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# DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE: CRITICAL AND CULTURAL DIFFERENCE

Terry Threadgold

Review Article: Drucilla Cornell, Michel Rosenfeld and David Gray Carlson, eds., *Deconstruction and the Possibility of Justice*. Routledge, 1992. \$US 17.

**D**econstruction and the Possibility of Justice has a place in the chain of readings/rewritings (in Dworkin's sense) that constitute the field of recent and emerging Australian work in Law and Literature and Critical Legal Studies. At the same time it is a book that is marked by an extraordinary difference to the Australian work. Perhaps in this case *differance* (in Derrida's sense) would be the better term since there is within the chapters of the book a constant deferral of the business of deconstruction in favour of the assertion of the possibility of justice in abstract theoretical terms. The theme of the difference of deconstruction in the United States context is one that is constantly reiterated in the book from the moment of Derrida's reference to the development of critical legal studies and deconstruction "in such an interesting way in this country" (p.9) in the first chapter in the book, through Samuel Weber's reference to Derrida's statement that the United States is "that historical space" which is "the most sensitive, receptive or responsive space of all to the themes and effects of deconstruction" (p.232), to Hillis Miller's comment on the conflation in critical legal studies of "reader-response theory" with "deconstruction" (something that is evident in Fred Dallmayr's chapter in the book) and his statement that "Deconstruction in America" is not the same thing as deconstruction elsewhere (p.306).

That Derrida may also have some anxieties about the difference/*differance* is indicated early in his chapter 'Force of Law: the "mystical foundation of authority"' when he makes some explicitly critical comments on the context of his encounter with critical legal studies in the U.S. and concludes: "Respect for contextual, academico-institutional, discursive specificities, mistrust for analogies and hasty transpositions, for confused homogenisations, seem to me the first imperatives the way things stand today." (p.9) The Derrida piece with its extraordinarily detailed and explicitly politicized deconstruction of the ter-

minology of liberal humanism and emancipatory and enlightenment discourses and its rigorously argued reading of Benjamin's *Critique of Violence* as a problematic text which reflects the (1921) crisis of European, bourgeois, liberal democracy (p.30) and "leaves open the possibility of reading the holocaust as an expiation and an indecipherable signature of the just and violent anger of God" (p.62) reveals inconsistencies and silences in Benjamin's text which go against the grain of received readings. Derrida's deconstruction, tied closely to the reading of a particular text, and to the contextual specificities of its production, is precisely not about indeterminacy but about "the strictest possible determination of the figures of play, of oscillation, of undecidability, which is to say, of the differential conditions of determinate history..." (1988:145). The aim of this exercise is explicitly said to be "something more consequential" than speculative or theoretical academic discourse. Its aim is "to change things" and to intervene in responsible ways in the profession, the *cite*, the *polis* and the world (pp.8-9).

Drucilla Cornell's companion piece in Part 1 of the book, "The Philosophy of the Limit: Systems Theory and Feminist Legal Reform", insists that Derrida's deconstructive readings of Lacan and Levinas make it very clear that unless we challenge Lacan's and Levinas' reduction of woman to an imaginary fantasy, "to the *phenomenologically* asymmetrical other", equal citizenship is impossible and the violation of women in patriarchal societies will continue (p.88). She is concerned here with what Joan Scott has called "restoration" - with understanding the reasons why "the conditions of women's inequality are continually restored" (p.68). She rewrites Luhmann's systems theory to include "gender hierarchy", showing how gender functions as a closed semantic system, structured around a binary opposition. She is then able to show, using Lacan, Luhmann and Derrida how gender and law function as different subsystems within the social system and how, together, they continually restore women's inequality. Deconstruction, in its insistence on the centrality of sexual difference to philosophical discourse, and as a political force, is enlisted as a way of changing that system and stopping the process of restoration.

These first two chapters engage in a kind of deconstruction which is not typical of the rest of the book, and Cornell's chapter is oddly prophetic of the "restoration" that goes on in some later chapters. It is precisely the contradictory and (a)political process of "restoration" or (re)-appropriation/colonization of deconstruction by legal discourse, that several of the other chapters in the book actually enact.

Part II of the book is entitled "Deconstruction and Legal Interpretation" and begins with a chapter by Arthur J. Jacobson, "The Idolatry of Rules: Writing Law According to Moses, with Reference to Other Jurisprudences". In this extraordinarily masculinist context Moses and his encounters with writing and re-writing are indeed read and re-written as a postmodernist

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metaphor for the workings of contemporary dynamic jurisprudences which, in the face of positivism and naturalism, and like Moses, refuse to treat rules as idols and continually struggle to remake them. The premise of this chapter is that "to erase is to rescue writing from idolatry" (p.106). The story of the three rewritings of the law in Moses' case becomes an allegory (an allegory of reading in de Man's terms) of the liberal humanist notion of the constant evolution of the common law in the direction of positive social change. Nowhere is there any mention of class, race or gender as implicated in these processes. The simple similarity between "rewritings" - as postmodernist evasions of fixity and rigid meanings - and 'rewriting' - as involved in normal legal procedures of interpretation - is adduced as constituting law's own potential internal deconstruction of its own processes. That is, the proof of indeterminacy is adduced as evidence of deconstruction, without any of the careful strictures on the reading of indeterminacy suggested by Derrida in this book and elsewhere.

What is at stake here is the very political question raised in Cornell's chapter, whether just any "rewriting" constitutes deconstruction - and whether in fact some forms of rewriting are actually forms of "restoration". It could be argued that the system within which Moses writes and rewrites the law (even if he does it three times), and the dynamic jurisprudences of which Jacobson speaks, are precisely the kinds of closed referential systems that constitute gender hierarchies and, rather than *constituting deconstruction*, actually *require deconstruction*. Indeed in much feminist and critical legal studies work that is precisely what has been argued of late. There is absolutely no indication that Jacobson has any sense of the politics (or the refusal to engage with the politics) of what he is arguing, or of the implications of a Foucauldian or Derridean position which would see power and knowledge as inextricably linked and any particular definition of truth or justice or dynamic jurisprudence as being always produced at the intersection of the social, political, and disciplinary interest that at any time constitute the field of possible discursive representations. The language he works with and takes from theory is the language of rewriting, intertextuality and undecidability of meaning, a carnivalesque heteroglossia, without a politics, which because it is "postmodern" is assumed to encompass difference and to lead inevitably to positive change. The question that is never asked is who does this rewriting and from whose perspective and in whose interests. There is a radical confusion here between theories of the nature of postmodern social conditions and the political or other consequences of rigorous deconstruction.

This problem with politics, the setting up of the political on the side of "man", subjectivity, rhetoric, the contingent and the particular, as against the system, law, objectivity, plain intendment of meaning and the universal, and the need to continue working within this binary system to prove that law is not political certainly locates much of the work in this book in an American liberal humanist jurisprudential context. Samuel Weber's comments on the very

specific nature of the American judiciary in its relations to the constitution and to laws (p.235), on the power of the U.S. Supreme Court in relation to the body politic (p.236), and on the way in which this separates "the people" from lawyers as "the unique interpreters of an occult science" (p.238), like Dallmayr's account of the history of the rule-governed character of legislative authority (pp.283 ff.) and of the constant need to separate powers so that the arbitrary and the contingent are kept semantically and practically apart from the legal (p. 288), go a long way towards suggesting the institutional and discursive fields in which this binary system is produced and continues to function. Weber (p.234) relates these political and legal traditions to the distinctive forms of deconstruction in the United States, alluding to the (re-)appropriation of deconstruction by legal discourse of which I have been speaking. He talks of the "familiar and uncanny" nature of deconstruction in the context of a social system whose very "constitution" depends on the reading and re-reading/rewriting of a written text (the Constitution) (p.238). He attempts to deconstruct this too easy association of deconstruction with existing legal process, pointing out the similarities of law and deconstruction - they share the qualities of an occult science and both are concerned with the rewriting of the writings of others - but arguing that deconstruction, while it too responds to conflictual appeals, does not arbitrate, set precedents, or seek to arrive at a definitive verdict.

Whether this is a valid distinction or not, it is particularly pertinent to the reading of the one chapter in this book which demonstrates the full extent of the "restoration" made possible by a self-justificatory system like legal argument when confronted with "the crisis in legal interpretation" produced by deconstruction. Michel Rosenfeld's chapter, "Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism", is an extraordinary exercise in what Stanley Fish has called the law's tendency to incorporate its others. First it is structured around the binary opposition between law and politics and is determined to maintain the proposition that "legal practice is irreducible to the practice of politics" (p.156), and second it is convinced and sets out to prove that the American legal and Constitutional system is already a deconstructive practice. To this end it first rewrites deconstruction as liberal humanist democratic practice, reversing the deconstructive enterprise (whereby texts are usually subject to deconstruction) by declaring that whether deconstruction actually provides a solution to the crisis in legal interpretation "depends on whether its ontological and ethical presuppositions are compatible with law and legal interpretation" (p. 166). In other words law and legal interpretation remain uncontested while deconstruction may be "incorporated" (the term is Rosenfeld's) provided that it is compatible with them.

The first rewriting then of deconstruction as liberal humanism is as follows: "The universe which lurks beneath the surface of deconstruction" is said

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to be one which (1) presupposes the perpetual postponement of the reconciliation of self and other and (2) implies the ethical necessity of a constantly renewed call to the other by way of forms of social interaction which promise reconciliation (p.166). The second rewriting of law as deconstruction follows. If law also conceives of itself as oriented towards a universe of actors split into self and other and sees its mission as bridging that gap (p.167) then "law can embrace deconstruction". We are told that the complex legal systems of Western democracies and the American system of justice rooted in the common law and a written constitution do satisfy these two conditions, particularly in their separation of legislation and adjudication which ensures the separation of the legal and the political. At this point, in an exemplary pair of paragraphs (p167), "legal systems prevalent in Western democracies" are proved to be already instances of deconstruction now defined as (1) and (2) above, and we find that: "So long as a legal system operates in the context of group pluralism, and through the application of general laws that are universally applicable, therefore, law meets the two conditions that entitle it legitimately to embrace deconstruction." Moreover the American legal system in particular encompasses a conception of law particularly well suited "to incorporate deconstruction" (p.168).

What follows this ambiguity of agency and this semantic muddle (or hermeneutic circle) over who is deconstructing, embracing or incorporating whom is a strange conclusion that the "incorporation" of deconstruction in these terms will inform the practice of legal interpretation so as "to repel the threat of absorption into mere politics". In other words an ethical humanism, a care for and desire to be reconciled with the other, rewritten as incorporated deconstruction, will be guarantee of the kind of integrity which also ensures the success of Ronald Dworkin's "chain-gang" approach to legal interpretation. At this point in the argument deconstruction is rewritten again to incorporate the "new legal formalisms" of Stanley Fish and Weinrib. Both, although critiqued at length, are read as ultimately offering ways of conceptualising law as an internally unfolding dynamic and deconstructive practice which carves a domain of social action that is separate from politics.

What is never clear is how a "law having embraced deconstruction" would be in any sense different from an undeconstructed law. What we are left with is a law which will "channel disparate self interests to a common ground" (p.197) with absolutely no substantive indications of how, no recognition of the gender hierarchy, to use Cornell's term, in which legal processes are implicated, and no recognition of the appropriation of the discourses of deconstruction by liberal humanist legal interpretative discourses which has gone on in this chapter. Far from demonstrating how a law which has embraced deconstruction might effect social change or solve the crisis in legal interpretation this chapter shows precisely wherein lies that crisis by demonstrating (1) the "resistance to theory" (Paul de Man 1986) that is built in to the processes of

legal interpretation themselves and (2) their systematically coercive powers of restoration and appropriation in the face of external attacks or challenges. In this case a close reading of Rosenfeld's text "uncovers ... contradictions that go completely against" this particular reader's "received, canonical understanding" of deconstruction (to misquote Norris 1989, p. 152, speaking of deconstructions of legal texts). The system reasserts itself and deconstruction, embraced and incorporated into the body of the law, is effectively feminised, seduced and disempowered. I have been selective in the chapters I have chosen for detailed discussion, but there is a real sense in which the difficulties that are raised in relation to the specifically American traditions of deconstruction that constitute critical legal studies in that context are constitutive of the book as a whole. Herrnstein Smith's chapter is genuinely deconstructive of the opposition between subjective and objective judgement, but is perhaps not so telling as the very brief contribution by Charles M. Yablon, which recalls the anxieties of Derrida, quoted above, about possible failures to recognise contextual, academico-institutional and discursive specificities. This is a fear which is consistently realised in the pages of this book as institutionally specific kinds of readings and rewritings and certain ethical propensities within liberal humanism and jurisprudence are too readily equated with deconstruction. Yablon's chapter quotes a summons form and exposes it to detailed textual and sociological analysis, concluding that "the indeterminacy of legal language must be used as a way of revealing and analysing the power exerted and pain inflicted by legal processes, not as a way of denying that power and pain" (p.262).

Part III of the book: "Comparative Perspectives on Justice, Law and Politics" contains the pieces by Dallmayr and Hillis Miller referred to above. Hillis Miller's reading of Kleist's *Michael Kohlhaas* offers another perspective on rewriting, exploring the ways in which readings of and commentaries on works of literature, as rewritings and retellings, enable a work of literature "to proliferate itself as universal law" (p.314), constantly doing/performing what it tells, in this case establishing the absence or failure of the law. Such retellings also go on telling the same and there are lessons here for those who would argue that retellings inevitably lead to evolution and change. The other contributions to this section cover a range of issues. Carlson's chapter deconstructs microeconomic price theory arguing that the utilitarian poetics of reconciling private selfishness with public good have failed in this context. His otherwise exemplary deconstructive approach however takes an interesting turn in his concluding paragraph where it begins to participate in the same discourse that characterises some of the chapters discussed above - the notion that the element to be deconstructed, in this case the market, already works according to a postmodernist logic. Thus the market has to be read according to a different poetics, not *engineering* and logic, says Carlson, but *bricolage* (p.279) and perhaps is not so bad after all.

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Henry Louis Gates' "Statistical Stigmata" is yet another interesting critique of the law and economics movement, demonstrating that the same "probabilistic turn" which subtends the so-called ethical basis of wealth maximisation is what rewrites race as a statistical property (p.331). The issue he explores is what he terms "probabilistic harm". The arguments revolve around actual case studies and case law and the issue of the evidentiary use of the statistics of discrimination, what he terms racial stigmata, particularly in relation to the issue of single-case probability. "Can you harm people by decreasing their chance of getting some good?" is the question he asks and he asks it to reaffirm the need to explore these statistical discourses and their effects, not simply to dismiss them as part of the discourse of the right. The ghost of Judge Posner hovers in the margins of this chapter as it does in Carlson's. It is one thing, Gates says, to deny these discourses their explanatory power, it is quite another to treat them as irrelevant. Gates' conclusion is not unlike Yablon's and again draws attention to the realities of legal institutions and the violence of their discursive appropriations: "Plainly the simple affirmation of indeterminacy cannot staunch the very human pain of racial stigmata. Statistical they may be: they bleed just the same" (p.341).

Agnes Heller writes in this section on "Rights, Modernity, Democracy", articulating here in abbreviated form the argument of her book *Beyond Justice*. Reiner Schurmann writes somewhat impenetrably on "Conditions of Evil". Alan Wolfe's chapter on "Algorithmic Justice" is an interesting place to conclude because it takes us back to the beginning, to Cornell's "incorporation" of systems theory in the services of Derridean and feminist deconstruction of legal processes, and because it has implications for a reading of Rosenfeld's "incorporation" of deconstruction and of new legal formalisms. What Wolfe argues is that there is an entirely logical explanation for what he sees as the apparently contradictory tendencies in postmodernist and deconstructive theorising. Such theories he argues have a remarkable tendency to be both "irrational", in the sense of celebrating indeterminacy, a Nietzschean plurality of meanings, the impossibility of metanarratives and the contextualised and contingent nature of understandings and practices, and at the same time to be committed to the rationalism of cybernetic notions of self-regulating systems. This produces, he argues, "autopoietic theories of justice" (p.378), theories of law or justice as self-regulating and evolving systems, and, I would add, contributes to the confusion in this book between such systems, postmodernist accounts of the social and deconstruction. According to Wolfe, we should not be surprised if postmodernism's fascination with eternal recurrence overlaps so significantly with a fascination for self-regulating systems. He quotes Deleuze and Guattari and Lyotard, as well as Nietzsche and de Saussure, to illustrate his point. What makes this for him a logical intersection and an inevitable confusion is the shared anti-humanism and negation of sociological accounts of self that are common to postmodernism/deconstruction and sys-

tems theories. If you have no theory of people you are forced to conceive the world in systems theory terms. His argument is that this conjunction of post-modernism/deconstruction - the rules are not made by God so we can remake them - with the contrary position which says that we have to follow the rules of the system - negates the possibility of agency and social change and requires a reaffirmation of humanism in the form of a theory of human selves (p. 383). Justice cannot be theorised in other words without a theory of people.

Despite the humanism of this conclusion it remains consonant with Cornell's anti-humanist position that deconstruction, in focussing on sexual difference (people), can provide a way of thinking and intervening in the changing of systems. The chapter also begins to show how certain American readings of deconstruction and postmodernism produce the odd conjunctures and coercive appropriations of deconstruction and new formalisms (systems) that characterise Rosenfeld's chapter and perhaps even contribute to the law and economics movement. What is most remarkable in this context is the absence of certain discourses, practices and trends that characterise comparable work in Australia, discourses, practices and trends that also derive from readings of critical theory, but which significantly include feminisms, poststructuralism and Marxism, and which make some very clear distinctions between what they call postmodernism and identify with "indeterminacy" and what they call deconstruction. The first three issues of *The Australian Feminist Law Journal* would provide many relevant examples.

Poststructuralist accounts of subjectivity, theories of the body and of sexual and ethical difference, the taken-for-granted and regularly demonstrated nature of the politics of legal processes, the careful and detailed analysis of the practices of what Cornell calls "the gender hierarchy", the understandings of and the critiques of the profoundly patriarchal nature of the structures of the law (structures which are on the whole being defended in this book), the different transmigrations and transformations of deconstruction, these are all signs of a cultural difference which is as profound as it is socially and historically located. The issues raised by the difficulties of this book, by its masculinist conservatism as well as by its revolutionary moments, and the problems of "restoration" and appropriation which it signals and embodies, are real problems now for all of us working in this field. If it does nothing else the book should make us all look critically at our own practice and, in characteristically un-Derridean ways, at what it is we think we mean by deconstruction and at how that might differ from rewritings and postmodernisms of various persuasions (deconstruction cannot have a "proper" place p.8 - 'If I had to risk, god help me, a single definition of deconstruction,... I would say without further ado: *Plus d'une langue*, "more than one language", but also, "one language no more" (p.232). We might learn to heed Derrida's warnings about the specificity of discursive regimes and proceed to deconstruct always in relation to local practices and their textual particularities and resistances to theory.



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This is one way of avoiding the kind of theoretical abstraction that proliferates “restoration” and more of the same. At the same time it has “uncanny” and seductive connections with the very thing it seeks to deconstruct - processes of legal interpretation. That is the lesson this book writes and rewrites and that needs constantly to be reread.

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