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While postmodern legal scholarship has had only modest impact on legal practice, it has left a trail of anguish in the legal academy. I refer particularly to the unhealthy envy it has produced in those who teach more prosaic subjects, such as commercial law. "Gosh," they are often heard to say, as they blow the suds off their beer, "I sure wish I could deploy some of those fancy literary devices such as semiotics, hermeneutics, and speech act theory." Or, "Gee, I just know Yale would publish my *Practitioner's Guide to The Packers and Stockyards Act* if only I could work in a reference to deconstruction."

Until now, their curiosity about continental philosophy has been squelched by those members of the academy who got there first. Consider Pierre Schlag's stinging observation that to ask "What is deconstruction?" is to reveal that one does not understand deconstruction.[1] Confused, yet silenced, by such rebuffs, most commercial law teachers have withdrawn in shame to their blue-collar demimonde.

Does it have to be this way? Can there be hope for people who think a "dangerous supplement"[2] is an outdated pocket part? Who when they hear the word *norm* think first of the fat guy on *Cheers*?[3] Who think a "foundationalist" is someone like Henry Ford. Well, the answer is no, there can't be really. They

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1. "Le Hors De Texte, C'est Moi": The Politics of Form and the Domestication of Deconstruction, 11 Cardozo L. Rev. 1631, 1631–33 (1990). Schlag argues that the "What is . . ." form of this question already presumes a sort of answer (a presence) that it is the aim of deconstruction to contest. I would suggest that novices who want to avoid this embarrassing pitfall should instead ask meta-questions such as "What sort of question should I ask to learn something about deconstruction?" or "If I were to ask you the correct question about deconstruction, what answer would you give?"
2. Jacques Derrida, Of Grammatology, trans. Gayatri Chakravorty Spivak, 141 (Baltimore, 1976) (an exterior addition that calls into question the sufficiency of presence).
3. Instead of an unsupportable value judgment. E.g., Symposium, The Critique of Normativity, 139 U. Pa. L. Rev. 801 (1991).

are too far behind and this stuff is way too hard to understand.[4] But that is no reason for them not to enjoy their own version of continental philosophy, especially now that it has become safely passé. I myself have enjoyed remarkable success in adapting deconstructionist and post-Freudian theory to commercial law and am willing to share my secrets with any aspiring commercial law scholar eager to make the leap.

The key to the successful integration of postmodern thought into your own scholarship is stunningly simple: all you have to do is not care whether you really get it right. Wannabe postmoderns don't realize that misunderstanding and misusing postmodern scholarship is a very low-risk proposition. Before you came to grief, you would have to be unlucky enough for one of the dozen or so people in the world who really do understand postmodern scholarship to (1) actually read your article in *The Business Lawyer,* (2) realize that you had said something clearly inaccurate instead of obscurely inspired, (3) be confident enough to take you on, (4) care enough about your article or your error to spear you in print, and (5) do you more harm than good in publicizing what you wrote. The odds of all these things occurring is about equal to that of all the planets coming into perfect alignment.[5]

Once freed from this outdated anxiety, you too will soon be turning out articles like "The Social Construction of Cowness in the Packers and Stockyards Act," or "Silencing the Lambs: Narratives of Loss and Evisceration in the Packers and Stockyards Act," or "Cattle Prods and Cutting Pens: A General Solution to Indeterminacy in the Packers and Stockyards Act." Anyway, to help get you started, I've illustrated a couple of basic ideas by using the UCC.

Différance in Article 2

The first lesson concerns the idea of *différance.*[6] Jacques Derrida created this clever French pun on two words meaning "difference" and "deferral." To

4. I could illustrate this statement with thousands of examples, but I will confine myself to one, a single paragraph from Julia Kristeva:

> Of course, no political discourse can pass into nonmeaning. Its goal, Marx stated explicitly, is to reach the goal of interpretation: interpreting the world in order to transform it according to our needs and desires. Now, from the position of the post-Freudian, post-phenomenological analyst—a position which is really an untenable locus of rationality, a close proximity of meaning and nonmeaning—it is clear that there is no World (or that the World is not all there is) and that *to transform* it is only one of the circles of the interpretation—be it Marxist—which refuses to perceive that it winds around a *void.*

Psychoanalysis and the Polis, *in* The Politics of Interpretation, ed. W. J. T. Mitchell, trans. Margaret Waller, 83, 93 (Chicago, 1983).

Now here in this footnote, where I hope nobody can see, I make my confession: even after someone took the trouble to translate this paragraph from French into English, even though I know the meanings of all the words used, even though I can identify the subjects and verbs of all the sentences, I haven't the faintest idea of what she means. Not even a little bit. Not a single thought. None. Zip. Nihil. There. I feel better.

5. If, despite these odds, the unthinkable actually happens, do not panic and do not under any circumstances confess your error. "Error" is an archaic, foundationalist notion insofar as it implies the possibility of truth. Instead, either (1) claim that you were engaged in a "creative misreading" (Jonathan Culler, On Deconstruction 175–79 (Ithaca, 1982)); or (2) chide your antagonist for failing to detect your postmodernist irony.

6. You have to practice until you can say this word with a French accent.

understand how really funny it is, you have to know something about semiotics, which is the science of signs and language. Semiotic theory holds that sign systems create meaning not by the inherent properties of the signs themselves but by the differences among the signs that make them up.[7] Phonetically, *cat* is recognized only insofar as it is different from *bat, mat, dog,* etc. Likewise with the *signifieds,* the concepts for which signs stand. Up is known by its difference from down; good by its difference from evil; red by its difference from blue and green.

Systems of difference often treat opposing terms asymmetrically, so that one term, e.g., *good,* is "privileged" over its opposing element, *bad.* It is a characteristic of any system of difference that the effective privileging of one term is dependent upon the maintenance of the excluded term over against which the privileged term has meaning. Up may be good, but there can be no up without down. The subordinate term is merely deferred, not annihilated. Moreover, and this is a deconstructionist practical joke, the privileged/subordinate relation between any set of opposing terms is inherently unstable and subject to reversal. For example, as he becomes more and more evil, Satan begins to steal the show in *Paradise Lost.* Deconstruction is the banana peel on the sidewalk of Language.

Now for your first lesson. As you know, all sales of goods by merchants who sell such goods are subject to the implied warranty of merchantability unless that warranty is effectively disclaimed.[8] Were I to ask a commercial lawyer what was necessary to disclaim such a warranty, she would probably say that the UCC requires that any written disclaimer mention "merchantability" and be "conspicuous."[9] Such naiveté discloses an insensitivity to *différance.* I would inform her that she has it exactly backwards: the UCC requires that any effective disclaimer contain *non*conspicuous language that does *not* mention merchantability.

If pressed for an explanation, I would smile condescendingly, stub out my Galloise in her Danish, and proceed: The term *conspicuous* is defined in section 1-201 (10):

> "Conspicuous": A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous." Whether a term or clause is "conspicuous" or not is for decision by the court.

Here we find a perfect illustration of a self-deconstructing text, complete with dangerous supplement. Notice first how this definition seeks to create

7. Frederick de Saussure, Course in General Linguistics, eds. Charles Bally & Albert Sechehaye, trans. Wade Baskins (New York, 1959).

8. U.C.C. § 2-314.

9. "Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous . . . ." U.C.C. § 2-316(2).

différance by privileging capitals at the expense of lower-case letters and larger letters at the expense of smaller. Capitals[10] are claimed to be conspicuous in themselves, without apparent regard to the need for the subordinated lower-case letters to make them so. The text strives to make this point self-evident by its embedded example. Yet, in illustrating itself, the text undoes itself. We can easily reveal the instability of this hierarchy by inverting it:

> "CONSPICUOUS": A TERM OR CLAUSE IS CONSPICUOUS WHEN IT IS SO WRITTEN THAT A REASONABLE PERSON AGAINST WHOM IT IS TO OPERATE OUGHT TO HAVE NOTICED IT. A PRINTED HEADING IN CAPITALS (AS: non-negotiable bill of lading) IS CONSPICUOUS. LANGUAGE IN THE BODY OF A FORM IS "CONSPICUOUS" IF IT IS IN LARGER OR OTHER CONTRASTING TYPE OR COLOR. BUT IN A TELEGRAM ANY STATED TERM IS "CONSPICUOUS." WHETHER A TERM OR CLAUSE IS "CONSPICUOUS" OR NOT IS FOR DECISION BY THE COURT.

Now which of *these* words is conspicuous? The text of the statute tells us that it is all of the paragraph except for the surviving lower-case letters. But surely the lower-case letters, in violation of the law, have themselves become conspicuous. Whatever the text seeks to make "conspicuous" depends on the rest of the text for its character.

To complete the undoing of itself, the text refers to the telegram rule. This exception is a classic form of dangerous supplement. While the main body of the statute struggles to maintain the natural distinction between the conspicuous and the inconspicuous, the telegram rule tacitly admits that all the language in any document could simply be declared to be conspicuous. This admission renders the rest of the statute pointless.

It is now child's play to resolve the matter at hand. Because conspicuousness is defined in terms of contrast, it is impossible for any contract to contain a conspicuous term dealing with merchantability unless it contains [perhaps a majority of] nonconspicuous terms dealing with other matters. It follows that the essential elements of a valid disclaimer of a warranty of merchantability are nonconspicuous terms that do not pertain to the warranty of merchantability. *Q.E.D., n'est-ce pas?*

Psychoanalytic Reinscription in Article 9

Literary criticism and theory furnish most of the intellectual source material for postmodern legal research. We all know what literature is obsessed with: sex and death. So post-Freudians like Jacques Lacan should figure heavily in your work. The element of the subconscious in writing has led deconstructive literary critics to observe that the contradictions of values described in texts are reinscribed in the very language used to describe them. Form tends to emulate substance through mechanisms of the unconscious. Blending this observation with psychoanalytic insights, one builds a powerful tool for a critical analysis of UCC rhetoric.

10. The reference to "capital" as the dominant element in this hierarchy of commercial value is not fortuitous, as will be seen in the second part of this essay.

At the most obvious level, it is no secret that the text of the UCC is saturated with sexual allusion.[11] Constant exposure to this prose is an occupational hazard: like overheated medieval monks reading the *Song of Solomon,* dedicated commercial law professors must have frequent recourse to cold showers and mortification of the flesh. As I am sure must be standard practice in most law schools, the ceiling in our commercial law classroom is equipped with one of those grocery-store vegetable spritzers to keep the students' libidinal temperature at manageable levels.

It is less commonly realized among commercial law scholars, however, that the code is also a structural figure of gender differentiation. You no doubt have guessed that I refer chiefly to the juxtaposition of sections 9-314 and 9-315.

The notorious section 9-314 on "accessions" is too painful to describe fully here.[12] I can bring myself to say only that it concerns collateral that becomes "affixed" to other collateral in the creation of a "whole" but which nevertheless remains vulnerable to being later "removed" by the secured party if the debtor defaults. The code permits removal even though "physical injury" to the whole is "caused by the absence of the goods removed."

Do I have to draw you a picture? Can this section be more explicitly male in its images of rationality, separateness, and castration. Who is this "secured party" that can remove the recently attached part from the newly formed whole? Who else indeed but the father in an Oedipal preemptive strike against the infant son, using the pretext of some default?[13]

And who can defend the son from this onslaught? The drafters have made section 9-314 subject only to section 9-315, which ostensibly deals with commingling.[14] Section 9-315 provides in part:

11. Two of the most notorious are the suggestive reference to "back-to-back practice" in U.C.C. § 5-116 cmt. 3 and the notion that "[i]nventory of a person is not to be classified as his equipment." U.C.C. § 9-109(4). And exactly what happens at the "midnight deadline"?

12. (1) A security interest in goods which attaches before they are installed in or affixed to other goods takes priority as to the goods installed or affixed (called in this section "accessions") over the claims of all persons to the whole except as stated in subsection (3) and subject to Section 9-315(1).

    ....

    (4) When under subsections (1) or (2) and (3) a secured party has an interest in accessions which has priority over the claims of all persons who have interests in the whole, he may on default subject to the provisions of Part 5 remove his collateral from the whole but he must reimburse any encumbrancer or owner of the whole who is not the debtor and who has not otherwise agreed for the cost of repair of any physical injury but not for any diminution in value of the whole caused by the absence of the goods removed or by any necessity for replacing them.

13. My interpretation of this passage was confirmed when I observed male law students shifting nervously in their seats when called upon to explain it.

14. The commingling problem arises when two secured parties have security interests in the components or raw materials that a debtor uses to manufacture a product for sale. For example, a paint merchant and a canvas merchant who each sell to an artist on credit may hold security interests in their products to secure repayment. If the artist paints a picture using the paint and canvas, then what interests does each creditor have in the painting?

> (1) If a security interest in goods was perfected and subsequently the goods or a part thereof have become part of a product or mass, the security interest continues in the product or mass if
>
> (a) the goods are so manufactured, processed, assembled or commingled that their identity is lost in the product or mass . . . .

The conventional reading of this text is as historical allegory, a standard trope of the Fall that begins with Edenic "good," "security," and "perfection," then descends to modernist alienation and loss of identity, before culminating in a postindustrial, Maoist reference to production and the masses. I would guess it is taught that way in 95 percent of American law schools.

But I wish to surface the Freudian aspects of this text, which, as we have seen, represents the infant son's only hope of salvation. In this regard, comment 3 to section 9-315 contains a very revealing image: "This section applies not only to cases where flour, sugar and eggs are commingled into cake mix or cake, but also to cases where components are assembled into a machine."

To the astute reader, the real operation of section 9-315 takes place in the figurative language of the comment, not in the statutory text. The drafters subconsciously reinscribed the oppositions of the statutory text in the imagistic rhetoric of the comment, which juxtaposes the image of a cake against the image of a machine. Our strong construction of gendered roles in the home and at work will assign obvious meaning to these images. The cake is organic, a machine mechanical. The cake is domestic, the machine commercial. Most important, the cake is feminine, the machine masculine. The ingredients of cake are associated with female (re)production (viz., the eggs) while the machine suggests the male genitalia, whose presence is dramatically emphasized by the very absence of any textual reference to them. The juxtaposition of these examples reinscribes at a meta-level the combination of elements operating within each one and between the statutory sections themselves.

The competing secured parties are thus revealed to be the primal parents, the paradigmatically "secure" parties. The creative act of commingling can only be the mixing of egg and sperm in the creation of the child, in which the identity of each is lost in the whole. The competing claims of the secured parties to the "whole" thus become the competing claims of the parents to the child, claims that would tear the child asunder. But in contrast to section 9-314's barbaric de(con)struction of the child, section 9-315 benignly insists that he be instead sold and the proceeds divided. Even as it offers this maternal rescue from the father's threat, however, section 9-315 expresses the anxiety that a child feels at his lack of individual identity and at his status as vehicle for the submerged identities of its parents.

Thus, the code reinscribes the antagonistic interdependence of being and nothingness. The male-oriented section 9-314 marks the anxiety of being: the return to disintegration. The female-oriented section 9-315 marks the anxiety of nonbeing: the loss of identity (as negation, as *pour soi)* in an enfolding, oceanic, maternal plenitude from which one can never emerge. These twin threats ironically but necessarily emanate from the parents, the source of all

existence. I have found that this unexpected textual encounter with the human condition never fails to leave my students dispirited and glum.[15]

* * * * *

There's really very little else I can tell you. All you have to do is glance through a few postmodern essays for footnote fodder,[16] work on your verbs (use words like *deploy, inscribe, efface, constitute),* write "always, already"[17] a lot, and you're on your way. Life will never be the same.

15. That at least is my explanation for my student evaluation reports.

16. I will soon be offering for sale a set of boilerplate footnotes citing works by the usual postmodernists in the original languages. Each will come with a full warranty of accuracy, so that if they are inserted verbatim, the editors of your favorite commercial law journal will not have to citecheck them.

17. Or is it "already, always"? I always forget.