It will turn out that X's claim to be closer to the Real Thing than Y will be undercut by this reinterpretation of the opposition of X and Y as a nested opposition. In sum, logocentrism as a strategy will always fail because logocentrism always involves the creation of a conceptual opposition that is already also a nested opposition.[83]

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80. F. PETERS, GREEK PHILOSOPHICAL TERMS: A HISTORICAL LEXICON 110-12 (1967).
    81. *John* 1:1.
    82. Here one can trace the influence of Heidegger on Derrida's thought. Heidegger argues that the original meaning of *logos* is "to put one thing with another, to bring together, in short, to gather; but at the same time the one is marked off against the other." M. HEIDEGGER, AN INTRODUCTION TO METAPHYSICS 124 (1959). Thus, intellectual conception means simultaneously gathering certain things together and distinguishing them from others.
    83. I have always thought it helpful to think of Derrida as announcing a sort of "Murphy's Law"

However, from this perspective, it should be clear that since there are many different attitudes among philosophers about what The Real Thing is, there are many different forms of logocentrism. Indeed, there are as many different forms of logocentrism as there are versions of Western philosophy. Plato's theory of Forms is obviously logocentric, for Plato tells us that knowledge of the Forms is knowledge of what most truly is, whereas sensory experience provides only a pale copy of the Truth. Yet the empiricist who informs us that all knowledge comes from experience and the logical positivist who insists that unverifiable statements are meaningless also indulge in their own particular versions of logocentrism. One might conclude from these examples that *all* Western philosophy is therefore logocentric, and this is precisely the conclusion that Derrida reaches.

It follows that *both* essentialism and its opposite, nominalism or conventionalism, involve forms of logocentrism. The essentialist argues that language points to or refers to real entities which are the source of truth. The nominalist, however, argues that established social conventions fix meaning; the search for essences that words refer to obfuscates the real source of meaning, which is linguistic convention. Because Ellis misinterprets Derrida to mean by "logocentrism" something much more specific—namely, essentialism—he cannot understand what motivates Derrida's attacks on Saussure, who as Ellis correctly points out is surely one of the most anti-essentialist thinkers of modern times.[84]

IV. THE CRITIQUE OF NOMINALISM AND LINGUISTIC CONVENTIONALISM

Ellis' discussion of Saussure and Derrida is, although ultimately misleading at key points, one of the best parts of the book, and one which is most relevant to legal philosophy. Ellis wages his attack on Derrida largely through a defense of Saussure's theories of language and meaning. This is because, as Ellis himself points out, Derrida's own views of language arise as an extension and partial critique of Saussure's theory.[85] Ellis therefore takes it upon himself to expound and defend Saussure's position, which, like Ellis' own, is nominalist or conventionalist. Ellis wishes to refute Derrida's claim that Saussure's linguistic conventionalism engages in the same logocentric error that Derrida attributes to other Western thinkers. More importantly, however, Ellis seeks to show that when Saussure's theories of language are correctly understood and applied, they offer no support for the claim that meaning is arbitrary in the sense of being indeterminate.[86] Thus, Ellis' defense of Saussure is his way

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of Metaphysics—that whatever aspect of being a philosophical system casts out or neglects will prove to be its undoing.

84. *See* p. 45.
85. *See* pp. 45, 52.
86. P. 51.

of establishing that a nominalist or conventionalist theory of meaning is
fully consistent with (and indeed, even requires) semantic determinacy,
and therefore that deconstructionist claims about the fluidity of language
are misguided.

In order to understand the debate between Ellis and Derrida, one must
therefore understand Saussure's theory. Here Ellis does a good job of ex-
pounding Saussure's views. Saussure's key argument is that the relation-
ship between signifiers and signifieds is "arbitrary."[87] Ellis correctly notes
that by this Saussure meant two different things about the relationship
between language and reality. The first is the arbitrary relation between
the sound-image of words and the concept or thing that they signify.
Thus, when Shakespeare tells us "[t]hat which we call a rose/ By any
other name would smell as sweet,"[88] he is making Saussure's first point
about the "arbitrary" relation between signifiers (here spoken words) and
signifieds (here concepts like *rose*).[89] However, Ellis notes, Saussure made
a much more radical claim about the "arbitrary" relation between signi-
fier and signified. The concept *rose* itself "is an arbitrary creation of a
language and does not necessarily exist outside that language."[90] Lan-
guage divides up the world into various concepts, and "[d]ifferent lan-
guages group, organize, and even interpret them in different ways."[91]
Thus, Ellis argues in perfectly Saussurian fashion that

> concepts [in a language] are not simple, positive terms that achieve
> their meaning by corresponding to reality or to nonlinguistic facts;
> instead, they achieve their meaning by the place they take within the
> system of concepts of the language and, in particular, by their func-
> tion in differentiating one category of things from another. It is the
> system of differentiation, therefore, that is the source of meaning.[92]

Ellis emphasizes, however, that Saussure does not mean by the "arbi-
trary" relationship of language to reality that language has *no* relation-
ship to reality. Words like *warm* and *hot* divide up the world into catego-

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87. F. DE SAUSSURE, *supra* note 62, at 67.
88. W. SHAKESPEARE, ROMEO AND JULIET, Act II, Scene 2, lines 43-44.
89. P. 45.
90. P. 45.
91. Pp. 45-46.
92. P. 46. Ellis gives as an example of Saussure's point the English words "warm" and "hot" and
the German words "warm" and "heiss":
> [T]he transition from the German word *warm* to *heiss* occurs very much further up the scale
> than . . . the transition from *warm* to *hot*. . . . *[H]iesses Wasser* is almost *too* hot . . . while
> . . . hot water is hot *enough*. . . . An English speaker who learns the similar German words
> without realizing that the two *systems* are different is likely to get hurt. . . . What, then, is
> the concept *warmness* of water? It is a creation of the English language, a decision on its
> speakers' part to group together and regard as equivalent for a certain purpose everything
> from roughly 90 degrees to 115 degrees Fahrenheit. Water itself does not dictate such a choice,
> but only the arbitrary system of [differences within] a given language.

ries, but that is because Saussure thinks that there is already something there to be divided up.[93]

Moreover, Ellis argues that Saussure's theory of linguistic conventions does not entail that individual speakers can mean anything they want by their words. Thus, Ellis claims, Saussure's concept of linguistic arbitrariness did not imply that meaning was indeterminate.

> To the contrary: it is precisely the fact that the conceptual system of English is the common property of its speakers (i.e., that all in a sense agree to make the same arbitrary decision) that gives its words any meaning at all. As Saussure himself puts it, "The word *arbitrary* . . . should not imply that the choice of the signifier is left entirely to the speaker (we shall see below that the individual does not have the power to change a sign in any way once it has become established in the linguistic community)," . . . Arbitrariness in this sense, then, refers not to randomness but to the reverse, to the fact that there is a *definite agreement* on the particular system of terms to be used and on how they are to be used.[94]

From Ellis' discussion and defense of Saussure, it is easy to see how Derrida concluded that Saussure had reinstituted a form of logocentrism in his anti-essentialist theories of language. For Saussure, the boundaries of linguistic concepts are not given by the world itself—the world will not tell us where *warm* ends and *hot* begins. Rather, these boundaries must be located in fixed linguistic conventions that we agree to use, or more correctly, that we are born into and use unconsciously and naturally. This feeling of naturalness is precisely what leads to the delusion of essentialism—we mistakenly believe that language re-presents boundaries that are already there in the world when we have collectively created them and assimilated that knowledge as members of a linguistic community. Meaning is located in linguistic conventions that are logically prior to, and control, the meaning of individual acts of meaning by individual speakers and writers. This is the basis of Ellis' argument that an individual speaker cannot simply decide to make a word mean whatever she wants it to mean.

Nevertheless, because Saussure places so much emphasis on the fixity of the linguistic sign, he has two problems: First, he must explain where the source of this collective knowledge resides, how everyone happens to share

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Pp. 46-47.

93. To be sure, highly culturally dependent concepts like *politeness* do not have the same relationship to the "natural" world of things and the sensory stimuli they produce as do concepts like *warmth*. Yet Saussure would probably say that the division between politeness and rudeness is only possible because there is already a culture which classifies particular acts as being polite and rude, and this previously existing set of shared cultural understandings is simultaneously demarcated and described by language.

94. Pp. 49-50 (quoting F. DE SAUSSURE, *supra* note 62, at 68-69).

it, and how they all appear to share it equally well.[95] Second, if individual speakers have no control over the meaning of language, Saussure must explain how linguistic change is ever possible. As we shall see, this difficulty causes problems for Ellis' position.

Linguistic conventionalism is thus premised upon a conceptual opposition between societal conventions and individual acts of meaning, which are parasitic upon those conventions. In Saussure's terminology, the opposition is between the systematic structural relationships of language, which he calls *langue*, and the contingent speech acts within the community of speakers, which he calls *parole*.[96] But this conceptual opposition leads naturally to reinterpretation as a nested opposition between conventions and specific acts within those conventions, or put another way, between structures and events.

To be a member of a language community is to be part of a form of life which circumscribes the meanings that words can have. As Wittgenstein suggests, one cannot say "bububu" and mean "[i]f it doesn't rain I shall go for a walk."[97] On the other hand, one might have thought in 1900 that one could not say "bad" and mean by it "good," yet Michael Jackson's hit album *Bad* demonstrated the contrary. Although no particular speaker can make "bad" mean "good," nevertheless languages do change, and they can only change by collections of individual acts of speech.[98] Someone has to start using the word "bad" to mean "good" for the practice to catch on—for this element of discourse to become a part of *langue*, to use Saussure's terminology, or part of the language game, to use Wittgenstein's. If linguistic meanings are fully fixed, then one must explain how it is possible to change them. If meaning requires fixity of conventions, then one must explain how lapses in that fixity can occur while people still continue to understand each other.[99]

There are two possible solutions to this problem, and each undermines Ellis' claims about the requirements of fixity in language. The first solution is that linguistic conventions are fixed, but that individuals in society, deliberately or otherwise, misuse and pervert them. They break the rules of the language game, and by breaking those rules, they create a new language game. We can put to one side for the moment the problem of

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95. Modern commentators on Saussure have pointed out that Saussure did not explain the mechanism by which shared understandings are shared. *See, e.g.,* R. HARRIS, READING SAUSSURE 196-203, 219-37 (1987).

96. F. DE SAUSSURE, *supra* note 62, at 9-17.

97. L. WITTGENSTEIN, *supra* note 21, at 18.

98. F. DE SAUSSURE, *supra* note 62, at 19, 98, 168.

99. This problem can be generalized to all systems of social convention. In many cases people who have abandoned essentialism argue that meaning, or appropriate behavior, or justice, or legitimacy are constituted by socially accepted conventions. The claim is also made that these conventions are more or less fixed, and that fixity is necessary for the conventions to operate effectively. But in each case one can raise the same question as to how change in conventions is possible while the conventions still continue to operate.

how this is possible given Ellis' assumption that meaning is fully depen-
dent upon fixed conventions. Yet if such disobediences can and do occur,
Wittgenstein's aphorism is incorrect—one can say "bububu" and mean by
it, "If it doesn't rain I shall go for a walk," or rather, one can make it
mean that if enough persons pick up the usage. Indeed, one can easily
imagine a group of philosophical wags saying "bububu" to each other
every day just to prove Wittgenstein wrong.[100] If language changes by
manipulation or abuse of its conventions—by breaking the rules of the
language game—and yet meaning goes on all the same, it cannot be the
case that full fixity of meaning is necessary for meaning to occur. Only
relative fixity is required for language to operate, a point which Wittgen-
stein would clearly embrace,[101] but which apparently confounds Ellis, his
self-appointed disciple.

Moreover, the possibility of misuse and abuse of the language must be
inscribed within the conventions of language, for otherwise languages
would never grow or develop. Although language seems to rely upon fix-
ity of meaning in order for people to mean, the growth and development
of language depends upon the possibility of an abuse of the very same
system, upon the possibility of disobedience of the rules of the language
game. Put in Saussure's terms, *langue* is privileged over *parole*, but
langue ultimately depends upon *parole*, because *langue* is constituted and
shaped by acts of *parole*.[102] Therefore a means of altering *langue* through
parole must exist—conventions must be subject to change through acts of
abuse or alteration. The inherent ability of signs to be used for unin-
tended or nonconventional purposes—the structural possibility of altering
or manipulating existing conventions—is one aspect of what deconstruc-
tive theory calls the "play" of signs.

In the alternative, one could argue, as Wittgenstein appears to do,[103]
that people do not necessarily violate the rules of the language game as
language changes. Rather, language is never fully fixed, and the rules of
the language game are always incomplete. To use Derrida's terminology,

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100. But of course, Wittgenstein would not really be proven wrong, for the philosophers would
have invented a new language game, or altered a previous one.

101. *See infra* text accompanying notes 110-11.

102. F. DE SAUSSURE, *supra* note 62, at 19, 74, 98, 168. Change and growth in social conventions
thus depend upon constant disobedience or manipulation of the conventions. Conventions develop over
time only by people stretching their limits or otherwise reacting to them. Conventions are thus always
in a state of becoming, in a continuous dialectic between fixity and fluidity, between status quo and
rebellion.

An analogous, although by no means identical, point applies to biological evolution. In order for
species to survive, they must reproduce themselves through genetic replication and recombination.
Nevertheless, the transfer of genetic information from one generation to the next contains the possibil-
ity of variation or even mutation, which produces the changes that transform existing species or create
new ones. Thus, built into the mechanism of perpetuation and replication is the mechanism of differ-
entiation and evolution. Without replication of their genetic information, species cannot survive. With
perfect replication, however, species cannot evolve.

103. *See infra* text accompanying notes 110-11.

one can argue that there is always a degree of play in the meanings of words and concepts. This is a second aspect of the deconstructive concept of "play"—the open possibilities of convention which are neither clearly proscribed nor permitted in advance.[104] Ellis is very much opposed to this way of talking, especially to Derrida's substitution of the concept of "play" for Saussure's concept of "difference."[105] This substitution, he points out, "says a great deal more . . . [it] suggest[s] that the mechanism of differentiation is much less controlled and specific"[106] than Saussure's theories of language allow. Once again interpreting Saussure to attack Derrida, Ellis argues that language has meaning because the system of differences is *fixed*—language may be just a system of differences, but words have determinate meaning because their differences are balanced against each other, like a house of cards. On the other hand, Ellis points out, if there is "play" in the system of differences, our words have nothing solid to push up against—the house of cards falls apart, and we have meaninglessness instead of meaning. *Black* has meaning because it is contrasted to *white* and to other color terms. But if this contrast were uncertain and indefinite, we could not know what the word *black* meant. Thus, concludes Ellis, Derrida's concept of a "play" of differences is incoherent—it cannot produce any meaning at all.[107]

Of course, deconstructive theory's point is that language means, and continues to mean, despite the fact that there is considerable play in the joints of language, or that linguistic conventions are subject to manipulation and alteration. Similarly, any system of social conventions operates, and continues to operate, despite the fact that it is potentially open or potentially changeable.[108]

Ironically, Ellis' theory of language is most inconsistent with that of his chosen philosophical role model, Ludwig Wittgenstein. For Wittgenstein's theory of language games assumes that linguistic conventions are never fully complete—that we do, to some degree, make the rules up as we go along. Indeed, no one was more insistent that the rules of a game need not be all defined in advance than Wittgenstein, just as no one was more concerned to show that we can get along quite nicely with concepts whose

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104. Obviously, the line between what is an abuse of a convention and what is simply an extension that is neither required nor proscribed can be a matter of considerable debate among adherents to the convention. The conceptual opposition between extending a convention and abusing or altering it is a nested opposition. This means that there is both similarity and difference between the two activities. The deconstructive concept of "play" encompasses both phenomena. Nevertheless, it would be a serious mistake to conclude from this that there is no difference between them.

105. P. 53.

106. P. 53.

107. Pp. 54-55.

108. This is consistent with Saussure's point that change and continuity in language are intrinsically related. F. DE SAUSSURE, *supra* note 62, at 74. Thus, Saussure offers a somewhat more flexible theory of language than Ellis ascribes to him.

edges are blurred, or words whose meaning is not completely circumscribed in advance:

> I *can* give the concept "number" rigid limits . . . but I can also use
> it so that the extension of the concept is *not* closed by a frontier. And
> this is how we do use the word "game." For how is the concept of a
> game bounded? What still counts as a game and what no longer
> does? Can you give the boundary? No. You can *draw* one; for none
> has so far been drawn. (But that never troubled you before when
> you used the word "game.")
> But then the use of the word is unregulated, the "game" we play
> with it is unregulated. [This is Ellis' objection to Derrida. Wittgenstein responds]—It is not everywhere circumscribed by rules; but no
> more are there any rules for how high one throws the ball in tennis,
> or how hard; yet tennis is a game for all that and has rules too.[109]

In his eagerness to differentiate Derrida from Wittgenstein, Ellis has missed a key point of similarity between the two thinkers.[110] If Wittgenstein merely believed that meaning was the result of a fixed set of conventions, *he* would hardly have advanced much beyond the earlier theory of nominalism, and he would be guilty of the same lack of originality with which Ellis charges Derrida. However, Wittgenstein's insight was that social conventions and language games are always potentially *open*—they can be made more exact when necessary, but such exactness is not necessary to speak meaningfully. The system of differences of which Saussure speaks does not have to be fully articulable in advance in order for language—or indeed for any system of meanings arbitrated by social convention—to function. The possibilities of further play are perfectly consistent with the possibility of a meaningful discourse.[111] Thus, Wittgenstein, like Derrida, points out that the meaning of our words is never fully complete when we use words; rather, their meaning is always yet to be determined, as new contexts and new problems arise.

Deconstructive arguments concerning language and play are important because they apply by analogy to all other discourses that rely upon social convention to establish meaning or value. Acts of meaning are dependent upon social conventions, but social conventions grow and change because of acts of meaning. Thus, the *langue* of manners and social expectations is both differentiated from and dependent upon the *parole* of particular acts of individuals in society. Structures and events are opposed, but their op-

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109. L. WITTGENSTEIN, *supra* note 21, § 68.
110. We might even say that there is a nested opposition between their respective philosophies.
111. Note that when the linguistic conventions of *langue* are open in a particular situation, speakers will determine how the convention is to be extended by individual speech acts of *parole*, which will then be incorporated into *langue*. This is another instance of the conceptual dependence of *langue* upon *parole*. This mutual conceptual dependence is what is meant by the claim that the opposition of *langue* and *parole* is a nested opposition.

position is always a nested opposition. That is why social practices and customs are at once both fixed and subject to manipulation and metamorphosis. We now see that the deconstructive concept of "play" is just another way of describing the mutual conceptual support and flux generated by the *langue* and *parole* of any system of social conventions.[112]

In particular, the deconstructive critique of linguistic conventionalism applies to conventionalism in legal theory. Legal theorists who accept some degree of cultural relativism may doubt whether ethical and political concepts like democracy, neutrality, or justice have a fully objective basis outside of particular cultures. They may nevertheless insist that these concepts have determinate meaning and application because they are the product of social conventions. Although the ethical and political concepts involved in legal discourse may vary from culture to culture, actors within the legal culture are nevertheless constrained and bound by that culture's conventions. Legal discourse is therefore always a debate within the constraints of these conventions.

For those legal theorists who do not believe in unchanging essences of legal and political concepts, conventionalism is a valuable and appropriate alternative. Yet we must remember that the deconstructive concept of play applies equally well to the legal conventionalist as it does to the linguistic conventionalist. Like linguistic conventions, legal conventions need not be fully fixed in order to operate, and the possibility of play is always inscribed within them. The very conventions which constrain legal actors are always open conventions, and are always susceptible to manipulation and alteration. Thus any form of legal conventionalism also places us within a particular dialectic of change and continuity, whose ground rules are preserved by convention even as they are constantly undergoing alteration.

The deconstructive concept of play can be easily misunderstood as a claim of linguistic nihilism. It is therefore important to remember that the argument is based upon a nested opposition between conventions of meaning and individual acts of meaning, and not a false opposition. It is incorrect to conclude that conventions of meaning are wholly fluid—that they offer no resistance to individual acts of meaning. A nested opposition involves mutual dependence *and* differentiation. Our previous deconstruction has endeavored to show how conventionalism involves the possibility of disobeying conventions and the fluidity of conventions, or in Saussure's terms, how the development of *langue* depends upon the variations produced by *parole*. However, we should not by this argument forget the strength of Ellis' earlier arguments. *Parole* depends upon *langue* as much

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112. This ambivalent relation is particularly obvious in debates between advocates for and skeptics of social change. Social practices resist alteration, but nevertheless mutate historically. Social history *is* the history of social change. Thus although change is invariably resisted, change is nevertheless possible, although not always on the terms desired by its advocates.

as *langue* depends upon *parole*. In fact, it would be impossible for "bad" to come to mean "good" if "bad" did not already have a relatively fixed meaning to play off of. "Bububu" could not come to mean "If it doesn't rain I shall go out for a walk" unless the latter phrase had a relatively determinate meaning. We can generalize this point to any system of social conventions, including legal conventions. Derrida's notion of "play" is thus dependent upon a baseline of conventions by which we can tell that "play" or variation has occurred. The notion of indeterminacy requires a concept of determinate meanings to play against. To say that we don't know whether "bububu" means "take a walk" or "take a hike" presupposes a determinacy of meaning of the latter two phrases. Indeterminacy is ultimately parasitic upon a form of determinacy.

Ellis sees this point clearly.[113] However, because Ellis does not appreciate the logic of a nested opposition, he mistakenly believes that he has refuted deconstructive arguments about language and meaning—when he has in fact confirmed them. A nested opposition between conventions and individual acts of meaning, between structures and events, or between fixity and free play, is a relation of mutual differentiation and dependence. As a result, the more we focus on one side of the opposition, the more we see that it depends upon the other, and vice versa. Once again it cannot be stressed too much that the reinterpretation of a conceptual opposition as a nested opposition does not abolish all boundaries or distinctions, but merely resituates them so that we can see their similarity or mutual conceptual dependence as well as their contrast and mutual differentiation.

V.   CONCLUSION

The concept of nested opposition is important to legal theory if only because it helps to clear up recurrent confusions about theoretical discussion. Yet once we understand deconstructive arguments, we can see their obvious connection to the legal forms of reasoning, which also depend upon ascriptions of similarity and difference. For some persons deconstruction no doubt is seen as the intrusion of a foreign element into law, in more than one sense of the word. Deconstruction has arrived on the American scene as one of the many European philosophical movements that have accompanied the rise of interdisciplinary legal studies in general and the Law and Literature and Critical Legal Studies movements in particular. Yet I believe that deconstruction has found a home in American legal thought because one tradition of American legal theory has always been in some sense deconstructive. When Critical Legal Studies scholars began rediscovering the legal realists (who were not totally forgotten in any case), they found that their arguments were as deconstructive as any-

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113.   P. 54; *cf.* p. 127 (ambiguity is parasitic upon specificity).

thing in Derrida.[114] Thus, deconstructive argument already was present in America's legal heritage by the time that more modern movements began to champion it.

To be sure, deconstructive techniques are more general in application and broader in scope than the forms of reasoning lawyers are used to. Deconstructive techniques are equally at home in non-doctrinal argument—they can be used in the study of legal ideology or intellectual history, or in all of the various types of jurisprudential debates that now rage in the legal academy. But deconstruction is different from other interdisciplinary developments in that it makes its presence felt within legal discourse itself as well as outside of it. One can make a deconstructive argument within doctrine without ever once mentioning any of deconstruction's special terminology or jargon.[115] Because the logic of law is the logic of similarity and difference, deconstruction can dissolve into legal discourse in a way that contributions from other disciplines often cannot. At the same time, it can lurk outside of legal discourse when it is employed for philosophical, historical, or ideological analysis. For those who worry about the invasion of law by interdisciplinary studies, deconstruction thus presents the strangest of cases. Deconstructive analysis and legal analysis are at once both alien to each other and a part of each other. They form, in other words, a nested opposition.

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114. Indeed, one of the first and most important deconstructive articles, Gary Peller's *The Metaphysics of American Law*, 73 CALIF. L. REV. 1132 (1985), made this connection quite explicitly. I also believe that Morris Cohen's "principle of polarity . . . that opposites . . . involve each other when applied to any significant entity," is akin to a general statement that every conceptual opposition can be reinterpreted as a nested opposition. M. COHEN, REASON AND NATURE 165 (1931).

115. *See, e.g.,* Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927) (legal realist critique of public/private distinction); Hale, *supra* note 54 (deconstruction of distinction between coerced and non-coerced contracts through exploration of background coercion created by state's positive law).