GERMAN LAW JOURNAL

Review of Developments in German, European and International Jurisprudence

Editors-in-Chief: Russell Miller; Peer Zumbansen

Editors: Gregor Bachmann; Gralf-Peter Calliess; Matthias Casper; Morag Goodwin; Dominik Hanf; Florian Hoffmann; Alexandra Kemmerer; Malcolm Maclaren; Stefan Magen; Ralf Michaels; Petra Minnerop; Hanri Mostert; Betsy Röben; Volker Röben; Christoph Safferling; Marlene Schmidt; Frank Schorkopf; Robert Schütze; Craig Smith; Cornelia Vismann.

www.germanlawjournal.com

© Copyright 2000 - 2005 by German Law Journal GbR. All rights reserved.

Vol. 6 No. 1 Pages 1 - 243 1 January 2005

TABLE OF CONTENTS

ARTICLES: SPECIAL ISSUE

A DEDICATION TO JACQUES DERRIDA

Special Editors:
Florian Hoffmann and Cornelia Vismann

INTRODUCTION

Florian Hoffmann and Cornelia Vismann
Introductory Editorial – Jacques Derrida: Before, Through, Beyond (the) Law 1 – 3

Cornelia Vismann
Derrida, Philosopher of Law 5 - 13

TABLE OF CONTENTS PAGE I
# Table of Contents

## Memoirs

<table>
<thead>
<tr>
<th>Author</th>
<th>Title</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Peter Goodrich J.D.</td>
<td>Derrida’s influence on philosophy and on my work</td>
<td>15 – 24</td>
</tr>
<tr>
<td>Simon Critchley</td>
<td>Derrida’s influence on philosophy and on my work</td>
<td>25 - 29</td>
</tr>
<tr>
<td>Anne Orford</td>
<td>Critical Intimacy: Jacques Derrida and the Friendship of Politics</td>
<td>31 – 42</td>
</tr>
<tr>
<td>Rachel Nigro</td>
<td>Derrida’s Last Conference</td>
<td>43 – 45</td>
</tr>
<tr>
<td>Rafael Haddock-Lobo</td>
<td>Derrida: survival as heritage</td>
<td>47 - 51</td>
</tr>
<tr>
<td>Allan C. Hutchinson</td>
<td>If Derrida Had Played Football</td>
<td>53 - 63</td>
</tr>
</tbody>
</table>

## Theory

<table>
<thead>
<tr>
<th>Author</th>
<th>Title</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dirk Baecker</td>
<td>A Note on Space</td>
<td>65 - 69</td>
</tr>
<tr>
<td>Friedrich Balke</td>
<td>Derrida and Foucault On Sovereignty</td>
<td>71 - 85</td>
</tr>
<tr>
<td>Adam Thurschwell</td>
<td>Specters and Scholars: Derrida and the Tragedy of Political Thought</td>
<td>87 - 99</td>
</tr>
</tbody>
</table>
# Table of Contents

Juan Amaya Castro and Hassan El Menyawi  
Moving Away From Moving Away: A Conversation About Jacques Derrida and Legal Scholarship  
101 - 124

## Justice

Drucilla Cornell  
The Thinker of the Future  
125 - 149

Petra Gehring  
Force and the mystical foundation of Law: How Jacques Derrida addresses legal discourse  
151 - 169

Costas Douzinas  
Violence, Justice, Deconstruction  
171 – 178

Elisabeth Weber  
“Deconstruction is justice”  
179 - 184

Peter Krapp  
Amnesty: Between an Ethics of Forgiveness and the Politics of Forgetting  
185 - 195

## Closing

Florian Hoffmann  
Epilogue: in lieu of Conclusion  
197 - 199
# TABLE OF CONTENTS

## DEVELOPMENTS

Manuela Finger and Sandra Schmieder  
The New Law Against Unfair Competition: An Assessment  
201 – 216

Stefan Kirchner  
Conference Report – Legal Unity Through Specialized Courts on a European Level?  
217 - 226

Kathrin Blanck, Angelika Hable and Ulrike Lechner  
Conference Report – Europe’s Constitutionalization as an Inspiration for Global Governance? Some Viennese Conference Impressions  
227 - 243
On the 8th of October 2004, Jacques Derrida died. By all accounts, whether sympathetic or unsympathetic to the philosopher, and understanding or not of his work, Derrida had, by the time of his death, gained the status of one of the most influential thinkers of the second half of the 20th century. He combined an essentially philosophical endeavour with an affinity for literary criticism, and a commitment to the venerable French tradition of the public, and, thus, political, intellectual. Unlike Habermasian and post-Habermasian critical theorists, he was not a self-conscious bridge-builder, though his thought nevertheless came to occupy sizeable and highly articulate niches across the world’s academies, and most notably in North America, thereby “disseminating” his always quintessentially francophone word far beyond the French and European scene.

Even though he was not a self-declared legal thinker, Derrida professed to a career-long fascination with law, which is duly reflected in many of his intellectual engagements. From such early travails as Violence and Metaphysics, the The Laws of Reflection: Nelson Mandela. In Admiration, or Before the Law to the seminal Force of Law: the “Mythical Foundation of Authority,” and such subsequent ruminations as The Other Heading: Reflections on Today’s Europe, or Specters of Marx: The State of the Debt, the Work of Mourning, and the New International, Derrida strove to bring to the fore the multifaceted character, not so much of the law, but rather of law as both an epiphenomenon of language, and the necessary, but always violently founded language of politics.

The positional force, the force of positioning is at issue here, where law and language coincide. And as the editors of this special issue we are from the very
beginning involved in that force. We were in the position of giving a title to the issue and by that positioned Derrida before, through and beyond. He is all over the place, the lawyers’ place, which is the Law, or is it simply law? Derrida is known for being the theoretician of this move towards capitalization. Simultaneously Derrida is known to be the greatest challenger of this capitalization process. Not that he is cancelling the Law as such, he is undoing it in bits. And after all, a deconstructed law, a law which is literally “worked down,” leaves its traces in the letters such as in the article of speech in the title, which we have deliberately deleted by striking through the word with a line (e.g., “the”). The gramme or sign of this deletion is this line or “bar.” So we find ourselves positioned at the bar, where one usually expects to find lawyers, and from there we started our call for papers for this special issue of German Law Journal.

With its transnational and multidisciplinary character, German Law Journal would appear to be a particularly apt forum for a hommage to this difficult but momentous thinker and his particular engagement with law. Indeed, German Law Journal has already featured Derrida in innovative and forward-looking ways, most notably in Martti Koskenniemi’s review of Giovanna Borradori’s attempt to create a dialogue between Derrida and Habermas, as well as in articles by Saul Newman and Michael Bothe and Andreas Fischer-Lescano.

In line with the best German Law Journal practice, our hommage aimed to steer away from the unconditional applause of those considering themselves the keepers of the Derridian graal, as well as the instinctive and unreflected rebuff of his harshest critics (who, without usually ever having seriously read him, were always quick to dismiss him as obscure and non-sensical). Instead, we have attempted to collect critical-constructive reflections, from those who feel enduringly inspired by Derrida’s ideas and by those who have been struggling with them. They have reflected on Derrida the person, his theory, and his notion of justice within the contemporary state of the world.


The editors’ call for papers was met by an overwhelmingly enthusiastic response. In the weeks that followed, a true logistical and intellectual camaraderie unfolded between authors with short deadlines and the editorial team, working in the United States, Germany, Brazil and Canada. We would like to express our deep gratitude to the authors for making this wonderful issue possible and to our readers who, throughout the first five years of the German Law Journal’s publication, have been encouraging us to undertake such initiatives. The Editors-in-Chief and all the members of the Editorial Board of the German Law Journal remain grateful, if sometimes mesmerized, by the continued support and interest of the Journal’s readers from around the world. We wish you, our readers and authors, another rich and inspiring half-decade with the German Law Journal – starting with this very special issue.
Derrida, Philosopher of the Law

By Cornelia Vismann

A. Introduction

Does Derrida’s death justify a special issue of this Journal, preceded immediately by a special edition on human rights? Can death justify anything at all? And what does this mean for the authors of this volume; are their texts doomed to remain unjustified, if no authority steps in to legitimize our endeavour to gather texts by friends in the name of Derrida?

B. The Juridicality of Deconstruction

It is none other than the subject of this special himself who insinuates those quasi-legalistic questions. Derrida is known for his intense mode of addressing the discursive practices of founding and appealing to an authority. Hence he can truly be called a philosopher of law, in the sense that law is not only the subject, as in his essay “Force of law/Force de loi,” but also the ultimate horizon of his philosophy. Not by accident do the majority of texts in this special issue focus on the “Force of Law” essay, which made Derrida popular among law-people. Beyond this direct thematization of the law, the legal, better stated as the juridical, is present throughout Derrida’s writing. His idiom is fused with legal concepts, whether it is the act of promising or claiming, of confessing, signing or making a constitution. What unites those acts is their ability to bring a text into shape. And this is Derrida’s discovery in the broad land of letters: no text exists without certain operations at the margin, not a legal text, not even a work of prose, which has a title and an author and thus makes a piece of writing imputable. These operations belong to the legal sphere, for example in order to apply the protections of a copyright.


At the margins a text is being held together by legal features. As a consequence, those textual functions at the margins, such as a title and a signature, are subsumed under an expression that derives from the legal sphere. They are called “performative” features, an expression that was not accidentally suggested to John Langshaw Austin, one of Derrida’s constant references, by the legal philosopher H.L.A. Hart. The hermeneutic tradition has underestimated the performative effects of those illocutionary forces in a text. They remained widely unobserved within a culture that had drilled its readers, also readers of laws, to search for meaning and not for how these acts function to give meaning to a text. Coming from outside the law, Derrida reminded all those whose business is the interpretation of texts of the legal underground of their activity.

However, the legality of textual margins does not suffice to explain the legal horizon in which Derrida’s thinking takes place. It explains the use und benefits of Derrida’s grammatological studies for a legal analysis, such as of the concept of authority, but not the many variations of the question of justice, we encounter more explicitly in Derrida’s later work, when the focus shifted from the force of signs (gramme) to ethics. Here language and law built a complex relationship of mutual dependency, simply because there is no right without words. The claim to have a certain right implies the right to have rights and that is, after all, to have a language, in which they can be articulated. But language is not given, human beings need education, access to the channels of justice and furthermore.

This conditional circle between law and language is not a paralyzing one, however. Derrida presents it as a circulating spiral, which in its dynamic, might improve on the long run the legal standard of special rights.

Deconstruction equated with justice demands a linguistic analysis of the underlying paradoxes. It presupposes that the defining force of law produces an unsaid, unrepresented surplus. For example, do the laws of hospitality produce hosts and, by the same token, though it is hardly ever said, hostages. The act of

---

2 For further details on this point, see Cornelia Vismann, Jurisprudence: A Transfer-Science, 10 LAW AND CRITIQUE 279-286 (1999).
3 See Elisabeth Weber, Petra Gehring, and Drucilla Cornell in this issue.
4 In her contribution to this issue Petra Gehring shows convincingly that there is a constant and consecutively followed line in Derrida’s thought, despite the “shift” towards the ethical, which can be observed on the surface.
6 Id. at 37.
7 See JACQUES DERRIDA AND ANNE DUFOURMATELLE, DE L’hospitalite (1997).
pardon shows the same ambivalence as a gift (Vergebung and Gabe; present and poison).8 And, to give a third example of a deconstructivist approach to justice, privileges are conceived as the incommensurable, forgotten rest of positive law.9 This statement invites, as often in Derrida’s theories, a historical substantiation.10 And indeed, the linguistic-bound insight that basic rights maintain a relationship with privileges, can be backed up by legal history; as Heinz Mohnhaupt has shown recently. Basic rights derive in form and content from privileges.11

Deconstruction dramatizes the exclusions, brings them to an extreme and confronts the law with that which is not justice in the realm of laws in order to give rise to the excluded. Or to put it differently: the cultivator of law breeds forgotten or suppressed forms of law with common legal features (others might call that re-entry) in order to arrive at times at a better law, at times at more justice without law. Whether the movement of amelioration is with or without law remains undecided, since law has an ambivalent status in the eyes of deconstruction. It is an impediment and at the same time the only possible access to justice. It is therefore a question of mentality whether Derrida is presented as a rebel or a legalistic thinker. Rebellion against and affirmation of the law have the same aim: to arrive at justice. They are not differentiable, but this is not so because of a witty (a tone one could miss in Derrida’s writings)12 camouflaging, as one might think, but by principle, the principle of indeterminacy.

In contrast to the law, deconstruction never claims that it can secure this direction to the better. Deconstruction is, after all, a promise, not a doctrine. Its ju-radicality or cry for justice does not trust in grand dialectical turns. It is a theory of approximation towards that which it deconstructs. It therefore never comes to a halt. It merely points at the shaky ground of the grand notions which allegedly

---


9 See DERRIDA, supra note 5 at 46.

10 For a critique of the absence of deconstruction’s lack of historical studies, see Friedrich Balke in this issue.


12 So, even if there is a certain playfulness in Derrida’s theory, which Allan Hutchinson has pointed out in his contribution to this issue, it is not coupled with wit and irony but rather with the sincerity of a game, which one does not want to loose. Only Derrida knows that it remains undecided – because: who should play the arbiter?
secure us, such as the state as the guarantor of rights, or the borders of legal definitions in words and on maps and is in this respect up to date with the diagnosis of the present, that the power of the law of the nation state vanishes, as it is observed in terms of self deconstruction of hierarchical forms of law.13

The restlessness of deconstruction is due to the unlimited and relentless questioning of the juridical conditions of discourse. Derrida’s speciality, by which one could infallibly identify a text by him, is thematizing this legal frame in which words are uttered. It is easy to see here, that he addresses law not as an executing force with various practices, as for example Michel Foucault does, but as the instance of formatting a discourse, not least his own discourse. So it is not astonishing to find in almost every one of his texts a reference to the situation in which they were presented. Just think of the constantly repeated quest for patience to his listeners (and think of the many speakers who never did so and challenged our patience far more than this singular polite and eloquent speaker). The references to the speech situation, which are not suppressed in the published version, let even the latter reader of the lectures never forget, that it is an oral presentation, he reads, a paper given, according to a happy English expression, which brings the impossibility of a speech to the scriptural bottom. It articulates that it is impossible to speak without a script, without a prefabricated text as well as an institutionalized frame such as an academic ritual and certain discursive features. We read in one of his texts14 how impossible it is to overcome the primordial script even if foreseen in the moment of drafting the speech. Derrida tells there that, before preparing a text for a lecture, he imagines the scene, which is awaiting him on the day of its presentation. And then he recounts that this moment of bringing a reflection to a halt is a painful moment. He feels like an animal chased around, that searches in the dark for an exit never to be found. But all exits are closed.15

The conditions of giving a paper – that of limited time, so that not everything can be said and the irreversibility of the order of speech and script – are impossible conditions, conditions of the impossible. There is no other escape than staying within and just naming these conditions which construct and obstruct the speech. The texts by the thinker of the primordial script, an arché-écriture, prior to any spoken word, are therefore consequently written speeches, which reflect the

14 Jacques Derrida, Mochlos, L’œil de l’Université, in DU DROIT A LA PHILOSOPHIE (1990) (German translation: MOCHLOS ODER DAS AUGE DER UNIVERSITÄT (2004)).
15 Derrida, id. at 64.
prerequisites of speaking. They involve the speaker in the preworld itself, the founding scene, where the conditions of speaking are set-up, where words are conditioned. With these matters there can be no question that we find ourselves here in the midst of the world of law, the place from which the Rechtsfähigkeit (juridicality) of Derrida’s philosophy derives. It is a concern with the juridical conditions of language, conditions of the impossible at the bottom of all our utterings.

C. Deconstruction as a Philosophy of Roman Law

Derrida is fond of foundations. As an expert of inaugural scenes he is not, however, a founder himself. He is the meticulous observer and describer of these scenes and through this effort he comes closest to the impossibilities that surround his reflections as untraceable exits in the dark. Hence, Derrida was once himself in the position of founding. The Collège International de Philosophie (CIPH) can be traced, among other initiators, back to him. The founding was accompanied by an impressive number of texts concerning the legal implications of such an institution. They are gathered in a volume under the title Du droit à la philosophie,16 which is now part by part being translated into German and English.17 These texts reside in the preferred domain of preparing. They draft a foundation that has no other raison d’être but the reflection on foundations, the act of laying ground as well as pure research (studies in laying foundations and that which laid the foundation of knowledge), unconditioned, without being integrated in any rational programs; in brief: an independent, sovereign institution.

Can there be such a thing as a sovereign institution, an institute of sovereignty? In a strict Derridian sense an institution is what meets all the conditions set up by law and as a concept of law sovereignty depends on successful representations. Since it is subjected to the regime of signs, Derrida concludes that sovereignty in such a dependent condition is none.18 It is a materialization and as such doomed to be a betrayal on the ideal. It has to count on its effects, at least it is orientated towards certain ends. It has, at the least, to administer time so that an institution becomes an institution of durability. Deconstruction does not overthrow the concept of sovereignty but recodes it by searching for a topos, a concept, even an institution that transcends these conditions.

16 Derrida, id.
17 DERRIDA, supra note 5; JACQUES DERRIDA, THE EYES OF THE UNIVERSITY, RIGHT TO PHILOSOPHY II (2004) (German translation: PRIVILEG. VOM RECHT AUF PHILOSOPHIE I (2003); MOCHLOS ODER DAS AUGE DER UNIVERSITÄT. VOM RECHT AUF PHILOSOPHIE II (2004)).
18 For an analysis of Derrida’s notion of sovereignty in his latest book (Schurken), see Friedrich Balke in this issue.
It searches for sovereignty without representation – an unconditioned sovereignty. One can certainly not think of that as a protestant power of anti-representation, which replaces the notion of sovereignty by the work of governing. The negation would remain within the same logic. The prefix “un” in the concept of an unconditioned sovereignty indicates an asymmetrical negation and as such sets free all kinds of oppositions. It suspends itself from legal bindings in general. Therefore “unconditional” is not the same as the legal concept of Bedingungsfeindlichkeit (adversity to conditionality) common in certain contracts or a testimony. It is more likely to hear it expressed as “unconditional surrender.” Although this has been a condition set up by the victorious allies in 1945, the speech act of capitulation itself is without conditions. The unconditioned speech act coincides with the unconditionality in the matter. An unconditioned sovereignty would therefore be one that capitulates, capitulates from the conditions of representation. But more likely one has to hear “unconditioned” with Kantian ears. Kant explains pure reason by the notion of the Das Unbedingte (unconditioned), which he paraphrases as the totality of all conditions and calls this universitas.19

The unconditioned as universitas: this equation invites Derrida to reserve the unconditioned sovereignty of all for the one institution named university.20 It has sovereignty by capitulating. Withdrawing from certain ends, the utilisation of knowledge, nests though the danger that the university suffices itself. Against this dangerous process of self-immunization21 Derrida sets up the obligation of the university to acknowledge certain obligations such as education. Sovereignty becomes then a negotiation between the unconditioned and the conditioned.22 The negotiation is itself the legally bounded part of sovereignty, of which the opposite is leisure, for the opposite of negotium simply is otium. Deconstruction of sovereignty therefore does not confront with the option: either power of representation or capitulation. Rather it allows the possibility for the university, to make sovereign use of both, action and “pointless” thinking of our fundaments. The latter part of the university is not subjected to any conditions such as the regime of time. It indulges in the luxury of infinite time. Endless sessions of faculty meetings is not meant, but the work or labor of thinking. Derrida himself demands that privilege of time, as his quest for patience indicates.

20 JACQUES DERRIDA, DIE UNBEDINGTE UNIVERSITÄT 17 (2001).
21 See id. at 45.
22 Id. at 63, 76.
It is not only with respect to the institutional founding of the CIPH that the question who is the sovereign has relevance. Throughout his writings Derrida’s hope weighs on philosophy. So he grants the right to found an institution unconditioned, though that is an impossible act, for philosophy. “… [P]hilosophy would have the right to speak of right and not reverse.” Although up to the grammatical form, the conditional seems unavoidable in the field of founding; philosophy and only philosophy is trusted to do away with legal conditions. It is not the philosophy, as it is presented at the faculties of today. It is, we learn in the same passage, the philosophical, that which comes before the grand oppositions, such as physis and nomos, which mark the western mode of thinking.

Before the grand oppositions there is a space open for demarcations, which the Greek called chôra. Despite the Grecian nature of this notion, to which Derrida dedicated a whole essay, he does not refer to the ground before the grounding, that is in brief to the Greek gods before Roman foundations in rural ground or ager publicus. Instead, Derrida treats chôra as a space for projection, a theoretical space in order to undo the distinctions. That the leading distinctions of western thinking, such as of the oral and script, have a history themselves, is not within the range of deconstruction. Rather, to ask for a history prior to an arché-écriture falls under the suspect of idealistic longings.

Deconstruction begins with its work, when the philosophical has become a superior system. Therefore the philosopher Theophrast who obeys the law, only earns what Derrida’s name also holds within it: his derision. Theophrast was going to lead a philosophy school, but he was prohibited from doing so, until the citizens of Athens voted for his admission. His philosopher-colleague, Derrida, comments: “A vote for the return of the philosophers! Must philosophy wait to be given votes publicly? Does it need majorities (democratic or not)”? With these rhetorical exclamations, the French founder of a philosophy school waives even those democratic legal achievements he usually treats with grand respect, instead favouring the unconditioned superiority of the philosophical philosophy. This is – good or not – Platonistic tradition, in which Theophrast plays not the least important role. The pupil of Leukipp and of Plato is infamous for “Platonizing” the centuries

23 DERRIDA, supra note 5 at 27.
24 See Dirk Baeckers article in this volume.
26 See Peter Goodrich’s article in this volume.
27 DERRIDA, supra note 5 at 25.
before the 4th. He confounded the oral tradition of the Pythagoreans, to which Leukipp also belongs, with the written philosophy of Plato. Derrida’s exchange with philosophy begins here, with the impossible speech, which Plato never ceased to lament on in his written dialogues and which ignores the tradition of the vowel alphabet and its implications for a culture in which philosophy was not yet separable, let alone superior to other techniques with letters, mathematics and music and law alike.

Derrida, the thinker of the “pre,” does not make a step before this Platonic ground (most likely because he is afraid of the “false” steps Heidegger once made in presocratic space) and thus affirms the monstrous phonologocentrism, against which deconstruction accedes. Within this phono-logic, law can only mean written law, as it gained shape in Ancient Rome and therefore Derrida’s grammatology serves to analyze the *ius scriptum*, that is in brief: the making of the authority of law. It cannot give an account though on the “pre” of the distinction between *ratio* and *oratio* (equally between *otium* and *negotium*) – distinctions of which, Pythagoreans and the lawgivers in this tradition such as Zaleukos und Charondas, did not even dream.

28 CHRISTOPH RIEDWEG, PYTHAGORAS, LEBEN, LEHRE, NACHWIRKUNG 156 (2002).

29 Friedrich Kittler, *Vom Appell des Buches* and *Mousa or Litteratura*, manuscripts with the author.

30 For an account of the complicated relationship with Heidegger, who is one of the few who never benefited from Derrida’s politics of friendship, see Derrida’s rather harsh dissociations form Heidegger. DERRIDA, supra note 5. Here, I would like to translate passages from a recent letter written by my father, Dieter Vismann:

> “Derrida states in 1972 that nothing that he tries would have been possible without the opening (Eröffnung) of Heideggerian questions (see, JACQUES DERRIDA, POSITIONEN 18 (1986)). He is of course not an epigone of Heidegger. Derrida wants to analyze the ambivalences in Heidegger’s project of overcoming metaphysics. This project had a constructive aim: to demarcate metaphysics in its positive possibilities, and that also means in its limits (see, MARTIN HEIDEGGER, SEIN UND ZEIT § 6 (7th ed. 1953)). This constructive drive can also be found in Derrida, which is yet not accompanied by the same pathos, *dem Walten des Seinsgeschickes*. Compared with that pathos Derrida’s deconstruction has the air of de-mythologizing Heidegger. […] According to Heidegger should the destruction of ontology finally give access to the primordial springs, ‘den ursprünglichen Quellen […]’, in denen die ersten und fortan leitenden Bestimmungen des Seins gewonnen wurden’ (HEIDEGGER, *id*.) This is the attempt to objectify the ontological way of thinking and to arrive beyond the tradition’s obstructions of *Sein* at the *eigentliche* (true) essence of *Sein*. […] Derrida sees here a metaphysical dualism in that opposition of *ursprünglich*/abgeleitet and *eigentlich*/uneigentlich, that slipped Heidegger’s attention in his search for a neue Ursprünglichkeit. […] Derrida is searching more explicit than Heidegger for a primordial difference, which differs beyond Sein und Seiendes and lays the traces for this difference. This difference, that cannot be drawn together in the word *Eigentlichkeit* or *Nähe*, is Derrida’s focus…”

Manuscript with the author.
Not to look for that which the Roman grounding, as the supermodel for all groundings, obstructs, is the limit of a philosophy in the tradition of Plato, a limit that lays above all ground for a deconstructivistic discourse on rights. By drawing a line beyond which one cannot step, it is rendered possible to ask: how to deconstruct the founding scene in its conditionality. It generates, if not to say: authorizes discourses that transcend the conditions of the given law, such as activist human rights discourses, at present. The prize however for that insight is that it turns it back towards an unconditioned Greek past, a present, by the way, of its own to western thinking.

To remain in the sphere of preparation for that which is yet to come, has the curious effect that things happen as they are announced. Institutions are founded while they are drafted. This is the whole secret of performative actions. Deconstruction counters this effect by the speech act of effacing or undoing legal actions. Even more, and quite dialectically, the absence of an authority generates the founding of a discourse on the very same matter, as not the least this special issue of *German Law Journal* proves. Here, deconstruction challenges the impossible: that things happen without words, unconditioned.

---

31 For the delimiting effects of limits, see the introduction to Drucilla Cornell’s contribution to this issue.
Introduction

Jacques Derrida. J.D. for short. And J.D. of course is titular. It is the acronym for Juris Doctor. It signifies a lawyer or one wise in the law. If we are to recollect and celebrate his life in its juridical context and significance then Jacques Derrida, J.D., is not a bad place to start. Technically, of course, and despite the legal sounding acronym, J.D. was not a lawyer. He did, however, hold a visiting appointment at a Law School in New York. My law school in fact. Let me add, at the risk of getting personal for a moment – and if not now, when? – that in many ways I am here because he was. And then also some of his most influential articles were on the subject of law or were delivered and published first in a legal forum. His essay on Kafka,1 on the law of genre, for example, and then again his lengthy and widely circulated exposition of “The Force of Law.”2 He kept coming back to law: he inhabited its margins, searched for its supplements, dwelt on its traces.

Looking back, fondly and critically, I think Derrida’s influence on legal scholarship was significant enough for the acronym J.D. to be appropriate. He was a lawyer in the classical sense of a scholar who gave opinions on law, an amicus, a jurisconsultus, or further back still, in a meaning to be explained later, he was a nomikos or adviser to lawyers. He was equally, however, a philosopher and critic, a humanist, a literateur amongst the lawyers, an outsider looking in and causing a touch of panic. He looked at positive law from the perspective of a prior or first law, that of writing or, to quote a phrase, that of “structure, sign, and play.”3 Such

1 Jacques Derrida, Péjugés Devant la Loi, in LA FACULTÉ DE JUGER (Jean-Francois Lyotard et al. eds., 1985).
was his gift, his genius and his challenge. He played with the norm and with the law of genre. To follow that contribution, both the critical pricks and the public persona, nomos and mark, it is the law of writing in the writing of law that he called into question.

Self-Portrait

Maybe you met Derrida the person. Not that tall, but always arriving in the company of his aura. Big handshake, generous, warm greeting, and a tendency to mention his mother. Or you have read Derrida the book, and on occasion also his handwritten letters and his postcards. We have learned that his middle name was Elie, elu or chosen one. We have watched Derrida the movie and smiled at Jacques on a somewhat unconventional couch. We have seen the still life of his face in an exhibition of the portraits of philosophers. Maybe we visited the park he helped design in Paris. There was also Derrida the postcard painting, and the subject of an exhibition by Rebecca Dolinsky. There are even a few of us who may be hip enough or old enough or neither to remember also hearing and perhaps dancing to “Jacques Derrida,” the Scritti Politi single. All of which makes Jacques Elie Derrida not a bad turn of phrase.

There is much that is fond in those avenues of access but they are no royal road to the philosopher, the erudite import, the fashion accessory, the scholarly figure or the disco beat. For those of us resident to the West of where Jacques mainly wrote, us denizens of the Anglophone world, before Derrida was Derrida in America, before he became “French Theory,” there was the baroque translation of his most complex work: Of Grammatology. This was his study of the “gramma” or the accumulations of marks that make up writing systems. It was his emblematic work, his first American intervention and I will take it, for that reason, as my initial theme. I will address J.D. — Jacques Derrida the mark. No helping it, honest reader that I am, I will elaborate upon what is left, the trace, the gram, in fact the Derrida-gram, the trajectory of name, nomos, and nomikos.

In truth I have no choice. It has to be either the mark or its failing image and materialist that I am I will start with the obvious. And I didn’t meet Jacques that often. It leaves me no option but to be economical and scrupulous. I will address the signs that remain, limit myself that is to the graphic traces, pay attention only to the marks or grams, and most strictly interpreted where better to start than the nomos of the name. It was Derrida the metaphor that more than anything else made us aware of how metaphor invades all of language use. There is a law of the mark,

---

4 JACQUES DERRIDA, OF GRAMMATOLOGY (Gyatri Spivak trans., 1976).
a sillepsis or slippage of the sign that not even lawyers can escape. That was at least implicitly his thesis. I will work it out here, however, by reference to his name. His proper name. His signature. My method is both simple and radical. I will focus on his gram in its various forms, as recognized by philologists and rhetoricians. Here is the list: J.D. the pictogram, the logogram, the lipogram, the chronogram, the anagram and the nomogram. I confess I more or less made the last term up. It is the punch line. You will have to wait. Though not for long. Just for a gram or two.

Grammatology

So first the pictogram. My favorite instance comes from a paper delivered by Roman Jakobson’s collaborator Louis Halle. He took an early manuscript of the 23rd Psalm and showed that if you turned the psalm on its side, it made a castle. He claimed that this provided a hermeneutic key to the poem: it was a defensive exercise, an apology and so on. Quite right too, and very persuasive. But what about Derrida’s name? I have put it sideways, upside down, diagonal and more, and at first, I confess, it didn’t seem to illustrate very much. Not a promising start; but wait, just look at the name in ordinary cursive (or in some other font, French Script MT maybe, or even better in Blackadder) and in time, depending on your font, you will see a ship. A firm initial capital “D,” the perilunar flourish forms a vigorous rudder, “D” the gubernator. The second “d,” in lower case, a funnel or a mast -- depending upon your sailing prowess. The final “a” with its forward curlicue makes a prow, a fine Norse nose cutting through the waters on the way to new worlds. And what are we to make of such a pictogram, Derrida the ship? It is, I think, an appropriate image of a heterotopic space, the sign of a moving mark, a floating signifier. Hermeneutically that is apt, it marks as it must Derrida the friend, the ship who passes in the night, and Derrida the courier or messenger, the advocate of deconstruction, alone and passing through. Europe in America, doing the continental.

That takes us nicely to the logogram, to the philology and etymology of the proper noun. In the old legal jargon, in a Latin gloss to the Corpus Iuris, we learn that the name inheres in the bones — nomina ossibus inhaerent — and this must be taken to mean that the name is its own law, the name as nomos appropriates the person, and it is the name that, to borrow from Baldus, makes the body walk. And so: Derrida, Jacques (pronunciation: da reader) (employment itinerant: Paris, New York, Irvine). The name is first off and most obviously from the Latin derideo, to scoff at, to deride. Etymologically at least, Derrida derided for good causes, he was a scholar, an erudite practitioner of the supplementary interpretation, an irreverent philosopher who allowed words to
have their say. Take the play on the name a little further, and we can note that in Medieval Latin, Derrida can be given a root in *rida* meaning ridge. There is a further cognate meaning associated with *ad deridicula* or to extremes, all the way to the ridge, to the limit as it were. And finally, as another supplement, there is an alternate etymology from the Old English *ridere*, from *ridan* to ride, which is the occupational name of a messenger.

Derrida is here again and variously the mercurial hermeneut, the itinerant figure of passage, of transmission of meaning. He is not, however, your usual messenger, his hermeneutics are in conventional terms on the margin or more simply they are extreme. His play upon interpretation, the elements of deconstruction and supplement, the philological ploys all make for an honesty, a candid refusal to reduce, that was early on interpreted to be somewhat mocking of accepted norms of academic discourse, a little critical of the self-possession, propriety and *amour propre* of scholars. Derrida was always most generous to words. He would play, mock, ride the ridge, push to extremes and, peculiarly troubling for law, offer a Janus face, a double reading. So his name is not far from his *nomos*, his logogram is close to the mark. If one sought a figure that captured this naming, then my choice would be *epimone* also termed in Latin *versus intercalaris*. This figure refers to a verse that is inserted several times in a poem and carries – bears the burden of -- its meaning. In Puttenham’s definition, the figure of *epimone* originally had a musical context and so suggests something of the lyrical and rhythmic, a submerged beat, a refrain. Puttenham gives an example from Sir Philip Sidney: “My true love hath my heart and I have his,” repeated three times in a poem to friendship.5

It is a good example. Derrida was all out for friendship and the *epimone* that his name suggests can be found most explicitly in his book on friendship which has as its *versus intercalaris*, the Aristotelian phrase “Oh my friends, there is no friend.”6 For Derrida, I suspect, there was no friend because the singular and unique relationship of amity or amorousness necessarily escaped the abstraction of friendship, the public token of amity in the market. Derrida, who always and vehemently resisted being in analysis, treated amity as far more than could be said or numbered and named. Friendship occupied a space of silence and the decipherment of its intimations. Everything, and here I will use his own words from an interview after the death of Althusser, “everything took place underground, in the said of the unsaid.”7 Hence in a sense to the intercalated

---

5 GEORGE PUTTENHAM, THE ARTE OF ENGLISH POESIE (s.v. epimone 1589).
6 JACQUES DERRIDA, POLITICS OF FRIENDSHIP 1 (1997).
phrase: there is no friend, only the becoming of friendship, the struggle towards friendship, the failed attempt at the self-presence of friends, to use Derrida’s own early terminology. In sum, friendship has its own law. That is what Jacques kept saying, what he repeated in his many different ways.

From logogram to lipogram. The third category of gram, the lipogram refers to a type of witticism, the classical device of dropping a letter from a word or, as in the case of Tryphiodorus, from an entire Odyssey or epic poem. Addison, the Augustan satirist, whose essay on wit is a principal source on this practice, cites Seneca on the lipogrammatists: “operose nihil agunt” (busy about nothing) and so indeed it is fortunate that Derrida never resorted to any simple lipogram, but he did famously drop an “e” and substitute an “a,” changing “différence” to “différance.” We can note that the substitution is recognized by Addison as a subtype of lipogram and as a more or less legitimate mode of witty argument. Addison gives the example of Cicero. The name comes from cicer meaning a wen or little morbid lump, a vetch no less. He then recounts that Cicero ordered the words Marcus Tullius with the figure of a vetch at the end of them be inscribed on a public monument. “This was done probably to show that he was neither ashamed of his name or family.” In Derrida’s case the lipogram différance is used in the argument that writing is presupposed in speech, that speech carries the trace of the written in a phonetically indiscernible manner. There is much more to the argument, in that the very possibility of this substitution marks a linguistic impossibility, a play or slippage of meaning that precludes any definitive origin or meaning to words and laws. Without expanding on the philosophical significance of the lipogram, we can simply note that it is a gram, and in fact it is one of Derrida’s more famous grams, a repeated term, and maybe even another epimone.

Fourth is the chronogram. We can link it to the lipogram. If the latter drops a letter, the former reads those letters in a name that are also Roman numerals. The numerals in the name are then added up to form a number, the chronogram. Not only is the chronogram a species of lipogrammatic substitution, it also shows the power of the concept of différance which argues that all meaning is potentially undecideable, that all words are codes or metaphors requiring the justice of interpretation. Choices have to be made, prejudices and precedents suspended, while the words are attended to, letters substituted, corruptions reformed perhaps, and meanings put into play. That is the project that the court of literature imposes

---


9 DERRIDA, supra note 4 at 44 et seq.

10 Addison, supra note 8 at 384.
upon the practices of law. In this case the issue is the numerical value, the numerological significance, of Jacques Elie Derrida.

Add it up and we can truthfully say that we have Derrida’s number. Here it is: CLIDID –100, 50, 1, 500, 1, 500. It comes to 1152 if one counts each Roman numeral separately. Added simply as Arabic numbers the total is 18. As neither of those totals means very much we need a lipogram. I will come to that shortly. First off, 1152 is not an insignificant date. Given time I could find many meanings for it. Without too much effort, we can place 1152 at the cusp that marks the transition from the late Middle Ages to the Renaissance. It is the era of the troubadour lyric and the reception of Ovid’s *Art of Love*. The comedy of eros was rampant, the laws of love were being formulated and promulgated, the flowers of rhetoric were being sown and we might hazard that philosophy would later and ambivalently watch them bloom. Put it differently, differently even, the first postclassical – cisalpine – postcards were being sent, the love notes of the courtly lyric, the first laws of the gay grammar, not Socrates to Freud so much as A.D. to J.D., Arnaut Daniel to Jacques Derrida and beyond.

It is the period of poetic searching, of the gay science, of *las leys d’amor* or of the cases, judgments and laws of love. For the troubadours court and law were everything, ethics ruled, and *amor vincit omnia*, as the poet legislators used to say. The point is that in 1152, our arbitrary date, and assuming even that the 12th century took place, law was really very much closer to what J.D. would likely propose, than to what positivists now mean by it. For the judges of the courtly lyric and of the legally disputed question of love, the *quaestio amoris*, the rule to be applied was that of rhetoric, both law and word, *rectorica* as it was later termed, and *mezura*, meaning measure and ethical honesty was the sign of the times rather than any more positive rule. It is also an epoch of transition in the uses of writing and law. Writing is just coming in as a trustworthy mnemonic in legal affairs. And then again, it is one of the many years that Aelred of Rievaulx, having made a start but being now taken up with his responsibilities as Abbot, postponed work on his treatise *On Spiritual Friendship*. So a lot going on. The transitional status of writing, the movement from unwritten to written forms of record, and specifically the indiscernible border between them is both an emblem of that epoch and an important grammatical theme. An intimate date. A hidden source perhaps, a precursor and exemplum for Jacques’ work.

Add to that the number 18, the age of majority, birth as a symbolic subject, entry into legal subjectivity and we hardly need the chronographic lipogram, it is hardly worth dropping the second D, the latter 5, so as to turn 18 into 13. But I will anyway and in honor of Derrida’s Jewish roots. Thirteen is the age of maturity for males in the Judaic tradition. We can add to that the observation that according to the Torah
there are 13 divine attributes, and 613 commandments. Thirteen is a wonderfully ambiguous sign, it is constantly at play, lucky and unlucky, powerful and portentous. I, for instance, was born on the 13th of the month. The Roundhead Oliver Cromwell, leader of England’s short-lived revolution, was born and died on September 13th. We could add, though this is cream on cream, *ad derridicula* as it were, that 13 was classically a sign of power and that Zeus sat as the 13th and most powerful God. In Tarot, the 13th major arcanum is Death meaning not ending but fresh beginning. So 13 is a kind of numerical equivalent of *différance*, and it too can be taken to mark an impossible space or fractured origin. And that is appropriate, granted that both the number and the concept are the products of lipograms, and both signify a peculiarly Derridean hermeneutic play.

**The Nomogram**

That takes us to the anagram. We have already noted the J.D. in Jacques Derrida. One could note, just for additional support, though it is quite unnecessary, just a flourish, that inside the name one can find *ad iure* or towards law, as well as ludic, *seria* and *deja lu*. But J.D. says it well, and it is that juristic theme that will be traced into the final gram, the nomogram. The term is not mine, but rather borrowed from the work of a colleague of Derrida’s, Pierre Legendre, whose work on writing and law addresses in a specifically legal context some of the themes, especially those of scribble, of writing and power, that Derrida played upon in more literary terms.11 Whatever the source, and Legendre hardly develops the term, the nomogram is a term coined from *nomos* and *gramma*, a combination that joins order or measure to mark, trace, or sign. We might translate it as the law of the sign or more specifically as the rule or institutional significance of the name. Derrida then or as I have suggested J.D. stands for something, it appropriates or names a person, an institution, a measure.

Derrida stood back. He acknowledged in an interview that he wrote in a complex and convoluted style, “almost to the point of unintelligibility,”12 so as to respect the political order at the Ecole Normale when he arrived there. He didn’t want to upset Louis Althusser, the philosopher prince, nor did he wish to be denounced or derided by Althusser’s acolytes as a reactionary thinker, a phenomenologist who prioritized subjectivity over politics, philosophy over social change. Those were the terms of the discourse when he arrived in the academy and they marked his work,

---


12 Derrida, *supra* note 7 at 153.
they gave his writings their *nomos*, that of suspension of judgement, of the ethics of indirection, of aporia and of waiting.

If Louis Althusser was the legislator of the intellectual norm, the promulgator of bad style, his fault was precisely that of adopting or at least allowing himself to be placed in the position of sovereignty. He and his followers enforced a code, they instituted a norm, they were even, in Jacques’ view, somewhat terroristic in their impositions and their judgements. Derrida sought to move beyond that degree of determination, or in Althusserian terms, the overdetermination of the real. He sought to avoid legislating and, being by training a phenomenologist, he wanted to attend to the question of origin, the question of what comes prior to judgement and law. His fascination with law was in consequence no accident. Whether because of personal experience or for institutional reasons, and specifically so as to overturn the structuralist orthodoxy that he encountered professionally, the question of law was persistently present.

The discipline of law represented for Jacques a protocol of close reading. He spent time with lawyers because they were to his mind unsung grammatologists, latter day hermeneuts, the disciplinary inheritors of a tradition within which words really mattered. Lawyers, and specifically legal scholars, with their texts, their cases, their briefs, their files and their dictats. Their discipline cried out for the application of a rigorous hermeneutics, for some flexibility and play in interpretation. They could use a little phenomenology and that is what Derrida gave. That was his gift. He addressed the force of law in terms of its illocutionary force, its modes of enunciation, its utterance and reiteration. His concern, his obsession if you like, was with the institutional site of legal discourse and specifically with the ground of its judgements. He wanted to look philosophically at the moment prior to judgement, pre-law, or Kafka’s *Before the Law*,13 as a way of holding up on legislating too quickly.

*Nomos* is derived from the verb *nemein* meaning to appropriate and by extension to name. What did Derrida name? More precisely, what did he appropriate, measure, make his own? The trajectory I have traced through his name, his own gram, is one that moves from gay science to law, from postcards to legal texts, from justice to judgement. There is first the attention to play, and specifically the play of words. In his book *The Post Card* Derrida plays upon the desire that subtends writing. He sends postcards and love letters as a species of literary acrostic that marks how every text is a fragment and exemplifies the hermeneutic necessity of attending to the lyrical and lexical, the unintended or marginal features of writing. His position

---

was very consistent. The troubadour, the poet lawyer, the scholar who attends to the measure that underpins law, is a distant lover, an infinitely patient reader, and attentive to every detail, to every syllable, sound and letter. Thus his injunction to his correspondents: listen. The protocol of listening is attention, waiting, doubting, holding on. Suspend the rush to judgement, do not be determined to decide, don’t decide in advance. Good readers are not afraid to retrace their path nor hesitant to examine how they came to be where they now are.

Lawyers decide. They judge, they determine, they legislate. There is no avoiding legal writs, the statutes, injunctions, *sub poenae*. No question about that. Good or bad, it gets done. Derrida’s question was slightly to the side of that manifest determination. He asked what comes before the law? What precedes the rush to judgement? How do we understand law in terms of whence it came? In his essay on the force of law Derrida held up the institutional site of legal judgement to scrutiny. He argued that before law there has to be a moment of suspension, an instance of inattention to law, a hearing of the particular, person and event, prior to rule or determination. Justice meant holding back from calculus and judgement. The instant precedes the rule. It was an argument made in a legal forum and with reference to the Levinasian concept of the face to face of justice, the call of the other. I will end by suggesting that in fact the legitimate force of law is for Derrida both richer and more complicated than his initial take in that essay suggests.

The clue lies in the *epimone*. For law to be just, the judge has to enter a relation with the judged. The subject of judgement has to be seen and heard. That is axiomatic. The judge has to listen and remind the judged that law is something held in common. Justice says, in effect, “Oh my friends, there is no friend”. A curious reprise, a strange if implicit judicial utterance. But Derrida was very much about the implicit in the legal and about the attitude or tone that came prior to law. For him friendship preceded law, it was the implicit relationship, the moment of amity being the expression of justice in the intimate space in which law was suspended. The judge cannot be a friend, there is no friend, but the judge exists amicably, in a loving relationship, amongst friends. Law will turn the singular into the general, the particular into the abstract, instance to rule. That is what law does, but before it does it there is a moment of amity, an attention to friendship, to things held in common. It is a position that has its origins in Aristotle’s *Ethics*, of course, and in the aphoristic dictum that “good legislators pay more attention to friendship than to law,”14 but Derrida’s genius was to take that principle seriously, to play with it, to apply it directly to the legislations of lawyers.

---

14 *ARISTOTLE, NICHOMACHEAN ETHICS* Book viii c. 1, at 235 (1846 ed.).
Friendship, living together, holding things in common, inhabiting the same institution, these are the pre-conditions of law. Amity is nomos. Amity is more important than law because it is amity that grounds law and makes justice possible. That is Derrida’s main argument, his nomogram, his measure of law. He was in that sense a nomikos, a term that appears in a few post-classical manuscripts and that means someone who is not a lawyer but one who advises lawyers, and specifically judges, on the meaning of law. Derrida. Nomikos. J.D. deserved his J.D.

There is a black and white photograph in our law school Faculty seminar room.

It shows Jacques at the 1990 Conference on his work, on “deconstruction and the possibility of justice,” at Cardozo Law School in New York. He is sitting and listening. Big hair. White as snow. He is leaning back, face turned, with a hand on his cheek. He looks younger then, but also tired, supporting his face with his hand, maybe hiding the blind side, the bad side. Whatever the tenor or pitch of the head, his gaze is generous, deep, attentive. He looks infinitely patient. He is attending the conference. He is waiting, waiting and listening to the lawyers talk as lawyers will. There is distance, time, stillness and a certain melancholy, a composed strangeness as well as an exceptional amicability in the portrait. He is not one of them, the eyes seem to say, but he is amongst them. Oh my friends, there is no friend. That is the lyrical and always potentially ludic position that his posture conveys. It is an image of intimacy, hung in a public place. A gesture of love in a professional domain. The photo remains. It is lodged in the Faculty seminar room. It hangs over the Law School. It shows Derrida from the inside, looking out. It offers a lesson for lawyers. Derrida the nomikos. J.D. in the process of getting his J.D. Or put it like this. He sent a nomogram. A postcard image. He was amicus curiae, a friendly critic of law.
Derrida’s Influence on Philosophy ... And On My Work

By Simon Critchley* 

A vital measure of the influence of a thinker on a discipline is the extent to which they transform its customs, protocols and practices in a way that makes it difficult to conceive how things were done before they appeared on the scene. Such transformations are usually simply incorporated into the discipline and presupposed by those who come after. This is why we often have a thankless relation to the most influential thinkers - because their innovations are now the way in which we are accustomed to see and do things. Definitionally then, great thinkers are often those who change the way we do things in a peculiarly thankless way. Jacques Derrida was a great thinker. He exerted a massive influence over a whole generation of people working in philosophy. His death is an unfathomable loss. In what follows I would like to thank him for what he enabled people like me to presuppose thanklessly in our practice.

How did Derrida transform the way in which people like me do philosophy? Let me begin negatively with a couple of confessions. I was never a structuralist and always found Ferdinand de Saussure’s linguistics a deeply improbable approach to language, meaning and the relation of the latter to the world. There is no doubt that Saussurean structuralism enabled some stunning intellectual work, particularly in Claude Levi-Strauss’s anthropology, Jacques Lacan’s reading of Freud and Roland Barthes’s brilliant and enduring literary and cultural analyses. But that doesn’t mean that Saussure was right. Therefore, Derrida’s early arguments in this area, particularly the critique of the priority of speech over writing in the hugely influential Of Grammatology, left me rather cold. Talk of “post-structuralism” left me even colder, almost as cold as rhetorical throat-clearing about “post-modernism.” So, in assessing Derrida’s influence, I would want to set aside a series of notions famously associated with him - like differance, trace and archi-writing - in order to get a clearer view of what I think Derrida was about in his work.

I have a similar scepticism about the popular idea of deconstruction as a methodological unpicking of binary oppositions (speech/writing, male/female, inside/outside, reason/madness, etc. etc. etc.). In my view this is a practice which led generations of humanities students into the intellectual cul-de-sac of locating binaries in purportedly canonical texts and cultural epiphenomena and then relentlessly deconstructing them in the name of a vaguely political position somehow deemed to be progressive. Insofar as Derrida’s name and half-understood anthologised excerpts from some of his texts were marshalled to such a cause, this only led to the reduction of deconstruction to some sort of entirely formalistic method based on an unproven philosophy of language.

In my view, Derrida was a supreme reader of texts, particularly but by no means exclusively philosophical texts. Although, contrary to some Derridophiles, I do not think that he read everything with the same rigour and persuasive power, there is no doubt that the way in which he read a crucial series of authorships in the philosophical tradition completely transformed our understanding of their work and, by implication, of our own work. In particular, I think of his devastating readings of what the French called “les trois H”: Hegel, Husserl and Heidegger, who provided the bedrock for French philosophy in the post-war period and the core of Derrida’s own philosophical formation in the 1950s. But far beyond this, Derrida’s readings of Plato, of Rousseau and other 18th Century authors like Condillac, and his relentlessly sharp engagements with more contemporary philosophers like Foucault, Bataille and Levinas, without mentioning his readings of Blanchot, Genet, Artaud, Ponge and so many others, are simply definitive. We should also mention Derrida’s constant attention to psychoanalysis in a series of stunning readings of Freud.

In my view, what confusedly got named “deconstruction,” a title Derrida always viewed with suspicion, is better approached as double reading. That is, a reading that does two things:

On the one hand, a double reading gives a patient, rigorous and – although this word might sound odd, I would insist on it – scholarly reconstruction of a text. This means reading the text in its original language, knowing the corpus of the author as a whole, being acquainted with its original context and its dominant contexts of reception. If a deconstructive reading is to have any persuasive force, then it must possess a full complement of the tools of commentary and lay down a powerful, primary layer of reading.

On the other hand, the second moment of reading is closer to what we normally think of as an interpretation, where the text is levered open through the location of what Derrida sometimes called “blind spots.” Here, an authorship is brought into
contradiction with what it purports to claim, its intended meaning, what Derrida liked to call the text’s vouloir-dire. Derrida often located these blind spots in ambiguous concepts in the texts he was reading, such as “supplement” in Rousseau, “pharmakon” in Plato, and “Spirit” in Heidegger, where each of these terms possess a double or multiple range of meanings that simply cannot be contained by the text’s intended meaning. Many of his double readings turn around such blind spots in order to explode from within our understanding of that author. The key thing is that the explosion has to come from within and not be imposed from without. It is a question of thinking the unthought within the thought of a specific philosophical text. Derrida often described his practice as parasitism, where the reader must both draw their sustenance from the host text and lay their critical eggs within its flesh. In the three examples of Plato, Rousseau and Heidegger, the crucial thing is that each of these conceptual blind spots are deployed by their authors in a way that simply cannot be controlled by their intentions. In an important sense, the text deconstructs itself rather than being deconstructed.

For me, Derrida’s philosophical exemplarity consists in the lesson of reading: patient, meticulous, scrupulous, open, questioning reading that is able, at its best, to unsettle its readers’ expectations and completely transform our understanding of the philosopher in question. Because Derrida was such a brilliant reader, he is a difficult example to follow, but in my view one must try. This is what I would see as the pedagogical imperative deriving from Derrida’s work. What one is trying to cultivate with students – in seminars, week in, week out - is a scrupulous practice of reading, being attentive to the text’s language, major arguments, transitions and movements of thought, but also alive to its hesitations, paradoxes, quotation marks, ellipses, footnotes, inconsistencies and downright conceptual confusions. Thanks to Derrida, we can see that every major text in the history of philosophy possesses these self-deconstructive features. Deconstruction is pedagogy.

Returning to the question of influence, although all of Derrida’s training and the great majority of his publications were in philosophy, it is difficult to think of a philosopher who has exerted more influence over the whole spread of humanistic study and the social sciences. The only comparable figure is Michel Foucault and just as it is now unimaginable to do historical or social research without learning from what Foucault said about power, subjectivity and the various archaeologies and genealogies of knowledge, so too, Derrida has completely transformed our approach to the texts we rely on in our various disciplinary canons. In a long, fascinating and now rather saddening interview with Le Monde from 19th August 2004, which was republished in a ten-page supplement after his death, he describes his work in terms of an “ethos of writing.” Derrida cultivated what I would call a habitus of uncompromising philosophical vigilance at war with the governing
intellectual common sense and against what he liked to call - in a Socratic spirit - the *doxa* or narcissistic self-image of the age.

Derrida’s treatment by mainstream philosophers in the English-speaking world was, with certain notable exceptions like Richard Rorty, shameful. He was vilified in the most ridiculous manner by professional philosophers who knew better but who acted out of a parochial malice that was a mere patina to their cultural insularity, intellectual complacency, philistinism and simple jealousy of Derrida’s fame, charisma and extraordinary book sales. In the English context, the incident which brought matters to a head was the initial refusal in late Spring 1992 to award Derrida an honorary doctorate at the University of Cambridge, a refusal that found support amongst prominent voices in the Philosophy Faculty. After finally receiving the honorary doctorate with his usual civility, humour and good grace, a letter was sent to the University of Cambridge from Ruth Barcan Marcus, the then Professor of Philosophy at Yale, and signed by some twenty philosophers, including Quine, who complained that Derrida’s work “does not meet accepted standards of rigor and clarity.” I would like to take this opportunity to register in print my gratitude to these know-nothings for the attention they gave to Derrida because it helped sell lots of copies of my first book - on Derrida and ethics - that also came out in 1992 and paid for a terrific summer vacation.

At the heart of the many of the polemics against Derrida was the frankly weird idea that deconstruction was a form of nihilistic textual free play that threatened to undermine rationality, morality and all that was absolutely fabulous about life in Western liberal democracy. In my view, on the contrary, what was motivating Derrida’s practice of reading and thinking was an ethical demand. My claim was that this ethical demand was something that could be traced to the influence of the thought of Emmanuel Levinas and his idea of ethics being based on a relation of infinite responsibility to the other person. Against the know-nothing polemics, deconstruction is an engaged and deeply ethical practice of reading of great social and political relevance. Derrida’s work from the 1990s shows this relevance with extraordinary persistence in a highly original series of engagements with Marx. It also shows this relevance to a vast range of subjects in law and transnationalism which must be of particular interest to the readership of the *German Law Journal*, including: European cultural and political identity, the nature of law and justice, democracy, sovereignty, cosmopolitanism, the death penalty, so-called rogue states, and finally with what Derrida liked to call an alternative possible globalisation, an “*altermondialisation*.”

Derrida’s work is possessed of a curious restlessness, one might even say an anxiety. A very famous American philosopher, sympathetic to Derrida, once said to me, “he never knows when to stop or how to come to an end.” In the interview
with *Le Monde*, he describes himself as being at war with himself: “*je suis en guerre contre moi-même.*” He was always on the move intellectually, always hungry for new objects of analysis, accepting new invitations, confronting new contexts, addressing new audiences. His ability in discussion simply to listen and to synthesize new theories, hypotheses and phenomena and produce long, detailed and fascinating analyses in response was breathtaking. I saw him do it on many occasions and always with patience, politeness, modesty and civility. Derrida had such critical and synthetic intelligence, a “brilliance” as Levinas was fond of saying. I remember sitting next to Derrida on a panel in Paris and thinking to myself that it felt like being close to an intellectual light bulb. The whole ethos of his work was at the very antipodes of the inert and stale professional complacency that defines so much philosophy and so many philosophers. He found the Ciceronian wisdom that “to philosophise is to learn how to die” repellent for its narcissism and insisted that “I remain uneducatable (*inéducable*) with respect to the wisdom of learning to die.”
Critical Intimacy: Jacques Derrida and the Friendship of Politics

By Anne Orford*

Since receiving the invitation to participate in this special issue, I have been wondering about whether I can do justice in this brief space to what I have learnt from reading Derrida. And as someone who long ago began to distrust those versions of the history of ideas organized around the names of important individuals, I’ve also wondered about how and why I would want to link lessons to the proper name “Jacques Derrida.” Indeed the pleasure, and even the reward, I have received from reading Derrida is hard for me to separate out from the experience of living as part of a community that exists within and across the institutions I inhabit, with colleagues, students and friends. I associate Derrida with a way of life, a way of reading, writing, speaking and listening to each other, that is part of the “simple day-to-dayness” and “the intense moments of work, teaching and thinking” that constitutes this community, that allies us.1 I hope I can communicate a little of what reading Derrida has meant, and still does mean, to me then within this particular institutional life.

When I mentioned to one such friend and colleague that I was writing this, he responded “I never felt personally linked to jd in a way that say foucault or barthes or agamben got under my skin.” This started me thinking about why encountering Derrida has had that intimate, “under the skin” quality for me.2 While many theoretical masters offer us a sociological description, a grand vision of where we have been, a history of the present or a plan for the future, Derrida offered me a lesson in how to be surprised by the world. The “task of reading” that he sets

---

* Professor, Faculty of Law, University of Melbourne. My thanks to Florian Hoffman for his kind invitation to contribute to this special issue, and to Juliet Rogers for organising the evening held at Gertrude’s Bar in Melbourne to celebrate the life of Jacques Derrida, at which a version of this text was presented.


2 Admittedly, my first thought was: how uncomfortable, that’s a lot of people to have under your skin; sounds quite lumpy.
himself and us in Of Grammatology involves looking within the text, to the interior, to find the traces of the unique or the singular or the excessive, that which escapes the circle of exchange or the economy of substitution. As Gayatri Chakravorty Spivak comments, his style is one of critical intimacy rather than critical distance, a style that I also associate with feminist theorists such as Luce Irigaray, Judith Grbich and Shoshana Felman. We cannot know in advance what such a reading will produce – each text will push away that which it marks out as other, hesitate before that which it cannot decide, guard its own secret, have at its origin the question which it cannot answer. Since reading Derrida, I have begun to find myself in a new relation to the resources of language, and to hear words “otherwise.”

This has been accompanied by the wondrous realisation that any text could be read in this way, could “suffer such a sea-change/ Into something rich and strange.” It might seem odd for someone educated, as I have been, in a common law legal system to learn this task of reading from philosophers like Derrida, or from literary theorists like Felman, rather than as part of being disciplined in the traditions of the law. After all, the common law is supposed to be organised around a respect for the uniqueness of each case, the singularity of each text. Yet while the common law is a fundamentally text-based system, it is one that tries to preserve its authority by denying the fictional nature of its grounds or the written nature of its origins. Thus it attempts to preserve from the work of interpretation those texts marked as facts, evidence and so on. To the extent that law is unable to see itself as writing, “law understands itself as reflecting a state of affairs, rather than producing it, and … it believes it can control the contexts in which its texts emerge and take on meaning.”

Yet for me to open by saying that Derrida transmits to us the task of reading rather than the inheritance of a new tradition for which he is the sovereign authority is perhaps a little naïve. It ignores the institutionalisation of deconstruction as part of academic life in the late twentieth century. This sense I have of Derrida as a scholar who persistently puts into question notions of sovereignty, authority and mastery is in part a result of the fact that I haven’t ever had an institutional or disciplinary

---

3 JACQUES DERRIDA, OF GRAMMATOLOGY 157-164 (Gayatri Chakravorty Spivak trans., 1976).
5 DERRIDA, supra note 1 at 201.
6 WILLIAM SHAKESPEARE, THE TEMPEST, I, 2.
relationship with Derrida. The kind of arts and legal education that I experienced, in Queensland in the late 1980s and in London in the early 1990s, did not lend itself to reading Derrida, and so I have encountered his writing alone or “in the friendship of an alliance without institution.” I’ve never had to write a paper on Derrida that received a mark, never had to sit or assess an exam on deconstruction. For whatever reason, I have found the insistence in Derrida’s early work on guarding the question that inaugurates each tradition extremely productive in my exploration of the stakes of writing in the discipline in which I work, international law.

To take a recent example, both the terrorist attacks of September 11, 2001, and the US military responses to those attacks have been experienced by international lawyers, and by many others, as a reminder of that which cannot be enclosed, of that which escapes the law. In much international legal scholarship, Iraq stands for what lies outside international law or beyond the UN Charter – a world in which international institutions have proved unable to challenge the pragmatists of the new American empire, or proved incapable of acting as the sovereign enforcer of the law. Yet this sense of a crisis of legal authority is not novel for international law – rather, it pervades the discipline. The inability to find a single authority to ground or guarantee the wholeness of the law is a condition of late modernity. Most modern law works by burying the knowledge of this lack at its foundation. For international lawyers, however, knowledge of this lack of ground for the law is inescapable. There is no nation-state or ultimate sovereign that can act as a “guarantor of right,” and thus do away with the uneasiness or anxiety caused by an inability to ground international law. International lawyers are thus always “before the law” in the sense that Derrida describes – in the “situation both ordinary and terrible of the man who cannot manage to see or above all to touch, to catch up to the law.”

---


9 This reading of the meaning of this sense of crisis in the discipline of international law is developed in: Anne Orford, *The Destiny of International Law*, 17 Leiden Journal of International Law 441-476 (2004).


12 Id. at 993.
Yet to paraphrase Derrida, this is not necessarily bad news. The persistent crisis of authority experienced by international law is at the heart of the relation that the tradition “maintains with itself, with the archive of its own demon.” International law preserves within it the recognition of the open question of authority that confronted European international lawyers attempting to manage state formation, modernization and imperialism in the late nineteenth and early twentieth centuries. Contemporary international legal debates about the use of force, human rights, terrorism and development are sites where the emptiness that founds the modern relationship to authority and law is again encountered. Perhaps this is one of the functions of international law as a discipline. A question, and a silence about its answer, is transferred through the constitution and inheritance of the discipline of international law. This secret is transferred across generations because there is something “better left asleep” here, that which calls up the legal responses justifying the wars on terror as defensive self-preservation. Often international law responds to the sense of a lack of mastery over its subject matter by acting out, attempting to reassert sovereign control or imagining itself on a journey towards the creation of a powerful world community. However, in reading critical histories of international law, we find moments when international law manages to live with this unresolved, and unresolvable, crisis of authority. At such moments, it may be best able to avoid the temptation to secure the grounds of law through a final solution in which those who are believed to threaten the health, security, emotional well-being or morality of the international community are violently sacrificed for the good of the whole.

While in his early work Derrida thus insists on the priority of the question that inaugurates every institution, his later work is marked by a concern with how one might respond to the call of the wholly other. This “radical alterity” is understood as that from which we set off or push away in order to constitute a subject, an institution or a tradition. For me, The Gift of Death is the text which has set out the

---

13 Id. at 943.
15 Id.
16 See Orford, supra note 9 at 464-476.
17 Spivak, supra note 4 at 426 (suggesting that where Derrida’s earlier work was concerned to guard the question or insist “on the priority of an unanswerable question,” his later work has “a greater emphasis on ethics.”).
18 Id. Spivak describes this turn as representing “an other-directed swerve” in Derrida’s philosophy.
possibilities and limits of this ethical turn most clearly. Here, Derrida maps the sacrificial tradition of thinking about responsibility, beginning with the story of Abraham, and tracing the meaning of this story for Christianity and for European politics. God demands of Abraham “that most cruel, impossible, and untenable gesture: to offer his son Isaac as a sacrifice.” Sacrificial responsibility involves a singular relationship with an unknown other. In the Christian tradition, this other is named God, but in the tradition of international economic law in which I work, we might name this other “the Market.” This responsibility can be acted upon only in silence, in solitude and in the absence of knowledge. It involves a relationship to the other to whom we respond, to whom we are responsible. This “form of involvement with the other ... is a venture into absolute risk, beyond knowledge and certainty.” Yet, lest we slip into thinking that this answer or responsibility is something that can easily be generalised or universalised, Derrida reminds us that when we respond to the other, we must betray all the other others. In making the decision, in answering the call of the other, we can only ever be responsible to the one who makes the demand.

This unique, singular other might be our child, our lover, our brother or sister, or that irreplaceable other represented in ethics. However, in my writing about international economic law, I have been interested in tracing the ways in which WTO agreements structure this responsibility so that the market becomes the singular other whose demand is to be answered by decision-makers. It is the global market to whom the decision-maker must be responsible in this sense. This economy of sacrifice is accompanied by the promise of the reward of the righteous in the future by the Father (God/Market) who sees in secret.


20 Id. at 58.
21 Id. at 5-6.
23 On the reward of the righteous, see Matthew, 10:34-40 (Revised Standard Version).
transparency in the case of the decision-maker) to meet these demands of the market in the expectation of a reward in the future. The question that remains for me is – how can decision-makers be responsible (rather than simply “accountable”) to those they sacrifice in such an economy? How might we think about the responsibility of Abraham to Sarah or to his son Isaac? Is it possible ever to be responsible to all the (other) others who are excluded from the relationship between decision-maker and those to whom the decision-maker is responsible, those whom we sacrifice when we decide to respond to the demands of the Father? Can the law encounter or repay the debts owed to those figures whose bodies seem to be the necessary ground of these internationalist texts, and whose sacrifices remain outside the economy of risk and reward that these texts establish?24

The tension or movement between these two tasks that a text might perform – preserving the self (guarding the question) and responding to the call of the other – is one that we see played out repeatedly in international law. For example, this movement informs the current debate about whether the priority of the inherent right of self-defence offers a basis upon which states are able to derogate from other international norms, such as the prohibition against torture.25 And as I have argued in detail elsewhere, it is this tension which gives the human rights victim such a spectral quality.26 This figure is haunting precisely because it embodies a memory of the trauma of what was done to the other to secure a self for the West. As Derrida shows us, the return of such spectres gives us the opportunity to learn from them about justice.

If he loves justice at least, the “scholar” of the future, the “intellectual” of tomorrow should learn it and from the


25 The (now infamous) Memorandum for Alberto R Gonzales, Counsel to the President, from Jay S Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, Re: Standards of Conduct for Interrogation under 18 U.S.C. Sections 2340-2340A (August 1, 2002) sets out the argument that “a nation’s right of self-defense” would justify a “government defendant” in torturing or otherwise harming “an enemy combatant during an interrogation in a manner that might arguably violate Section 2340A” of the United States Code implementing the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. For the related argument that self-defence offers a basis upon which to derogate from other human rights norms, see SHABTAI ROSENNE, THE PERPLEXITIES OF MODERN INTERNATIONAL LAW 216, 234 (2004).

ghost. He should learn to live by learning not how to make conversation with the ghost but how to talk with him, with her, how to let them speak or how to give them back speech, even if it is in oneself, in the other, in the other in oneself: they are always there, specters, even if they do not exist, even if they are no longer, even if they are not yet. They give us to rethink the “there” as soon as we open our mouths …27

According to Derrida, we can exorcise the threat that such spectres represent, not “in order to chase away the ghosts,” but rather so that they may “come back alive, as revenants who would no longer be revenants, but as other arrivants to whom a hospitable memory or promise must offer welcome.”28 It is just such an arrivant — the refugee — who most clearly unsettles the comforting separation between self and other, here and there. The refugee, the stranger, is excluded or detained in an attempt to protect a stable, unitary sense of national identity. Yet this foreigner is always already a part of that very identity. In modernity, the subject’s identity is structured through its relations to the nation-state, and one of the “others” against whom the nation is formed is that of the foreigner, the stranger. Thus the subject as citizen has as one of its doubles the alien, or the refugee. For the law, the refugee represents this stranger in its most threatening form, because the refugee seeks to be recognized by the law, and thus to remind the law, and through it the subject, of the repressed otherness at the foundation of identity. Through the claims or demands of these refugees from violence, the law is confronted with the spectre of a suffering other who does not stay at home. Their arrival at the borders of the nation-state:

is experienced as the symptom of the trauma, as the return of the repressed, the sign of the lack in the heart of the citizen. The exclusion of foreigners is ... constitutive of national identity [and] human subjectivity. In asking to be recognised, refugees bring back the exclusion and repression at law’s foundation, and demand of us to accept the difficulty we have to live with the other in us, to live as an other.29

27 DERRIDA, supra note 8 at 176.

28 Id. at 175.

Yet the human rights tradition as translated into the covenants and constitutions of modern law threatens to tame the unsettling or haunting effect of these *arrivants*. Let me explain what I mean by drawing on the evocative notion of human rights as memory developed in the work of Klaus Günther. Günther argues that in the European context, human rights “are embedded in a *memory of injustice and fear*.”

Like many other human rights theorists, Günther argues that human rights function in Europe almost as a collective memory, invoking in particular the Holocaust. For Günther, a right to voice flows from this memory of massive trauma and suffering, and this means that the rights to expression and speech are particularly important. As a result, the archives of the state must be opened and remain open.

The articulation, shaping, and reconstruction of this memory are, and can only be, a collective work in progress, a project that will never end. It has to be undertaken by the people themselves, as a part of their collective self-understanding and identity. But it is also a matter of education, of historical research, and of public reasoning and deliberation. As a consequence, the rights of freedom of information and expression have to be defended. It seems that we still have not uncovered all cases of violations, that there are still a lot of experiences of injustice and fear which are not made public and are not part of the collective memory. A perhaps surprising concrete consequence may be the following: a human right to access the archives of the State and its institutions. The archives have to be opened to the public, and they may never be closed.

I agree with Günther that a key political and legal question of our time is how we keep faith with those spectres who haunt our communities. Yet his call for the archives to be open suggests a danger in institutionalising human rights. The archive of the state represents a frozen, encrypted vision of the past. This is the

---


31 *Id.* at 126 (emphasis in the original).

32 The UN Charter and the major human rights covenants are regularly described in these terms as an international legal response to the Holocaust and an attempt to protect individuals from future excesses of state power.

situation facing Kafka’s man from the country, who finds that he has been calling for the gates of the law to be opened, only to realise that they have been opened all along. In a sense, the archives of the state are all too open, we are all inscribed in these archives of the modern bureaucratic state, and it is in part through this inscription that we are controlled and normalized. Institutionalising human rights threatens to tame its unsettling or haunting quality. State law is not unsettled if its ‘others’ have their own institutional location – frozen into an institutional role as victims. At stake in the way we think about human rights might then be what the figure of the human rights victim represents in terms of this engagement with history. These figures from the past confront us each time for the first time – we cannot know in advance what they demand of us or what their memory means for the future.

I want to finish with a passage that captures the sexy, funny, scandalous, intimate address that was and is the pleasure of reading Derrida for me. The passage is from The Post Card, a text in which Derrida links sexuality to the impossibility of avoiding the question posed to us by the other. Here, in this recognition that we begin and end with an unanswerable question, death is always present. Indeed, Derrida’s meditations on friendship and love repeatedly return us to death, but as Derrida wrote, “they do so precisely so as not to let death have the last word, or the first one.” I find in much that Derrida has written a preparation for death, a recognition that each of us “lives a life which is made of death.” To assume the death of the subject as a coherent self, to accept the loss that this entails, is the “symbolic means of the subject’s coming to terms not with death but, paradoxically, with life.” This is developed specifically in The Post Card through the question of seduction, and its relationship to the speaking body and the limits of mastery and of possession (of self and other). While the act of seduction on the part of professors often seems part of their production of a valuable self for themselves, here Derrida performs in a way that appears to make him unusually vulnerable. As Jane Gallop argues:

54 Franz Kafka, Before the Law, in Metamorphosis and Other Stories 165-166 (Malcolm Pasley trans., 1992).

55 For a related exploration of this question, see Orford, supra note 26 at chapter 6.

56 Derrida, supra note 1 at 201; see, particularly, Jacques Derrida, The Politics of Friendship (George Collins trans., 1997); and the beautiful collection of elegies and lamentations written by Derrida after the deaths of his friends and collected in Derrida, supra note 1.


58 Id.
By giving up their bodies, men gain power – the power to theorize, to represent themselves, to exchange women, to reproduce themselves and mark their offspring with their name. All these activities ignore bodily pleasure in pursuit of representation, reproduction, production.39

Yet men can also gain these things – power, reproduction, recognition – through strategic and violent deployment of their bodies imagined as self-contained and self-possessed. Instead, Derrida here seems to me to accept the risks of seduction and to recognize that reaching out to an other involves a loss of faith in a whole, autonomous self. He fails to constitute himself as an upright, indifferent, reliable figure who masters himself, embraces the law and is able to possess and thus exchange one feminized figure for another. Instead, Derrida writes himself as an embodied, melancholy lover, one undone by his desire for the singular, unique other to whom all that he writes is addressed. In doing this in a philosophical text, he shows a lack of respect for the father’s law, something very desirable in a masculine body.

In the philosophy of failed seduction that is The Post Card, he lets us feel the urgency of his desire to speak to the ‘you’ to whom the postcards are addressed. Yet at the same time he points to the scandalous nature of seduction. To succeed at seduction is to succeed at the production of an expectation – perhaps that meaning will last, that desire will be satisfied, that bodies might be capable of understanding one another, that the other might be our destination. These expectations can never be fulfilled. In a sense, then, as Felman argues, to succeed at seduction is to succeed at failure.40 In signalling this, Derrida reminds us that failure is part of the performative, rather than an accident of the performative.41 “I am the promise that cannot be kept,” as Paul Claudel wrote.42 This situating of failure within the performative is exhilarating and, yes, seductive – it separates me from other ways of understanding what it is to speak, to write.43

---


41 Id. at 44.

42 Id. at 41.

43 Id. at 44.
Throughout *The Post Card*, Derrida explores “the impossibility that a unique addressee ever be identified, or a destination either.”44 Yet, as he writes, “I begin to love you on the basis of this impossibility.”45 I sacrifice all the other others, I wait for you – “*please, come.*”46 So although there is no destination and no addressee, we keep trying “to touch each other with words.”47

I don’t know if I’ll send you this letter since you are here in so few days. I will give it to you. But I cannot stop myself … I have to write to you all the time when you are not here – and even when you are here and I am still alone (the old, impossible dream of exhaustive and instantaneous registration – for I hold to words above all, words whose rarefaction is unbearable for me in writing) … In the last analysis I do nothing that does not have some interest in seducing you, in setting you astray from yourself in order to set you on the way toward me, uniquely – nevertheless you do not know who you are nor to whom precisely I am addressing myself. But there is only you in the world.48

“I hold to words above all” – speech here is “the true realm of eroticism, and not simply a means of access to this realm.”49 ‘I cannot stop myself … I have to write to you all the time’. It is through speech that we set out with such urgency towards the other, yet knowing that “there is no destination, my sweet destiny.”50 And so let me leave you with this passage, as a farewell:

> Plane from Heathrow tonight. I will have tried to call you back again (*collect*) from now till then, if the line is free. If ever I should no longer arrive, you know what will have been my last, my last what in fact? Certainly

44 DERRIDA, supra note 14 at 81.
45 Id.
46 Id. at 67.
47 Id. at 56.
48 Id. at 69.
49 FELMAN, supra note 40 at 15.
50 DERRIDA, supra note 14 at 29.
not will. My last image at the back of my eyes, my last word, the name, all of this together, and I will not have kept my belt buckled, one strophe more, the final orgasm and compulsion, I will swim in your name without turning back, but you will never be your name, you never have been, even when, and especially when you have answered to it. The name is made to do without the life of the bearer, and is therefore always somewhat the name of someone dead. One could not live, be there, except by protesting against one’s name, by protesting one’s non-identity with one’s proper name. When I called you, at the wheel, you were dead. As soon as I named you, as soon as I recalled your first name. And you came right out and said so, before the first rendez-vous ... I hope to perceive you when I land.51

51 Id. at 39.
Derrida’s Last Conference

By Rachel Nigro

Derrida’s death caused a surprising reaction in the media, being responsible for a great number of articles, commentaries and announcements. It seems that now, with his death, one of his inventions – the most famous and misinterpreted one which is widely used to define his philosophical style and which is known as “deconstruction” – has finally been understood. Fortunately, in the most respected newspapers in Brasil, articles with a good survey of Derrida’s work were published not only by journalists but also by literary critics, economists, lawyers and psychoanalists. But, unfortunately, the philosophers, or the ones that call themselves philosophers, seem to have insisted on ignoring the fertility of his thoughts.

One of a major Brazilian magazines, Veja, published an article comparing Derrida to the doctor that created Frankenstein; in this metaphor deconstruction serving as the monster run amok, disseminating improper meanings. An out of control “signifying device.”

Philosophy, strictly speaking, has been resistant to Derrida. This is a sign or a symptom that should be analyzed. Such rejection can be seen as a symptom of a disease that has been contaminating all manner of western academic discourse. There is a resistance to what is new, to what is unknown; the bureaucracy of thought that threatens all kinds of institutions and confines the capacity of thought in our time. This is what Derrida calls closure.

Derrida disturbs the so-called philosophers by questioning the philosophical stature of Philosophy. He systematically complicates the lines with which one is used to demarcating the different domains of knowledge. That has made him the target of a set of very hostile reactions, ranging from hatred to disdain. Beyond the emotions provoked by Derrida’s words, the question remains: does deconstruction

* Professor, Catholic University of Rio de Janeiro, Brasil; Member of NEED (Nucleo of studies in Deconstruction and Ethics).
need or want to be Philosophy? But, what is Philosophy? What or who defines its meaning?

Since Derrida’s style looks rather suspicious for some Brazilian philosophers, it’s no wonder they didn’t show up for his last conference when he was brought to Brasil by a literature department belonging to the University of Juiz de Fora, a city located not far from Rio. Derrida’s last conference, beyond european borders, took place at Maison de France, in Rio de Janeiro, in August 2004 and lasted three days. Derrida opened the conference with a three-hour speech, stopping only for a sip of water. His conference was about forgiveness and the crowded audience received with delight the gift of his words and of his presence, even more after the uncertainty of his arrival due to his poor health. Fortunately, Derrida was well enough to be present throughout the entirety of the conference, until the last word of the last speech of his last coloquium. A coloquium about his work conducted in his presence. For the last time.

But the limits of Brazilian academia are not a surprise or a problem for Derrida. He had grown used to feeling himself a foreigner, “marginal,” wherever he went.

We all know that Derrida died disappointed in the fact that the recognition of his work in France was imposed by the recognition of his work in other countries. Although France wasn’t his birthplace Derrida chose the French language as his haven. He was born in El Biar, Argelia, which was then a French colony known for its violent occupation. So French citizenship was imposed on him, but the French language was chosen by him. He used to say, in different ways, that we have only one language and that it is still not ours. No one has a language, and in a certain way, one is also disposed by language. The French language is his own language and the language that owns him, it shapes his thoughts, and entwines without distinction with the deconstruction style.

At the same time, French is not his language as France is not his birthplace. Derrida, in the same way as Dionisio, Nietzsche and Walter Benjamin, didn’t belong to only one place. He was a lost soul, un flâner, wandering around and crossing over the borders of different fields of knowledge.

But what is a foreigner? What does it mean to say that Derrida is a foreign man? Let us use Derrida’s own words, found in Of Hospitality:

In “The Apology of Socrates” (17d), Socrates addresses his fellow citizens and Athenian judges. He defends himself against the accusation of being a kind of sophist or skillful speaker. He announces that he is going to say
what is right and true, certainly, against the liars who are accusing him, but without rhetorical elegance, without flowery use of language. He declares that he is ‘foreign’ to the language of the courts, to the tribune of the tribunals: he doesn’t know how to speak this courtroom language, this legal rhetoric of accusation, defence, and pleading; he doesn’t have the skill, he is like a foreigner. (...) the foreigner is first of all foreign to the legal language in which the duty of hospitality is formulated, the right to asylum, its limits, norms, policing, etc. He has to ask for hospitality in a language which by definition is not his own, the one imposed on him by the master of the house, the host, the king, the lord, the authorities, the nation, the State (...) and that’s the first act of violence.”
Derrida: Survival as Heritage

By Rafael Haddock-Lobo

One has never experienced the initial words of “The Ends of Man” spoken so seriously as at the recent colloquium held in Rio de Janeiro, between August 16-18, 2004. The international colloquium “Towards a Reflection on Deconstruction: Issues of Politics, Ethics and Aesthetics” opened with a lecture by Jacques Derrida entitled “Forgiveness, Truth, Reconciliation: What Gender?” It seems to echo incessantly the sentence of the philosopher who claimed in his own *Margins of Philosophy*: “every and any philosophical colloquium necessarily has a political sense.”

If before, in May of 1968, the philosopher had already announced this necessary political sense of the philosophical congress, particularly when it concerns an international colloquium, what repercussion would such a meeting have in which a philosopher’s last words would have been spoken? And to what extent would the notions of response, responsibility and heritage be given more weight in relation to this “event”?

Not so surprisingly, the avalanche of *post mortis* comments seems to certify the late acknowledgement, whether sincere or not, of the impact of the vast collected work concerning what is termed “Deconstruction,” to the extent that Jürgen Habermas recently remarked that “Derrida practically had no match (…) to forge the spirit of a whole generation” and that “under his inflexible view, every context is broken up into fragments; the ground which we believed to be stable becomes unstable, what


we assumed to be complete reveals its double depth. (...) The world in which we believed to be comfortable becomes uninhabitable. We are not from this world: in it we are foreigners among foreigners.\(^3\)

However, despite believing that it is never late for a true acknowledgement, as we believe Herr Habermas’s sincere words and the exact way in which they touch upon fundamental points of Derrida’s work, we wonder whether this would be the task that the philosopher would have bequeathed to us. We know the constant place of the bow in Derrida’s text, which in his *Adieu to Emmanuel Levinas* (one of the most beautiful works of the philosophical literature) would already have been defined.\(^4\) The moment of departure, when it is observed that the Other is no longer there, is a moment of irremediable courtesy, of the total certification of the absolute asymmetry which rules the relation between the Other and me, but it is also, above all, the moment in which we inherit the unpronounceable secret and we become responsible for this other who does not speak anymore. Thus, it is a pact, but a pact beyond calculation and which can only be conducted by the demand of ingratitude. Ingratitude in the sense that we must take over the other’s task and carry it on, which can never contain the stagnated analytical repetition, in which, instead of allowing the task to happen in its alterity, we only, violently, cloister it in the order of the Same. If, to Levinas, the sense of the work is the Other (that is, the “wholly Other”), to Derrida, the sense of the work is another one (in Levinas’s words, “wholly otherwise”). Not only must its course follow a path towards the Other, but it also follows its own disseminated course of the alterity.

Therefore, in a first moment, the avalanche of bows and posthumous acknowledgements perfectly fit, according to the law of courtesy, but the philosopher taught us that more is required. If in his *Adieu*, there was no room for a deconstruction, for not allowing tears in the eyes and naked and disarmed words, one year later, at another conference. Derrida’s *word of welcome* contained the necessary ingratitude, exactly in order to do justice to the movement of the dear friend’s work. As the philosopher claimed, does one only deconstructs what one loves, the task of a “simple” reading turns into a movement which involves following and tracing, but also “crossing,” “twisting” and “diverting” the text read.

---


\(^4\) JACQUES DERRIDA, *ADIEU TO EMMANUEL LEVINAS* (from ADEUS A EMMANUEL LEVINAS (Fábio Landa trans., 2004).
The theme of heritage had already been approached before in *Spectres of Marx*. In his exordium, in which the sentence “I wanted to learn how to live at last” reverberates, the theme of the relation between life and death contains the issue of the heritage of this “phantasmatic” tradition. One only learns how to live (which also means learning how to die) with the ghosts. Thus, one learns how to live in another better way, a fairer one, for the sentence asserts that this act of “being-with” the ghosts, other others, is not restricted to the simple act of “being-with” the others, because it opens a politics of memory, heritage and generations. According to Derrida, “generations of ghosts” that, precisely, break with the temporality and the “metaphysics of the presence,” for these others are never present, presently alive or present in the living present of the word, here and now. That is why “it is necessary to speak about the ghost, even to the ghost and along with it, as no ethics, no politics, whether revolutionary or not, seem possible, thinkable and fair without acknowledging in its principle the respect for these others who no longer live or for these others who are not there, presently alive, whether they are already dead or are not born yet.”

Thus, like Hamlet’s phantasmagorical revelation (“enter the ghost, exit the ghost, re-enter the ghost”), we receive a secret and a task from the philosophical tradition of doing justice to this same phantasmagoria which breaks with the temporality and the ideal of a presence so that we start towards the act of responding for the responsibility in relation to every other, alive or dead, mortal or immortal, human or non-human, past, present or future. It is the task of the thinking, through the structural gaps of the writing itself, to let speak a multitude of ghosts, assumed or not, announced or repressed, that the very text cannot avoid amalgamating in its construction as a *construct*. And it is this act of doing justice that leads life beyond the present life, not towards death, but towards *survival*, that is, a trace “in relation to which life and death would only be traces and traces of traces.”

We can certainly state that this seems to us to have been Derrida’s task since his first writings, in the sixties, when we observe, in *Grammatology*, the almost-concept “trace” presented as being not only the disappearance of the idea of origin, but a “concept” that, in its own rise, destroys itself, for, as the trace is neither absence nor presence and it is not the origin, it is simultaneously the origin of the origin, as the

---


6 *Id.*

7 *Id.* (slightly modified).
very idea of origin was composed by a non-origin. That is, "if everything begins through the trace, above all there is no original trace."\(^8\)

This trace, as it is the only possibility of preserving the alterity as such, is the path through which difference works and acquires its sense, and that is why Derrida is not interested only in differences, but even more in the very producing movement of differences, the *différance*, being, therefore, that which would allow the articulation between the sensitive and the intelligible, as among the several oppositions constitutive of the Metaphysical, not in order to formulate an inversion in the order of these pairs which define each other mutually, but in order to promote a displacement through the assumption of the “differenciality” itself (the principle of differentiation), which, then and at last, would open up room for a new conception of experience.

If the concept of experience remains such as the one presented by tradition, designating a relation with a presence, we could never think of an experience of the writing, just like the one conceived by Derrida, based upon the relation with those other others. A thought without calculation, and beyond it, is close to an extremely tragic conception, in which even so there is something to be done, not closing itself in nihilism at all. This new experience of thinking that Derrida seems to open up and which seems to have bequeathed to us as heritage, this intimacy with the ghosts, this responsibility for every and any other (people, discourses, animals and whatever can be conceived, and maybe even beyond the thinkable) is what seems to open one of his favourite works, his *Spectres*.

One would like to “learn how to live,”\(^9\) he says, but learning how to live is learning how to die, because, if there is some lesson to be learnt, this is only taught *by* and *with* the ghosts. Thus, one learns that there is no life, the life itself, the full presence of the living-being living in him/herself and to him/herself, but also that our life is a trace of traces among many traces of traces. And that is why, in one of his last interviews, Derrida said: “no, I have never learnt how to live. Not at all! To learn how to live, this should mean learning how to die, to take into consideration the absolute mortality to accept it.” We are always or almost always associated with dead thinkers and, because of this, more living than never, and now, like before, or now more or less than before, with Jacques Derrida among them, among the living-dead of tradition, and this is what makes us or should make us involved with the

---


theme of survival – to survive: to continue living, but also living after death. A task for which the thinking is responsible.

But who are “we”? Derrida does not answer, and says, “Maybe we are between this vigil and this waiting which are also the ends of man. But who, us?”10 The impossible that happens, the non-response which turns into responsibility and the unthematizable turned into “object” of the thinking – which is left to us, to the survivors.

10 DERRIDA, supra note 8 at 177.
If Derrida Had Played Football

By Allan C. Hutchinson*

“Is football a matter of life and death?
No, it’s much more important than that.”

– Bill Shankly

In a candid interview in 1991, when he was 60, Jacques Derrida let the cat out of the bag. For all his academic achievements and popular acclaim, his abiding dream for himself remained that of his youth “becoming a professional footballer.”¹ In this mere aside, Derrida revealed as much about himself as both philosopher and person (if they can be separated) as in almost all his voluminous writings, speeches, reviews, and interviews. How fitting, therefore, that this passing remark should take us from the expressive margin into the subversive heart of this man of thought and reveal him as a frustrated man of action; the philosophical life was only a consolation for a more fulfilled life as sporting hero. Yet, in so many ways, so much can be learned and understood about the Derridean oeuvre by treating its author as a footballer, as someone who plied his trade on the fields of sporting endeavour than in the classrooms and libraries of the world. Indeed, if Derrida had played football, both philosophy and life might have been the better for it. Not because he would have spared the world his philosophical interrogations, but because he might have made even more of an impression on the sensibilities and senses of his times. It is as a footballer of attacking flair, not as an intellectual of defensive legend, that I will remember Derrida best. While it is hard to imagine the suave Derrida in the garishly-coloured synthetic shirt of his favourite team with a number “7” and “Derrida” emblazoned on the back, there is a genuine excitement at the prospect of him tantalising and tormenting the opposition in his own version of “the beautiful game.” He knew that those who knew nothing of football knew nothing of life.

¹ Osgoode Hall Law School, York University, Toronto.
Everyone needs a foil, someone or some style against which they can develop and display their own talents. For Derrida, Plato and his followers was the epitome of all that was wrong with football. Plato wanted to find the perfect game, the game of games, the one true and only real way to play the game, a God’s eye-view of the game. His mission was to distinguish the necessary from the contingent, the universal from the particular, and the conceptual from the concrete. Plato’s belief was that there was one Game of games and one way to play that Game. Although he talked of “wonder,” he was driven by the fear that, without such an ideal possibility, the show would be over and that anything could and would go all the ways of playing the game were as good as any other way of playing the game and there would be no way to criticise or approve of such ways of playing the game in any general or objective way. Plato cast an appalling shadow over the game, its coaching and its performance. Derrida was determined to change all that.

For Derrida, the problem with Plato’s approach was the failure to resist the temptation to divide the world up into categories. To understand and control the world, Platonists employ a set of rigid distinctions that are treated as natural and obvious, such as objective/subjective, reason/emotion or mind/body. Indeed, the “natural” was a particularly treasured category to be contrasted with the contrived or constructed. This means that any coherent and cogent account of fixed meaning and grounded knowledge must not only explain the precise and stable relation between these oppositions, but also find a way of talking about them that is itself precise and stable. In a signature move that has underpinned and distracted Western thinking, philosophers claim to do this by privileging one over the other and granting metaphysical authority to it -- objective over subjective, reason over emotion, and mind over body. And, of course, this has had implications for what we value in people and how we go about organising the world. For instance, we tend to associate objectivity, rationality and intellectuality with sound thinking in contrast to a less valued emphasis on subjectivity, emotions and physical instinct.

To its eternal loss, much of the thinking and practice in football has been influenced by this Platonic strategy. However, in the Twentieth century, several different approaches to the importance of games and their relation to play have begun to assert themselves. Influenced by the formidable insights of those German Übermenschen, Friedrich Nietzsche (who subscribed to the “no pain, no gain” school of endeavour) and Martin Heidegger (who never used a simple or easy phrase when a more complicated or obscure one would do), a number of European theorists -- Ludwig Wittgenstein, Hans-Georg Gadamer, and Johan Huizinga, to mention but a few -- sought to rehabilitate the neglected idea of “play” and to re-imagine football in its suggestive terms. Their basic line was that football, like all
games, was a form of play; games were rule-based, but they allowed for play and choice within them. Moreover, they insisted that play was never “mere play,” that its significance was not to be under-rated because play, in its game and non-game form, offered a subversive challenge to stilted values and rational styles of understanding. At its most grandiose, these philosophical play-masters wanted to treat all human activity as being part of the Great Game of Life and World-Play; the rules and goals were never fully established and were actually part of the game itself. In the Nietzschean sense, history consisted of a violent, arbitrary and ecstatic play of forces in which man is both player and plaything: life was an exuberant match of football.

Derrida picked up on this tradition. While his work owes much to the legacy of Friedrich Nietzsche, it neither begins with nor ends with him. Although Nietzsche had found the right tree, his barking did little to help his cause. Seemingly preferring excess in all things, Nietzsche went very close to reinforcing the hold of absolute truth by celebrating its flip-side -- nihilism. He inverted Plato and emphasised the Dionysian madness in which there is no good or bad, only the will to power. Derrida took up this theme that life is less a pilgrimage, as Plato thought, and more of a carnival, as Nietzsche suggested. But Derrida introduced a rigour and discipline to the Nietzschean insight. While embracing the idea that there are no objective foundations to knowledge or living, he insisted that this does not render all knowledge illusory, turn all truths into falsehoods, throw all order into chaos, or reveal all objectivity as sham. Being a believer in an open and fluid game, Derrida did not pin his hopes on finding an ultimate foundation and guarantor of knowledge, truth and the rest, but on keeping the game going so that different ideas of knowledge, truth and the rest might be tried and tested. Footballers, like philosophers, need to have passion as well as intellect; they need to be a part of the game, not apart from it.

An Algerian by birth, Derrida became the enfant terrible of the French intellectual team. His views tended to polarise debate around the notion of play and life generally. Embraced by some as a sporting guru of genius, others (particularly the stuffy English strongholds of traditional philosophy) have decried him as the worst kind of athletic poseur. When Derrida was awarded an honorary degree from Cambridge United (which was, incidentally, Wittgenstein’s favourite team) in 1992, his critics were sufficiently well-organised and influential that he was denied this accolade:

M. Derrida describes himself as a [footballer], and his [performances] do indeed bear some marks of ... that discipline, ... [but] M. Derrida’s work does not meet accepted
standards of clarity and rigour; ... he seems to us to have come close to making a career out of what we regard as translating into the [sporting] sphere tricks and gimmicks similar to those of the Dadaists.2

In these words are the usual motifs of inclusive and exclusive, serious and playful, and genuine and gimmicky that Derrida spent much of his life challenging. Indeed, this rejection makes many of the points and reveals much of the insecurity which his career was so cannily able to underscore. Indeed, insofar as it is possible to claim to have threaded a way through all the nuanced wisdom and exaggerated nonsense of his difficult fixtures, Derrida might well be a kind of philosophical Maradona of the footballing consciousness, a crazy combination of incomparable technical skills, unpredictable temperament and exquisite eye for the main chance who dazzles and deconstructs with his audacious fakes and feints, mazy dribbling and his deadly finish. Pinning down Derrida is no less a hopeless challenge than it was trying to mark Maradona out of the game.

For Derrida, human life and history were to be treated, like football, as one big playground that has no inherent design or natural purpose. There have been imposed a whole set of social games that privilege certain kinds of activities and ideas; they channel the free-play of human interaction, beliefs and practices into arbitrary structures and patterns. In contrast to traditional thinking, Derrida’s deconstructive critique goes behind those hierarchical dichotomies -- objective/subjective, reason/emotion and mind/body and shows that they have a history and are far from natural or obvious. Within such an approach, play is treated not so much as irrational, but more as part of what it means to be rational: there is no Reason for settling arguments about reason that are not themselves part of the game of reasoning. It is less a matter of either/or and more one of both/and. The ambition is not to privilege play at the expense of structure or to value the subjective over the objective; those that simply want to invert the relation and privilege play over structure remain trapped within the very Platonic system they claim to subvert and reject. Meanings are found in the un-grounded and multiple “play of differences” between the opposites.3 All understanding is interpretive and, therefore, playful -- there is no neutral or disinterested apprehension of objective authority. Moreover, the element of play can never be repressed or disciplined

---


entirely: it continually reasserts itself to disrupt and reconfigure the way that different games are played. In seeking to express itself, play is not pursuing some ultimate goal, but is simply opening up the game of life so that new games with new players can move in from the margins. There is nothing beyond play, but more play; there is no Game of games that can save us or satisfy us. Nor is there any Play of plays; there are only more and different games to play in and be played.

Whether playing or talking about playing, Derrida emphasised that football puts into question all kinds of issues about the way to play the game of life. And, of course, issues of legality, ethics, politics and moral judgment in each person’s life and daily social practices inform the performance and understanding of football. In the academic jargon of the day, football is a “social text” upon which are inscribed signs from other social texts and experiences: football is a rare blend of military battle, religious ritual, class warfare, sexual encounter, cathartic release, and much else besides. Understood as textual artifices, football games, although ostensibly rule-based and rule-structured activities, are never quite or only what they seem; there is more to them than meets the eye and what meets the eye is filtered through a host of interpretive filters. Football can be treated as a social practice or performance that invites interpretation and obtains its meaning through its production, positioning and role as a cultural artefact. While it has no core or any enduring essence, its followers make frequent appeals to some transcendent archetype or imagined version of the game to understand and assess its intrinsic meaning as well as its broader import. Any understanding of what it really means to play the game is constantly evolving and changing. In other words, the heart of football is the inconclusive and passionate game over what it means to play the game.

Most importantly, Derrida was adamant that football, like all other games, must be understood as being played out in that historical and social space that is defined by the tension between the game as “game” and the “game” as an embodiment of cultural lessons and broader messages. At different times and in different ways, football is both a finite and infinite game or, to put it more another way, finite episodes of football take place within the infinite possibilities of Football. In each game, there is a result and, over the course of a season, there are winners and losers: one team is able to claim victory over others in competitions and championships of local and national play. Nevertheless, the broader game of football and life continues unabated; the result in the finite occasion of a particular game is one strategic episode whose general performance becomes open to revision and reformulation at the very moment that it brings to a close that particular instance of footballing play. Accordingly, as a cultural drama, football captures the concentrated fizz that is life itself; football’s text is woven in and through life’s texture. In every kick, every header, every tackle, every half, every shot, every injury,
every goal, every miss, we can see, know, understand and give meaning not only to “the game,” but to our lives in all its complexity and possibility.

As showcased by Derrida, football, like life, is an infinitely variable process in which there is never any ultimate victory or performance, but only the repeated and unrepeatable working of the space between order and chaos, freedom and constraint, acceptance and possibility, and permanence and contingency. Being a game of infinite possibilities, football only has the present shape and style that it has because its players and fans are largely satisfied with its present practice or are unwilling to change it. But there is nothing about football today that should be thought of as The Way Football Really Is. At best, it only amounts to a contingent understanding of what it means to play the game. Efforts to isolate and define the essence of Football are irresistible, but irresolvable.

Of course, this means that what passes for good football or play in the future might bear little or no resemblance to its present or past understanding; it is not that “anything will go,” but that “anything might go.” Moreover, what counts as good football will depend upon what people are persuaded to accept as being a proper or appropriate way to play the game: it is a matter of social fact and popular persuasion, not official edict and technical analysis. As an activity that is always beyond absolute determination and never fully finished, football not only passively allows, but also actively encourages transformative and disruptive acts because, without them, the game risks paralysis and irrelevance. As another French sage rather opaquely put it, “the novelty of the unexpected ‘move’ ... can supply the system with that increased performativity it forever demands and consumes.” And Derrida was a past master at the novel and unexpected. Like the best of footballers, he was at his most dangerous and effective when he seemed to be most contained and controlled. It was his ability to conjure up the mysterious out of the familiar (as much as the familiar out of the mysterious) which was his calling-card. Yet he knew that too much of the unpredictable was predictable and so he could do the expected in an entirely exceptional way.

II.

The quality of greatness, in footballing or philosophising, is never fixed; it is a contingent and contested notion. All great players not only possesses special qualities, but also put their unique spin on what counts as great. What it means to be a great player is part of the infinite and contingent game over what it means to

---

play the game. The hallmark of great players is not simply their ability to beat every one at their own game: it is the capacity to envision and dictate a different game to be played. Greatness is to be found in the inestimable genius to improvise, experiment with and transform conventional standards for playing law’s infinite game. For such artists (because that is what they are), the best accolades are earned not for their technical prowess, but their capacity to reveal possibilities that the rest of the football community have not even seen or thought possible. By making novel moves, they play the game of football and life as much by playing with the game as playing within it. At its most audacious, this style of play demands an almost dare-devilish approach, not only a willingness to chance spectacular failure, but also the courage to court it in the pursuit of the greater glory of the game itself; it is a precarious and potent recipe for greatness that only a few can even aspire to, let alone successfully achieve. In short, they are great players in and on their own terms; they surpass existing standards as they transgress and transform them. By my reckoning, Derrida was not only a great player, but a great player at the game of defining greatness.

Of course, Derrida owes some of the mystique that surrounds his work to its opaque, obscure and, frankly, often incomprehensible nature; he was an enigmatic player who managed to be both conservative and revolutionary as well as backward-looking and non-traditional. Yet, for all that, his style of play had the mark of greatness in it. Indeed, there is much in a Derrida’s performance that resonates with the artistry and career of Maradona. Like Maradona, Derrida was his own player and played his own game and controversy seemed likely to follow him wherever he went; he had good games and bad games. His skills were extravagant and his global effect on the world could not be ignored in his relatively short career. However, perhaps the one modern player that best epitomises the style and achievement of Derrida is his fellow Frenchman, Eric Cantona. While playing in and against some of the most established teams, they both took on something of the role of the “outsider.” In this, they both resembled Camus’ eponymous rebel, the outsider Meursault, who refused to submit to conditions and circumstances that stifle humanity and deprive them of their justified and rebellious destiny: “rebellion cannot exist without the feeling that somewhere, in some way, you are justified.”

A self-styled Gaelic savant, Cantona cultivated the weighty persona of the outsider and bad boy. In a career arc that had equal measure of footballing genius and
disciplinary transgression, philosopher-king Eric played football like he played life: he was unpredictably talented and talentedly unpredictable. He built up a moody reputation that served him well in his dealings with defenders on the field as well as his detractors off it. Such was his skill at surrounding himself with mystery that he was able to get away with the obvious and straightforward as if he had done the most unexpected and feigned of moves. For some, his demeanour was more psychotic than philosophic, his displays of footballing virtuosity more artifice than honest, and his petulance more definitive than distracting. Nevertheless, his influence on the English game is surely undisputed; he introduced a continental element to the English style of play whose transformative effect is likely to continue for decades to come. Yet, like Derrida’s, Cantona’s career was haunted by a notorious incident which both blighted and blessed his reputation.

After being sent off in a league game, Cantona dived into the stands to assault a racially-abusive fan. He was duly suspended from playing for six months and received a conditional criminal sentence for assault. In responding to a barrage of media attention, Cantona was asked whether it was important that players should set an example to youngsters. His reply was characteristically direct and controversial:

I think that one should stop treating the heart and soul of youngsters as clay to be modelled in whatever fashion you like. I am not there to educate anyone; I don’t see that as my role. They should be able to work things out for themselves. Children go where they find sincerity and authenticity. In my way of working, of carrying out my career, I don’t betray anybody and they know it. I don’t consider that it would be better to teach them to deny their own emotions for the benefit of the established order. Is it in teaching people to be submissive that they become adult citizens?6

There is much here to ponder à la Derrida. It seems optimistic, at best, to think that kids “work things out for themselves” and that they “go where they find sincerity and authenticity.” Indeed, the identity and antics of contemporary football celebrities do little to support such a claim. However, there is much that is good in

---

Cantona’s views. Contrary to conventional views, education is often seen as an occasion to inculcate dominant values and ideas; it is less about opening up young people’s minds than keeping them tightly shut. Although Cantona is not advocating that everyone should go around attacking and kicking everyone who says something that you do not like, he is stressing that obedience to “the established order” is not always the best course of civic action. Of course, you have to be prepared to take the consequences of what you do and for what you believe, but the responsibilities of citizenship are best met by holding up society to its own cherished ideals, by pointing out any shortfall, and by sticking to your own principles when the going gets tough. In putting authenticity over submission, Cantona acted in a virtuous and honest way. Although many disagree with what he considered to be a defensible moral code, they should not contest his sense of honour. Cantona, like Socrates, deemed it important to be true to himself, almost whatever the consequences.

Similarly, Derrida made a principled, if ill-judged intervention in a festering incident which provided fuel to the self-righteous fire of his would-be detractors. In the late-Eighties, Derrida came to the defence of his long-time friend and teammate, Paul de Man. In 1988, five years after his death, the literary critic Paul de Man was outed as Nazi or, at least, as Nazi sympathiser. In particular, while living in Belgium, he had written a commissioned essay in 1940 for the pro-Nazi newspaper *Le Soir*. In it, de Man had observed that “one can thus see that a solution to the Jewish problem that would lead to the creation of a Jewish colony isolated from Europe would not have, for the literary life of the West, regrettable consequences.”

The Jewish Derrida stood by de Man and offered a deconstructive defence which was intended to demonstrate that de Man was not actually saying anything bad about the Jews. While Derrida’s valorous act of friendship was commendable, his political discretion was lacking. For some, he seemed to expose the duplicitous quality of much deconstructive work by demonstrating how its interpretive techniques could be used almost at will to render the meaning of texts non-sensible and to defend the indefensible. However, for the less judgmental and ill-disposed, Derrida offered a gallant and very real act of loyalty which put his whole conventional reputation at risk for the sake of an important personal commitment. It was the legendary stuff of hermeneutical opacity and heroic naivety.

Beneath the theatrical snarls and Gallic shrugs, both Cantona and Derrida sought to embody an authentic responsibility to rebel against the very system that gave them their privileged and, in some quarters, adored status. In a world of convenient values and even more expedient justifications, they each took a stand which characterised as it threatened their whole legacy: they were prepared to be counted as more than deft performers and to stake their claims for a better world. Justice might always be deferred and elusive as a general virtue, but it could be
established, however contingently and conditionally, by an impassioned blow against tyrannical resignation. While each may have acted rashly, they brought attention to the moral force of probity in a hypocritical world. And took a kick at it as an act of courage, not cowardice or complicity. Indeed, there was an authenticity to Cantona and Derrida that Camus would have admired, even if somewhat conditionally. They knew how they wanted to play the game in life and in football. Neither were prepared to play by others’ rules -- victory was less important than integrity. Never beyond interpretation, Cantona’s and Derrida’s intervention were also interpretive gauntlets thrown down to the pusillanimous ranks of the chattering classes. They both left the game richer for their participation and more attuned to its own possibilities for renewal. Harnessing vision and inventiveness, they grasped that greatness was to be found in oneself, especially in the act of having the courage of one’s convictions.

III.

For all the huff-and-puff of his lengthy career, Derrida knew that football, no matter how well or wonder-fully played can never attain that cherished independence from contingent considerations; what it means to play the game is destined to be born and die, flourish or perish in the hands of historical circumstance. However, like few before (or after him?), Derrida profoundly appreciated that and sought to impress its inevitable force on others. He grasped that the most important contribution that he could make was most definitely not to bring the competing games of life to a stop so that we can fix and settle upon what it means to play the game of LIFE for all time and in all places. Instead, he committed himself to inspiring all those who played with him or participated vicariously through him that the best way to play the game is to do so with abandon and commitment. If the accumulated performances of his career add up to anything, it is that life’s challenge is not to bring the game to a close, but to keep it going with all the freshness and diversity that can be mustered. Matches and seasons end, players come and go - some more tragically than others -, but the game lives on, unending and unsullied in its possibilities to tease, to thrill and to redeem. It is sport as life and life as sport in which, as the old poem says, triumph and disaster impost forever.

In 1991, one fan of the beautiful game made a pessimistic assessment of football. He said that “in the world we live in, if you put it terms of a football game, the dark side is 3-0 up and it’s half-time. I can’t accept that this is the way it’s gotta be.” And Derrida assures us that it doesn’t have to be. We must remember that we tend to get the world that we deserve as much as the world we want. However, we must also not forget that we can change that world; things only end up as they are not because it is meant to be that way, but because we have not yet got around to
changing them. It is always half-time in that there is always at least another 45 minutes to play in which anything is possible, even if it does not always work out the way we hope it will or expect. But, sometimes, the dark side is vanquished. On a cold December Saturday in 1957, Charlton Athletic were down to 10 men and losing 5-1 against Huddersfield Town, with only 20 minutes left to play. Undaunted, Charlton battled back and pulled off one of the great comebacks of all time. Led by Johnny Summers’ 5 goals, they went on to win the game 7-6. The example of that humble Charlton side should give hope to all of us. It is never over until it’s over. And that’s the case whether the fat lady has sung or not. Whether we like it or not and whether we choose to or not, there is no way not to be in the game of what it means to play the game. Jacques Derrida is a philosophical Johnny Summers for the ages.
A Note on Space

By Dirk Baecker*

With respect to space at least, philosophy is almost unanimous. A space comes into being as soon as a border is established and an observer looks at both sides of the border including at the border separating the sides. Without the border, no space, and the space has none. Without the observer, the same applies, even if there are only observers where distinctions are being drawn. Jacques Derrida was conscious of this. One of his questions is the perennial question of philosophy: what is space if, for a space to reveal itself, there is a boundary to be drawn, such that an observer may emerge looking at the space the boundary is brought forward in.

In this note, I propose to look again at Kant's concept of space, because he goes a long way toward putting it all together by acknowledging that space is a question of aesthetics. And aesthetics brings the observer in, even if only cautiously so by looking at the taste a subject is made to share with other subjects in order to be able to communicate its subjective view of the world. Aesthetics, thus, is a matter of observers being observed by observers, defining their respective places with respect to the judgments they share in order to be able to communicate that each one of these judgments is singular.

***

Immanuel Kant, in his Kritik der reinen Vernunft (B 37-45), conceived of an aesthetic concept of space, which considers space as "a condition of the possibility of phenomena." Kant refuses to speak of a "notion" of space and instead sees space as "a pure idea a priori." Kant states that space is the condition of the possibility of the subject to imagine itself and objects as claiming to exist in different places in it.

* Professor of Sociology at the University of Witten/Herdecke, Germany. He is the author of two review essays on Jacques Derrida's philosophy: Wir werden darauf zurückkommen: Die Sprache und die Hand bei Jacques Derrida, 19 ÄSTHETIK UND KOMMUNIKATION 109-115 (1989); Eine neue Internationale, 20 SOZIOLOGISCHE REVUE, 21-26 (1997). Email address: baecker@mac.com.
Kant's concept of space is critical of the usual common sense understanding of space: that space is out there and, somehow, both supporting and receiving what we are doing. Yet, whatever it is that is out there, Kant rejects the label "space" because that would give it some objective necessity, which does not correspond to the actual realm of variation which space exhibits in its exploration by men. The concept of space should start with the acknowledgment of the degrees of freedom we discover while hitting on the restrictions we attribute to it. That is, space is not a cause of phenomena, but, as Georg Simmel in his *Soziologie* put it, "a form without effect *per se*;" 1 that anything is taking place in space, does not mean that it is taking place because of it.

The point in which I am interested is that to understand all of this we need a certain understanding of "aesthetics" that is close to Kant's. And we need to remind ourselves of a problem, which, from Plato to Jacques Derrida and G. Spencer-Brown, is taken note of under the heading of the concept of space.

***

A concept of aesthetics, which fits Kant's concept of space, is Kant's understanding of aesthetics minus its transcendental aspect. In a footnote explaining the title of his "transcendental aesthetics," (*KrV*, B 35), Kant lets it be understood that his concept of aesthetics refers to something languages other than German call a "critique of taste." That is, he is not referring to the "critical judgment of the beautiful by means of reason," which the "excellent analyst" Alexander Gottlieb Baumgarten hoped for. Here, at least, he is critical of the taming of subjective sensuality, a move he will later reinforce by inventing the institution of a *sensus communis* with which all individual subjects comply when trying to communicate their aesthetic judgments (*Kritik der Urteilskraft*, § 8). In this footnote to the notion of aesthetics in *Kritik der reinen Vernunft*, however, all rules, with which any critique of taste might possibly comply, are empirical. This is why I propose that we skip the reference to the transcendental to deal only with Kant's psychological approach, which today comprises psychology and sociology extending into the realm of cognitive sciences.

Receiving the concept of an aesthetics, which explores the condition of the possibility of phenomena, it seems to be conceivable that Kant's "critique of taste" might be transformed into a research agenda about taste in a complex world, relying on modern cognitive sciences informed by neurophysiology, psychology, and sociology. A critique of taste would, on the one hand, look at a conscious, and on the other hand, a social, construction of phenomena of the sensual world.

---

brought forward by the double closure of sensorium and motorium described by neurophysiology: acting we change our way to perceive the world; by doing something we create something to look at; by looking at something we get the chance to discover ourselves looking, doing, perceiving, and acting. Think only of these poor kittens, which were put onto a small trailer right after being born and were literally shown the world without ever being able to touch it and play around with it: They never received the first notion of it and remained unable to act in it and on it.

***

Thus space is to be considered as both product and precondition of aisthesis. Few concepts seem to be more improbable or even impossible. Yet surprisingly, not only philosophy, but mathematics and physics as well, finds agreement on this point. Each of these fields consider the nonexistence of absolute space; and all of them struggle to find out what that kind of action and reception might be able to bring space forward.

In Plato's Timaeos (51a-53b) space, or chôra, is considered to be a third genre, and more precisely that genre which receives like some kind of matrix the first genre of the being and the second genre of the becoming. This third genre is devoid of any design to begin with, yet it gets form and forms via design and via number, even if this is only carried out by God. Jacques Derrida, in his paper "Chôra," puts Plato's concept of space down to the idea of a "lieu d'inscription de tout ce qui au monde se marque." Chôra, to be sure, presupposes its own chôra the very moment it gets marked, thus producing the concept of spaces entangled within spaces.

This concept of space is close to G. Spencer-Brown's understanding of it in his Laws of Form, in which he states that "a universe comes into being when a space is severed or taken apart." Considered this way, a possible notion of form follows easily: "Call the space cloven by any distinction, together with the entire content of the space, the form of distinction. Call the form of the first distinction the form." This means that the notion of form is introduced to propose ways of looking at the coupling of marks in spaces, the mark being itself the manner by which a coupling is produced. Italo Calvino in his story Un segno nello spazio in his book Le Cosmicomiche (Torino 1965) showed in a very charming way how this may be understood.

---


Reading John von Neumann’s and Oskar Morgenstern’s *Theory of Games and Economic Behavior*, a comparable set and game theoretical formulation of this concept of space may run like this: A space is a *partition* in space, which preliminarily announces via the phenomena received or the distinctions being drawn that further information is yet to be given at a later moment. Space, for Kant again, is an “infinite given measure” (*KrV*: B 39), that is, it cannot be determined nor distinguished, but it is the place where boundaries are to be drawn and distinctions to be crossed. As Martin Heidegger in *Sein and Zeit* puts it, space is the place where de-distanciation (*Ent-fernung*) and alignment (*Ausrichtung*) take place.

Such an aesthetic concept of space takes note of a fundamental condition of the possibility to order and describe, to remember and forget, to soften and to strengthen sensual experiences via their separation and distinction both consciously, that is via self-observation of the individual, and socially, that is via cultural conventions of society. For that note to be of any use, only one condition applies, which is that separation and distinction are seen to construct content via relation, or identity via control. That kind of space exhibits a structure, albeit a playful one (to honor Jacques Derrida’s paper “Structure, Sign, and Play in the Discourse of the Human Sciences”), in that it self-similarly (or fractally) repeats itself the very moment a boundary is drawn or a distinction crossed. The organization of experience produces a space where distinctions are to be drawn.

It is worth noting that a mathematical notion of space, understood as a set of elements featuring a structure, corresponds with such an aesthetic concept, provided that space is not confused with that structure but conceived of as the result and condition of its contemplation. Even the physical notion of space is compatible with an aesthetic concept if space is considered the result and condition of the emergence and effect of a field.

The concept of space in philosophy and cognitive sciences as well as in mathematics and physics puts an end to absolute notions of space and to spaces to be described ontologically. Without the contemplation, that is distinction, of a space as the product and condition of a phenomenon and its distinction, there would not

---


6 MARTIN HEIDEGGER, *SEIN AND ZEIT* §23 (1926).


be any space. An aesthetic concept of space owes to a critique of taste what today is received as the art of deconstructing, that is observing, an observer, thereby discovering, to be sure, ourselves as unknown to ourselves.

Reading Derrida, I am inclined to believe that this, among other things, is what he would have liked to let us see.
A. A “Certain Sovereignty”

In his final publication Derrida argues for a rather wide notion of the concept of sovereignty. Sovereigns are not only public officers and dignitaries, or those who invest them with sovereign power – we all are sovereigns, without exception, insofar the sovereign function is nothing but the rationale of all metaphysics, anchored in a certain capability, in the ability to do something, in a power or potency that transfers and realizes itself, that shows itself in possession, property, the power or authority of the master, be it the master of the house or in the city or state, despot, be it the master over himself, and thus master over his passions which have to be mastered just like the many-headed mass in the political arena. Derrida thinks the sovereign with Aristotle: the prima causa, the unmoved mover. It has been often remarked that philosophy here openly reveals itself as political theology. Derrida thus refers to the famous lines of the Iliad, where Ulysses warns of the sovereignty of the many: “it is not well that there should be many masters; one man must be supreme – one king to whom the son of scheming Saturn has given the scepter of sovereignty over you all.”

This means that all metaphysics is grounded on a political imperative that prohibits the sovereignty of the many in favor of the one cause, the one being, the arche (both cause and sovereignty), the one principle and princeps, of the One in the first place. The cause and the principle are representations of the function of the King in the discourse of metaphysics. Derrida, however, does not only describe the

---

1 Teacher of Philosophy and German Literature at the University of Cologne and Bochum; Executive Director of the Research Center “Media and Cultural Communication” at the University of Cologne. He has published on political philosophy, social and cultural theory and contemporary French philosophy. He is the author of: DER STAAT NACH SEINEM ENDE. DIE VERSUCHUNG CARL SCHMITTS (1996); and GILLES DELEuze (1998).

2 Quoted by Aristotle at the end of book 12 of his METAPHYSICS (1076a).

metaphysical overstepping of the boundaries of a political category; as a
metaphysical category, sovereignty encroaches on ‘life,’ insofar it nominates a
power, potency or capability that is found “in every ‘I can’ – the *ipse*
(ipsissimus)*. This power does not only refer to individuals, insofar they are
politically active, i.e. as public active agencies or as sovereign *pouvoir constitu ant*,
but also refers to all which individuals can actually do, without being forced ‘from
the outside.’ A soon as they are not only subjected to a causality, but on their part
turn into a spontaneous cause of subsequent actions, they exhibit a ‘certain
sovereignty.’ Thus understood, sovereignty is mere liberty, that is, “the authority or
power, to do as one pleases: to decide, to choose, to determine oneself, to decide on
oneself, to be master, and in particular master of oneself (autos, ipse).[...] No liberty
without selfhood, and no selfhood without liberty, *vice versa.* And thus a certain
sovereignty.”

Nothing and nobody can escape a sovereignty thus understood, not even
deconstruction, the unending challenge of which, as Derrida once again makes
unmistakably clear, was to disassociate itself time and again from a sovereignty
with which in the last resort it was to inevitably coincide. Even there, where it
seems to be impossible, deconstruction has to distinguish between “on the one
hand, the compulsion or self-implementation of sovereignty (which is also and no
less the one of selfhood itself, of the same, the self that one is [...] the selfhood,
which comprises – as etymology would affirm – the androcentric power position of
the landlord, the sovereign power of master, father, or husband [...] and on the
other hand the posit of unconditionality, which one can find in the critical and
(please permit me the word) deconstructive claim for reason alike.” Insofar
deconstruction claims to be “an unconditional rationalism,” it is thus being haunted
by what Derrida has called the “sovereignty drive.”

B. Sovereignty and Democracy

I would like to pose an objection here. The rather limited political value of Derrida’s
theory of sovereignty for me seems to lie in its hasty generalization. There is in
Derrida no real history of sovereignty, but merely an initial ‘onto-theological’
determination which cannot be modified or thwarted by a historical event, since
historical differences can play themselves out only in the framework opened up by
the initial metaphysical determination. Derrida defines sovereignty as metaphysical

---

3 *Id.* at 28.
4 *Id.* at 42.
5 *Id.* at 190-191.
and is thus able to carry out its critique as another variant of the deconstruction of the metaphysical heritage. All the historical analyses which Derrida also commences, can thus only confirm what was certain from the very beginning. However, thus they turn out to be mere illustrations of a particular definition, which on its part is not accessible to a historical relativization. All that can happen to sovereignty in the narrower political sense is, according to such a metaphysical analysis, to be *transferred* and, in the case of democracy, to possibly return to its origin after the expiration of a time limit, only to be transferred anew. Thus, Derrida can claim that “sovereignty is circular, round, it is a rounding,” insofar as it rotates according to the conditions of Greek democracy, as it can take “the alternating form of succession, of the one-after-the-other:” today’s rulers will be tomorrow’s ruled. Such a model of “spheric rotation,” however, does not necessarily have to take the form of an effective return of sovereign power to its point of origin. Instead of a sovereignty that is transferred to and fro between governors and governed, one can think of a speculative variant, according to which the sovereign is envisioned as being endowed with power once and for all by an act of originary authorization. Instead of an alternating rotation of rulers and ruled, we would have the case of a transfer of sovereignty without the possibility of revocation.

Yet, Derrida emphasizes the fact that the interrelation of democracy and sovereignty remains problematic, since philosophic discourses never succeed in abolishing “the semantic indeterminacy at the center of *demokratia*.” There seems to be a limit to sovereignty’s capability of effectively coding society in its entirety. Repudiations of democracy in Classic Greek Philosophy, accusing it of a lack of identity and determination with regard to constitutional law, testify to that. Too much “free-wheeling” in democracy, regarded as the most beautiful political order only by those who are, according to Plato, “womanish and childish.” Either democracy spins around, following the circle defined by sovereignty, or it loses track, develops without plan and aim, erratically, an “essence without essence,” which can “comprise all kinds of constitutions, constitutional schemes, and thus interpretations.” But, it should be asked, is such a democracy a viable alternative to sovereignty, does the ‘force’ of a *différance* manifest itself in it, which

---

6 *Id.* at 30.

7 *Id.* at 64.

8 *Id.* at 47.

9 *Id.* at 53.

10 *Id.* at 60.
differentiates it time and again from all that seeks to identify itself with it? Or is it merely a piece of a philosophical fantasy the function of which is to intervene in a particular war (with democracy, with the assemblies, with rhetoric, with the Sophists), one that is about to invade the polis and to confirm once again (in the name of the kingship of philosophers, or of true monarchy) a model of sovereignty in crisis? Plato’s image of democracy parallels his image of art: the insubstantiality and mere mimetic character of both serves their political disqualification. Democracy for Plato is the negative utopia of the politeia, of the politeia in the state of dissolution, guidelessness, and a-nomy.

C. Tyrants

Up to this point one cannot clearly see the connection between sovereignty and the subject of “rogues” (voyou, rogue), which has given its title to Derrida’s last publication. Neither its metaphysical determination, nor its political articulation within the frame of a philosophical theory of democracy open up a dimension of “roguishness” within sovereignty. On the contrary, philosophical discourses treat the absence of sovereignty as an almost unbearable state of unseemly mixtures and deviations from the ideal standard of the politeia, which could be connected to the subject of a-nomy and an-archy – that is: roguishness. A democracy without a sovereign head (Plato) or sovereign cycle (Aristotle), proves to pave the way for tyranny, differing from rightful ‘monarchy’ insofar as it is a liminal case of a dissociation of sovereignty and rights, or law. Greek political theory as well as political praxis knows the problem of tyranny as a liminal case of sovereign dominance, transforming the sovereign into an outlaw, with no contractual connection to the citizens, so that they can deal with him like a tyrant. On the other hand, Hieron shows, that philosophers should also be prepared to communicate with tyrants, in order to conjointly search for possibilities of a more ‘just’ or measured exertion of his authority. A tyrant does not necessarily have to be killed, he can also be educated. Yet, despite this intensive concern for the phenomenon of tyrannical hubris, a suspicion that sovereignty might be of a fundamental roguish nature is nowhere voiced. Derrida allows for this fact in that he does not touch the subject of tyranny in his study of “rogues.”

D. Silently and Secretly

Derrida’s engagement with the “rogues” is motivated by the use of that term in the official statements of the US diplomacy and geopolitics after the end of the Cold

---

11 Nino Luraghi, Sterben wie ein Tyrann [Die like a Tyrant], in TYRANNIS UND VERFÜHRUNG [TYRANNIS AND SEDUCTION] 91-114 (Wolfgang Pircher and Martin Treml. eds. 2000).
War. His text centers on the question of the existence of so-called “rogue states.” Derrida asks for the conditions of possibility for such a diagnosis. Who has the right and the possibility to identify certain states as rogue states, and to threaten them with measures that include military force – and this even, as is explicitly stated, in the case that these states have not yet been guilty of a prior violation of International Law, but the willingness for such a violation in the (near) future is only assumed? The identification of states outside the law leads to the paradoxical consequence that those states that feel called to combat, or that let themselves be formally empowered (e.g. by the UN Security Council) to combat, on their part claim the ‘sovereign’ right to take measures, even if these measures violate established law. In the ‘exceptional case,’ one has to be prepared to violate law in order to restore it. The state strong enough to define and combat rogue states has to be a rogue state itself, insofar he claims the ‘sovereign’ right to deviate from the law under particular circumstances (that is, for a certain period of time that seems to be favorable to the cause), to suspend the law, to annul it. The rhetorics of rogue states suggest that it is always only a handful of ‘rotten apples’ that violate law and order; fact is: “There are only rogue states, in potentia, or in actu. The state itself is roguish. There are always more rogue states than one thinks.”  

The moment a strategy of foreign policy commits itself to the combat of rogue states, one finds that the term has already “come up against its limits,” that its time is already used up, since it promises to localize a threat coming from uncontrollable and widespread weapons of mass destruction, whereas the dynamics of dissemination, and thus: the failure of all those efforts to reserve the atomic privilege to the ‘club’ of hegemonic industrial states, has long become visible. The preliminary result of the Iraq War shows, that such weapons are never located on the territory of the state against one is at war with.

In connection with his diagnosis of current politics Derrida sets out anew to a fundamental determination of political sovereignty, which I would like to quote, since it, I think, all too hastily presents itself as a theory of the ‘nature’ of the sovereignty, whereas it in fact accommodates a historically datable shift in the relation of sovereignty to other powers and forces. “Silently and secretly, like sovereignty itself,” Derrida states the bottom line of his theory of political sovereignty, even though the ‘holder’ of sovereignty originally was the one who could achieve his power – a collective “binding” – only by speaking in public, instead of trusting in the silent right of the strongest. The sovereign wards off everything that is reminiscent of death, his office is not to unleash the violence of war, but to found peace by way of a mutual agreement, thus, a contract. The matter-of-factness of Derrida’s equalization of sovereignty and violence has to be opposed by the

---

12 Id. at 144.
dissimilarity of sovereign and bellicose power-effects and power-operations as established in the context of the Indo-European “three orders” or “three functions.” Before I enter this context, of which I want to show that it is the frame for Foucault’s genealogy of sovereignty, I want to quote the passage in which Derrida conjures the roguish substance of all sovereignty. The sovereign is a rogue, because he always is at work ‘silently and secretly,’ like a criminal – everything he publicly declares is subordinated to his intention, to break the law ‘in good intention,’ without getting caught. Thus he makes every possible effort to ‘abruptly’ take action at the right moment and to create a fait accompli which even a retroactive jurisdiction cannot undo:

“Silence, disavowal, that is exactly the never appearing nature of sovereignty. [We will see that the opposite is the case for the original nature of sovereignty: to appear, and to act through the light of appearance, F.B.]. That, about which the community has to maintain silence, is last but not least a sovereignty which can only place and assert itself silently, in the unsaid. Even if it rehashes every juridical discourse and all political rhetoric, sovereignty itself (if there is such a thing, in its purity) is always silent in the self-hood of its own moment, which can only be the time of an indivisible instant.

Pure sovereignty is indivisible, or it is not. This all theoreticians of sovereignty have rightly recognized, and that is what gives sovereignty the character of an exception out of pure decisionism, commented on by Carl Schmitt. This indivisibility as a matter of principle withdraws it from collective participation as well as from time and language. From time, from temporalization, to which it is ceaselessly exposed, and thus, paradoxically, from history. Thus, sovereignty is in a certain manner unhistorical, it is a contract made with a history contracting itself into the punctiform event of an exceptional decision without temporal and historical expansion. Thus sovereignty also withdraws itself from language, which introduces universalizing collective participation. […] There is no sovereignty without violence, without the force of the stronger, the justification [raison] of which – as the right [raison] of the strongest – consists in its power over everything [avoir raison de tout].”

So much for Derrida’s theory of sovereignty, the historical signature of which becomes clearer the more he insists on denying its connection to history. One might venture to say that the sovereign for Derrida is inseparable from a certain excess or mania of the top, or the head. From an epistemological perspective one could speak of a political solipsism, since the sovereign, even when he speaks, does not talk to anybody, but refuses any communicative participation. Not by chance Derrida

---

13 Id. at 141-142.
mentions Carl Schmitt, which I take as another hint that it is in fact a very specific structure of sovereignty that Derrida is describing, a structure that locates the sovereign act in its decision, without posing the question of the quality of who makes that decision: “Sovereign is he who decides on the exception,”\(^{14}\) means that whoever makes such a decision takes the place of sovereignty, regardless of his qualification. In Schmitt’s and Derrida’s concept of the sovereign decision figures a ‘baroque’ experience of a crisis of the sovereign body, who in the act of decision at the same time decides on his existence.

### E. Wolves, Lambs, Lycology

Derrida evokes an etymological speculation that derives “voyou” (rogue) from the French term for *werewolf*, “loup-garou.” This speculation is “interesting,” even if it has not “met with much response.” Derrida thus joins with some considerations of Giorgio Agamben, who himself has also proposed a theory of sovereignty that defines the sovereign act as the act of a systematic creation of a state *hors-la-loi*, of an un-making of peace.\(^{15}\) The werewolf is the one banned from the community by sovereign decree, existing on the border between man and beast. He is not ‘released’ into banishment, in contrast, the act of his (symbolic) banishment is meant to increase the image of his presumptive dangerousness. As a wolf, he would have been expelled from the human community once and for all, as a werewolf, however, he still poses a virulent threat to the very community that had banished him. In *Rogues*, Derrida announces a debate with Agamben’s theory of sovereignty and its figuralization in the *homo sacer*\(^{16}\) “for some other time.”\(^{17}\) There was no time for this, however, before his death. Via the semantics of outlaw nations and the rhetorics of the bestialization of enemies, as was the case in the mass media representations of the “Baghdad Tyrant,” Derrida establishes an up-to-date historical connection between “the wild beast and the sovereign” – at the same time this was the title of a seminar in which Derrida tried to come up with a

\(^{14}\) CARL SCHMITT, POLITICAL THEOLOGY - FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 5 (George Schwab trans., 1988).

\(^{15}\) For his notion of sovereignty and the state of exception, see recently GIORGIO AGAMBEN, STATE OF EXCEPTION (Kevin Attell trans., 2004); see also Interview with Giorgio Agamben – Life. A Work of Art Without an Author: The State of Exception, the Administration of Disorder and Private Life, 5 GERMAN LAW JOURNAL 609 (2004), at http://www.germanlawjournal.com/article.php?id=437.

\(^{16}\) See GIORGIO AGAMBEN, HOMO SACER - SOVEREIGN POWER AND THE BARE LIFE (Daniel Heller-Roazen trans., 1998) (German translation: HOMO SACER. SOUVERÄNE MACHT UND BLOSES LEBEN (2002)).

\(^{17}\) Id. at 44.
“genealogical theory of the wolf (lykos), the figure of the wolf and all werewolves in the problematic of sovereignty.”

This seminar focused on La Fontaine’s famous fable of The Wolf and the Lamb, the introductory sentence of which Derrida uses as a motto for Rogues:

La raison du plus fort est toujours la meilleure
Nous l’allons montrer tout à l’heure.

That “the right of the stronger has always been the best right,” as the moral of the story, which in fact precedes it, claims, is the open, even cynical confession of sovereign power to speak in the name of the law, and to simultaneously violate it. Derrida finds in this formula to a certain extent sovereign plaintext which unambiguously states the paradox that the right of sovereignty is its power to break the law: sovereign or criminal, sovereign or rogue. Yet, Derrida writes: “The logic of La Fontaine’s fable has no room for the rogue” – neither from the perspective of the fabulist, nor from the perspective of the wolf (not to speak from that of the lamb, who takes up a position of pure innocence): “The wolf is in principle no rogue, since he represents sovereign power that poses the law and entitles itself.”

Derrida’s conclusion is quite enigmatic, since the fable’s whole strategy seems to set out to present the wolf as a rogue, since the wolf speaks from the position of the law, but would never allow it to be turned against himself. The law is a weapon in the wolf’s claws, who conducts a mock trial against the lamb, being prosecutor, judge, and executor at the same time. A crucial aspect of the fable is the surprising fact that the wolf does not devour the lamb immediately – which he would certainly do if he was nothing but a wolf – but that between their meeting and the final devouring of the lamb, a quasi-juridical intermezzo unfolds, a “trial,” which is opened, as a matter of course, by the wolf in his role as prosecutor. La Fontaine thus stresses that there is a lawful and contractual connection between wolf and lamb, even if it becomes clear that the wolf systematically violates the law. The sovereign speaks, before he devours. The lamb, on the other hand, that inevitably will become his victim, does not recognize in the wolf its ‘natural enemy’ (in that case it would take to its heels and run), but an authority, and it apologetically stammers: “Oh, your majesty!” The recognition of the wolf as master is the lamb’s crucial mistake, and here lies the fable’s irony. The wolf’s “cruelty,” then, does not consist in his drive to give the lamb short shrift and eat it, but in the unflinching way with which he dismisses the not only legitimate, but irrefutable objections put forth by

18 DERRIDA, supra note 2, at 101.
19 Id. at 102.
the lamb. The wolf’s accusations do not only contradict the facts, they prove impossible.

Michel Foucault has presented a comprehensive genealogy of pastoral power. Its punch line lies in the fact that he can show that the model of the shepherd and the flock is transferred from the religious-spiritual contexts, where it was first used, to the sphere of political relations. The shepherd has to protect the flock by all means, be it even at the cost of his own life; he has to keep track of every sheep that gets astray, and bring it back to the flock safe and sound. The fable’s scenario at first sight seems to present such a critical situation, in which a lamb has gotten lost and meets its most dangerous enemy, the wolf, who eats it. Yet, the situation of the fable is slightly off-balance with regard to the ideal situation of the pastorate, insofar we are dealing here with a dual relation, the “cruelty” of which lies in the fact that the shepherd himself has become the wolf. The shepherd, who is absent in the fable, ‘hides’ in the wolf, who therefore has to conduct a trial against the lamb before he can eat it. Even where the sovereign resorts to violence, he cannot but do it in the guise of the law. La Fontaine’s fable is thus indeed an essay about the relation of sovereignty and law. It shows the sovereign as wolf, but does it also express an insight in the ‘nature’ of sovereignty? Could it not be the case that this exposure, this disclosure of the wolfish nature of the sovereign, is in fact a superimposition of two functions that have to be differentiated, even if they coincide in one and the same figure?

I will close this section with a reference to the role of a completely different presence of the wolfish in the context of Rome’s myth of origin. Instead of a wolf that devours, we are presented with the image of a nurturing she-wolf. The “shepherd of the royal flock,” writes Livius, observes how a “thirsty she-wolf” – in La Fontaine’s fable it is the lamb that quenches its thirst – “compassionately offers her teats to the infants [the abandoned twins Romulus and Remus, F.B.]” and later “licks the infants with her tongue;” another version of the legend affirms this surprising generosity of the wolfish: the shepherd takes the twins to his wife to raise them. “Some people believe,” thus Livy, “that Larentia was called ‘she-wolf’ by the shepherds, because she gave her body indiscriminately, and that this is the origin of the legend.” The wolfish strength that the twins, one way or another, acquire, does not only help them to resist “wild beasts,” as Livius says – they also use it in a manner that benefits the shepherds, with whom they live: they attack “booty-laden robbers” and “distribute the haul amongst the shepherds.”

---


21 Titus Livius, Ab Urbe condita. Liber I:4
lycology of Livy is thus entirely different from La Fontaine’s. The values of lawlessness and anomy, evoked by the semantic field of the wolfish, are not used for a sovereign exclusion, the excluding sovereignty does by no means amalgamate, as in the modern lycology, with the excluded beyond distinguishability. Romulus’ wolfish nature manifests itself in the course of the foundation of the city in an exemplary act of ‘unlimited’ inclusion, by attracting “multitudes of riffraff and inferior mobs,” that is: rogues which, as Livy notes, has been “the original nucleus of the increasing size of Rome.”

F. The Great Trap

From beginning to end, Foucault’s political theory, his insistent elaboration of an analytic of power, is concerned with the topic and problem of sovereignty. In contrast to Derrida, however, he does not make sovereignty the horizon of his political thought. For Derrida, there is no escape from the structure of sovereignty, just as little as from that of metaphysics; what he apostrophizes as the coming democracy can never substitute sovereignty, but can only – if at all – differ from it in an inconspicuous, minimal manner. Politics for Derrida means: to mark a difference in the relation to sovereignty, to make the sovereign, who by nature holds his tongue, speak, to induce him to share his essence with the citizens, to communicate himself to the citizens. To remind the sovereign that he, according to his nature, himself is what he accuses others of: a rogue. For Foucault, the problem of sovereignty is not founded in a metaphysical basic position, but in the – not at all arbitrary – impact of a model or a discourse that prevents us from thinking a power that has long ceased to function according to the model of sovereignty. Power effects do not necessarily presuppose the existence of a sovereign from which they emanate. The “massive historical fact,” according to Foucault, one has “to get away from if we want to analyze power,” is the “juridico-political theory of sovereignty” that “dates from the Middle Ages” and is a result of “the reactivation of Roman law.” For Foucault, the theory of sovereignty is “the great trap we are in danger of falling into when we try to analyze power.”

Foucault thus scans European history for what in its politics eludes the model of sovereignty. Whereas for Derrida the history of the political can never escape the spell of the sovereign, Foucault tries to excavate that moment in political history where the sovereign may not cease to exist, but forever loses his exemplary position. What will become apparent is the fact that the moment of the most extreme and intensive challenge of the sovereign’s position coincides with the attempt of a re-erection, inseparably connected with the name of Thomas Hobbes and the image of the Leviathan.

22 Id. at 18.

In his attempt of the sovereign’s disempowerment, Foucault strangely enough does not mention the periodic rites attested by anthropologists, which in the course of an extensive carnivalization of the socio-political order also dethrone the king: “In a scenario of a general licentiousness, clamorous festiveness and inverted social roles, this inversion conjoins with subversion, and even perversion. Master and servant are on the same level, maybe even take the other’s position. The king is put to flight (refugium) or ritually killed. In the case of the incwala ceremony of the Swazi – famous with anthropologists – the king’s capital is raided, and he himself is branded with holy dispraises as public enemy.”24 With Derrida, one could recognize here another evidence for the existence of a democratic cycle, different from the contractual alternation of rulers and ruled only by force of its symbolic violence: in both cases, history corresponds to the concept of a “spheric rotation.” Thus, where for Derrida power revolves around the sovereign, Foucault searches for that power which inflicts a symbolic death blow on the sovereign once and for all. All those deaths the sovereign has to die – eg. in the archaic kingdoms – do not prevent his ultimate return to the throne. After all, as ethnological studies attest, the sovereign was never shown much respect. Instead, he was revered only on condition of the right to his profanation. Appointment, deposition, and reappointment are regular moves in the fort/da-game that people play with the sovereign. The king is and remains an “alien,” he always comes from the exterior, as an usurper, he spreads fear and terror, but is “gradually integrated and domesticated”25 by the natives. In contrast to Derrida’s claim, sovereignty does not withdraw from “collective participation in principle” by means of its indivisibility, it is thus also wrong to think it as an “exceptional decision without temporal and historical expansion.” The periodic rites in which the people get rid of the sovereign attest to exactly this: the attempt to communize the absolutely a-social as which the sovereign appears.

The discourse that Foucault reconstructs as the condition of the possibility of his own analytic of power basically ceaselessly recalls the cultural fact that the king is an usurper and thus does not possess any legitimacy, that the legitimacy that he claims owes to an act of erasure of that disruption that his emergence presents. “It happens remarkably often,” Marshall Sahlins writes, “that the big chieftains and kings of political society do not come from the people that they govern. According to local myths of origin, they are aliens, foreigners, just as the draconic measures by

24 Marshal Sahlins, Der Fremde als König oder Dumézil unter den Fidschi-Insulanern [The Stranger as King, or, Dumézil amongst the Fidschi], in MARSHAL SAHLINS, INSELN DER GESCHICHTE [ISLANDS OF HISTORY] 95 (1992).

25 Id. at 79.
which they come into power are alien to the attitude of the ‘true people’ or the true ‘sons of the country.’” The discourse of the Count of Boulainvilliers, who takes center stage in the historico-political discourse reconstructed by Foucault, basically says the same. More precise: he draws the pathos of his political accusation from the identification of a betrayal of which the usurper-king has made himself guilty by conspiring with the indigenous population in order to make his position of power invulnerable and thus: truly sovereign. Boulainvilliers tells the tale of the genesis of sovereignty as a process of increasing estrangement between the king and his ‘ancestral’ people. The king becomes a sovereign the very moment he successfully rises above ‘his’ former people. The historico-political discourse is nothing but an attempt to retrieve the sovereign into the (fictitious) immanence of his ancestry and to restore his transcendence with regard to the conquered, who by now have become his allies.

What remains unclear in Derrida – i.e., in what sense a sovereign could be called a ‘rogue’ – Foucault reveals: the sovereign turns into a rogue when his foreignness is no longer accepted, when he is being denied the transition from a bellicose apparition to a legislative authority (like in the exemplary case of Romulus in Roman history), when every attempt of a political ‘sublimation’ is answered by a gesture of immediate ‘martial’ de-sublimation. The sovereign’s foreignness is no longer understood as his original quality, but as the result of a political estrangement assigned to him, and which has to be annihilated. This annihilation is no longer provided for by the ritual, but by the regeneration through war, which the king has brought by his mere appearance, and which is now being declared on him by the people. The structural ambivalence of the sovereign position – king and enemy – is being resolved in favor of one side of the differentiation - leading to nothing less than a fundamentally new concept of political authority. Sahlins characterizes this notion as one that conceives of political authority as of something which “emerged from within society and resulted from the nature of social connections and relationships.” As examples, he names contractual, Marxist and biologistic conceptions of the social to which one would have to add the analytic of forces and bellicose relations described by Foucault, since they also locate the play of power within society. Power is immanent to society – this is indeed the rationale of Foucault’s analytic. Yes, the historico-political discourse reconstructed by Foucault turns even war which, as ius belli, i.e. as the most exclusive right of the sovereign, is taking place between states, into a society-immanent, descriptive category.

---

26 Id. at 83.
27 Id. at 81.
G. The Three Orders

Foucault stresses the fact that a binary conception of society (such as the martial discourse of the prosecutors of the king) is opposed to both organic and bodily models of society. In addition, it also cannot not be subsumed under the conception of a “tripartite organization” used to conceptualize the social structure as a relation of superordination and subordination. On the one hand, we have a discourse that pacifies society and founds order, on the other hand, we have a discourse that tears it into pieces. Foucault enriches the reflection on the forms and functions of sovereignty by discussing it within the framework of the model of trifunctionality, which historians of religion (e.g. Georges Dumézil) and linguists (e.g. Émile Benveniste) have revealed as the Indo-European system of representing power. Sovereignty finds its position within this system which has both a theological and a political and social dimension. Dumézil’s much admired by Foucault, was particularly interested in examining the Roman version of that system, in addition to an analysis of the classic Vedic version of the pattern of the three orders. This is certainly the reason why Foucault speaks of the historical type of discourse that stages sovereignty as a ‘Roman history.’ In Rome, it is – on the theological level – the famous sequence Jupiter, Mars, Quirinus presiding over the three functional areas. From a social perspective, the activities characteristic of the three areas are represented – here as well as in the other Indo-European cultures – by the priest, the warrior, and the farmer.

It is interesting to observe that Foucault, when he speaks of the “Indo-European system of representing power,” exclusively refers to the first function which can indeed be characterized as the function of sovereignty. According to Foucault, historiography of the Roman type, leading via the Middle Ages directly to the court historiography of the emerging absolute monarchies, is nothing but a discourse that is juridical and magical at the same time. It justifies power and reinforces it by letting it appear in its full glory. Following Foucault, there are two operations with which the sovereign wins the hearts: binding (law) and dazzling (magic):

Now, these two functions correspond very closely to two aspects of power, as represented in religions, rituals, and Roman legends, and more generally in Indo-European legends. In the Indo-European system of representing power, power always has two aspects or two faces, and they are perpetually conjugated. On the one hand, the juridical aspect: power uses obligations, oaths, commitments, and the law to bind; on the other, power has a magical function, role, and efficacy; power dazzles, and power petrifies. Jupiter, that eminently divine representative of power,
the preeminent god of the first function and the first order in the Indo-European tripartite system, is both the god who binds and the god who hurls thunderbolts.\footnote{FOUCAULT, supra note 23, at 68.}

The history of our society, thus Foucault, has long been a “‘Jupiterian’ history,” but with the form of discourse emerging at the threshold to the 17th century, a historiography comes into existence that is no longer ‘dazzled’ by the glory of gods and kings, a “counterhistory” no longer singing the “continuous chant” of sovereign power, but completely antithetical to history “as constituted up to that time.” Instead of recounting history as an uninterrupted sequence of victories, a “counterhistory of dark servitude and forfeiture”\footnote{Id. at 73.} rises to speak, a history the symbolic center of which is no longer Rome, but Jerusalem, a history as well that only evokes the past in order to completely break with it. “Unlike the historical discourse of Indo-European societies, this new discourse is no longer bound up with a ternary order, but with a binary perception and division of society and men; them and us, the unjust and the just, the masters and those who must obey them, the rich and the poor, the mighty and those who have to work in order to live.”\footnote{Id. at 74}

One would beg to differ with Foucault here. All he has said about the new anti-Roman discursive type, all the statements he quotes, paraphrases, and reconstructs, do not imply the slightest doubt that this history, which declares war on sovereignty, does not at all break with the ternary order. To see this, we only have to ask ourselves from which position within this model a binary perception and distribution of society is possible. Such a perception, and its respective discursive construction is only possible from the perspective of the \textit{second function}. It is not Jupiter, but \textit{Mars} for whom war never ends and who keeps awake the memory that the origin of the state is not law but the “mud of battles.”\footnote{Id. at 47.} Foucault’s assessment obviously follows a reading of the model of the three orders that exclusively operates from the perspective of the first function. Even though he constantly refers to the \textit{three} orders, the \textit{three} functions, and the \textit{three} classes, he never mentions the second or even third function, nor does he refer to the complex play of relations and interactions between them. He does not comment on them, although they are constitutive for the history that he narrates about the discourse of counterhistory. I would even venture to argue that Foucault’s \textit{History of the Political}, the history of its dissociation from the model of sovereignty, follows a line that begins with Jupiter and runs via Mars to Quirinus. \textit{Foucault’s history projects the structure of the three}
orders from the paradigmatic onto the syntagmatic axis of his own discourse. He transforms the series of the three orders into the principle of temporal organization of the history of the political – of the history that is his object, as well as the history he is recounting, and the development of which not by accident proceeds via the phase of the bellicose dissociation of the body politic, only to end under the sign of the governmentalization of power. The governmental technology of exerting political power produces an extensive politicization of the third function. The function of the police is nothing less than the observation, description, and administration of all life phenomena, insofar they are indispensable for the fortification of the state. A power that does not recount anymore, but counts, the element of which is the “big number” (Dumézil), and the regulative idea of which is the advancement of man’s “happiness.” Such a power occupies the third function, presided over, as Dumézil stresses, by a god: Quirinus, the “heterogeneity” of whom is incontestable.32

---

32 Georges Dumézil, Quirinus. La ville et l’empire, 195.
Specters and Scholars: Derrida and the Tragedy of Political Thought

By Adam Thurschwell

“To be or not to be?” – in a sense that has always been the question of ethics, of the life worth living, and philosophy would be the search for the answer to that question. In this essay I would like to propose an alternative formulation and interpret it, rather grotesquely (Shakespeare I’m not), as the following: “To ontologize the ethical or not to ontologize the ethical: that is the question of politics.” Ultimately, I would like to suggest that this is a question that must but cannot be answered, or at least answered by philosophy, by a philosophy that retains the ideal of an “answer” that conforms to the form of knowledge. The vehicle for this exposition will be several texts by Jacques Derrida (primarily “Force of Law: The ‘Mystical Foundation of Authority’”1 and *Specters of Marx*). My hope is that this discussion will ultimately justify (or at least excuse) my grotesque paraphrase of Hamlet as well as my rather pretentious subtitle.

First, however, because this is a memorial issue I cannot resist beginning with a personal reminiscence. As it happens I was in the audience at Benjamin Cardozo Law School in 1989 when Derrida first presented “Force of Law: ‘The Mystical Foundation of Authority’” at the conference titled “Deconstruction and the Possibility of Justice.” Although I had heard him lecture before, this was my first opportunity to speak with him on a more personal basis, and I was astonished by how different he was from what I had expected – a man of grace, charm, and (most

---


remarkable of all to me at the time) sincere humility. Subsequent occasions gave me glimpses of his wit – he was extremely funny – and of his enormous generosity as well. Hundreds if not thousands of articles written over the past 25 years attest to the fact that Derrida represented the ideal intended audience for a large number of younger scholars. Even my limited personal experiences with him were enough to suggest that that influence (indeed, transference in the Freudian sense) has been as much a function of the quality of his character as of his philosophical brilliance.

In any event, personal memories aside, Derrida’s address was a stunning event in a number of ways. He had clearly been provoked by the conference title – some of this comes through in the written text; one has to recall that in 1989, joining together “deconstruction” and “justice” (even its “possibility”) was a rather radical intervention into the received notions of deconstruction – and he came prepared to provoke in his turn. And boy, did he, with the simplest of declarative statements, such as (I’ll cite the two that stuck with me) “Deconstruction is justice” and “Nothing seems to me less outdated than the classical emancipatory ideal.”

For many in the audience, these statements thrilled or shocked because both in style and substance they represented such an apparently clean break with what we thought we knew about Derrida and deconstruction - his coy refusal to take “a” position (as opposed to “positions,” as in the book of interviews with that title), his brilliant but elliptical and etymologically exotic style, and above all, his consistent side-stepping – or what amounted to the same thing, two-handed (“on one hand, on the other hand”) – non-approach to questions of ethics and the political (at least in his theoretical writings – we all knew that he identified himself as a “man of the left” in his personal and institutional life). For many in the audience, I think it is fair to say, these simple affirmations represented a disappointing falling away from his most brilliant, Nietzschean insights into the groundlessness of values, the arche-origin behind every ostensible origin, the “violent opening of ethics,” the dissemination of meaning in the différance of language, and so on. For them (and here I’m engaging in reductive generalizations, I know), even when deconstruction was a useful, even crucial tool of political analysis, in itself it was not “political” and certainly not “ethical” – rather, it was an unsurpassed instrument of cognitive mastery, the theoretical approach par excellence for de-mystifying, “seeing through,” the metaphysical claims and assumptions surreptitiously lurking beneath every discourse of politics, ethics, or value generally (including the discourse of cognition itself).

\[3\] Jacques Derrida, Force of Law at 15, 28.
But for others in the audience that day, myself included, “Force of Law” was a thrilling confirmation of what we had read or felt between the lines of Derrida’s cautious two-handedness and analytical rigor, an ethical impulse held in check by its suspicion — indeed, self-suspicion — of all available vocabularies of the ethical and the political, and of the danger of being taken for what that ethical impulse stood most strongly against — “the worst,” as Derrida liked to call it, for which the best, including deconstruction, could always be mistaken. The thrill was in watching and hearing Derrida throw that caution to the wind for the Kierkegaardian “madness of the decision” (as he called it in “Force of Law”), an emergence from the protective comfort and mastery afforded by a rigorous (if undecidable) theoretical stance into the black “night of non-knowledge and non-rule,” the naked, unsupported possibility constituted by an openness to the Other: what Derrida later called the “the unpredictability, the ‘perhaps,’ the ‘what if’ of the event, the coming . . . of the other in general, his or her or its arrival.”

Again, I do not mean to overstate the break represented by “Force of Law,” because its themes are unquestionably foreshadowed in several earlier pieces (as Derrida himself pointed out), nor do I want to oversimplify the audience’s reaction to it. But it nevertheless seems clear that “Force of Law” not only firmly established the general question of law and politics within the field of deconstruction, it determined or brought to the foreground many of the themes (the undecidability of the decision, hyperbolic responsibility for the Other, the “spectral,” the singularity and à venir of justice) that became increasingly significant in Derrida’s post-“Force of Law” work. Beyond that, “Force of Law” introduced an overtly “Levinasian mood” into his discourse, if I can call it that, that characterized virtually all of his work on whatever topic ever since.

Here then is the not terribly original question I would like to pose and explore, however briefly, using Derrida’s texts as a resource: How does the passage from the theoretical attitude, crudely and approximately exemplified in my story by the “pre-‘Force of Law’” reception of Derrida and deconstruction, to ethical or political responsibility (the “post-‘Force of Law’” Derrida), take place? What is its mechanism? Is it theoretical or ethical or something else? And if it is not theoretical, then what is the status of Derrida’s own discourse in “Force of Law” and his subsequent essays on law and the political? Are these writings political philosophy, as they appear and virtually claim to be, or are they something else

4 Id. at 26.

5 Jacques Derrida, Psychoanalysis Searches the States of Its Soul: The Impossible Beyond of a Sovereign Cruelty (Address to the States General of Psychoanalysis), in WITHOUT ALIBI 278 (Peggy Kamuf, ed. and trans, 2002) [hereinafter Address to the States General].
again – such as testimony, or prophecy? It seems notable that some of those who favored the earlier work – and I’m thinking here of some of his most sophisticated and clear-headed interpreters – throw up their hands at Levinas himself (”I need to see an argument here, not just the pious assertion of the ideal,” to quote a private e-mail from one such interpreter) and puzzle over increasing Levinasianism of Derrida’s later years, even when they continued to admire the later work as well. If the mechanism for this passage is theoretical, it is theoretical in a manner that is evidently not immediately recognizable to at least some of his theoretically astute readers.

Moreover (and more interestingly), the radical break that I’m taking “Force of Law” to represent is not just a matter of an historical event in Derrida’s intellectual trajectory but is explicitly thematized in “Force of Law” itself and many of Derrida’s most important subsequent writings, particularly the ones on law and politics. In each case this thematization takes the form of an unresolvable opposition, or aporia, between a pole that represents calculative, cognitive or conceptual knowledge, on one side, and on the other, a pole that represents the singularity of an ethical relationship, demand or act that cannot be subsumed under any conceptual schema or mode of knowledge. What each of these aporias share – in fact they are all different versions of the same aporia – is an undecidable “hiatus,” “moment of suspense,” épokhè, “discontinuity” or “interruption” that, while dividing and separating the poles, is not itself primarily negative but is rather the trace of a wholly affirmative ethical response to an Other. And just because each of these aporias traverse conceptuality and knowledge in the direction of the non-conceptual singularity of an Other, they cannot finally be described in the language of theory or philosophical conceptuality, but only evoked as an “experience,” an experience marked indelibly by its opening to the “to-come” (à venir) of the Other who always remains, structurally, to come.

And so in “Force of Law” we have the aporia of (calculable) law and (incalculable, singular) justice, joined and divided by an impossible yet necessary decision that must pass through an “ordeal of the undecidable” that leaves the singularity of the genuinely just decision always “to come” and never in the present judgment. In Politics of Friendship it is a matter of the “disjunctive laws of democracy” that dictate, simultaneously and impossibly, the requirement of “calculable majorities” of “stabilizable, representable subjects, all equal” on one hand and an absolute “respect for irreducible singularity or alterity” on the other, a disjunction that issues in a demand for a “democracy to come” that remains unrealizable in any given “present.” In The Gift of Death it is the irresolvable conflict between the “ethical or

---

* Jacques Derrida, Politics of Friendship (George Collins trans., 1997).
political generality” that dictates that our ethical/political responsibility extends to all equally, and the singularity of a religious experience that speaks to an absolute responsibility to the one absolute Other, God, that demands the sacrifice of all ethical-political generality. In *Adieu to Emmanuel Levinas*, it is the hiatus that divides the ethical injunction that unconditionally enjoins a politics and a law, and the “political or juridical content” thus enjoined, which “remains undetermined, still to be determined beyond knowledge, beyond all presentation, all concepts, all intuition.” And, finally, in the “Address to the States General of Psychoanalysis,” Derrida concludes by distinguishing the “orders” of the constative (the order of “theoretical or descriptive knowledge”) and the performative (the order of “institution”), and insists that between them there is an “absolute cut,” an “interruption,” a “discontinuity” that gives a chance for a “free responsibility that will never be deduced from a simple act of knowledge.” And most pregnant of all, beyond these two orders Derrida identifies a third, the order of the “impossible” itself, the “event” as “unpredictable alterity” and “*arrivance* of the *arrivant*,” “unconditional coming of the other,” that can “can and must put to rout the two orders of the constative and performative.”

Thus, if Derrida’s shift to the language and thematics of ethics in “Force of Law” seemed sudden and theoretically suspect to some, I think it has to be said that Derrida had already anticipated that objection in “Force of Law” itself (and even more so in subsequent elaborations), by articulating the ethical in terms of the necessity of an event that arrives to interrupt the theoretical attitude – the “unconditional coming of the other . . . that can and must put to rout the two orders of the constative and performative,” as Derrida put it, for example. In order to sharpen up my ultimate point, I would like to emphasize the “necessity” of the event of ethics in Derrida’s account and break it down into three aspects:

(1) First, the ethical moment necessarily pertains to an “arrival” insofar as it is genuinely ethical – the Other of ethics is she who comes to “disturb[] the being at home with oneself [le chez soi],” as Levinas puts it. This necessity is the necessity of a pure passivity – the absolute passivity that precedes the opposition between activity and passivity, in the Levinasian formulation, the awaiting without anticipation of the pure unpredictable event of alterity. It is this pure passivity that

---

9 Supra note 5 at 277-8.

---

determines the prominent place that Derrida gives to the concept of the “dangerous perhaps” in Politics of Friendship and similar figures of pure contingency, some of which I’ve quoted above. In any event, if, as I have suggested, Derrida is in fact talking about the interruption of the theoretical attitude by the event of ethical alterity, then one would expect that the “necessity” of this passivity and contingency ought to be primary.

(2) But it seems clear that the “necessity” that Derrida speaks of in these instances is just as much, or even more, the necessity of a traversal, a movement from one pole of the aporetic opposition toward the other, sometimes compelled by a law-like edict or injunction, sometimes called into being as an ethical response, but seemingly always in a motion that is motivated and active, and thus an exercise of a kind of “force” or “power” on behalf of that injunction or call. Two examples, the first from “Force of Law,” the second from the “Address to the States General of Psychoanalysis”:

(a) From “Force of Law”: “This anxiety-ridden moment of suspense – which is also the interval of spacing in which transformations, indeed, juridico-political revolutions take place – cannot be motivated, cannot find its movement and its impulse (an impulse which cannot itself be suspended [that is, is necessary – AT]) except in the demand for an increase in or supplement to justice . . . For in the end, where will deconstruction find its force, its movement or its motivation if not in this always unsatisfied appeal?”

(b) In the “Address to the States General,” after thematizing the force, potency or power that inhere in the instituting power of the performative speech act in terms of an “I can,” “I may,” and “I must,” Derrida goes on to identify a third order, beyond the order of the “power and the possible” represented by the constative and performative orders – the event of the “unconditional coming of the other” cited above. But he then insists that this higher order itself “can and must put to rout” (my emphasis) the constative and performative – a formulation that seems to put the most active power, potency and force – even violence – back on the side of the (otherwise absolutely passive) ethical event.

Even if this motion, motivation and impulse ultimately remain within the undecidable space of the hiatus (as seems to be the case in “Force of Law,” at least), and thus do not resolve the undecidable aporia in any particular direction or with any particular outcome (by aufhebung, etc.), it also seems to me that this rhetoric of

---

11 Derrida, supra note 1 at 20-21.

12 Derrida, supra note 5 at 277-8.
activity, of motion, “motivation,” “impulse,” of “can and must,” plays a large role in giving Derrida’s work since “Force of Law” its affirmative character, that is, the sense that Derrida was (finally!) standing up for something, taking a “position,” even if that position amounts to nothing more determinate than an affirmative call for an affirmation of the event in general. Moreover, despite Derrida’s precautions (and perhaps contrary to his intentions, although that seems doubtful to me) even at this level of indetermination or abstraction one can see at least the outlines – the “spectral outlines,” I’m tempted to say – of the founding, instituting violence of law in this affirmative movement. What is one to make, for example, of Derrida’s call in the “Address” for an ethical event that “can and must put to rout” all instituting performativity, along with constative (theoretical) appropriations, explanations or justifications for law? Without attempting fully to defend this suggestion, is this not a very deliberate call – the repetition of the “can and must” after the earlier characterizations of the performative in terms of “I can,” “I must,” cannot be coincidence – under a different name, for something very much like the divine violence that, according to Benjamin, puts all mythological violence to an end? Let us not forget Derrida’s long hesitation before Benjamin’s notion of divine violence in the second half of “Force of Law” – if I’m right about this, then Derrida’s movement on this front seems to be a significant indication of the direction his thought took after 1989.

(3) But, to return to the question I asked above, are these various formulations of the “necessity” of the ethical event, whether passive or active, philosophical defenses or theoretical justifications of ethical/political affirmation, or something else? Can one justify an “experience,” such as the “experience of the undecidable” that Derrida says conditions every genuine decision, or only attest to it? It seems to me in this as in parallel areas, Derrida aims quite deliberately to undermine the stability of the categories of the “philosophical” and “theoretical” (or the constative), by, for example, not only thematizing the “perhaps” as a condition of both the ethical and the ontological but also qualifying so many of his own assertoric statements with it. And yet, it also seems to me that something of the ambiguity of the “necessity” of the ethical that I’ve tried to indicate above – the ambiguity between the necessity of an absolute passivity without which ethics isn’t ethics, and a necessity that seems to characterize the motivated self-activity that gives Derrida’s rhetoric its affirmative character and that seems to resemble the “force of law” as much as a purely passive opening to alterity – spills over into his rhetoric when it comes to the status of his own claims.

Again two passages, one from “Force of Law” and the other from Specters of Marx. In both, what is at stake is, first, the apparent necessity for the appearance of a certain “it is necessary [il faut]” in Derrida’s thought at key moments even in discourses otherwise given over to the “perhaps,” the “undecidable,” the
“spectral,” and similar figures of contingency; and second, the wavering of this “it is necessary [il faut]” between competing meanings of “necessity” as ethical injunction and “necessity” as fate, as (ontological) truth, as “the way things are” or are compelled to be. The first passage, from “Force of Law,” seems to me to comment ironically on (dare I say deconstruct?) the second:

Toward the beginning of “Force of Law,” Derrida engages in a reading of one of Pascal’s pensées as a way of indicating the direction that his own argument will take. Pascal’s pensée concerns the relation of justice to force, and begins with the sentence, “It is just that what is just be followed, it is necessary that what is strongest be followed.” He thus draws a distinction between what follows as a matter of the “justness” of “justice” – that is to say, what follows as an ethical matter – and what follows as a matter of the raw necessity of force. However, since, as Pascal goes on to note, justice without force is “impotent” while force without justice is “tyrannical” and “accused of wrong,” they each need the other. Hence, Pascal concludes, “it is necessary [il faut] to put justice and force together.” To which Derrida rather drily comments, “It is difficult to decide whether the ‘it is necessary’ in this conclusion . . . is an ‘it is necessary’ prescribed by what is just in justice or by what is necessary in force.”

I trust that the stakes of this undecidability are clear: in Pascal’s pensée, if the necessity is “prescribed by what is just in justice,” then the necessity of employing force to achieve justice is an ethical necessity, a necessity that is a justification and an injunction rather than a guarantee, since an injunction can always be disregarded. But if this necessity is prescribed by “what is necessary in force,” then the use of force is not justified but rather tautological – the necessity of force is force itself, or to put it another way, simply a brute fact or reality. In the latter case, there is no question of justifying this necessity or of acting on it or realizing it, but only of recognizing it, of knowing it when one sees it – it simply is. And the alliance with “justice” is tactical rather than intrinsic; force simply requires justice as an ideological cover to avoid inconvenient accusations of “tyranny” and “wrongness.” However, as Derrida goes on to point out, the undecidability of the question doesn’t seem to matter in the precise context of Pascal’s pensée, at least to the extent that justice cannot be just without force to enforce it. If “justice, as justice, requires recourse to force,” then justice and force go together as a matter of ethical necessity regardless of its factual necessity and the ambiguity is of no consequence.

---

13 Jacques Derrida, supra note 1 at 10-11.
14 Id. at 11.
What then of the “it is necessary” – or rather, the second “it is necessary” – in the following sentence from Specters of Marx? The specific context here is a discussion of Alexandre Kojève’s tendentious claims about “post-historical man,” the broader topic, which Derrida is extracting from Kojève’s text, is the aporia cited above (closest in form to the one from Adieu to Emmanuel Levinas) between the ethical which “enjoins a law and a politics” and the law or politics thus enjoined, whose content the ethical injunction cannot speak to and which thus remains, from the perspective of ethics, absolutely indeterminate, still to be determined in a future decision-to-come. At ultimate issue, thus, is the essential relationship between the “futurality” of the future and the “politicality” of the political. For Derrida, a denial of that futurality in triumphalist narratives of “post-history” like Kojève’s (Francis Fukuyama’s The End of History and the Last Man is his main target in Specters of Marx) is not just a premature interment of the promise of Marxism, but a denial of the messianic/ethical impetus of the political itself (and thus Derrida is equally critical of parallel narratives of post-history in certain versions of Marxism as well).

But, as Derrida demonstrates, the future is not so easily disposed of. To make this point, the translator of Spectres de Marx quotes the relevant sentence fragment from Kojève in mixed English and the original French to preserve the ambiguity of the French verb devoir: “Post-historical man doit . . . .” Derrida highlights the competing meaning of doit as either “must” or “should.” But, for reasons that are complementary to those in the example from Pascal quoted above, he says this ambiguity doesn’t matter – Kojève has been caught in his performative contradiction (I’m paraphrasing Derrida rather freely, of course), because regardless of the injunction issued to post-historical man, whether ethical (“should”) or assigned by law or fate (“must”), what remains the case in either case is that a task is assigned and that therefore there is, or rather there “must/should be” a future even for “post-historical” man. Thus, even in ostensible “post-history,” “it is necessary [that there be] the future [‘il faut l’avenir’].”

And then this sentence, which I quote in full:

We must insist on this specific point [i.e., that “it is necessary [that there be] a future” regardless of whether that necessity is a “must” or a “should”] precisely because it points to an essential lack of specificity, an indetermination that remains the ultimate mark of the future: whatever may be the case concerning the modality or content of this duty, this necessity, this prescription or this injunction, this pledge, this task, also therefore this promise, this necessary promise, this “it is necessary” is necessary, and that is the law.\(^{15}\)

\(^{15}\) DERRIDA, supra note 2 at 73 (emphasis original).
This “it is necessary” is necessary, and that is the law – Derrida emphasizes this sentence in italics in the original text. We understand the ambiguity of the first, internally quoted “it is necessary” – Derrida has explained it to us, it may signify either the “should” of an ethical injunction or the “must” of legal or factual compulsion, but either way, regardless of the other differences between these two possibilities, “it is necessary” that there be a future.

I don’t think the same can be said for the second “… is necessary.” In fact, everything would seem to turn on whether it is a “should” or a “must.” Is the “it is necessary” of the future, its lying before us whether we will it or not, an ethical task given to us from on high by the Absolute Other (“… and that is the law”), to give shape and meaning to our lives in the pursuit of justice? Or does the future and its “necessity” simply lie before us as a burden imposed by force of law or mythic fate (“… and that is the law,” in another sense), without any further meaning to be had (and lets us recall that Benjamin said, and Derrida did not disagree, that the essence of law is fate)? Doesn’t, literally, everything turn on these alternatives? And yet, as Derrida says of Pascal, “it is difficult to decide whether the ‘it is necessary’ in this conclusion … is an ‘it is necessary’ prescribed by what is just in justice or by what is necessary in force.”

Strangely, almost sixty years ago (and in a text that Derrida was studying in a seminar shortly before he became ill), Maurice Blanchot identified a similarly corrosive ambiguity within linguistic meaning and gave it the name “literature.” Maurice Blanchot, Literature and the Right to Death, in THE WORK OF FIRE 344 (L. Davis trans., 1995). Listen as Blanchot interlaces the themes of death, understanding and comprehension, hope and redemption (in the medium of “the creator of the world in man”), and “unhappy fate” in an “irreducible double meaning, a choice whose terms are covered over with an ambiguity that makes them identical to one another even as it makes them opposite”:

Death ends in being: this is man’s hope and task, because nothingness itself helps to make the world, nothingness is the creator of the world in man as he works and understands. Death ends in being: this is man’s laceration, the source of his unhappy fate, since by man death comes to being and by man meaning rests on nothingness; the only way we can comprehend is by denying ourselves existence, by making death possible, by contaminating what we comprehend with the nothingness of death, so that if we emerge from being, we fall outside the possibility of death, and the way out becomes the disappearance of every way out. Id.

This “original double meaning,” Blanchot goes on to say, “which lies deep inside every word like a condemnation that is still unknown and a happiness that is still invisible, is the source of literature.” Id.

Blanchot’s text is far too rich to address here at any length, beyond noting the virtual identity of the themes Blanchot identifies with those that we have seen structuring the passage from SPECTERS OF MARX – redemptive meaning, “hope” and ethical “tasks” on one side, and “unhappy fate” on the other. The difference, of course, is that Blanchot thematizes this ambiguity (and also relates it directly to death)
Allow me to wind down with a few more general observations inspired by this reading. *Specters of Marx* ends with an ethical injunction of its own, one that manages simultaneously to conjure the ghost of Hamlet’s father (*Specters* is as much a brilliant literary-philosophical reading of *Hamlet* as it is of Marx), Nietzsche’s “philosophers of the future” from *Beyond Good and Evil*, and, in a more critical vein, a certain specter of Marx, the Marx of the “11th Thesis on Feuerbach” who urged philosophers that the point was to change the world, not simply to interpret it. Derrida says, “If he loves justice at least, the ‘scholar of the future,’ the ‘intellectual’ of tomorrow should learn [or teach – *apprendre*] it and from the ghost.” The “it” that these scholars should learn and teach from the ghost is the question with which I began, the question of ethics, of learning/teaching “how to live” (*apprendre à vivre*), as Derrida puts it in the initial “Exordium” to the book. The “ghost” or “specter” invoked here is the dominant motif of *Specters of Marx* and figures the instability of all of the oppositions that are fundamental to ontology—presence and absence, living and dead, actual and inactual, real and imaginary, and being and non-being (“to be or not to be” in the conventional reading, as Derrida puts it), among others. The specter also figures the quasi-transcendental condition of the event as such, and thus also the possibility of ethics as the event of the coming of the Other.

More to my point, Derrida says that “there never has been a scholar who really, and as a scholar, deals with ghosts.” Real, or “traditional,” scholars cannot not believe

17 DERRIDA, supra note 2 at 176.

18 Id. at xvii & 177 n.1.

19 Id. at 11.

20 See, in this regard, id. at 189 n.6, where Derrida suggests that the figure of the “specter” can be articulated with a moment of Husserlian phenomenology (the *noeme*) that is neither real (“in’ the world”) nor a component of subjectivity (“in’ consciousness”) but which constitutes the “condition of any experience, any objectivity, any phenomenality” and thereby is “also what inscribes the possibility of the other and of mourning right onto the phenomenality of the phenomenon.” For Derrida’s classic analysis of the inextricable intertwining of phenomenality and the ethical event, see JACQUES DERRIDA, Violence and Metaphysics: An Essay on the Thought of Emmanuel Levinas, in WRITING AND DIFFERENCE 79-153 (Alan Bass trans., 1978).

20 DERRIDA, supra note 2 at 89.
in the binary oppositions of ontology and remain scholars. Hence the call for “scholars of the future,” who, like Nietzsche’s “philosophers of the future,” will take these ontological categories much less seriously and be willing to learn to live in justice from specters, including the specter of a certain Marx. That specter, or rather “spirit” of Marxism (Derrida distinguishes the two for reasons that I cannot address here) is, Derrida says, a “certain emancipatory and messianic affirmation, a certain experience of the promise.” And, Derrida goes on, “a promise must promise to be kept, that is, not to remain ‘spiritual’ or ‘abstract,’ but to produce events, new effective forms of action, practice, organization, and so forth.” 21 But, Derrida warns, in so doing these scholars of the future must beware of a temptation or error, one that Marx himself did not avoid: “the ontological treatment of the spectrality of the ghost,” 22 the reduction of the ghost to the very ontological categories that its spectrality deconstructs.

My question is this: Can anyone, even as astute a “scholar” as Derrida himself, act on a promise, “emancipatory and messianic” or not, in order to produce “events,” “new effective forms of action,” and so on, without an “ontological treatment of the spectrality of the ghost”? Even if that “event” or “new form of action” presents itself as “theoretical” rather than “practical,” and, emptied of all ontological content, is left to stand as the simple affirmation of “emancipatory and messianic affirmation” itself?

I do not know, and what I hope to have suggested by my preceding readings from “Force of Law” and Specters of Marx is that this question does not admit of answers in the order of knowledge. The tragedy of political thought – to finally get to my subtitle – is indeed Hamlet’s. “To be or not to be, that is the question,” a question that political thought must but cannot answer, if it is to be genuinely “political” – if it is to “produce events, new effective forms of action, practice, organization, and so forth,” which is also to say, if it is to change the world as well as interpret it, bring about the future as well as recognize and understand it as it happens. It is not just that political thought is caught in Hamlet’s dilemma of whether or not to act, although it suffers that dilemma also, if to act threatens to ontologize the messianic promise that political thought desires to realize, and not to act is to break that promise even more certainly, since, as Derrida says, a promise is always a promise to act. It is that, having acted on that messianic promise, political thought cannot know, it cannot “theorize the question,” of whether or how it has acted – whether the messianic spirit of the promise has been redeemed or ontologized (and thus

21 DERRIDA, supra note 2 at 89.

22 Id. at 91.
And, I would add, this is why Derrida, while he consistently turned to questions of ethics and politics over the past thirteen years, at the same time turned increasingly to categories of religious thought, or rather categories of what he has called “religion without religion” – “faith,” the “secret” of a certain unshareable experience which is paradoxically shared by all, “testimony” (which is always at base testimony of the witnessing of a miracle, as he says), and so on. The ethical enjoins a politics and a law, but all three find their justification and their truth elsewhere.

23 Again, if I’m right about this, can one not hear in this dilemma much more than an echo of the Benjamin of *Critique of Violence*, for whom divine (“unalloyed”) violence cannot be distinguished from the profane in the order of human knowledge? “Less possible and also less urgent for humankind . . . is to decide when unalloyed violence has been realized in particular cases . . . because the expiatory power of [divine] violence is invisible to men.” (Walter Benjamin, *Critique of Violence*, in *1 SELECTED WRITINGS (1913-1926)* 252 (Edmund Jephcott trans., 1996). From another direction, Paul de Man’s reflections on the positional structure of language in *ALLEGORIES OF READING*, which move from demonstrations of how this structure leaves our “ontological confidence . . . forever shaken” to analyses of law and justice in terms of the structure of the promise and (blind), would also seem to be relevant here. See *PAUL DE MAN, Social Contract (Promises), in ALLEGORIES OF READING: FIGURAL LANGUAGE IN ROUSSEAU, NIETZSCHE, RILKE, AND PROUST* 123 (1979); see also Adam Thurschwell, *Reading the Law, in THE RHETORIC OF LAW* (Austin Sarat and Thomas Kearns eds., 1994).
Moving Away From Moving Away: A Conversation About Jacques Derrida and Legal Scholarship

By Juan M. Amaya-Castro and Hassan El Menyawi*

[Editorial Comment: This engaging dialogue between the two authors is a selection from a much larger piece including a wider exploration of Derrida’s intellectual context and his current interlocutors in law and the social sciences in general. The editors of this Special Section hope to publish further parts of this conversation in a subsequent issue of German Law Journal.]

A. Introduction: A Tribute to Derrida

As we all know, this fall, the leading philosopher, Jacques Derrida has passed away. We feel privileged to have our thoughts published in this journal, hoping to have come to create a proper tribute to an original thinker. In this article, we set out to explore some of the ideas that Derrida discusses in his philosophical work. Although this text is by no means exhaustive as a source to understand Derrida, or any other philosopher or thinker for that matter, its goal is to spark some thoughts about him, some of his core ideas, and how we see him relating to the legal discipline.

We considered writing a standard law article for the German Law Journal when we received the call for papers, but then thought that one of the best ways to pay tribute to Derrida is to write about him in a form that reflects his ideas, since form was never a marginal, let alone accidental matter for him. Indeed, as we explain in our addendum, his work can be seen as an attack on Western philosophy’s logocentric and phonocentric biases. The logocentric bias represents this idea of centering the discovery of truth on logic. For Derrida, this is problematic considering that logic, in the way that it has been described by philosophers, has

* Juan M. Amaya-Castro is Director of International Law and Human Rights Programmes, United Nations University for Peace, San José, Costa Rica. Hassan El Menyawi, LLM, LLB, BCL, B.Sc., is Assistant Professor of International Law and Human Rights, United Nations University for Peace, San José, Costa Rica; Visiting Scholar, Harvard Law School (2003-2004).
prioritized presence over absence: the “what is” versus the “what is not.” By focusing exclusively on the present, it in effect produces the illusion of meaning by fixating on describing a ‘thing’, a present thing, thereby ignoring the many other phenomena that are absent. Since the absent relates with the present, this produces radical instability in meaning. By doing this, Derrida demonstrates that logocentrism is a myth: there is no absolute site of meaning, no origin, no center for logic (or logocentrism) where truth and meaning flow. Undecidability pervades meaning and instability is ubiquitous.

While Derrida’s first preoccupation was the “logocentric” bias in Western philosophy, the second major one is the “phonocentric” bias, again in Western philosophy. Derrida describes the phonocentric bias as constructing oral discourse as somehow superior to writing. Derrida uses Plato to make this demonstration. For Plato, writing is viewed as problematic, because the author is no longer present to verify, correct misperceptions and misunderstandings of his text when it is read by others. But, Derrida fundamentally disagrees with this idea of oral speech, quite explicitly showing that there is ambiguity when we speak, and even when we speak to ourselves. Instabilities and undecidabilities pervade throughout our speech. Meaning drifts away from us, producing ambiguity in others’ perspectives, but also from the perspective of the hearer, who senses a vertigo produced by his own confusion at what she says.

We consider that a conversational format\(^1\) is meant to respond to the two critiques that Derrida advances in response to the phonocentric and logocentrism biases. Let us start off with the phonocentric bias. By presenting ourselves through the oral speech, we feel that we have moved away from the perceived comforts of the written word. Having transcribed our words, the transcript of the conversation that follows can be seen as relying on the oral word as a means of communication. Of course, a paradox that has not been lost on us is how to communicate the oral word, we had to request that a transcriber write our conversation. A paradox we think Derrida would enjoy.

But, let us also consider the logocentric bias. For most philosophers and legal theorists, an article is meant to be written, in the form that it is, for reasons of systemicty, comprehensiveness, sequential logic, etc., and these qualities represent rigor for most legal scholars. As legal scholars, we have been constructed

---

\(^1\) As a method of communicating ideas in legal theory, the conversational format has been used before by legal scholars in legal journals. For articles written in a conversational format, see Peter Gabel and Duncan Kennedy, Roll Over Beethoven, 36 STAN. L. REV. 1 (1984); Ellen C. DuBois, Mary C. Dunlap, Carol J. Gilligan, Catherine A. MacKinnon and Carrie J. Menkel-Meadow, Feminist Discourse, Moral Value, and the Law - A Conversation, 34 BUFFALO LAW REVIEW 11 (1985).
in our discipline as seeing these qualities as a type of logical flow that produces clarity for our readers. But, Derrida would remind us that clarity comes at the cost of ignoring many absent features. Such a style of writing represents a concoction, an illusion of meaning. To pay tribute to this idea, we have decided to speak our minds to one another, reflecting in a manner that might not be seen as ordered. Although there is still much absence in our conversation, we feel the mode in which we converse will constantly remind the reader of that.

Although we have come to this decision, this is not to say that conversing has not produced anxieties in us. These anxieties were felt throughout the project: from the moment we picked up and spoke into the microphone to record our conversation, throughout our discussion as we asked ourselves questions, and even, or perhaps, more accurately, especially when reading and editing our conversation. We both jokingly wonder if we are feeling the pangs of the logocentric bias. Being legal academics, writing, teaching and presenting ideas to students and colleagues with the illusion that it must be ordered, sequenced in a particular way, we were confronted face to face with our anxieties about how our conversation seemed disorderly (in light of our logocentric biases).

After reading our transcripts, we had a need to change this or that, wanting to just add this point because it had to be comprehensive, clearer, or even, the best of all these justifications is “it should sound like me.” “Did I really say this?” Hassan exclaims. Juan asks Hassan, “I wonder why you didn’t answer this question I was trying to ask you again and again?” Both of us also asked “why did we ask these problems, and not others?” “How did this happen?” and “why did the conversation go in that direction?” This brought us face to face with our logocentric biases. After having read our original transcripts, we came to recognize that. We came to recognize that it is difficult to judge a conversation as having too little or too many questions, or to judge it by saying that they didn’t answer enough questions, or answered too many. Conversations are are inventions. Spontaneous inventions. During our conversation, speech seemed to be out of control, on its own, determining itself without us. For us, the task of conversing in this way provided a perpetual reminder that the phonocentrism of philosophy was seemingly wrong. Every time we tried to reach clarity, something else would preempt that. Editing the written version of the conversation, we needed to talk about it, in order to edit more written stuff, and this would produce a renewed need to discuss it, and so on. Every time we wanted to just address this question, another question would emerge, preempting the attempt to set the agenda, put something finally to rest. If anything, rest was not possible, settling questions beyond our reach. After we completed reading and editing our mutual parts of the original transcripts, we recognized ourselves in a passage by Gilles Deleuze and
Claire Parnet entitled *A Conversation?: What is it? What is it for?*, in Dialogues,\(^2\) where they say the following:

It is very hard to ’explain oneself’ – an interview, a dialogue, a conversation. Most of the time, when someone asks me a question, even one which relates to me, I see that, strictly, I don’t have anything to say. Questions are invented, like anything else. If you aren’t allowed to invent your questions, with elements from all over the place, from never mind where, if people ’pose’ them to you, you haven’t much to say. The art of constructing a problem is very important: you invent a problem, a problem-position, before finding a solution. None of this happens in an interview, a conversation, a discussion.\(^3\)

Indeed, when we read these opening remarks of Deleuze and Parnet’s book, we recognized ourselves. We remarked to each other how this systematic idea of problem followed by solution is connected to the idea that order is possible in a conversation, that conversations can yield discoveries, truths. Our discussion didn’t provide solutions, but further discussions, and questions. The questions were experienced by us as somehow distant, determined by them, rather than by us, the interlocutors.

Another point in Deleuze and Parnet’s text where we identified ourselves is where they say the following about conversations:

…Objections are even worse. Every time someone puts an objection to me, I want to say: ’OK, OK, let’s go on to something else.” Objections have never contributed anything. It’s the same when I am asked a general question. The aim is not to answer questions, it’s to get out, to get out of it.\(^4\)

Indeed we had felt concerned, and even distressed about how sometimes we felt the other was not really answering the question we posed him, that he was ducking, or changing the topic. Again, the logocentric side of our identities told us, dictated, that somehow this was the direction my interlocutor should go. Sometimes we felt somehow alienated by the other, in our view, moving away from what the questioner thought was the center – only yielding the movement from one question to another – really the movement from one peripheral matter to another peripheral matter. Yet somehow even if peripheral, we each had the desire to set the tone,

\(^2\) Gilles Deleuze and Claire Parnet, Dialogues (1977).

\(^3\) Id. at 1.

\(^4\) Id.
decide the center, and construct the discussion in the image of our perception of what constituted the ‘good,’ the great conversation. This need to center, to question and request answers as a way of ordering is bankrupt. Instead of answering, we sound like we are, in the words of Deleuze and Parnet, “getting out” of the question, not to answer, but to get out of the question. And in each of our minds, to move to what we think are the right questions.

Deleuze and Parnet seem to be right. Questions are inventions, triggered by our imaginings of what we hear, but also what we don’t hear. As Derrida reminds us, logic has been constructed in philosophy as “present” and not absent. The logocentric idea of conversations as dialogue to resolve problems and achieve understanding seemed inaccurate to us after reading our experience, after recording or conversations. But if we were to focus on the absent aspects of a conversation, what is not said explicitly, what is felt, a conversation is not this ordered, stable tool for understanding. In the words of Deleuze and Parnet, it is filled with silent moments where we “don’t have anything to say.” And in response to questions, we would rather resist, and move away to speak our thoughts. Questions in this sense are distractions. Instead, we rather invent our own questions. This is in fact something we can identify with. We felt at different times that the other didn’t hear, wasn’t answering my important question. And we felt alienated, “Why is he asking that?” The absent, unexpressed thought seems to lead to a perpetual moving on.

This is where Derrida comes in: if each of us is moving on, moving away from questions, the movement of a conversation as ordered is questionable. And, all there exists in a conversation are moves away, and moves away from moving away: a perpetual chain of moves-away making the conversation, not a source of structure and order, but a disordered matrix of contingent thoughts. This notion of moving away from moving away ties in nicely with Derrida’s idea of difference, a coined neologism by Derrida suggesting that language, or conceptual meanings, are perpetually deferred. Every term means another, and each of these others means other words, in turn demonstrating the deep instabilities of the word.

In light of these comments, it comes as no surprise to our readers that it in no way is meant to provide a comprehensive understanding of any of the ideas presented by Derrida. It is meant to be a tribute, to pay homage to his ideas, and provide some examples of ways he might have, and continues, to influence the legal field. If anything, it can be seen more as a discussion between two legal academics, who have particular interests, preoccupations, and anxieties with Derrida, and feel the need to discuss it. And, in this sense, it is not even a piece that should be read to explore the varying ways in which Derrida might have influenced the legal field.
from a historical level, but a piece that provides general, or broad-strokes about how Derrida might be influencing the legal field.

Our single goal is to provide a conversation that is moderately readable to the intellectually curious legal scholar who wants to have an introduction about Derrida, and an introduction that we think is immersed with recognizable legal concepts and ideas. A conversation on Derrida perhaps by legal scholars for legal scholars. The hope is not to provide information about all of Derrida’s work, and how it can be used by particular legal scholars, or legal scholarship in general, but rather to spark an interest in him, maybe stimulate us to go to Derrida’s book, and take a read sometime. We think that perhaps that is a nice way to pay tribute to a man whose works are of increasing interest to academics of many disciplines.

B. Talking about Derrida

Hassan: So, do you think that Derrida has left an imprimatur in our field – that is, the legal field? Do you think that he has some kind of so-called presence in our field?

Juan: Actually I don’t think he has that much of a presence as he could or even should. Funny, because he seems to be omnipresent in many ways, in for example the way ‘deconstruction’ is a very popular word and increasingly used in all kind of contexts. In our field I would see him much more present in the close reading practices that law and literature people use and semiotics people in and in feminists who use law and literature as well as semiotics in their analysis.5

5 Throughout the text, we use the words “post-structuralist” and “semiotic” interchangeably.

Hassan: That’s what I was thinking about the other day: how difficult it is somehow to find traces of Derrida’s works. His presence is perhaps, oddly enough, *implicit*. You have to read Derrida into the work of legal academics. Derrida is not even present in the footnotes or citations, forget about the body of academics’ works. Legal scholars who use critical thinkers often turn to philosophers such as Foucault and Nietzsche rather than Derrida. Consider Janet Halley’s *Taking a Break from Feminism*, which relies on Foucault and Nietzsche to advance her critique of feminism. Also consider Duncan Kennedy and David Kennedy working in different areas of the legal discipline: Duncan Kennedy working primarily in private law (property, contract, and tort law) and David Kennedy working in international law. Neither David Kennedy nor Duncan Kennedy rely on Derrida, save Duncan in a single work of his, the *Semiotics of Critique*.

Juan: I find him even in those cases to be absent as an anxiety, which is one of the ways in which you could signal an implicit presence. While he could be a thinker who produces immense and even lasting anxiety, I find him absent as such, even when I analyze Janet Halley’s text *Taking a Break from Feminism* and I see her as strategizing with her arguments. Not as trying to cope with a Derridian kind of anxiety. I might, with some effort, see him in David Kennedy’s writing style, in the way that he’s constantly reemphasizing, rehearsing and repeating which seems to be the flow of his texts. I might see it there. But like I said, that’s with some effort and I don’t suspect that there is a conscious Derridian anxiety. But then again I don’t know, is he present as an anxiety? I mean, we have several Derridas, one is the Derrida of anxiety, about the elusiveness of language, about the emptiness of meaning. What often in our conversations becomes obvious as in the moments of self consciousness that Basak was talking about. The realization, when you say something, that it is actually bullshit. You know: “whatever that means” and “whatever,” etc. I see that as a Derridian kind of anxiety. Which is not necessarily a painful anxiety, but there I see Derrida somehow operating. Intersecting with whatever train of thought we are pursuing. What do you think?

difficulty of placing certain authors at either side of the structuralist – post-structuralist divide will remain a recurring issue, and not merely in this conversation.


9 Basak Cali is a dear friend who is often present in our conversations.
Hassan: I am not so sure what you mean by anxiety, but if you mean the anxiety of thinking about Derrida’s work or his insights, then I understand. Yeah, in terms of David Kennedy, I absolutely think that we can define or refine our analysis of his work in such a way as to say that it is highly influenced, if not inspired, by Derrida. If this remains inaccurate, we can at least describe his work, easily, I would say, through Derridian concepts. The use of words like counterpoint, in Thinking against the Box10, or his method in The Human Rights Movement: Part of the Problem?11 seems to at least fit the interpretation that David Kennedy can be described through Derridian concepts. The mere attempt of consistently showing how some foundational concepts of human rights, such as ‘deontology,’ ‘abstractness,’ ‘universality’ are part of the problem of the very notion of human rights, in turn disabling the human rights activists and members of the so-called ‘human rights movement’ to actualize their self-declared goals, I see that as an inherently Derridian approach, or at least as adopting what seems to be a Derridian approach. David Kennedy’s method in Part of the Problem? starts off with showing what certain core concepts mean to persons and activists in the human rights movement, but then moves on to show the internal instability of these concepts, by demonstrating how the opposing concept might be useful to achieving the self-declared goals of activists in the human rights movement. David Kennedy does this, for example, by showing that human rights activists and theorists see human rights as deontological, but then saying that maybe taking on a teleological approach would be more useful. But, he even goes further, telling the human rights activist “that actually seeing human rights as strictly deontological is part of the problem, in turn explaining the failures of human rights activists.”12 To consistently see human rights as deontological does not allow one to strategize, for example, or to take on a teleological, pragmatic approach, one that is more goal-oriented. David does this flipping (sometimes referred to as flippability among critical legal scholars) – shifting from the way activists and theorists of human rights see human rights, and


12 This is to point out that although within quotations, these words were pronounced by Hassan.
showing, well, that might be a problem for human rights activists. David Kennedy does this by informing the human rights activist that: "look, the binary opposite concept that you, Ms. Human Rights Activist, have excluded, would actually facilitate, be helpful to the human rights movement in pursuit of its goals." 13 So, David would ask, ‘instead of the abstract, where’s the concrete?’; ‘instead of universal, where’s the cultural?’ and so on. By flipping the way that he does, David implicitly (or perhaps quite explicitly) attacks the underlying suppositions that activists and theorists believe about human rights, showing how their conception or theory of human rights are part of a broader mental model, one that systematically and comprehensively includes ‘deontology,’ ‘universality,’ ‘legality,’ ‘abstractness,’ ‘emancipation’, and that somehow these concepts are suspect, since they do not inevitably yield the political outcomes that activists have (and had) in mind. This is one methodology which I think, even if not inspired by Derrida, is certainly is related to him. It is a method in which the idea of human rights, if I can call it that, what is seen as its core essences are actually not an essence of this thing called human rights, and actually, many other essences have been excluded from them, which if included, might have been useful to achieving the self-declared goals of human rights. This is one way to show that there isn’t an essence to something called human rights. I see this throughout Human Rights: Part of the Problem? It’s actually a pretty fantastic text, because it has very few, perhaps no footnotes whatsoever. David’s goal doesn’t really seem to be about providing an analytically cogent set of criticisms in order to improve the task of international human rights activists and scholars, or of improving or perfecting theories of human rights. But rather, it consists of a list of what people think are human rights, or what they think that human rights movements do, and showing them that actually, while they think this thing called ‘right’ that they are relying on will yield these good results, they don’t at all, and by the way, they don’t because (and not in spite) they are properly relying on a particular theory of what human rights are, and those things that they are relying on are precisely the culprits, the causes, of the bad results. What is brilliant about David’s text, what puts it in a category called critique or critical thought, at least for me, is that it operates by showing how the very concept that human rights activists and theorists rely on, is the very thing that yields the opposite (or less than ideal) result that human rights activists long to achieve.

Juan: Yeah, I see David as leaving Derrida aside, but as seeing things in a way that you could construct as being from a Derridian perspective. I see David at his strongest when he is running, at his weakest when he is standing. When he attempts to pinpoint, to translate his constant efforts, ongoing efforts into one political sound bite, like when he says that ‘we need more contestation’, or ‘we

---

13 This is to point out that although within quotations, these words were pronounced by Hassan.
need more politics’, I see those points there being very powerful when he’s like just
making them and then going on to say the opposite. But I find him weaker when he
tries to nail them down, which in a way goes back to this other image that I have of
Derrida. The one in which language is always requiring more language. This
inversion of differance that instead of language pushing meaning ahead and just
deferring meaning,14 it is somehow always inviting you to speak more: “please
come, speak more.” Almost like the sirens in the story of Ulysses, irresistible,
tempting, “come, come, tell me more, and keep on talking.” We are driven by it,
we’re persuaded, and we’re seduced by it. This would be a Derridian insight as a
pleasure principle. And I see him, David Kennedy, doing that at his strongest, just
going on and on. “Actually, blah, blah, blah, but actually, the opposite of blah, blah”,
flipping and flipping and inverting. There I see Derrida very much as a presence.

Hassan: The use of the words flippability, words like counterpoint, indeterminacy, and
unknowability seem to be part of the language of critical legal thought, particularly
at Harvard Law School, where we were both visiting last year, but also in other law
schools as well. The same words have been imported to other places where faculty
and students are interested in critical thought like here at the United Nations
University for Peace, where we teach. But, such words differ from the ones that
Derrida has used. Consider Derrida’s use of words such as deference, differance,
arbitrariness, traces, and deconstruction. With the possible exception of the word
deconstruction, none are commonly used rhetorically in the aisles of the law school,
and definitely not in legal journals, or legal scholarship in general. And, so I say all
this because I am wondering to what extent you think that people like Peter Gabel
and Duncan Kennedy and other critical thinkers of the 1980s have in some way
constructed a particular Derrida marketable for the legal field?. This construction is
one that is constantly deployed by Ph.D. students around the world who are
interested in critical legal thinking. In other words, these Ph.D. students are actually
reflecting on the Derrida that was imported by the Duncan Kennedys, the Peter
Gabels,15 and the Roberto Ungers.16 And, somehow Derrida – his own voice and
writing – are now quite distant in the legal academy.

Juan: I don’t know, but okay, we should further explore that sentiment that
everything is flippable. Because you could argue that most of it is of a structuralist

14 See Jacques Derrida, ... That Dangerous Supplement ... , in Of Grammatology 141 (Gayatri
Chakravorty Spivak trans., 1974); Jacques Derrida, Structure, Sign, and Play in the Discourses of the


16 See Peter Gabel, A Critique of Rights: The Phenomenology of Rights-Consciousness and the Pact of the
character. But where I do see Derrida at work, or almost at work, in Duncan’s work, is in his article *The Stages of Decline of the Public/Private Distinction*, in which he constructs, but in a way that is well, artificial, even ironic, the stages of decline of this dichotomy, the different manifestations of the public/private distinction from being very stable to, finally, caught in a circle of loopification, in which by going within a set of legal categories more and more towards the ‘private’ you end up where you started, which was the most ‘public’ one to begin with. It is a brilliant piece. You could actually take that argument further into a fuller Derridian moment, as in seeing his construction of the decline in stages in a diachronic mode. He projects it on a temporal development. There used to be a time, and he even implicitly refers to periods, when it was a stable dichotomy and then progressively it declined into loopification. And the point that I would make is that you can also see this fluidity of the dichotomy, this ability to ‘change’, to move from a solid state to a state of flux, not only in a diachronic, temporal, even historicized frame, but also in a synchronic situation. So, to use Duncan’s vocabulary, all the stages of the dichotomy can be seen to exist or operate in one moment in time, synchronically.

[...]

Hassan: [...] I think that constructions of Derrida, in many different types and styles, will emerge in the literature of many scholarly disciplines, particularly after his death. Well, where is he? Is he somewhere, is he nowhere, and if he is somewhere, how does he look, what’s his shape?

Juan: Yeah, yeah, you know, the whole idea of an obituary is about placing somebody. It’s about looking back and seeing that person as a central actor, in a story that you construct to commemorate that person and to somehow, to use maybe an inappropriate word, to celebrate that person’s death.

Hassan: So you want to say something about Derrida? I mean do you want to place him in a box?

Juan: No, no, I actually already placed him as a presence. I think so far for now I am happy with placing him as suddenly in our conversation having become a presence even an indefinable one, whatever, but somehow a presence. We somehow are looking for connections between what we have been talking about and his vocabulary. And we want it definitively to be his vocabulary. ‘Trace’, ‘deference’, ‘undecidable’, ‘instability’, as his words. We definitively want his ghost to be here!

---

And if in the first part of this conversation we were using his terms as if they were ours, now we definitively want to use them as if they were his.

Hassan: Well..., I would be cautious in using the pronoun ‘we’, and I would ask you what you mean by that? Because I would say that I certainly appropriate Derrida in particular ways. And I’m not sure I have much of an interest in connecting how he saw his work to some kind of real or actual idea of his work. And certainly the project of trying to, in your words, “celebrate his death” by defining contours of something you call ‘presence’ or ‘placement’ is one that I’m afraid I don’t see myself engaged by. I see myself more engaged by finding ways for him to connect to my thoughts, to instigate, fuel ideas for my work, to inspire, in the way that we are doing in this conversation. And, I don’t see how we are talking about it any differently than how we did prior. I don’t see any commitment, any need, to define him and to place him, and neither do I find that his relevance increases if we try to infuse his ghost into our words. In other words, to appropriate him in ways that is loyal to his vocabulary. Anyways, I find that even when I am not being loyal, I don’t see myself as being loyal. Perhaps attempting to be loyal to Derrida, believing that his ideas stand for something, and not for other things, is a type of appropriation. Oh, a paradox? It seems that being loyal means appropriating, using, transforming them for our purposes. Remember, his work, his papers, the way he structures and formats his ideas, can be generalized as demonstrating conceptual instabilities. And I find that to try to find a meaningful type of underlying meaning to Derrida would be contrary to the themes he’s developed in his work. Perhaps the attempt to replicate, duplicate him, to be true are antithetical notions of Derrida himself, these are not themselves Derridian, I would say at least in the way that I understand him. So I don’t feel this need to pick him up and find his shape somehow, even after his so-called death.

Juan: I would agree with that but at the same time I see, and I would construct this as a tangent and the moment before the tangent as one in which we were somehow consciously invoking his vocabulary. For our purposes and loyal or not loyal, whatever that is, but somehow yes, looking for his footprints. Like explicit footprints. Like the words that we used because he wrote them. And some of them he arguably invented. And in that sense, that’s what I meant. I didn’t see it as somehow looking for his contours or his boundaries, but I saw it more as somehow to have him sit here at this table, to have him present as a ghost, and I think he would like that kind of presence. You know the kind of presence of a ghost which is also a non presence.

[...]
Hassan: I was just thinking about a variety of relations, and how we’re constructed in specific ways in the legal discipline to make use of, to discursively deploy dichotomies. They are everywhere: in contract law, tort law, international law, public interest law, constitutional law, human rights law, criminal law, etc. Many contemporary legal theorists and scholars from these disciplines explicitly and implicitly drench themselves in dichotomies or theoretical oppositions as a way to communicate their ideas. Derrida rejects these dichotomies or oppositions when they are presented as a source of meaning, or understanding. In that sense, Derrida is distant from legal academia in general. But, of course, there are some works in legal theory that attempt to show how legal dichotomies are somehow problematic. Consider Clare Dalton’s An Essay in the Deconstruction of Contract Doctrine in the Yale Law Journal, which attempts to ‘deconstruct’ contract law, which examines the idea of consent, problematizing contract law-specific dichotomies, such as private-public and objective-subjective will. But, sometimes ‘deconstruction’ is used in ways that doesn’t remind me or alienates me from my understanding of the word. Many people refer and talk about deconstructing this notion within their discipline. And many times, I think to myself, oh! that isn’t deconstruction. We could get to define the word deconstruction, but at this point I am curious if we could go through a set of interesting research questions or inspirational thoughts from Derrida that you think our colleagues in varying parts of the legal discipline would be interested in using for their work. Of course, I say that with full awareness that many legal scholars do deploy dichotomies with a sense that their meanings are stable.

Juan: Well, I don’t know, but I would like to say that in this sense I do see David Kennedy as, suddenly, because we first only referred to his style as being Derridian, but only in terms of dealing with doctrine, I would see him as a towering Derridian figure. Dealing with, focusing on particular doctrines, particular oppositions in those doctrines, his relentless problematization, I see as the kind of Derridian move that you were just talking about. Somehow telling scholars, telling international lawyers, don’t believe these categories, don’t believe them, because the opposite is true as well. As to interesting research questions, I don’t know, it’s my thing, my preoccupation with Derrida in the context of my activity and somehow in the context of the ‘discipline’, to use a David Kennedy notion, how to relate to my discipline, which is usually focused on making categories, and better categories, and improving them. Make them more solid. My discipline, my international law and human rights discipline, seems to be based on that. ‘We need more clarity’, ‘more reduction’, ‘more essentializing’, consent is this, or compliance is that. It is about defining and building structures. And what does it do to my relationship with that discipline, to my being a part of that discipline? To have this Derridian

compulsion to problematize those boundaries? And David Kennedy has showed me a style of problematizing, with his "well actually... this", "well actually... that". Or, in his more recent foregrounding the background and backgrounding the foreground, which I find Derridian moves. By the way, it's funny how we managed to construct Derrida as an implicit absence in David Kennedy and now we're constructing Derrida as a very explicit presence in David Kennedy, which goes to show, which makes our point... But to come back to the point I was trying to make, my personal preoccupation is: how do I relate to that? So one way which is very common to critical approaches to international law is to, and which I think is somehow linked to or contaminated by the kind of Form and Substance articles (as if it is a genre!), is to somehow, as it is taking place, by historicizing it, by 'temporalizing' it, which means that you put it into a temporal context, which actually means that you start to wondering about strategy or you start wondering about downstream effects. And by the way, downstream effects is a very temporal notion And that's one move which I think we both find very problematic or very difficult to sustain. Because these are somehow linked to ideas about causality and intentionality. There they are again those words that demand a fate of their own. So, this is the thing, you move from rejecting faith in categories and definitions to like an apparently more dynamic faith in causality and intentionality by focusing on strategy and downstream effects to a loss of faith in causality and intentionality..., and then what? And even if you find the 'then what,' I am sure you could problematize the faith in that as well. Another thing is that I think that having faith is important, even though, I could interrogate, and I sometimes do, my religious experiences and wonder 'what do I have faith in'? And maybe I could say that I have faith in terms of my recent experience and you could transpose that to you know, to my relation to my discipline, and you could say that having faith is not a having faith in, but it's an acceptance of unknowability, it's an embracement of humility, it's seeing my discipline through all my phases of a Derridian 'problematization of the problematization,' etc., as being a kind of a Sisyphus-process.19 Arguably it's having faith in the impossibility of closure. But somehow I always have trouble in translating that to a concrete engagement with my discipline. I mean in terms of writing articles or stuff.

Hassan: Now, I wanted to point out that our conversation will be published in a law journal. And more specifically, a law journal that self-identifies as 'German', and hence, a journal from Europe. And in Europe one interesting fact of the European academic culture, if I could generalize, is the prominence of some

---

19 From Albert Camus’ Myth of Sisyphus, which consists of a story of a man that continuously carries a boulder up the hill even after it falls. Albert Camus uses this as a metaphor to explain the human condition wherein a person continues to struggle, although nothing is changed, and meaninglessness and absurdity pervades. See Albert Camus, The Myth of Sisyphus and Other Essays (1955).
philosophers and scholars like Habermas. I have found that Habermas is present in legal articles and journals in Europe, particularly in continental Europe. He is seen as a key figure by European legal academics. Would you see the level of influence that Habermas has, the level of interest in Habermas by European legal academics as somehow parallel to that of Derrida, and if so (or if not so), then why, and how?

Does this question pose problems? Some legal academics claim that Habermas facilitates their legal research, in far-reaching areas, such as contract law; tort law; democratic theory; parliamentary; and constitutional law. Derrida reminds us that the research we are actually doing is an illusion. Of course Derrida doesn’t put it in such terms, but his work in Difference indicates that ‘logic’ does not yield the results, the expected outcomes that people like Plato, Aristotle, Kant, and Habermas, have assumed. For him, logic does not allow us to discover that great, ethereal something called ‘truth’. And, the thesis that a word conceptually signifies a thing in an ‘outer world’ (in contradistinction to something known as an ‘inner self’) is less than accurate. So, to return to my question, do you see Derrida as similar to Habermas with respect to his level of influence and importance in legal academia? Is Derrida seen as relevant by legal scholars in the same way that they see Habermas as relevant?

Juan: I definitively agree that the question poses some problems. But I think it is interesting to draw on the relevance or presence or whatever, of Derrida by talking about another prominent scholar, about a philosopher like Habermas. Having said that, I would move immediately to a differentiation between the two. Because I somehow see Habermas as having a project that is about constructing a social theory ‘that fits’, while I see Derrida’s intervention as radicalizing the epistemological field in which legal discourse operates, and in that sense the way that scholars would lean on or deploy Habermas’ writings as very different. And again, and this brings me back to our previous discussion, I see Habermas as comforting, he gives comfort to the Liberal project of building the rule of law, improving democracy, etc. Guaranteeing the procedural equality of those who engage in the dialectics of trying to build a consensus. And I see Derrida as the opposite, as somehow raveling in producing discomfort. Or as emphasizing an existing discomfort.

Hassan: Before you go on to that, in what way does Derrida create this discomfort? And as you say, in what way does Derrida create this juxtaposition with Habermas? Are you saying, that, unlike Habermas, who believes in the possibility of communication and mutual understanding, Derrida does not think it possible?

---


Juan: Absolutely! I see Derrida as somehow saying that the whole notion of consensus is an illusion. Because the idea of consensus has this link to this idea of closure and of clarity. ‘We know when we see it’, and ‘there is a consensus.’ And ‘we know when it’s not there’, and when it’s not there, ‘we need to talk’. That is Habermas. Derrida would say: we don’t know when it’s there and when it’s not there and even if is there, it’s never an ending point with any kind of stability. It’s just an experience. And not something somehow linked to either ideas or knowledge or even, to look at it from a more materialistic Marxist perspective, interests, or relations between groups or classes. In that sense I would use a common distinction which I immediately find problematic, and say that Habermas’s project is constructive, while Derrida’s project is one of critique or one of problematizing. I could immediately problematize this distinction, by constructing Derrida as hyper-realist, or as hyper-pragmatic, by arguing that he shows how good intentions are based on a set of illusions and that he makes the point that we should snap out of it. But here I feel that I am projecting too much normativity on Derrida’s project. I think that this snapping out of anything, I don’t think that Derrida would actually say that at all.

Hassan: I would agree with you that maybe Derrida wouldn’t agree. But, certainly by saying that it might be different from something normative, your snapping idea, Juan, what would it then be? Descriptive? I think then Derrida would disagree that it is normative, or for that matter, its seeming opposite, ‘descriptive.’ But, I guess if Derrida’s project is normative, I would agree with you, its politics or morality is not about saving the world or ending world suffering, but about doing just that, “snapping.” A politics of snapping. But, I would distance myself from your insinuation that this politics of snapping is about awakening people from their slumbers, or about bringing them from ignorance toward knowledge, but about snapping them out of their sense that some ideas are not problematic, by revealing some problematics in the ideas they strongly believe in. But, there another thing that is interesting about invoking this idea of ‘normativity’, since critical theorists, including Derrida, consider law and politics to be related, connected, and even, interchangeable. But, interesting enough, someone like Habermas also sees law and politics as related.22 He sees law and politics mutually presupposing one another, in a type of mutual dances, inter-relating, and inhering in one another. In fact, both Habermas and Derrida would agree that positivists are mistaken in thinking that law is independent from politics. They would both concede that law and politics are intermingled, one in the other. But they would both agree that politics inheres

in many things, including their own academic projects. But, then, if that is the case, what does it mean for Derrida’s idea of deference to be normative? And if not normative, then, is it descriptive? The term descriptive is often seen as the binary opposite of normative. But, what would it mean that deference is descriptive? And, if one argues that Derrida’s work, or notion of deference, is neither “normative” nor “descriptive”, then what is it?

Juan: I must resist that distinction between normative and descriptive. Because I see, okay, normativity or description is of course something we can project on either or both.

Hassan: Absolutely...

Juan: Either on Habermas or on Derrida. But I would like to make the point that, even though I brought it up myself, when you asked me about scholars, and how they referred to Habermas or Derrida, and I started talking about Habermas and his projects, and about Derrida’s projects. However, now I would like to come back from that, and leave them for what they are, they have their projects, whatever, but talk instead in terms of how legal scholars use and appropriate and employ and refer to Habermas or Derrida. I think it’s more useful or more appealing to talk about these scholars, and not about Habermas or Derrida, but about the projects of these scholars. And we might be talking about the same thing by the way, but I could see some scholars using Derrida alongside Habermas, and not so much in opposition to, and having a constructivist project, while I can see some scholars using Habermas alongside Derrida in a critical or a ‘deconstructivist’ project. So, there are some using Habermas for the constructivist potential of his theories, but also Derrida for his constructivist potential, or the constructive potential of his view, or his writings. So in that sense I think we should talk more about the projects of those scholars if you want to. And, to continue on the line of ‘experience’ of the experiential, I think that the drive to use either Habermas or Derrida, or both, can be linked to the idea of anxiety, or to anxieties. So, constructivist scholars who want to somehow add or connect with projects of the rule of law and international organizations, and democracy, they might feel at a certain level an anxiety in the sense that they might have some lingering doubts about the actual possibility of this. And then they would defer to Habermas to deal with that sometimes. I might have some doubts but there is a scholar, this very smart person Jürgen Habermas, who worked it all out. He dealt with the doubts. He responded to them and in this is what I mean with comforting. At the same time I think some critical scholars, who have their own project of emphasizing indeterminacy and the fluidity of language might have some doubts because they themselves often experience language as highly determinant. And not fluid at all. They would defer that doubt to Derrida. So there is this thinker, Jacques Derrida, who addresses this stuff and
who demonstrates, once and for all, that language is fluid and that meaning is elusive. So they would seek comfort for their anxieties in Derrida. So that is I think one of the ways in which the different scholars would refer to either. At the same time you could argue that some constructivist scholars would seek comfort in Derrida, by somehow constructing Derrida as somebody, you know, they would cut off his radical wings, and they would use his article Force de Loi as somehow leaving intact the possibility of justice. So, they would pursue their constructivist project with the reassurance that even the guy who demonstrated the elusiveness of meaning, even him, he left intact the possibility of justice. So somehow even he does serve their projects. And at the same time some critical scholars might seek comfort in Habermas because he somehow acknowledges open-endedness and they would construct a Habermas that is not necessarily concerned with determinacy and closure but offers a formal setting, while he knows that things are problematic and within that knowledge, within that consciousness, merely offers a formal setting for dialogue to take place. So they would downplay his constructivism.

Hassan: That is very interesting, Juan. Critical scholars using Habermas for their own work, and constructivist Liberals who use Derrida to advance, perfect their Liberal constructivist projects. Yes, Juan, you are right. Indeed, Habermas, who is typically seen as advancing a nouveau Liberalism, newly justified through the optic of communication, believes in the idea of constructing democracy, although this is not to say that he thinks doing this is easy, or unproblematic. Habermas’ sparkling constructivism is in seeming sharp contrast with Derrida’s constant problematization of designing systems such as democracy, but as you know, if Derrida has talked about something again and again, it is language or communication. While Habermas sees communication as possible, as resulting in mutual understanding and shared knowledge, Derrida sees communication as riddled with ambiguities, and complicit in producing misunderstandings between interlocutors. And, as you say, despite this seeming opposition between the two thinkers, there are many critical legal scholars who still use, appropriate Habermas, and many Liberal constructivists who draw on Derrida’s ideas to advance their Liberal projects. In spite of coming from different philosophical places, Liberal constructivists and critical scholars mutually appropriate ideas from one another, for their own purposes. And, in fact, I have not only seen that in the academic literature, but at conferences as well. I have also had a personal experience that I would like to share that reminds me of what I have referred to as “mutual appropriation.” This is about a comment I received during the oral defense of my master’s thesis. On my examining committee was Princeton Professor Richard Falk.

But, for now, just some background information about Richard Falk: his work has a distinctly Liberal constructivist flavor to it, in the sense that he believes in the possibility of language, in the sharing and learning of values, and that he sees communicative interactions as useful, in fact, as a doorway to “progress.” This comes out quite clearly especially if you read his recent piece called Global Peoples Assembly in the *Stanford Journal of International Law*. During my Master’s degree thesis examination, Princeton Professor Richard Falk in that piece, he shows how international democracy might be possible to design if international civil society develops a Global Peoples Assembly, where representatives from different nation-states would communicate with one another. In spite of this, Richard Falk advised me to read more Derrida as a way to better perfect the design of international democracy. In this sense, it is interesting to note that to academics there are really two Derridas. One Derrida, the Derrida of Richard Falk, is an assistant, someone who inspires ideas to better develop Liberalism. Someone who fires the Liberal’s imagination, to think new thoughts, to go where no Liberal has gone before. This might account for Richard Falk’s undoubted creativity, and explain his original ideas on democracy. Of course, there is the other Derrida who sees communication as a bankrupt project because of how ambiguity pervades language. And, so all this to say, Juan, I agree, Habermas is used by critical scholars, and Derrida is used by constructivist Liberals.

Hassan: I want to move away from that and talk about this word that has been coming up also a lot, and I will then explain why I bring this up. The word is *critique*. Actually, the word “critique” is a word that is rarely used or perhaps not used at all by Derrida who uses many other words that we’ve been throwing around throughout our multiple conversations about him, such as *deference* and *différance*. Yet, I would say that the word critique is very much related to Derrida. The thing that I find interesting about the word critique is that often you and I use it in manners which come really close to resemble Derrida’s idea of *deference*. In fact, it’s almost as though Derrida has strongly influenced you and myself in terms of our perception of what critique is. I think that we both accept that there’s no *definable*, *essentialized* meaning of critique, but whenever we talk about it, it sounds to me as though our methodology is Derridian. But if you take *Semiotics of Critique* by Duncan Kennedy, we realize that the word *critique* is expansive in its definition. It includes people like Hegel, Weber, Schmitt, and Nietzsche includes people

---


like Kierkegaard,\textsuperscript{28} and it even includes people who work in general equilibrium
theories of economics\textsuperscript{29}, it includes Marx\textsuperscript{30} and Freud,\textsuperscript{31} it includes Catharine
MacKinnon, and it includes the obvious and usual suspects: Levi-Strauss, Judith
Butler,\textsuperscript{32} and De Saussure\textsuperscript{33} and obviously Derrida. Duncan generally describes
Derrida’s work as deconstruction. But the thing I am curious about is this word
“critique” that for some reason, in my mind, is related to Derrida’s ideas. But, then
again, we could argue that Derrida is not related to critique as well, or is only
associated to \textit{one} type of critique. Consider how Duncan Kennedy considers Hegel,
who paradigmatically differs from Derrida, as doing critique, (although admittedly
a different mode of critique, yet still critique). Duncan refers to Hegel as doing
\textit{organicist} critique\textsuperscript{34}…

Juan: Okay, okay. Maybe this goes to the point that you are somehow trying to
make, but in a way I have many doubts about it. My first instinct, my first reaction
is to say that all of these people can be seen as doing critique or as doing the

---

\textsuperscript{28} See CARL SCHMITT, THE CONCEPT OF THE POLITICAL (George Schwab trans., 1976) (1932); CARL SCHMITT,

\textsuperscript{29} For an example, see LEON WALRAS, ELEMENTS OF PURE ECONOMICS, OR THE THEORY OF SOCIAL WEALTH

\textsuperscript{30} See KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY (Frederick Engels & Ernest Untermann
eds., Samuel Moore & Edward Aveling trans., 1906); KARL MARX & FRIEDRICH ENGELS, THE COMMUNIST
MANIFESTO OF KARL MARX AND FRIEDRICH ENGELS (D. Ryazanoff ed., Eden Paul & Cedar Paul trans.,
1963); KARL MARX, THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE (Daniel de Leon trans., 3d ed. 1919);
KARL MARX, \textit{On the Jewish Question}, in KARL MARX: EARLY WRITINGS 1 (T.B. Bottomore ed. & trans.,
1965).

\textsuperscript{31} See SIGMUND FREUD, A GENERAL INTRODUCTION TO PSYCHOANALYSIS (G. Stanley Hall trans., 1920).


\textsuperscript{33} See FERDINAD DE SAUSSURE, COURSE IN GENERAL LINGUISTICS (Charles Bally et al. eds.,
Wade Baskin trans., Peter Owen Ltd. 1959) (1907-11).

\textsuperscript{34} Kennedy, \textit{supra} note 8 at 1156-7. See G.W.F. HEGEL, THE PHENOMENOLOGY OF MIND (J.B. Baillie trans.,
1971). Hegel’s work is very nicely explained by Herbert Marcuse. See HERBERT MARCUSE, REASON AND
REVELATION: HEGEL AND THE RISE OF SOCIAL THEORY (2d ed. 1960). \textit{See also} CATHERINE COLLIOIT-
opposite of it, whatever that is, and I would say, to connect to what I was saying earlier, that doing critique is to offer discomfort, anxiety, and doing the opposite of it, whatever that is, to offer hope and comfort. Now, I think this is a workable observation in the sense that, like I just said, within one book David Kennedy offers both anxiety and comfort. And Martti Koskenniemi offers both anxiety and comfort. So I see it as unproblematic to refer to Duncan’s article in that sense, and am not too surprised when he sketches all these shades of different critiques and puts people in boxes that are somehow, for some readers, counterintuitive. However, at the same time I have some problems with what I just said because, what is comfort and what is discomfort?, and when can you say that something is a critique and when can you say that something is the opposite? […]

[…]

C. Afterward

As described in the introduction, there is a sense of moving away from moving away throughout our conversation. And as we each read our transcripts, we both shared a sense of this moving away. This manifested itself in the type of alienation that comes with recognizing that the conversation came to an end. Not just an ending, but one that was experienced as abrupt. We felt the ending to be sudden. We felt, that if we just had one more question, maybe if I just asked you this, if I could only have answered that..., I could have further nuanced, qualified, and explained these notions further. And then, looking back on our entire script and how it developed, we both felt that, oh no, “I wish I had more time to talk about this or that.” “And, if I only read my transcript as I was speaking, I could have pointed out this or that.”

The sense of abruptness, sudden as it seemed, feeling like a smack, could be explained by this act of moving away from moving away. Somehow we felt we still wanted to move away. But more than that, it seemed that in the beginning or in the middle of the conversation, we had experienced this sense that ‘whatever I haven’t yet said or completed, that I haven’t yet nuanced will be corrected, and sealed, fixed later on’. The implicit, unconscious hope was to move away temporarily, and to return later to frame or nuance our previous utterances. This anticipation, hopeful as it might have seemed, resulted in producing a sense in which ending, what ending? oh no, the ending of our movement away from movement was experienced as abrupt, as alienating.

35 See MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (Lakimiesliiton Kustannus, 1989).
Acknowledging Derrida’s idea, we recognized that ‘doing better,’ ‘speaking more,’ ‘nuancing more,’ wasn’t going to produce a better, so-called more coherent conversation. Conversations are not logocentric, sequenced, clear, with each utterance flowing with a constancy that produces a sense of comprehensive completion. We recognized that continuing our conversation only meant continuing to move away from moving away – to ask more questions that only produce further unexpected questions to answer, which only produce further answers that begin to sound problematic, producing further questioning. Deleuze and Parnet say this in the following passage:

Many people think that it is only by going back over the question that it’s possible to get out of it...[People] won’t stop returning to the question in order to get out of it. But getting out never happens like that. Movement always happens behind the thinker’s back, or in the moment when he blinks.36

While editing our piece, we also recognized that moving away from moving was continuing to occur. We had an idea of what it means to speak clearly, hoping that our editing would re-frame, order the conversation to live up to that. Our discussions began to reveal that we not only constructed our own type of phonocentrism, and we were confronting the contingency of it. Why is this too long? How could this follow that? Why is it that you seem to ramble on? Did you not say that differently in the conversation? There was a way to talk, to speak that made speech clear, that made speech understandable. After editing and re-editing our piece, we came face to face with our own phonocentric biases, now recognizing that our activity constituted a type of experiential critique of our unconscious, phonocentric biases.

Throughout our activity, which included the conversation and the editing a transcribed version of the conversation, we recognized that we moved not only away from our questions, but also that we were moving away from the oral word to the written word, shifting perpetually. Moving away from speech to writing and then from writing to speech. Somehow the oral and the written began to collapse, each format producing layers of ambiguity in the other. When we sent each other the written edits, we wondered to ourselves “This does not seem clear. But I wonder if I can really discuss this by email. I will have to speak about this.” And the reverse also occurred, when it seemed that the oral word was too difficult, because it was too cumbersome to explain, and some kind of record seemed necessary as a basis of reflection, we wrote to each other, thinking that the oral

36 DELEUZE AND PARNET, supra note 2 at 1.
word was insufficient. And this was another type of moving away from moving away.

A conversation is a peculiar activity. It brings us face to face with our logocentric and phonocentric biases, but also face to face with ourselves. One can potentially see a conversation as a dialogue between two persons, each distinctive, responding logically to the other. Somehow the idea is that Juan and Hassan are speaking, these are Juan’s ideas here, oh, and there are Hassan’s ideas. It relies on an idea of the person – the self. And in fact, this is the way that we present it. But after moving away from moving away, we came to recognize that this divide between being and becoming in a conversation is another logocentric bias. For Deleuze and Parnet “a conversation is…simply the outline of a becoming.”

Indeed, this idea of a conversation as the outline of a becoming was made evident to us as we each struggled both to communicate something called ourselves while at least sound as though our communications were crafted as responses to our colleague’s questions. Somehow we were not articulating a particular view, but rather caught in a web of questions on one end and our desire to speak our thoughts on the other. We were not separate to the discussion, we were the discussion. We were becoming, hence the sense of moving away from moving away. Or, to put it differently: of moving ourselves, or our-self, away from another self. Always in transition, never at any destination. Hence, our sense of alienation when we ended, thinking ‘could this really be the end? But there’s so much more!’

This idea that ‘there is so much more’ presupposes that certain thoughts must be made for the sake of comprehensiveness, as suggested above. But those thoughts might change as we move along. And so, what we started off thinking that it was necessary to discuss changes as we discuss further with our colleagues, only making us desire to share the experience of what we now think is necessary to discuss, in order to remain comprehensive and rigorous. We are moving away from one self with particular thoughts to another self. Moving away from our self to another self, as the conversation crafts, shapes us, makes us realize how wrong, or even how right we are, in turn transforming us, and making us move away into new selves perpetually. This is reflected in the words of Deleuze and Parnet, who say the following about becoming:

The question “What are you becoming?” is particularly stupid. For as someone becomes, what he is becoming changes as much as he does himself…The wasp and the orchid provide the example. The orchid seems to form a wasp image, but in fact

37 Id. at 2.
there is a wasp-becoming of the orchid, an orchid becoming of the wasp, a double capture since ‘what’ each becomes changes no less than ‘that which’ becomes. The wasp becomes part of the orchid’s reproductive apparatus at the same time as the orchid becomes the sexual organ of the wasp. One and the same becoming, a single bloc of becoming... 38

As explained in the paragraphs preceding the passage above by Deleuze and Parnet, becoming is about recognizing that the changes are not separate from our identities, but are us, we are perpetually becoming, never being or the self. The self is not fixed, but moving away from itself, again and again. But, another insight that struck us both as fascinating is the fact that, as Deleuze and Parnet say: “The wasp becomes part of the orchid’s reproductive apparatus at the same time as the orchid becomes the sexual organ of the wasp. One and the same becoming, a single bloc of becoming...” The sense we got while we did our conversation that our changes, questions, the changes to our questions, the changes in our answers, were a part of us, a feature of our becoming. But also that our becoming was the product of our mutual interventions. That a conversation is not necessarily the product of two people discussing in the illusory logocentric design that presents itself, but as an entity as well, an entity in which the conversation is a becoming, a move away from the two persons who spoke, a thing separate, without loyalty to anything or anyone. Something that itself, by itself, has moved away, perhaps a long time ago, at the moment of its inception – conception – from the authors. Away from their grip.

38 Id..
There has perhaps been no greater thinker of the future than Jacques Derrida. Throughout his entire body of work Derrida constantly returns to the thinking of the “perhaps,” of the arrizant. This thinking of the “perhaps” takes shape as what is “new” and other to our world, something that is therefore unknowable even as a horizon of ideality that both arises out of and points to what ought to be in any given world. I renamed deconstruction the philosophy of the limit so as to emphasize Derrida as the protector of what is still yet to come. My argument was fundamentally that Derrida radicalized the notion of the Kantian meaning of “laying the ground” as the boundaries for the constitution of a sphere of valid knowledge, or determinant judgment. In Kant, to criticize aims to delimit what is decisive to the proper essence of a sphere of knowledge, say for example science. The “laying of limits” is not primarily a demarcation against a sphere of knowledge, but a delimiting in the sense of an exhibition of the inner construction of pure reason. The lifting out of the elements of reason involves a critique in the sense that it both sketches out the faculty of pure reason and surveys the project as the whole of its larger architectonic or systematic structure.

But critique, in Kant, is a setting of boundaries in the sense that human reason is seen as a finite creature. The finitude of reason, in a sense, defines unalterable
limits for Kant. The price we pay for a verifiable island of truth is that reason, understood as finite reason, can never reach beyond the limits of the human mind—a knowing subject who intuits the world through a transcendental imagination in which all objects come to this subject bounded already by space and time. Martin Heidegger famously wrote that Kant takes us to the limit of the very notion of critique and ultimately raises, but does not fully address, the question of “who” is this finite being that must think through the transcendental imagination. “Who,” in Heidegger’s words, is “man,” and so this “who” is da sein. That Heidegger himself so carefully addressed Kant and the way in which Kant pushes us to answer the question of “who is man” is an important part of philosophical history that has often been lost. As Derrida has himself noted, in France those neo-Kantians who focused almost exclusively on the architecture of the system and the existential phenomenologists that take up the question “who is man” were both divided from one another and, indeed, hostile to one another. And yet as I suggested Heidegger’s own thinking can only be grasped if it is understood as a deep and profound response to Kant; and, if you will the question, the critique in Kant’s sense demands that we ask. One aspect of the renaming of the Philosophy of the Limit was to return Kant to his rightful place in what has now become called continental philosophy. We can not rightly understand the significance of Kantian critique if we do not struggle with those aspects of Kant that are most troublesome, at least to certain schools of neo-Kantianism—the transcendental imagination and synthetic a priori judgment. I wanted, in this way, to bring a Kantian specter that I believe haunts Derrida’s work into the vision of deconstruction that had dominated the academy in the United States, at least at the time when I wrote Philosophy of the Limit.

We know several interpretations of deconstruction: as a method of reading, as a demonstration of the infinite regress in language that undermines the foundations of determinant judgment, as serious play that opens up new possibilities of interpretation in the conventions of meaning. I was not so much arguing against the validity of these interpretations of deconstruction as much as I thought it was necessary to open up the ethical as the heart of the matter of deconstruction. In the Philosophy of the Limit I sought to show that Derrida radicalizes the notion of the “laying of the ground” in Kant’s critique by showing us that the a priori of the “laying of the ground” of reason can never be overcome. Nor can the question of “who is man” be answered definitively as another ground for pure reason. Derrida set deconstruction to work against all attempts to ontologize the meaning of “man,” whether optimistic or pessimistic. Therefore, the “deontological” moment in Derrida was always done to show us that it was impossible to know definitively what is possible or what is impossible. Most notably, Derrida set deconstruction to work in Specters of Marx against the ontologization of a triumphant liberalism that in many different declarations suggests “man” is definitively the liberal citizen of
modern western democracies, and that the rest of humanity was fated to catch-up with this negatively idealized “man.” In this sense, deconstruction shows us that the limits of the knowable exist in the name of a future that might yet always arrive. The chapter published here was originally called, “From the Lighthouse: The Promise of Redemption and the Possibility of Legal Interpretation.” In the Politics of Friendship Derrida returns to my metaphor of lighthouse and writes as follows:

Yes, like searchlights without a coast, they sweep across the dark sky, shut down or disappear at regular intervals and harbour the invisible in their very light. We no longer even know against what dangers or abysses we are forewarned. We avoid one, only to be thrown into one of the others. We no longer even know whether these watchmen are guiding us towards another destination, nor even if a destination remains promised or determined.

We wish only to think that we are on the track of an impossible axiomatic which remain to be thought. Now, if this axiomatic withdraws, from instant to instant, from one ray of the searchlight to another, from one lighthouse to the next (for there are numerous lighthouses, and where there is no longer any home these are no longer homes, and this is what is taking place: there are no longer any homes here), this is because darkness is falling on the value of value, and hence on the very desire for an axiomatic, a consistent, granted or presupposed system of values.1

Here, in this quotation, Derrida is true to his constant reminder that what remains “other,” only appearing briefly as a glimmer, might come in the form of a warning for what is new; the truly different might not arrive for us as the good or the just, but indeed might be its exact opposite.

We can not know the future precisely; if something is the future, the other, then it is not in our system of calculable knowledge. Thus, the lighthouse, or lighthouses, can be read as giving us warnings. But of course it can also be read as giving us hope of redemption held out—for Derrida’s famous phrase—in the messianism without messiah. My interpretation, if you will, is more optimistic in that I read my

1 JACQUES DERRIDA, THE POLITICS OF FRIENDSHIP 81 (George Collins trans., 1997).
own metaphor as giving us the glimmer of a good that is always beyond our immediate horizon of knowledge. The lighthouse, of course, could be read either way. Derrida is right that there is always a risk and a promise of redemption and the relentless protection of the “yet to come” as what might be different, as what might be other, and, yes, what might be a redeemed world. There is no promise of redemption without this risk. And yet, as Derrida himself always wrote, his own deconstruction was always in the spirit of Marxism in that he sought to delimit the realm of the possible in the name of the what might yet still be possible—the dream of a redeemed humanity that is inseparable from ideal of communism.

***

The Violence of the Masquerade: Law Dressed Up as Justice

From our childhood, most of us are familiar with the fairy tale “The Emperor’s New Clothes.” Throughout this book I have challenged a reading of “deconstruction” that has been proposed by its friends and its foes in legal circles. My decision to re-name deconstruction the philosophy of the limit has to do with the attempt to make the ethical message of deconstruction “appear.” The more accepted readings understand deconstruction to expose the nakedness of power struggles and, indeed, of violence masquerading as the rule of law. With this exposure, the intervention of deconstruction supposedly comes to an end.2 The enemies of “deconstruction” challenge this exposure as itself an act of violence which leaves in its stead only the “right” of force and, as a result, levels the moral differences between legal systems and blurs the all-too-real distinctions between different kinds of violent acts. We have seen this critique specifically evidenced in the response to Derrida’s writing on Rousseau. I have countered this interpretation as a fundamental misreading, especially insofar as it misunderstands the Derridean double gesture.

At first glance, however, the title of Jacques Derrida’s essay, “Force of Law: The ‘Mystical Foundations of Authority’,”3 seems to confirm this interpretation. It also, in turn, informs Dominick LaCapra’s subtle and thoughtful commentary,4 which evidences his concern that Derrida’s essay may – in our obviously violent world – succumb to the allure of violence, rather than help us to demystify its seductive power. I refer to LaCapra’s text because it so succinctly summarizes the political

---

and ethical concern that deconstruction is necessarily “on strike” against established legal norms as part of its refusal to positively describe justice as a set of established moral principles.

To answer that concern we need to examine more closely the implicit position of the critics on the significance of right as established, legal norms that “deconstruction” is accused of “going on strike” against. This becomes extremely important because it is precisely the “on strike” posture not only before established legal norms, but also in the face of the very idea of legal norms that troubles LaCapra. Undoubtedly, Derrida’s engagement with Walter Benjamin’s text, “The Critique of Violence,” has been interpreted as further evidence of the inherent danger in upholding the position that law is always deconstructible. It is this position that makes possible the “on strike” posture toward any legal system. But it is a strike that supposedly never ends. Worse yet, it is a strike that supposedly cannot give us principles to legitimately curtail violence. This worry is a specific form of the criticism addressed in chapter 2 that deconstruction, or the philosophy of the limit as I have renamed deconstruction, can only give us the politics of suspicion. I, on the other hand, have argued throughout that deconstruction, understood as the philosophy of the limit, gives us the politics of utopian possibility. As we saw in the last chapter, the philosophy of the limit, and more specifically the deconstruction of the privileging of the present, protects the possibility of radical legal transformation, which is distinguished from mere evolution of the existing system. But we still need to re-examine the stance on violence which inheres in Derrida’s exposure of the mystical foundations of authority if we are to satisfactorily answer his critics. To do so we will once again return to the ethical, political, and juridical significance of his critique of positivism. The case we will examine in this chapter is *Bowers v. Hardwick.* But let me turn first to Derrida’s unique engagement with Benjamin’s text.

Walter Benjamin’s text has often – and to my mind mistakenly – been interpreted to erase human responsibility for violence, because the distinction between mythic violence – that is, the violence that founds or constitutes law (right) – and divine violence, which is the “antithesis” of mythical violence because it destroys rather than founds, expiates rather than upholds, is ultimately undecidable for Benjamin. The difference between acceptable and unacceptable violence as well as between divine and mythic violence is ultimately not cognitively accessible in advance. We

---


6 Id. at 281-83.

will return to why this is the case later in this essay. Law-making or founding violence is then distinguished, at least in a preliminary manner, from law-preserving or conserving force. We will see the significance of this further distinction shortly. If this undecidability were the end of the matter, if we simply turned to God’s judgment, there would be no critique of violence. Of course, there is one interpretation already suggested and presented by LaCapra that Benjamin – and then Derrida - erases the very basis on which the critique of violence proceeds. But this interpretation fails to take notice of the opening reminder of Benjamin’s text, to which Derrida returns us again and again, and which structures the unfolding of Benjamin’s own text. To quote Benjamin:

The task of a critique of violence can be summarized as that of expounding its relation to law and justice. For a cause, however effective, becomes violent, in the precise sense of the word, only when it bears on moral issues. The sphere of these issues is defined by the concepts of law and justice.

Critique, in this sense, is hardly the simple glorification of violence per se, since Benjamin carefully distinguishes between different kinds of violence. Indeed, both Benjamin and Derrida question the traditional positivist and naturalist justifications for violence as legitimate enforcement for the maintenance of an established legal system or as a necessary means to achieve a just end. In other words, both thinkers are concerned with rationalizations of bloodless bureaucratic violence that LaCapra rightfully associates with some of the horrors of the twentieth century. Benjamin’s own text speaks more to the analysis of different kinds of violence and more specifically to law as law conserving violence, than it does to justice. But Derrida explicitly begins his text, “The Force of Law,” with the “Possibility of Justice.” His text proceeds precisely through the configuration of the concepts of justice and law in which the critique of violence, understood as “judgement, evaluation,

8 Benjamin, supra note 5 at 277-79; Derrida, supra note 3 at 983-85, 989.
9 Benjamin, supra note 277.
10 Benhabib, supra note 2. Seyla Benhabib misunderstands Benjamin here.
11 LaCapra, supra note 4 at 1077.
12 Derrida, supra note 3 at 919. I want to note here that this is also a reference to the title of the conference, “Deconstruction and the Possibility of Justice,” held at the Benjamin N. Cardozo School of Law in October 1989. “Force of Law” was the basis of Jacques Derrida’s keynote address at the conference.
examination that provides itself with the means to judge violence,” must take place.

As we have seen, it is only once we accept the uncrossable divide between law and justice that deconstruction both exposes and protects in the very deconstruction of the identification of law as justice that we can apprehend the full practical significance of Derrida’s statement that “deconstruction is justice.” What is missed in the interpretation I have described and attributed to LaCapra is that the undecidability which can be used to expose any legal system’s process of the self-legitimation of authority as myth, leaves us – the us here being specifically those who enact and enforce the law – with an inescapable responsibility for violence, precisely because violence cannot be fully rationalized and therefore justified in advance. The “feigning [of] presence” inherent in the founding violence of the state, using Derrida’s phrase, disguises the retrospective act of justification and thus seemingly, but only seemingly, erases responsibility by justification. To quote Derrida:

Here we “touch” without touching this extraordinary paradox: the inaccessible transcendence of the law before which and prior to which “man” stands fast only appears infinitely transcendent and thus theological to the extent that, so near him, it depends only on him, on the performative act by which he institutes it: the law is transcendent, violent and non-violent, because it depends only on who is before it and so prior to it-on who produces it, founds it, authorizes it in an absolute performative whose presence always escapes him. The law is transcendent and theological, and so always to come, always promised, because it is immanent, finite and so already past.

Only the yet-to-come (avenir) will produce intelligibility or interpretability of this law.

---

13 Derrida, supra note 3 at 983.
14 Id. at 945.
15 Id. at 991.
16 Id. at 993.
Law, in other words, never can catch up with its projected justification. Therefore, there can be no insurance of a metalanguage in relation to the “performativity of institutional language or its dominant interpretation.” As we saw in the last chapter, this insistence that there can be no metalanguage in which to establish the “external” norms by which to legitimate the legal system separates Derrida from Habermas. The question then becomes, what does it mean practically for the field of law that we cannot have such insurance, other than that it separates Derrida from Habermas’ neo-Kantianism? For LaCapra this lack means that we cannot in any way whatsoever justify legal principles of insurance. If we cannot justify legal principles, then, for LaCapra, we will necessarily be left with an appeal to force as the only basis for justification. To quote LaCapra:

A second movement at least seems to identify the undecidable with force or even violence and to give to violence the power to generate or create justice and law. Justice and law, which of course cannot be conflated, nonetheless seem to originate in force or violence. The extreme misreading of this movement would be the conclusion that might makes right—a conclusion explicitly rejected at one point in Derrida’s essay but perhaps insufficiently guarded against at others.

For LaCapra, in spite of his clear recognition that Derrida explicitly rejects the idea that might makes right, there is still the danger that undecidability will lead to this conception of law and the role of legal argument and justification within legal interpretation. But, indeed, the opposite position is implied. Might can never justify right, precisely because the establishment of right can never be fully rationalized. It also does not lead to the replacement of legal argument through an appeal to principle with violence, as LaCapra seems to fear it might, if taken to its logical conclusion.

To emphasize once again why deconstruction does not reduce itself to the most recent and sophisticated brand of legal positivism developed in America which, of course, asserts that might does indeed make right, it is useful to again contrast “deconstruction” as the force of justice against law with Stanley Fish’s insistent identification of law with justice. Fish understands that as a philosophical matter

---

17 Id. at 943.
18 LaCapra, supra note 4 at 1067.
19 See STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF
law can never catch up with its justifications, but that as a practical reality its functional machinery renders its philosophical inadequacy before its own claims irrelevant. Indeed, the system sets the limit of relevance. The machine, in other words, functions to erase the mystical foundations of its own authority. My critical disagreement with Fish, a disagreement to the support of which I am bringing the force of “deconstruction,” is that the legal machine he celebrates as a marvel, I abhor as a monster. Once again, as in the last chapter, we are returned to the divergent viewpoints of different observers.

In the case of law, there is a reason to be afraid of ghosts. But to see why I think the practical erasure of the mystical foundation of authority by the legal system must be told as a horror story, let me turn to an actual case that embodies the two myths of legality and legal culture to which Fish consistently returns us. For Fish, contemporary American legal interpretation, both in constitutional law and in other areas, functions primarily through two myths of justification for decision. The first is “the intent of the founding fathers,” or some other conception of an original foundation. The second is “the plain meaning of the words”, whether of the relevant statutes or precedent, or of the Constitution itself. In terms of “deconstruction,” even understood as a practice of reading, the second can be interpreted as the myth of full readability. These myths, as Fish well recognizes, conserve law as a self-legitimating machine by returning legal interpretation to a supposed origin that repeats itself as a self-enclosed hermeneutic circle. This, in turn, allows the identification of justice with law and with the perpetuation of the “current” legal system.

---

20 In his essay, Working on the Chain Gang, Fish notes:

Paradoxically, one can be faithful to legal history only by revising it, by redescribing it in such a way as to accommodate and render manageable the issues raised by the present. This is a function of the law’s conservatism, which will not allow a case to remain unrelated to the past, and so assures that the past, in the form of the history of decisions, will be continually rewritten. In fact, it is the duty of a judge to rewrite it (which is to say no more than that it is the duty of a judge to decide), and therefore there can be no simply “found” history in relation to which some other history could be said to be “invented.”

Id. at 94 (footnote omitted; emphasis in original).
To “see” the violence inherent in being before the law in the many senses of that phrase which Derrida plays on in his text, let us imagine the scene in Georgia that sets the stage for Bowers v. Hardwick.22 Two men are peacefully making love, little knowing that they were before the law and soon to be proclaimed guilty of sodomy as a criminal offense. Fish’s glee is in showing the impotence – and I am using that word deliberately – of the philosophical challenge or political critique of the legal system. The law just keeps coming. Remember the childhood ghost story “Bloody Bones” to help you envision the scene. The law is on the first step. The philosopher desperately tries to check the law – but to no avail by appealing to “outside” norms of justice. The law is on the second step. Now the feminist critic tries to dismantle the law machine which is operating against her. Again, the law simply wipes off the criticism of its masquerade and here, heterosexual bias, as irrelevant. The law defines what is relevant. The law is on the third step. It draws closer to its victims. Fish admires precisely this force of law, the so-called potency, to keep coming in spite of its critics and its philosophical bankruptcy, a bankruptcy not only acknowledged but continually exposed by Fish himself. Once it is wound up, there is no stopping the law, and what winds it up is its own functions as elaborated in the myths of legal culture. Thus, although law may be a human construct insofar as we are all captured by its mandates, its constructibility, and therefore its potential deconstructibility, has no “consequences.”23


23 In Dennis Martinez and the Uses of Theory, Fish responds to Mark Kelman, quoting:

It is illuminating and disquieting to see that we are nonrationally constructing the legal world over and over again... In fact, it is neither. It is not illuminating because it does not throw any light on any act of construction that is currently in force, for although your theory will tell you that there is always one (or more) under you feel, it cannot tell you which one it is or how to identify it. It is not disquieting because in the absence of any alternative to interpretive construction, the fact that we are always doing it is neither here nor there. It just tells us that our determinations of right and wrong will always occur within a set of assumptions that could not be subject to our scrutiny; but since everyone else is in the same boat, the point is without consequence and leaves us exactly where we always were, committed to whatever facts and certainties our interpretive constructions make available.

Fish, supra note 19 at 395 (footnote omitted).
In *Bowers* we do indeed see the force of law as it makes itself felt, in spite of the criticisms of “the philosophers” of the opinion. Justice White concludes and upholds as a matter of law that the state of Georgia has the right to make homosexual sodomy a criminal offense. Some commentators, defending the opinion, have relied precisely on the myth of the intent of the founding fathers. The argument is that there is no evidence that the intent of the founding fathers was to provide a right of privacy or any other kind of right for homosexuals.

The arguments against the philosophical justification of this position repeated by Fish are obvious. The concept of intent is problematic when speaking of living writers, for all the reasons discussed in writing on legal interpretation. But in the case of interpreting dead writers who have been silent on the issue, the subtle complexities of interpreting through intent, are no longer subtle, but are manifestly ludicrous. The process of interpreting intent always involves construction once there is a written text that supposedly introduces the intent. But here, there is only silence, an absence of voice, simply because the founding fathers never addressed homosexuality. That this silence means that there is no right of homosexuality and they thought it so self-evident as never to speak of it, is clearly only one interpretation and one that can never be clarified except in the infinite regress of construction. Since the process involved in interpreting from silence clearly entails construction, the judge’s own values are involved. In this case we do not even need to go further into the complexities of readability and unreadability of a text, because we are literally left with silence, no word on homosexuality.

But in Justice White’s opinion we are, indeed, returned to the problem of the readability or the unreadability of the text of the Constitution and of the precedent that supposedly just “states” its meaning. Justice White rejects the Eleventh Circuit’s holding that the Georgia statute violated the respondent’s fundamental right “because his homosexual right is a private and intimate association that is beyond the reach of state regulation by reason of the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment.” The Eleventh Circuit relied on


The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

U.S. Const. amend. IX.
the line of precedent from Griswold\textsuperscript{27} through Roe\textsuperscript{28} and Carey\textsuperscript{29} to read the right of privacy to include “homosexual activity.” Justice White rejects this reading. He does so, as we will see, by narrowly construing the right supposedly implicated in this case and then by reading the language of the holding of each case in a “literalist” manner implicitly relying on “the plain meaning of the words.” Do we find any language in these cases about homosexuality? Justice White cannot find any such language. Since he cannot find any such language, Justice White concludes that “the plain meaning of the words” did not mandate this extension of the right of privacy to “homosexual activity.” To quote Justice White:

> Accepting the decisions in these cases and the above description of them, we think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent.\textsuperscript{30}

We do not need to develop a sophisticated philosophical critique to point to the flaw in Justice White’s “literalist” interpretation of the cases. We can simply rely on one of the oldest and most established “principles” of constitutional interpretation: the principle that cases should be narrowly decided. If one accepts that this principle was operative in the cases associated with the establishment of the “right of privacy”\textsuperscript{31} then the reason none of these cases “spoke” to homosexuality was that

\begin{quote}
The Due Process Clause of the Fourteenth Amendment provides that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.

U. S. Const. amend. XIV, cl. 1.
\end{quote}

\textsuperscript{27} Griswold v. Connecticut, 381 U.S. 479 (1965).
\textsuperscript{28} Roe v. Wade, 410 U.S. 113 (1973).
\textsuperscript{31} The cases in this line include Skinner v. Oklahoma, 316 U.S. 535 (1942), which struck down a law requiring sterilization of those thrice convicted of certain felonies involving “moral turpitude,” on
the question of homosexuality wasn’t before them. Judges under this principle, or in Luhmann’s terms, under this system, are to decide cases, not advance norms or speculate about all possible extensions of the right.

When and how the right is to be extended is dependent on the concrete facts of each case. In spite of what he says he is doing, Justice White, like the commentators already mentioned, is interpreting from a silence, and a silence that inheres in the principle that constitutional cases in particular should be construed narrowly. Need I add here that if one is a homosexual, the right to engage in homosexual activity might have everything to do with “family, marriage, or procreation,” even though Justice White argues the contrary position? As a result, his very interpretation of the “privacy” cases – as being about “family, marriage, or procreation” – could be used against him. Can White’s blindness to this obvious reality be separated from his own acceptance of an implied heterosexuality as legitimate and, indeed, the only right way to live?

Justice White’s opinion does not simply rest on his reading of the cases, but also rests on an implicit conception of the readability of the Constitution. For White, the Constitution is fully readable. Once again, he does not find anything in the Constitution itself that mentions the right to homosexuality. Therefore, he interprets the Eleventh Circuit as creating such a right out of thin air, rather than on a reading of the Constitution and of precedent that understands what is fundamental and necessary to privacy as a right “established” by the Constitution. For Justice White, to simply create a “new” fundamental right would be the most dangerous kind of activism, particularly in the case of homosexuality. And why is this the case for Justice White? As he explains:

> Proscriptions against that conduct have ancient roots. Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 states when they ratified the Bill of Rights. In 1868, when the

grounds which included that the punishment interfered with the individuals’ rights in procreation; 
Loving v. Virginia, 388 U.S. 1 (1967), in which the Supreme Court overturned a miscegenation law, in part because it interfered with the right to marry; Griswold v. Connecticut, which affirmed the rights of married persons to receive information on the use of contraceptives as part of their rights to conduct their family life free from state interference; Eisenstadt v. Baird, 405 U.S. 438 (1972), which addressed the right of a person, regardless of marital status, to make decisions as to her own procreative choices; Roe v. Wade, providing for the right of a woman to have an abortion; and Carey v. Population Services International, 431 U.S. 678 (1977), in which the Court disallowed a law prohibiting distribution of non-prescription contraceptives by any but pharmacists or distribution to minors under the age of 16.

Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults. Against this background, to claim that a right to engage in such conduct is “deeply rooted in this Nation’s history and tradition” or “implicit in the concept of ordered liberty” is, at best, facetious.\(^3\)

For White, not only is the danger of activism always to be guarded against, but it must be specifically forsaken in a case such as this one. Again, the justification for his position turns on his implicit conception of the readability of the Constitution. To quote Justice White, “[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.”\(^4\)

I have critiqued the charge of judicial activism elsewhere as a fundamental misunderstanding of the inevitable role of normative construction in legal interpretation\(^5\) once we understand that interpretation is also evaluation.\(^6\) Fish has his own version of this critique. The point I want to make here is that for Fish, the power of law to enforce its own premises as the truth of the system erases the significance of its philosophical interlocutors, rendering their protest impotent. The concrete result in this case is that the criminal sanctions against gay men are given constitutional legitimation in that it is now proclaimed to be legally acceptable for states to outlaw homosexual love and sexual engagement.

Is this a classic example of the conserving violence of law? The answer, I believe, is unquestionably yes. But more importantly, given the analysis of Justice White, it demonstrates a profound point about the relationship, emphasized by Derrida, between conserving violence and the violence of foundation. To quote Derrida, and


\(^6\) See FISH, Working on the Chain Gain, in DOING WHAT COMES NATURALLY, supra note 19 at 93-95.
I quote in full, because I believe this quotation is crucial to my own response to LaCapra’s concern that Derrida yields to the temptation of violence:

For beyond Benjamin’s explicit purpose, I shall propose the interpretation according to which the very violence of the foundation or position of law (Rechtsetzende Gewalt) must envelop the violence of conservation (Rechtserhaltende Gewalt) and cannot break with it. It belongs to the structure of fundamental violence that it calls for the repetition of itself and founds what ought to be conserved, conservable, promised to heritage and tradition, to be shared. A foundation is a promise. Every position (Setzung) permits and promises (perm et pro-met), it positions en mettant et en promettant. And even if a promise is not kept in fact, iterability inscribes the promise as the guard in the most irruptive instant of foundation. Thus it inscribes the possibility of repetition at the heart of the originary. . . . Position is already iterability, a call for self-conserving repetition. Conservation in its turn refounds, so that it can conserve what it claims to found. Thus there can be no rigorous opposition between positioning and conservation, only what I will call (and Benjamin does not name it) a differantielle contamination between the two, with all the paradoxes that this may lead to.37

The call for self-conserving repetition is the basis for Justice White’s opinion, and more specifically, for his rejection of “reading into” the constitution, in spite of an interpretation of precedent, a fundamental liberty to engage in “homosexual sodomy.” As White further explains:

Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution’s text involves much more than the imposition of the Justices’ own choice of values on the States and the Federal Government, the Court has sought to identify

37 Derrida, supra note 3 at 997.
the nature of the rights qualifying for heightened judicial protection.\textsuperscript{38}

To summarize again, the result for White is that “fundamental liberties” should be limited to those that are “deeply rooted in the Nation’s history and tradition.”\textsuperscript{39}

For Justice White, as we have also seen, the evidence that the right to engage “in homosexual sodomy” is not a fundamental liberty is the “fact” that at the time the Fourteenth Amendment was passed, all but five of the thirty-seven states in the union had criminal sodomy laws and that most states continue to have such laws. In his dissent, Blackmun vehemently rejects the appeal to the fact of the existence of antisodomy criminal statutes as a basis for the continuing prohibition of the denial of a right, characterized by Blackmun not as the right to engage in homosexual sodomy but as “the right to be let alone.”\textsuperscript{40}

Quoting Justice Holmes, Blackmun reminds us that:

\begin{quote}
It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.
It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.\textsuperscript{41}
\end{quote}

Derrida gives us insight into how the traditional positivist conception of law, in spite of Justice Holmes’ remark and Justice Blackmun’s concern, consists precisely in this self-conserving repetition. For Fish, as we have seen, it is the practical power of the legal system to preserve itself through the conflation of repetition with justification that makes it a legal system. Of course, Fish recognizes that repetition as iterability also allows for evolution. But evolution is the only possibility when justification is identified as the functioning of the system itself. Law, for Fish-in spite of his remarks to the contrary-is not deconstructible and, therefore, is also not radically transformable. As a system it becomes its own “positive” social reality in which the status of its own myths cannot be challenged.


\textsuperscript{40} Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (Blackmun, J. dissenting; quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

\textsuperscript{41} Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (quoting Oliver W. Holmes, The Path of the Law, 10 HARV. L. REV. 469 (1897)).
It is, however, precisely the status as myth of its originary foundation and the "plain meaning of the words"—or in more technical language, the readability of the text—that Derrida challenges in the name of justice. We are now returned to LaCapra’s concern about the potentially dangerous equalizing force in Derrida’s own argument. LaCapra reinterprets what he reads as one of Derrida’s riskier statements. Let me first quote Derrida’s statement: “Since the origin of authority, the foundation or ground, the position of law can’t by definition rest on anything but themselves, they are themselves a violence without ground.”

LaCapra reformulates Derrida’s statement in the hope of making it less subject to abuse. To quote LaCapra: “Since the origin of authority, the foundation or ground, the position of the law can’t by definition rest on anything but themselves, the -question of their ultimate foundation or ground is literally pointless.”

My disagreement with LaCapra’s restatement is as follows: it is not that the question of the ultimate ground or foundation of law is pointless for Derrida; instead, it is the question of the ultimate ground, or correctly stated, lack of such, that must be asked, if we are to heed the call of Justice. That no justificatory discourse can or should insure the role of a metalanguage in relation to its dominant interpretation, means that the conserving promise of law can be never be fully actualized in a hermeneutical circle that successfully turns back in on itself and therefore grounds itself.

Of course, there are, at least at first glance, two kinds of violence at issue here; the violence of the foundation or the establishment of a legal system and then the law-conserving or jurispathetic violence of an actual legal system. But Derrida demonstrates in his engagement with Benjamin’s text just how these two kinds of violence are contaminated. To concretize the significance of this contamination, we are again returned to Bowers. The erasure of the status of the intent of the founding fathers and the plain meaning of the words as legal myths is the basis for the justification of the jurispathic or law-conserving violence of the decision. The exposure of the mystical foundation of authority, which is another way of writing that the performativity of institutive language cannot be fully incorporated by the system once it is established, and thus, become fully self-justifying, does show that the establishment of law is violence in the sense of an imposition without a present justification. But this exposure should not be understood as succumbing to the lure of violence. Instead, the tautology upon which Justice White’s opinion rests-that the law is and therefore it is justified to be, because it is-is exposed as tautology rather than justification. The point, then, of questioning the origin of authority is precisely

---

42 Derrida, supra note 3 at 943.

43 LaCapra, supra note 4 at 1069.
to undermine the conflation of justification with an appeal to the origin, a conflation made possible because of the erasure of the mystical foundation of authority. LaCapra’s reformulation may be “riskier” than Derrida’s own because it can potentially turn us away from the operational force of the legal myths that seemingly create a self-justifying system. The result, as we have seen, is the violence of Justice White’s opinion in which description is identified as prescription, criminal persecution of homosexuals defended as the necessity of the rule of law.

But does the deconstructionist intervention lead us to the conclusion that LaCapra fears it might? That conclusion being that all legal systems, because they are based on a mystical foundation of authority, have “something rotten” at the core and are therefore “equal.” In one sense, LaCapra is right to worry about the equalizing force of Derrida’s essay. The equality between legal systems is indeed that all such systems are deconstructible. But, as we have seen throughout this book, it is precisely this equality that allows for legal transformation, including legal transformation in the name of the traditional emancipatory ideals. Derrida reminds us that there is “nothing less outdated” than those ideals. As we have seen in Bowers, achieving them remains an aspiration, but an aspiration that is not just impotent idealism against the ever functioning, nondeconstructible machine.

As we have seen, Derrida is in disagreement with Fish about deconstructibility of law. For Fish, since law, or any other social context, defines the parameters of discourse, the transformative challenges to the system are rendered impotent because they can only challenge the system from within the constraints that will effectively undermine the challenge. “There is” no other “place” for them to be but within the system that denies them validity or redefines them so as to manage the full range of the complaint. But for Derrida “there is” no system that can catch up with itself and therefore establish itself as the only reality. To think that any social system, legal or otherwise can “fill” social reality is just another myth, the myth of full presence. In Fish, it is practically insignificant that law is a social construct, because, social construct or not, we can not deconstruct the machine. Derridean deconstruction reaches the opposite conclusion. As Derrida explains, returning us to the excess of the performative language that establishes a legal system:

44 Benjamin, supra note 5, 286.

45 See LaCapra, supra note 4 at 1071, 1077-78.

46 Derrida, supra note 3 at 971.
Even if the success of the performatives that found law or right (for example, and this is more than an example, of a state as guarantor of a right) presupposes earlier conditions and conventions (for example in the national or international arena), the same “mystical” limit will reappear at the supposed origin of their dominant interpretation.

The structure I am describing here is a structure in which law (droit) is essentially deconstructible, whether because it is founded, constructed on interpretable and transfonnable textual strata, (and that is the history of law (droit), its possible and necessary transformation, sometimes its amelioration), or because its ultimate foundation is by definition unfounded. The fact that law is deconstructible is not bad news. We may even see in this a stroke of luck for politics, for all historical progress.47

The deconstructibility of law, then, as Derrida understands it, is a theoretical conception that does have practical consequences; the practical consequences are precisely that law cannot inevitably shut out its challengers and prevent transformation, at least not on the basis that the law itself demands that it do so. It should not come as a surprise, then, that the Eleventh Circuit, the court that held that the Georgia statute violated the respondent’s fundamental rights, rested on the Ninth Amendment as well as on the Fourteenth Amendment of the Constitution. The Ninth Amendment can and, to my mind, should be interpreted to attempt fidelity to the deconstructibility of even the “best” constitution, so as to allow for historical change in the name of Justice. The Ninth Amendment can also be understood from within the problematic of what constitutes the intent of “the founding fathers.” The intent of the constitution can only be to be just, if it is to meet its aspiration to democratic justification. This intent need not appeal to “external” legal norms but to “internal” legal norms embodied in the interpretation of the Bill of Rights itself. The Bill of Rights clearly attempts to spell out the conditions of justice as they were understood at the time of the passage of the Constitution. But the Ninth Amendment also recognizes the limit of any description of the conditions of justice, including those embodied in the Bill of Rights. An obvious example is the call of homosexuals for Justice, for their “fundamental

47 Id. at 943-45.
liberty.” The Ninth Amendment should be, and indeed was, used by the Eleventh Circuit to guard against the tautology upon which Justice White’s opinion rests.48

Silence, in other words, is to be constructed as the “not yet thought,” not the “self-evident that need not be spoken.”

But does this interpretation of the Ninth Amendment mean that there is no legitimacy to the conservation of law? Can a legal system completely escape the promise of conservation that inheres in its myth of origin? Certainly Derrida does not think so. Indeed, for Derrida, a legal system could not aspire to justice if it did not make this promise of conservation of principle and the rule of Law. But it would also not aspire to justice unless it understood this promise as a promise to Justice. Again we are returned to the recognition, at least in my interpretation of the Ninth Amendment, of this paradox.

It is precisely this paradox, which, for Derrida, is inescapable, that makes Justice an aporia, rather than a projected ideal.49 To try exactly to define what Justice is would once again collapse prescription into description and fail to heed the humility before Justice inherent in my interpretation of the Ninth Amendment.

Such an attempt shuts off the call of Justice, rather than heeding it, and leads to the travesty of justice, so eloquently described by Justice Holmes.50 But, of course, a legal system if it is to be just must also promise universality, the fair application of the rules. As a result, as we saw in the last chapter, we have what for Derrida is the first aporia of Justice, epokhe, and rule. This aporia stems from the responsibility of the judge not only to state the law but to judge it.

In short, for a decision to be just and responsible, it must, in its proper moment if there is one, be both regulated and without regulation: it must conserve the law and also destroy it or suspend it enough to have to reinvent it in each case, rejustify it, at least reinvent it in the reaffirmation and the new and free confirmation of its principle.51

49 See Derrida, supra note 3 at 961-63.
50 Oliver W. Holmes, The Path of the Law, 10 HARV. L. REV. 469 (1897).
51 Derrida, supra note 3 at 961.
Justice White failed to meet his responsibility precisely because he replaced description with judgment, and indeed, a description of state laws a hundred years past, and in very different social and political circumstances.52

But if Justice is (note the constative language) only as aporia, if no descriptive set of current conditions for justice can be identified as Justice, does that mean that all legal systems are equal in their embodiment of the emancipatory ideals? Is that what the “equality” that all legal systems are deconstructible boils down to? And worse yet, if that is the conclusion, does that not mean that we have an excuse to skirt our responsibility as political and ethical participants in our legal culture? As I have argued throughout this book, Derrida explicitly disagrees with that conclusion: “That justice exceeds law and calculation, that the unpresentable exceeds the determinable cannot and should not serve as an alibi for staying out of juridico-political battles, within an institution or a state or between one institution or state or others.”53

But let me state this positioning vis-à-vis the deconstructibility of law even more strongly. The deconstructibility of law is, as I have argued for the last two chapters, exactly what allows for the possibility of transformation, not just the evolution of the legal system. This very openness to transformation, which, in my interpretation of the Ninth Amendment, should be understood as institutional humility before the call to Justice, as the beyond to any system, can itself be translated as a standard by which to judge “competing” legal systems. It can also be translated into a standard by which we can judge the justices themselves as to how they have exercised their responsibility. Compare, for example, Justice White’s majority opinion with Justice Blackmun’s dissent.54 Thus, we can respond to LaCapra’s concern that all legal systems not be conceived as equally “rotten.” All judges are not equal in the exercise of their responsibility to Justice, even if justice can not be determined once and for all as a set of established norms.

The idea of right and the concrete, practical importance of rights, it must be noted, however, is not denied. Instead, the basis of rights is reinterpreted so as to be consistent with the ethical insistence on the divide between law and justice.

52 For a more thorough exploration of the appeal to natural and unnatural conceptions of sexuality, see Drucilla Cornell, Gender, Sex and Equivalent Rights, in FEMINISTS THEORIZE THE POLITICAL (Judith Butler and Joan Scott eds., 1991).

53 Derrida, supra note 3 at 971.

This ethical insistence protects the possibility of radical transformation within an existing legal system, including the new definition of right. But the refusal of the idea that only current concepts of right can be identified with justice is precisely what leads to the practical value of rights. Emmanuel Levinas once indicated that we need rights because we cannot have Justice. Rights, in other words, protect us against the *hubris* that any current conception of justice or right is the last word.

Unfortunately, in another sense of the word, Justice White is “right” about our legal tradition. Homosexuals have been systematically persecuted, legally and otherwise, in the United States. Interestingly enough, the reading of deconstruction I have offered allows us to defend rights as an expression of the suspicion of the consolidation of the boundaries, legal and otherwise, of community. These boundaries foreclose the possibility of transformation, including the transformation of our current conceptions of “normal” sexuality as these norms have been reflected in the law and used as the basis for the denial of rights to homosexuals. What is “rotten” in a legal system is precisely the erasure of its own mystical foundation of authority so that the system can dress itself up as justice. Thus, Derrida can rightly argue that deconstruction

> hyperbolically raises the stakes of exacting justice; it is sensitivity to a sort of essential disproportion that must inscribe excess and inadequation in itself and that strives to denounce not only theoretical limits but also concrete injustices, with the most palpable effects, in the good conscience that dogmatically stops before any inherited determination of justice.55

It is this “rottenness” in our own legal system as it is evidenced in Justice White’s opinion that causes me to refer to the legal system, as Fish describes it, as a monster. The difference in Luhmann’s terms turns on what is observed and why.

But for LaCapra, there is also another issue, separate if connected to the potential equalization of legal systems due to their inherent “rottenness.” That danger is a danger of an irresponsible turn to violence, because there can be no projected standards by which to judge in advance the acceptability of violent acts. For LaCapra, this danger inheres in the complete disassociation of cognition and action that he reads as inherent in Benjamin’s text, and perhaps in Derrida’s engagement with Benjamin. As LaCapra reminds us in a potential disagreement with Derrida’s formulation of this disassociation:

---

55 Derrida, *supra* note 3 at 955.
As Derrida himself elsewhere emphasizes, the performative is never pure or autonomous; it always comes to some degree bound up with other functions of language. And justificatory discourse—however uncertain of its grounds and deprived of the superordinate and masterful status of metalanguage—is never entirely absent from a revolutionary situation or a coup de force.56

But Derrida certainly is not arguing that justificatory language has nothing to do with revolutionary situations. His argument is instead that the justificatory language of revolutionary violence depends on what has yet to be established, and of course, as a result, might yet come into being. If it did not depend on what was yet to come, it would not be revolutionary violence. To quote Derrida:

A “successful” revolution, the “successful foundation of a State” (in somewhat the same sense that one speaks of a “felicitous” performative speech act) will produce apres coup what it was destined in advance to produce, namely, proper interpretative models to read in return, to give sense, necessity and above all legitimacy to the violence that has produced, among others, the interpretative model in question, that is, the discourse of self-legitimation … There are cases in which it is not known for generations if the performative of the violent founding of the state is “felicitous” or not.57

That separation of cognition and action by time means that no acts of violence can truly be justified at the time they take place, if by truly justified one means cognitive assurance of the rightness of action. I believe that this interpretation of , Derrida’s engagement with Benjamin is the reading that does full justice to the seriousness with which both authors take the command “thou shalt not kill.”58

---

56 LaCapra, supra note 4 at 1068.
57 Derrida, supra note 3 at 993.
58 Benjamin, supra note 5 at 297-98; Derrida, supra note 3 at 1029-31.
Thus, we can only be just to Benjamin’s text and to Derrida’s reading if we understand the responsibility imposed upon us by Benjamin’s infamous statement about divine violence. “For it is never reason that decides on the justification of means and the justness of ends, but fate-imposed violence on the former and God on the latter.”59 Since there can be no cognitive assurance in advance of action we are left with our responsibility for what we do. We cannot escape responsibility by appealing to established conventions. Revolutionary violence cannot be rationalized by an appeal to what “is,” for what “is” is exactly what is to be overthrown. In this sense, each one of us is put on the line in a revolutionary situation. Of course, the inability to know whether or not the situation actually demands violence also means there can be no justification for not acting. This kind of undecidability is truly frightening. But it may not be more frightening than the justifications for violence—whether they be justifications for the death penalty or the war machine—put forward by the state. LaCapra worries precisely about the day-to-dayness of extreme violence in the modern/postmodern state.60 But so does Benjamin in his discussion of the police.61 The need to have some standards to curtail violence, particularly this kind of highly rationalized violence, should not be confused with a justification for revolutionary violence. The problem is not that there are not reasons given for violence. It is not even that these reasons should better be understood as rationalizations. It is rather that revolutionary violence cannot be rationalized, because all forms of rationalization would necessarily take the form of an appeal to what has already been established. Of course, revolutionary movements project ideals from within their present discourse. But if they are revolutionary movements they also reject the limits of that discourse.

Can they do so? Have they done so? Judgment awaits these movements in the future. Perhaps we can better understand Benjamin’s refusal of human rationalizations for violence by appealing to Monique Wittig’s myth, Les Guerilleres.62 In Les Guerilleres, we are truly confronted with a revolutionary situation, the overthrow of patriarchy with its corresponding enforcement of heterosexuality. In the myth, the Amazons take up arms. Is this mythic violence governed by fate? Is the goal the establishment of a new state? Would this new state not be the reversal of patriarchy and therefore its reinstatement? Or does this “war” signify divine violence—the violence that truly expiates. The text presents those questions as myth, but also as possibility “presented” in literary form.

59 Benjamin, supra note 5 at 294.
60 See LaCapra, supra note 4 at 1069-70.
61 See Benjamin, supra note 5 at 286-87.
How could the women in the myth know in advance, particularly if one shares the feminist premise that all culture has been shaped by the inequality of the gender divide as defined by patriarchy? If one projects an ideal even supposed by feminine norms, are these norms not contaminated by the patriarchal order with which the women are at “war”? Rather than a decision about the resolution of this dilemma, Wittig’s myth symbolizes the process of questioning that must inform a revolutionary situation, which calls into question all the traditional justifications for what is. I am relying on this myth, which challenges one of the deepest cultural structures, because I believe it allows us to experience the impossibility of deciding in advance whether the symbolized war against patriarchy can be determined in advance, either as mythic or divine, or as justified or unjustified.

Yet, I agree with LaCapra that we need “limited forms of control”. But these limited forms of control are just that, limited forms. Should we ever risk the challenge to these limited forms? Would LaCapra say never? If so, my response to him can only be “Never say never.” And why? Because it would not be just to do so.

Derrida’s text leaves us with the infinite responsibility undecidability imposes on us. Undecidability in no way alleviates responsibility. The opposite is the case. We cannot be excused from our own role in history because we could not know so as to be reassured that we were “right” in advance.

---

63 LaCapra, supra note 4 at 1070.
A. Introduction

In the 1970s and 80s, the philosophical works of Jacques Derrida became known well beyond the borders of France and beyond the limits of the French language. It was a radical and disturbing new form of materialism which made Derrida’s thought so notorious: a philosophy of writing, of *différance*, of the movements of negation which always escape our grasp – with the effect that all theoretical trust in the idea of “presence” is undermined. Derrida develops his thought relentlessly on the border between form and content. It could be said that he balances on this border. And he conceives these diverse, experimental balancing acts, which are portrayed as readings of other texts, as a procedure in its own right – a procedure, called “deconstruction”, which has a distinctly irritating effect on the reader.

Derrida’s deconstructive “readings” pursue the project of a radical subversion of knowledge; and in this regard they share a certain kinship with the works of authors such as Foucault, Baudrillard, Lyotard, as different as they otherwise are. From a philosophical point of view, the project of deconstruction is directed against “the” entire tradition of (Western) metaphysics, and from a political point of view against the order of speech, perhaps more precisely against technique, the techniques of speech and of recording (including the techniques of renewal) in science itself.

I am not certain whether the euphoric phase of the subversion of knowledge in French thought, which followed structuralism, should be called a “movement.” At any rate, through books such as *De la grammatologie* and *La dissémination* (and,
Derrida’s “deconstruction” has settled since the 1970s into diverse academic disciplines (or orders of speech: discours, discourses) as their uninvited guest. And this uninvited guest, deconstruction, is not easy to deal with. Derrida’s texts are insistent about the material of what is written, and each new reading dismantled what is specific about the contents of what was read until it seemed that these contents only referred to their own character of being written, their own readability. – And Derrida himself? He is regarded as the philosopher with a hammer who, like Nietzsche, wants to rupture philosophy’s eardrum, its “tympanum”, as it is put in one of Derrida’s wildest texts dating from 1972: “Tympaniser – la philosophie.”¹

Anyway, the accent of Derrida’s writings shifted around the middle of the 1980s at the latest. Deconstruction is increasingly fascinated by ethical, political and social questions. The main track followed by deconstruction is no longer the sheer textuality of the texts, the threads leading back to the cocoon of materiality, which is stripped of the orthodoxy of reading from which the sense emerges. Through the self-references of writing, the focus is on the alien-ness of that which and on the Other who gets entangled in the text: whether it be the forms of creative art or the urgency of the political or the appeal of ethics.

In particular ethics. Derrida himself has emphasised the increasing significance of Emmanuel Levinas’s radically ethical philosophical work (an ethics as prima philosophia, if we follow Levinas, prior to any ontological inquiry, and perhaps even any critical inquiry).² Thus, since the beginning of the 1990s the recurrent inquiries of deconstruction have revolved around phenomena or concepts such as “promise” (promesse), “witness” (témoignage), “responsibility” (responsabilité), “gift” (don), “justice” (justice), “hospitality” (hôtesse) and “friendship” (amitié) – in addition to others, of course. There has been talk of a turn towards the other, of a


² Compare further the striking profession: “En ce moment même dans cet ouvrage me voici.” (JACQUES DERRIDA PSYCHE. INVENTIONS DE L’AUTRE 159-202 (1987)). Derrida’s early essay on Levinas (Violence et métaphysique, in L’ÉCRITURE ET LA DIFFÉRENCE 117-228 (JACQUES DERRIDA 1967)), by contrast, keeps a clear distance as far as the substance is concerned, dismissing the foundational claims of Levinas’s ethics in their metaphysical aspects.
“performative turn,” and also, perhaps particularly striking, of a “transition from a problem of undecidability to one of undeconstructability.”

Against this background, it was surprising how Derrida made a move in 1989-1990 to apply himself to the legal context, namely in the text to be treated here: Force de loi.

Force de loi is a surprising text because it suddenly becomes apparent how little Derrida had had to say about law until then – although he seemed to write about almost everything. Force de loi is surprising inasmuch as law, after so many years, finally becomes a topic. And in particular, Force de loi is surprising for the vehemence with which deconstruction takes hold of law. The text has a tone of distinct identification. It seems that whereas on the one hand Derrida “deconstructs” legal discourse, that is, decodes the law with respect to what remains unthought, he simultaneously affirms the model of law; it may even be that he adopts it as a certain broken form of the justice of law, as a paradigm of deconstruction itself.

In the present paper I shall address three questions to this prominent text of Derrida’s:

- How does Derrida portray law and legal discourse (to what extent does he perform a deconstruction of law or legal discourse?) (Section B.)

- How does Derrida project a model or his model of legal justice, of justice in the law? (Section C.)

---

3 Compare further Rodolphe Gasché, A Relation called “Literary”: Derrida on Kafka’s “Before the Law”, 2 ASCA. AMSTERDAM SCHOOL FOR CULTURAL ANALYSIS 17-33 (1995) (German translation: Eine sogenannte “literarische” Erzählung: Derrida über Kafkas “Vor dem Gesetz”, in EINSÄTZE DES DENKENS. ZUR PHILOSOPHIE VON JACQUES DERRIDA 256-286, 260 (Hans-Dieter Gondek, Bernhard Waldenfels eds., Antje Kapust trans., 1997); see also Hans-Dieter Gondek/Bernhard Waldenfels, Derridas performative Wende, id. at 7-18 (this formulation is also used).

4 Hans-Dieter Gondek, Zeit und Gabe, id. at 183, 186.

5 Jacques Derrida, Force de loi: Le “fondement mystique de l’autorité”, 11 CARDOZO LAW REVIEW 919-1045 (1990) (republished: Paris 1994) (German translation: Gesetzkraft. Der “mystische Grund der Autorität” (Alexander García Düttmann trans., 1991)). The first publication is bilingual (French and English); therefore, I shall cite three page numbers: French and English separated by a slash, followed by the page number in the German translation. If indicated, this last shall be included in a footnote with an alternative German translation.
• In order to make of it a model for deconstruction, that is, to address law as a paradigm for the process of deconstruction. (Section D.)

It is obvious that of these three questions the first – how does Derrida grasp law, what theory of law does he intend to offer – is ultimately the most interesting one for legal theorists. Does deconstruction deconstruct law, is it possible with Derrida to conceive new paths, perhaps even a new legal theory? At the conclusion, I shall return to this question, for it is the question which I am most interested in: Derrida’s analysis, his text is directly addressed to legal discourse; what does it really have to offer for an analysis of law, of juridicity, upon which the juristic order rests?

B. Law and Legal Discourse

Force de loi is made up of two parts, each of which has its own specific perspective. In the first part of the text, Derrida explicitly addresses lawyers; it was written as a lecture for a colloquium of the Cardozo Law School in 1989. Here, Derrida “addresses” legal discourse from within – in a quite literal sense. The topic of this part of Force de loi is the question of the practical possibility of justice in law as law. The second part of the book consists of a reading of a classic of the political-anarchistic questioning of the constitutional state (Rechtsstaat). At issue is the controversial essay “Zur Kritik der Gewalt” which Walter Benjamin wrote in 1921. In this second part of his reflections, Derrida views legal matters – as Benjamin had – as it were from an external perspective. The topic from this perspective is both the question as to what law as law – that is, law as a whole – is based on as well as the question of the possibility of justice outside of law.

In contrast to the first part, which, as I have already indicated, is distinctly affirmative, the second part keeps more distance. Derrida inspects the lines of Benjamin’s diagnosis, and ultimately rejects it.

It is this the point at which I shall pick up the discussion: with Derrida’s fundamental reflections on the status of law, the order of law or the legal order, that is, with deconstruction’s external perspective on law and legal discourse. With the question of justice – whether extralegal or intralegal – I shall proceed so to speak backwards to the first part of the text, which immediately addresses legal discourse.

---

6 Benjamin speaks of positive law and uses the term Rechtsordnung (legal order) for it. Compare further Walter Benjamin, Zur Kritik der Gewalt, in GESAMMELTE SCHriften II/1 179-203 (Walter Benjamin 1977).
“Le droit n’est pas la justice” law is not justice” – with this Derrida takes the same point of departure as Benjamin (and it is also common to Emmanuel Levinas). The question of justice cannot be treated within law, it must be treated as the question of the justice of law. But law is force – and not just in the sense that in particular cases it ordains certain sanctions, but rather by virtue of the fact that law is based on the enduring possibility of a certain force or violence to enforce laws, that is, on a force (or violence) by means of which it ensures its “applicabilité / applicability”:
as law, as a rule. Walter Benjamin calls this “rechtserhaltende Gewalt”, a law-preserving violence; and the point for him is that it is not a result of law, but rather is given with the very form of law. Of a law which preserves itself as an order only as a whole, thanks to a state monopoly on violence (which is tacitly presupposed in the application of law).

Derrida’s reflections emphasise the same point. Law is per se and as such the bringing to bear of a rule, it is “l’élément du calcul / the element of calculation”
, and the validity of any rule is based on and even actualizes violence. Law has the generality of an act which does not address an addressee in the singular – and this aspect contains a sort of violence which is irreducible and inconsistent with the idea of full justice. Derrida draws a parallel between this generalizing violence of law and the violence of language. Language, too, is the application of rules and misses the singularity of a situation, of an “address”. And indeed, reliance on law, on jurisprudence and on jurisdiction, presupposes the regularity of language, more precisely, the disposition to linguistic generalization.

But Derrida is not solely interested in this point, the dimension of “violence conservatrice / the violence that conserves”. A second dimension is at least equally important for him, the dimension of a latent reference to violence which law contains from the very beginning. Benjamin emphasizes this aspect with the term “rechtsetzende Gewalt,” which could be translated into English as constitutional or legislative violence. Derrida translates it into French as violence fondatrice (English: violence that founds) (see further on page 1006/1007). What is meant is that all law is based on violence inasmuch as there is no original law, but rather all law was instituted at some time. Inasmuch as the law presupposes the legitimacy of its own

---

7 Derrida, supra note 5 at 946/947 (German trans. at 33).
8 Id. at 924/925 (German trans. at 12). Literally translated into German as “Anwendbarkeit.” What is meant is doubtless the wide field of conditions of what is classically called the “Wirksamkeit” (effect) of law as distinct from its mere “Geltung” (validity).
9 Derrida, supra note 5 at 946/947 (German trans. at 34).
10 Id. at 1006/1007 (German trans. at 90).
origin, it ultimately refers to an extralegal act, to an originating act of violence; and this unnamable instituting violence constitutes the groundwork of the authority of law whenever the law (or statute or an individual judgement) explicitly appeals to the “legitimacy” of its own institution. This historically equivocal dimension of the establishment of law is an obscure foundational secret which recurs in the performative character of legal speech; following Montaigne, Derrida calls it “mystical” in Force de loi.

Il y a là un silence muré dans la structure violente de l’acte fondateur / Here a silence is walled up in the violent structure of the founding act.\(^{11}\) The “mystical” is an abyss in the heart of what is supposedly well founded: vanished cruelties at the moment of constituting a state, forgotten terror when new law comes into force, events which remain historically “ininterprétables ou indéchiffrables / uninterpretable or indecipherable”.\(^{12}\)

This is the dimension which Derrida emphasises in his reading of Benjamin – nota bene because Zur Kritik der Gewalt addresses the violence which preserves law and that which establishes law not merely as attendant circumstances or as a background of law, but as a constitutive factor of what constitutes law as law, or, as I would like to put it, its juridicity, its juridic character as such.

Now, Walter Benjamin incorporates reflections into his criticism of violence (not violence within the law nor through the law, but the violence of law) which Derrida is only partly willing to follow. Benjamin regards the connection between the violence which establishes law and that which preserves it as a fatal mixture. To put it more precisely, there is a specific myth-making at work in both cases: concrete means of force or violence are placed in a context of justification so as to minimize their violent character, and abstract ends are instrumentalized in order to disguise the illegitimacy of the means. Benjamin calls this historical superimposition of means and ends a “mythical” violence in history; the historical forms of instituting and preserving legal orders, that latest of which is in the epoch of the state, constitute a “cycle” of legitimation for something which on principle cannot be legitimated.

\(^{11}\) Id. at 942/943 (German trans. at 28) (”Es gibt da ein Schweigen, das in die gewaltsame Struktur des Stiftungsaktes eingeschlossen ist.”).

\(^{12}\) Id. at 990/991 (German trans. at 78).
In *Zur Kritik der Gewalt*, Benjamin makes a radical step at this point. He is completely separating the realm of means from the question of ends – thus taking leave of the idea of legitimating ends: such “pure” ends are unreal, perhaps “divine,” but at any rate inaccessible to humankind. Against this background, Benjamin’s real interest is in the question of the possibility of “pure means,” and in the attendant question as to whether such “pure means” – if they are conceivable – must without exception be qualified as violence, or whether there are certain conditions under which they need not be.

I shall only go into this point very briefly – it is a substantial topic in its own right (which, incidentally, I do not think Derrida himself really goes into in his reading of Benjamin). As is known, Benjamin affirms the possibility of pure means – that is, a practice which is situated fully on this side of the context of aims and legitimation, on this side of the horizon of (juristic?) legitimacy. The Criticism of Violence lists examples: virtues such as “kindness of heart, love of peace, inclination, trust” which are situational paths of individual communication, whether in diplomacy or in love; and paradigmatically: language where it consumes itself free of aims in dialogue as an end in itself, as a “technique of civil accord,” as he puts it in the text.

Derrida answers the question as to whether “non-violent resolution of conflicts is possible” (to which Benjamin says, “… doubtless”) with a “no.” This “no” is a matter of principle: *Force de loi* attacks equally the idea of non-violence as well as the idea of “purity” and the ideal of “criticism” in making a “distinction” or “decision” with which the “pure” might be distinguished from other things.

I shall defer the question to what extent Derrida’s reading, which aporetically deconstructs these concepts and demonstrates them to be logically untenable,  16

---

13 Benjamin, *supra* note 6 at 191.

14 *Id.* at 192; Derrida only quotes this formulation, prior to it the formulation “culture of the heart” (see further 1016-1018/1017-1019, 99-100); surprisingly, he does not go into the idea of the pure means as a *technique* in any more detail. However, this point seems to be central for Benjamin – also with respect to language (writing?).

15 Benjamin, *supra* note 6 at 191.

16 Derrida confronts the anarchistic revolutionary Benjamin and the Jew Benjamin with certain questionable political implications of the metaphor of “purity”; these are passages in which his deconstruction can only be regarded as embarrassingly unsuccessful: for example, when Derrida juxtaposes the question of death without shedding blood (claiming that for Benjamin the lack of blood is the subliminal “decisive” indication of “divine” punishment) to the bloodless extermination technology of the “final solution” (compare further with Derrida, *supra* note 5 at 1026/1027); or when, in the
really does justice to Benjamin’s text. I think it is can be clearly seen that with the idea of the “pure means” Benjamin wants to point out something which is situated beyond legitimation (and perhaps beyond legitimability), to which however certain real practices correspond: that is, not just a singular practice, but also practice forms. The pure means would then be something which need not be completely free of generalization, but only free of any insidious goal orientation. It stands for a practice that at least in the moment of its coming to be reality is free of justification in any legal (for law or legitimacy reachable) sense.

Derrida, however, sees no possible practice, no reality behind the concept of “pure” non-violent means. The concept is probably different (different in breadth) for the two authors - and maybe for systematic reasons. I will not try to invent the dispute one could imagine between Benjamin an Derrida over this point. What is more important here is Derrida’s conclusion: In Force de loi the fundamental “no” which deconstruction pronounces on the ontological possibility of a “pure” means is followed by a fundamental “yes” to the irreducibility of law - which must essentially also be understood in a quasi-ontological sense. It seems that the same consequence is necessarily entailed when Benjamin establishes the “Unentscheidbarkeit aller Rechtsprobleme,” the “ultimate insolubility of all legal problems;” and Derrida draws a parallel to the impossibility of deciding the question of violence for language itself inasmuch as in the order of language nothing can transcend communication. If the means-end structure of language cannot be transcended, all that remains is a certain movement within language itself, a movement which may be ruptured in a new manner. Thus: If the means-end structure of the legal sphere appears to be irreducible as does that of (linguistic) sense in general, then all that remains is a certain movement within law itself, a movement which may be ruptured in a new manner. “Law is not justice.” I quoted Derrida with this remark at the beginning. Indeed, Benjamin could have said this as well. We can see how Derrida – nevertheless – attempts to set off his solution from Benjamin: Against the decidability of questions of justice outside of law, deconstruction banks on the undecidability of meaning as such – thus returning to the medium of law: only within law is it possible to take account of the impossibility of justice.

I emphasize the point “only within law,” because I do not think it is compelling. Derrida presupposes a parity of the linguistic order and the legal order which does

postscript, Derrida raises the tormented the question as to what Benjamin “would have thought, in the logic of his text … of both Nazism and the final solution” (see further id. at 1040).

17 Derrida: “ultime indécidabilité qui est celle de tous les problèmes de droit” (Derrida, supra note 5 at 1020/1021 (German trans. at 102)) ; compare further Benjamin, supra note 6 at 196.
not hold for Benjamin: parity with respect to their irreducibility. Neither of them sees justice within law or “justifications,” legitimacy outside of law. The impossibility of a “pure” outside of an order only results in the transcendental necessity of remaining within the order if the order at issue is identical with the fact of order as such, such that, for example, there are no alternative orders of a different character, neighboring orders beyond the legal order as the order of that which is founded as legitimate. Although for Benjamin justice outside of a legal order may well not be possible, language and non-violence are; hence, the demonstration that a pure outside of language is not possible does not block out the idea of a pure outside of law. For deconstruction, however, the motions are analogous: If the pure means disavows itself in language, which cannot deny its “mystical foundation,” then the hope of a breach with the “mystical foundation of the authority” of law is also disavowed.

C. (Legal) Justice

“Ultimate insolubility of all legal problems”\(^{18}\) – this is also the point of departure for the first part of *Force de loi*. Law admits no pure solutions, no good decisions, and in this sense it must admit to being violent just as, according to Derrida, language – everything in which mediation is somehow at work – is necessarily “contaminated.” *Force de loi* speaks of a “contamination différantielle / a contamination différantielle”.\(^{19}\) Thus, the means which are supposed to lead to justice are contaminated with the violence which (as Benjamin pointed out) is proper to law as law, and this contamination is immediately associated with the basic philosophical idea of deconstruction: the fundamental movement of difference itself has – in regard to that – a certain structure, difference as *différance*, as Derrida puts it with a modification of spelling which cannot be heard. And this structure of mixture, of ungraspability, of a movement which can never be conceived as pure presence, as ultimate, as decidable, as clear-cut, or the simple movement of something slipping away from our grasp, showing that the character of something being some thing is a metaphysical illusion, such that something strange, alienating, the impression of an other (perhaps a trauma) remains – in sum, this structure of difference/différance irrevocably returned in the practice and dilemmas which characterize *droit* and *justice* in French, in English law, legal

---

18 Derrida, *supra* note 5 at 1020/1021 (German trans. at 102).

19 *Id.* at 996/997 (German trans. at 83).
discourse and the tradition of justice which they open, in the German Recht, Rechtsdiskurs and Justiz as well as Gerechtigkeit.\textsuperscript{20}

Even though justice within law and outside of law is impossible, can there then still be something like justice? Both Derrida and Benjamin pose this question. Even the structure of the problem is paradoxical. It makes a doubling of the concept “just” necessary. Within law, inasmuch as it has been seen to be violent, there can be no justice in the normal sense of the word; law is de-legitimized for deconstruction as well as for the Criticism of Violence so that the juristic category of legal justice: justice within law, the justice of law is inapplicable. Is it nonetheless possible to conceive a kind of “justice without law”?\textsuperscript{21}

Benjamin resolves the paradox of unjust legal justice by changing the level: the question of the non-violent character of violence (and, if you will, the hope for its ‘just’ character) is decided in the historical dimension. In this realm, the mythical violence which has already been mentioned reigns: the “cycle” of patterns of justification, the recourse to historical goals which already begins when history is narrated as history; for historical accounts are stylizations with the aim of legitimating the past. The point of the fact that Benjamin continues to entertain the possibility of conceiving events which breach this “cycle” has to do with the philosophy of history. Such breaches, in which only the “fateful violence” (or power: Gewalt) of history becomes manifest will defy memory. They have no place “in” history. This shifts the question of what is just to the field of tragic paradox, to an impossible future perfect (‘sometime it shall have been historically the case …’ – but then it cannot have been just). Nothing remains than the contingency of a historical present which is quite incapable of knowing itself in historical categories, a kind of “unconscious,” a passing now-moment (‘it shall not become historical’ – and then as far as knowledge after the fact is concerned, it did not take place at all, the just event is unknown).

There is more than one way to read Benjamin’s ambiguous mobilization of history, but it does not provide a solution for the justice deficit of the law as law. Derrida makes a different decision. He does not take leave of the possibility of justice, but rather devotes himself to the problem of the “mystical foundation” in a discussion of the perspectives of nonetheless deciding and judging as justly as possible; he proceeds by regarding legal discourse as a discourse within the setting of the

\textsuperscript{20} In contrast to the English word “justice” and “justice” in French (the language of Force de loi), German distinguishes terminologically between “Justiz” and “Gerechtigkeit,” that is, between the institution which delivers justice and justice itself.

\textsuperscript{21} Derrida, supra note 5 at 1024/1025 (German trans. at 104).
aporetic structure of justice which has to come to terms in its own way with the dilemma of law – under the aspect of the impossibility of deciding on the one hand and on the other hand under the aspect of the binding necessity of acting nonetheless: the necessity of passing judgement.

*Force de loi* shows – remember, at this point we are looking at the first part of the text – that within the law, including law in the concrete sense of the institutions of justice, the logic of justice runs idle with this paradoxical programming. The text gives three examples. In the first place the principle of legality, that is the norm orientation of judges’ actions: it is contained in the “*l'épokhè de la règle / the épokhè of the rule*.”22 Fundamentally, the law is suspended in the judgement because legal acts are not only the application of norms, but also the setting of norms. In the second place, the ideal of the just decision: it is subject to the “*hantise de l'indecidable, / the visitation of the ghost of the undecidable*” (see further page 962/963, 49) inasmuch as the rule which is supposed to be applied necessarily falls short of the concrete case in its singularity. In the third place the assumption that as the basis for juristic deliberation knowledge is in principle complete: such an epistemic horizon is closed off to judgement due to time limitations, due to “*l'urgence qui barre l'horizon du savoir / the urgency that obstructs the horizon of knowledge.*”23 It is fundamentally the case that the decision always comes too early for the juristic deliberation and always interrupts it at an untimely moment because justice “does not wait”, or, as the text also puts it, “*une décision juste est toujours requise immédiatement / a just decision is always required immediately, / right away.*”24 According to Derrida, precisely factors such as these, which as far as Benjamin is concerned would seal the “pointlessness” of law, contain a specific, ambivalent chance. Derrida interprets the fact that legal discourse cannot follow its own logic in aporias such as those named as an “*Indéconstructibilité / undeconstructibility,*”25 as a specific constitutive dilemma; and for him it is precisely this point which contains, more precisely incorporates an enormous, alien “opening” to justice which is not subject to regular legal process. The fact that it can happen that law encounters the aporetic of its own limitation becomes the starting point for a definition of the possibility of justice by way of the opening of the order which has thus become manifest. Derrida does not shy away from using the term “idea” for

---

22 Id. at 960/961 (German trans. at 46).
21 Id. at 966/967 (German trans. at 53) (“Die Fälligkeit, die den Wissenshorizont versperrt.”).
24 Id. at 966/967 (German trans. at 54) (“Eine gerechte Entscheidung ist immer unmittelbar erforderlich.”).
25 “Undekonstruierbarkeit.”
this logically demonstrated undeconstructibility (actually undeconstructabilities in the plural) – an idea of justice which shows itself precisely in this undeconstructibility. The “idea of justice” would be the possibility, the “there is” of the undeconstructable.26 It is immediately apparent that this definition is consciously circular, specifically with respect to the procedure with which the undeconstructable is exposed, that is, deconstruction itself. And indeed, Derrida writes: “La déconstruction est la justice / Deconstruction is justice,”27 and this provocative sentence caused quite a stir. I shall return to its implications later. This “idea of justice” becomes apparent in the pure negativity of the failure of a logic in the opening of legal discourse (in the practice of its opening); but beyond this Derrida makes a more precise determination of justice; and this is the point which I shall now dwell on.

He calls it “infinite” (with Levinas) – in the sense of an ethical requirement which can never be satisfied. The idea of justice is not quite similar to the idea in the Kantian sense of a fixed regulative idea; rather, it is temporally determined, it is something that remains “in coming”: “La justice reste à-venir, elle a, elle est à-venir / Justice remains, is yet, to come, à-venir, it has an, it is à-venir,” Derrida writes, it transcends the now in the mode of “peut-être / perhaps.”28

In addition to this ethical determination, more precisely: determination in terms of the logic of human alterity, there is also a practical determination. For Derrida, the idea of justice corresponds to indecidability in the sense of an “experience.” In its ambivalence as revealed by deconstruction, justice, which is neither within nor outside of the law, is concretely experienced as “undecidability”: this is the thesis – or is it a postulate? – with which Force de loi directly addresses legal practice, concretely: the situation in which judges make judgement. Justice is “l’expérience ... de l’aporie / the experience of aporia,” “l’expérience de ce dont nous ne pouvons faire l’expérience / the experience of what we are not able to experience,” “une expérience de l’impossible / an experience of the impossible.”29

26 See, e.g., Derrida, supra note 5 at 944/945 (German trans. at 30-31).
27 Id. at 944/945 (German trans. at 30).
28 Id. at 970/969-971 (German trans. at 56-57). It is well known that elsewhere Derrida indeed accepted the term “messianism” to characterise deconstruction. Without a “quasi-messianisme’ aussi inquiet, fragile et demunié / uneasy, fragile and disarmed quasi-messianism,” a “‘messianisme’ toujours présupposé, un ‘messianisme’ quasi transcendentale/ a ‘messianism’ which is always presupposed, a quasi-transcendental ‘messianism’” there would only be “law without justice.” JACQUES DERRIDA, SPECTRES DE MARX 267 (1993) (German translation: MARX’ GESPENSTER 264-265 (Susanne Lüdemann trans., 1996).
29 Derrida, supra note 5 at 946/947 (German trans. at 33).
If we attempt to imagine that, then we see the decision as it were at the crossing of at least two experiences: First, there is the experience of something undeconstructable which is immanent to the law, something which can be felt precisely where the aporias of the juristic realm reveal the pretensions of legal discourse to render justice to be absurd such that nothing more than a “mystical foundation” appears, and the only thing left is a “désir / desire” for justice. And second the experience of undecidability – which for the protagonists of legal discourse amounts to the paradoxical necessity of performing an act which is actually impossible; and of performing it responsibly, needless to say.

At this point, *Force de loi* – and that is interesting – has to insert an additional, political-moral argument (a consequentialist argument) to withdraw the suspension of the legal decision from pure decisionism. The vastness of justice, its ultimately imponderable character must not serve as an alibi, for otherwise it could adopt “le calcul le plus pervers / the most perverse calculation”. Thus, it follows from the idea of the decision without a rule, “*la justice incalculable commande … de calculer / … incalculable justice requires us to calculate.*” One must remain as close as possible to the law even if there is no justice in it: there is thus a further justice in addition to the “idea” of justice as a transcendence which is supposed to orient juristic efforts. This is the justice which sets fundamental limits for the suspension of judgement, and which requires an affirmation of the law as a whole. The intellectually decisive keystone of *Force de loi* would then be an almost Kantian figure: The idea of justice refers for its part to a sort of obligation towards the law. The specific, suspending responsibility which deconstruction aims at cannot be had at random; rather, it is supposed to a responsibility in legal form. And: the necessity of this responsibility also has to be experienced – so that a third aspect of the “experience” of justice arises.

I emphasize this conception because it is just this that makes *Force de loi* consistent as legal theory, that is, as a theory of specific legal justice, beyond a general ethics or morals. Nonetheless, the text lacks a clear concept of justice in this sense. Derrida’s usage remains confusing, for example when he calls the “demand”, the “call” for justice itself “just,” or when he crowns the idea of an ethical infinity with paradoxical formulations such as “*Il faut être juste avec la justice / One must be just with justice.*” In addition to the question of this convergence of – different? analogous? – justices (in the plural), there is of course also the question as to who or what is meant by the expression “one must” in such a sentence.

---

30 Id. at 970/971 (German trans. at 57).
31 Id. at 954/955 (German trans. at 40) (“*Man muß mit/gegenüber der Gerechtigkeit gerecht sein.*”).
D. Deconstruction and (Legal) Justice

“Cette justice-là, qui n’est pas le droit, est le mouvement même de la déconstruction / This kind of justice, which isn’t law, is the very movement of deconstruction”32 – this conflation of the goal and the path will probably not be as surprising at this point as it would have been had I quoted it at the beginning of my talk. But it is still a coup. By virtue of Derrida’s specifically demonstrative reading, justice emerges with multiple ruptures in legal discourse, and *Force de loi* links the concern for justice in this sense immediately with the procedure of deconstruction itself.

In the first place, this makes a claim that would have to be called morally daring. The process of critical diagnosis itself takes the place of that the lack of which it reproachfully attempts to demonstrate. That sounds like sophism, and it has to provoke philosophical mistrust, even if there are authors such as Levinas who explicitly justify such a procedure and who wish to theorise on the basis of the “révélation / revelation” of a transcendence (transcendence of the ethical).33

In the second place – and this is a remarkable point – it seems that Derrida wants to grant law priority as the paradigm of deconstruction before the pure immediacy of a political realm with no juristic anchoring (as Benjamin has it); and by the same token legal justice before the justice of pure ethics or morals (as Levinas has it). *Force de loi* repeatedly stresses this. Lawyers’ discourse is particularly close to the discourse of deconstruction. Deconstructive “questionnement / questioning”, he writes, is “plus at home dans des law schools ... que dans des départements de philosophie et surtout dans des départements de littérature / more at home in law schools ... than in philosophy departments and much more than in the literature departments.”34 The point is to intervene, to change things. A constellation (configuration, conjunction, conjuncture) which is “sans doute nécessaire et inévitable entre une déconstruction de style plus directement philosophique ou plus directement motivée par la théorie littéraire, d’une part, la réflexion juridico-littéraire et les ‘Critical Legal Studies’ d’autre part / no doubt necessary and inevitable between, on the one hand, a deconstruction of a

---

32 Id. at 964–965 (German trans. at 52).


34 Derrida, supra note 5 at 930–931 (German trans. at 18).
...style more directly philosophical or more directly motivated by literary theory and, on the other hand, juridico-literary reflection and ‘Critical Legal Studies.’”\[^{35}\]

I shall be brief on this point. As a whole it is more likely of interest to philosophers, perhaps only to those specialists in philosophy dealing with the subtle strategies of the self-disclosure which Derrida calls “deconstruction” – which is, of course, his procedure. This procedure had always been concentrated on the production of an undecidability, and in this connection on the avoidance of any self-commitment. This aim is served in particular by the many elaborate intersections of contrary, paradox double perspectives. I have already intimated that this is also the case in *Force de loi*. Derrida speaks of two “voies / ways” or “styles / styles” along which deconstruction equally proceeds: there are logical-formal aporias and there is the reading of texts with a view to the historical dimension, a careful interpreting which Derrida calls “genealogical” (which I do not think should be regarded in the proximity of Michel Foucault’s *généalogie*). In this sense, deconstruction has always moved back and forth between complementary “necessities” as it were in a kind of no man’s land: between the necessity of active intervention (a destructive, random intervention in texts which is directed against their declared meanings) and the necessity of an intervention which the text concerned itself makes as it were: “*opération ou plutôt l’expérience même / operation or rather the very experience*” which a text “*fait d’abord lui-même, de lui-même, sur lui-même / does itself, by itself, on itself*”; Derrida calls the fusion of both movements to form as it were one an “*auto-hétéro-déconstruction / auto-hetero-deconstruction*”.\[^{36}\] It is this gesture – that there is no positive decision in the deconstructive reading, at least none that is not at the same time opposed by a negation that crosses it out – which made deconstruction famous. Deconstruction owes a great deal of its provocative force to this gesture. But also a certain intangibility and (if you permit) a special form of philosophical redundancy.

The perspective of *Force de loi* turns the thought of undecidability towards a new unambiguity. If deconstruction “*is*” or at least can be justice – by making a decision which cannot possibly be “just” but which is striving after justice, a decision in view of undecidability after the model of legal justice – then the situation has changed. In fact, Derrida indicates a form in which what previously took place at best as a pure, singular event removed from any order now occurs. Linked to law, deconstruction would no longer be just a general strike on the part of meaning.

\[^{35}\] Id. at 932/933 (German trans. at 19) (“...zweifellos notwendiger und unvermeidbarer Art – zwischen einer Dekonstruktion, deren Stil eher philosophisch oder durch die Literaturtheorie angeregt ist und einer juridisch-literarischen Reflexion und den ‘Critical Legal Studies.’”).

\[^{36}\] See, e.g., id. at 980/981 (German trans. at 68).
(crossed with radical ethical intimations which suggest a situation-bound outside). Rather, deconstruction relates its own paradoxical double movement specifically to an order in which “responsibility,” including the political responsibility of its work, would find an optimal framework on the peripheries of discourses.

It is not law and statute which stand for this, but the specific, professional pragmatics of legal discourse. Perhaps it can be put this way: Derrida has discovered a sort of paradigm, and this paradigm is close to the institutional facts of the constitutional state. He writes that deconstruction is not “une abdication quasi nihiliste devant la question ethico-politico-juridique de la justice / a quasi-nihilistic abdication before the ethico-politico-juridical question of justice”, but rather “responsabilité / responsibility.” In this connection, responsibility is supposed to be for its part a double movement: on the one hand “responsabilité devant un héritage qui est en même temps l’héritage d’un impératif ou un faisceau d’injonctions / responsibility in face of a heritage that is at the same time the heritage of an imperative or of a sheaf of injunctions”; and on the other hand an anarchistic responsibility towards the “singularité de l’autre / singularity of the other,” a responsibility which is irresponsible with respect to all preconditions. On the one hand, responsibility towards tradition, for example legal traditions, which one has to follow as a good judge – as far as one can. And responsibility as a factor which renounces tradition, thanks to which one can, when in doubt, break with legal doctrine – like a good judge.

*Force de loi* does not really make it clear to what extent deconstruction does not only want to identify with a certain “legal” idea of justice, but also with its institutional reality – with the European? Anglo-Saxon? or even a “critical”? justice system. At any rate, democracy is a subliminal, but important topic in the text. Derrida identifies “politicalization” as its goal: the politicization of all fields which impinge on law and from which law cannot be separated. This is supposed to take place as a revision and reinterpretation of legal foundations. As examples, the text cites the Declaration of the Rights of Man and the abolition of slavery – that is, legal reforms and not the overthrowing of the state (Benjamin’s “Entsetzung” (abrogation) of law). “Rien ne me semble moins périmé que le classique idéal émancipatoire / Nothing seems to me less outdated than the classical emancipatory ideal,” declares Derrida at the end of the first part of his book, distinguishing the “territoires identifiés de la

---

37 Id. at 952/953 (German trans. at 40).

38 Id. at 954/955 (German trans. at 40).

39 Id.

40 Id. at 972/971 (German trans. at 58).
juridico-politisation / territories of juridico-politization” from marginal zones which must continuously show themselves as the other of law.41

Let me come to a conclusion: in comparison, concrete legal practice and, as Derrida puts it, the “excess of the performative” within it seem to be exemplary. But what does this mean? Does deconstruction answer for justice in the style of a lawyer representing a party? Or more in the manner of a judge’s judgement? More with a view to “cases” as in Anglo-Saxon case law? Or more with a view to the law as in continental law? Against the background of continental European legal theory, it is not least Kant who comes to mind. It is tempting to speak of a union of freedom and necessity in the form of a (legal) obligation. Derrida would quite probably reject such a parallel – a parallel to Kant as the thinker of the Western logos as such! But I think it exists. Force de loi speaks of “l’épreuve de l’indécidable / the trial [or test] of the indecidable.”42 Kant also has a trial or test, but here reason sits in judgement, a logos as the moral law and court of last appeal.

In the part on Benjamin, Force de loi vigorously rejects the paradigm of “criticism,” of distinguishing and deciding. But to the extent that deconstruction approaches legal decision with the pathos of an impossible and yet possible decision, it questions this distance from “criticism” and to violence as a “critical” arbitrariness. To the extent that a discourse authorises the execution of justice in its own name – as does Derrida’s discourse in Force de loi – it does not just quote legal discourse, but rather adopts the legal gesture as its own. Freedom becomes the obligation to accept what is valid for all – for example as the movement of a reading (which perhaps may be objective?).

E. Conclusion

With that I come to an end, and I hope that my thesis has become clear. If in accordance with the ambiguity of “justice / justice” not only the perspective of justice, but also the legal perspective is not external to deconstruction, then for Derrida’s texts the question of violence must indeed be posed (from a philosophical standpoint) as the question of the violence of the legal form. The specific rhetorical, discursive, perhaps also institutional features which, if it can be put this way, make up the juridicity, the juridic character of the law would then be characteristic of the deconstructive procedure.

41 See, e.g., id at 972/973 (German trans. at 59).
42 See, e.g., id at 962/963 (German trans. at 50).
On the other hand, there is some doubt as to this point – that is, whether the juristic character of the law is touched at all. In the introduction, I mentioned this question, which now brings us back to the beginning of my paper. What does deconstruction mean, who or what does it deconstruct when it addresses the law and legal discourse? I think that the inspection of Derrida’s concept of law as well as his concept of the idea of justice (and the half aporetic, half genealogical reading as a “process”) have shown not least one thing: that he has a certain metaphysics of symmetry foremost in mind, and that he reveals its “aporias” in order to question it under the sign of the other – an Other who is “beyond the law and even more so beyond the juristic” – for in other texts Derrida makes another determination of justice: quite apart from law.

Thus, it could be asked whether the law serves in Force de loi as a foil for a theory of responsibility in general devised with the means of the criticism of metaphysics – and thus not specifically legal. Is the point only to cite the legal sphere in order to set something off against Levinas’s ethical immediacy (and if this works out, then ultimately at the cost of an undesired proximity to Kant)?

I think lawyers would have no problem affirming the “aporias” of the legal sphere which Derrida and Benjamin worked out and presented as contradictions. These paradoxes are not new for legal discourse. To the extent that legal discourse sees itself as a normative discourse (in contrast to metaphysics) and is capable of reflecting accordingly, it is aware of its own inconsistencies (as well as of its violent character). Even when law regards itself as “application” of laws and as hermeneutics, it is not naïve. It does not believe that it is producing truth (in the sense of freedom from paradox or simply of consistency).

In other words: However powerful a certain model of law for deconstruction’s pragmatic idea of justice (as a philosophical procedure) may be, deconstruction cannot be readily applied to a specific “reading” of law devoted to the law as law, to the traces of its juristic character. As a procedure, Derrida’s deconstruction is dependent on the construction of logical “undecidabilities” which can only be brought to bear against texts the existence of which is linked to the idea of truth. Does the “aporetic” experience, the shock effect of which Derrida conjures, occur in legal discourse at all? The law is not a logical discourse, it makes other claims. The fact that Derrida overlooks this has to do with the fact that he treats the order of law analogously to the order of language – to the order of a language which strives to be true and to be legitimate in terms of founding.

By contrast, I suspect that the legal order only aims to be true to a very partial extent, that it only produces a discourse of truth in parts, that it may even be that it functions only to a very partial extent as a “discourse” at all (in Foucault’s sense) – this is precisely the specific point of explicitly for themselves claiming to be nothing
more than in a legal sense “normative” texts, of juristic discourse and his style to construct his specific phenomena in general. Derrida treats foundational paradoxes of the law, but the juristic character of the law remains obscure, because the paradoxes he dismantles are arbitrary for the legal dispositiv.
I think that this situation of deconstruction is unfortunate, because I think that the juristic character of the law should be and can be the subject of inquiry.

When Jacques Derrida addresses legal discourse, one thing above all becomes apparent: that as a subject the law impinges upon the limits of deconstruction. There is no new legal philosophy to be expected with *Force de loi*. Deconstruction was made for truth discourses, not for the in a quite different way organized discourse of law, the – as one may say – jaded normativity of legal affairs.43

---
43 Special thanks to David Kennedy for his help to find the word.
In his famous talk “The Force of Law,” given at Cardozo Law School in 1989, Derrida linked his work with the Critical Legal Studies movement. This lecture signposted a change of direction in deconstruction. Early deconstruction had been criticized for formalism, aestheticism and scant recognition of political realities. Derrida’s (in)famous statement that “there is nothing outside of the text,” was a rare philosophical sound-bite meaning that language, communication and social interaction cannot avoid, as commonly assumed, the uncertainties and ambiguities of the written text. But the aphorism was often misinterpreted to signify extreme idealism, disregard for the real world and literary and philosophical reductionism. But the “Force of Law” signified a clear turn towards political and ethical engagement, symbolized by the discussion of law and justice. After that talk, deconstruction became obsessed with questions of ethical responsibility, the meaning of friendship and the complex relationship with the other. Before his death, Derrida wrote a number of essays on contemporary political events. He denounced the Kosovo and Iraq wars and devoted a book to ‘rogue’ elements and states, in which he attacked the United States as the greatest rogue. Just before his untimely death in 2004, Derrida had become preoccupied with the concept of sovereignty at the basis of the tragedies and abuses of modernity. It is this political and ethical turn of deconstruction that I would like to address in the context of critical legal theory.

The critical traditions associated with Marxism, realism or feminism have consistently asked the question: “whose interests are served by law”; what extralegal power imbalances and asymmetries –class, gender or race– are reflected in the operations of an institution which claims to be neutral, natural, above politics and the contingencies of everyday life? Deconstruction does not refute these critiques. Deconstruction de-sediments “the superstructures of law that both hide

* Dean, Faculty of Arts, Birkbeck College, University of London.

1 JACQUES DERRIDA, VOYOUS (2003).
and reflect the economic and political interests of the dominant forces of society. 2 But Derrida was concerned to go beyond that well-established critique in order to explore two crucial relationships that have determined the life of the institution: that between law and force and that between law and justice.

Law is intimately connected with force. There is no law, if it cannot be potentially enforced, if there is no police, army and prisons to punish and deter possible violations. In this sense, force and enforcement are part of the very essence of legality. Modern law coming out of the endless feuds of princes and local chiefs claimed a monopoly of violence in the territory of its jurisdiction and used it to protect the ends and functions it declares legal, but also to protect the empire of the law itself. This violence that follows the law routinely and forms the background against which interpretation can work is called by the philosopher, prophet and flaneur Walter Benjamin law-preserving. It guarantees the permanence and enforceability of law. There are two aspects to the violence that conserves the law.

“Every juridical contract...is founded on violence” says Derrida and the legal academic Robert Cover agrees: “Legal interpretation takes place in a field of pain and death.” 3 Legal judgments are statements and deeds. They both interpret the law and act on the world. A conviction and sentence at the end of a criminal trial is the outcome of the judicial act of legal interpretation, but it is also the authorization and beginning of a variety of violent acts. The defendant is taken away to a place of imprisonment or of execution, acts immediately related to, indeed flowing from, the judicial pronouncement. Again as a result of civil judgments, people lose their homes, their children, their property or they may be sent to a place of persecution and torture.

The recent turn of jurisprudence to hermeneutics, semiotics and literary theory has focused on the word of the judge and forgotten the force of the word. 4 The meaning seeking and meaning-imposing component of judging is analyzed as reasoned or capricious, principled or discretionary, predictable or contingent, shared, shareable or open-ended according to the political standpoint of the analyst. The main if not


4 The linguistic and interpretative aspects of the law were always a part of legal theory. They were somewhat neglected during the heyday of legal positivism, but they have been reinstated within jurisprudence. Law is often now seen as an exclusively linguistic and meaningful construct and various types of hermeneutics and literary theory have been adopted to explain and justify the operations of the "prison house of language." For a critique of these theories see DOUZINAS & GEAREY, CRITICAL PHILOSOPHY OF LAW Chapter 13 (2005).
exclusive function of many judgments is to legitimize and trigger past or future acts of violence. The word and the deed, the proposition and the sentence, the constative and the performative are intimately linked.

Legal interpretations and judgments cannot be understood independently of this inescapable implication in violent action. In this sense, legal interpretation is a practical activity, other-orientated and designed to lead to effective threats and - often violent - deeds. This violence is evident at each level of the judicial act. The architecture of the courtroom and the choreography of the trial process converge to restrain and physically subdue the body of defendant. From the defendant's perspective, the common but fragile facade of civility of the legal process expresses a recognition "of the overwhelming array of violence ranged against him and of the helplessness of resistance or outcry." But for the judge too, legal interpretation is never free of the need to maintain links with the effective official behavior that will enforce the statement of the law. Indeed, the expression "law enforcement" recognizes that force and its application lies at the heart of the judicial act. Legal sentences are both propositions of law and acts of sentencing.

Legal interpretation then is bonded, bound both to the deeds it triggers off and the necessary conditions of effective domination within which the sentence of the law will be enforced. Without such a setting that includes a formidable array of institutions, practices, rules and roles - police, prison guards, immigration officers, bailiffs, lawyers etc - the judicial word would remain a dead letter. All attempts to understand legal judgments and judicial decision-making as exclusively hermeneutical are incomplete. Legal interpretations belong both to horizons of meaning and to an economy of force. Whatever else judges do, they deal in fear, pain and death. If this is the case, aspirations to coherent and shared legal meaning are liable to flounder on the inescapable and tragic line that distinguishes those who mete out violence from those who receive it. Legal decisions lead to people losing their homes or children, being sent back to persecution and torture: legal interpretation leads to people losing their lives.

But there is also the violence of language itself. The law is full of examples in which people are judged in a language or an idiom they do not understand. This is the standard case with asylum-seekers who are routinely asked by immigration officials to present their case and to recount the brutalities and torture they have suffered in a language they do not speak. "The violence of an injustice has begun when all the members of a community do not share the same idiom throughout," states Derrida.

5 Cover, supra note 3 at 1607.
For Jean-François Lyotard an extreme form of injustice is that of an *ethical tort* or *differend*, in which the injury suffered by the victim is accompanied by a deprivation of the means to speak about it or prove it.

“This is the case if the victim is deprived of life, or of all liberties, or of the freedom to make his or her ideas or opinions public, or simply of the right to testify to the damage, or even more simply if the testifying phrase is itself deprived of authority... Should the victim seek to bypass this impossibility and testify anyway to the wrong done to her, she comes up against the following argumentation, either the damages you complain about never took place, and your testimony is false; or else they took place, and since your are able to testify to them, it is not an ethical tort that has been done to you.”

When an ethical tort has been committed the conflict between the parties cannot be decided equitably because no rule of judgment exists that could be applied to both arguments. In such instances, language reaches its limit as no common language can be found to express both sides. The violence of injustice begins when the judge and the judged do not share a language or idiom. It continues when all traces of particularity of the person before the law are reduced to a register of sameness and cognition mastered by the judge. Indeed all legal interpretation and judgment presuppose that the other, the victim of language’s injustice, is capable of language in general, man as a speaking animal. But as the Scottish poet Tom Leonard put it:

“And their judges spoke with one dialect,
But the condemned spoke with many voices.
And the prisons were full of many voices,
But never the dialect of the judges.

And the judges said:
‘No one is above the Law.’”

---


But force has another important role in law’s life: force institutes and founds law. Most modern constitutions were introduced against the protocols of constitutional legality that existed at the time of their adoption, as a result of defeat in war, popular uprisings or colonial occupation. Revolutionary violence suspends the law and constitution and justifies itself by claiming to be founding a new state, a better constitution and a just law to replace the corrupt or immoral system it rebels against. At the point of its occurrence, violence will be condemned as illegal, brutal, evil. But when it succeeds, revolutionary violence will be retrospectively legitimized as means to the end of social and legal transformation. Most legal systems are the outcome of force, the progeny of war, revolution, rebellion or occupation. This founding violence is either re-enacted in the great pageants that celebrate nation and state-building or forgotten in acts of enforcement of the new law and of interpretation of the new constitution.

The French revolution has been retrospectively legitimized by its Declaration des droits de l’homme, the American by the Declaration of Independence and the Bill of Rights. But these founding documents will carry in themselves the violence of their foundation, as they move from the original act to its representations. The American Bill of Rights is an obvious example. The violence of the militias, so important in the war of independence, is perpetuated in the constitutionally protected right to bear arms, which, some two centuries after the revolution, still keeps the United States in a state of war. Similarly, capital punishment reproduces the founding violence of war in every execution, which accompanies legal operations as the dark and empowering side of legal normality. But these repetitions of the traumatic genesis of the new law are re-interpreted as demands of legality and the original violence is consigned to oblivion. Indeed one of the most important strategies in this politics of forgetting is the creation of a dominant approach to legal interpretation. Once victorious, revolutions or conquests produce “interpretative models to read in return, to give sense, necessity and above all legitimacy to the violence that has produced, among others, the interpretative model in question, that is, the discourse of its self-legitimation.” For Derrida, therefore, the founding and conserving violence of law cannot be separated as Benjamin and Cover tried to do. The two types of violence are intertwined and contaminate each other, as contemporary acts of legal “conservation” or interpretation repeat and re-establish the original law-making violence which establishes the new law.

Even within well-established and democratic legal systems, popular violence shadows that of the state and moves the law in unpredictable and undesirable for

---


10 Derrida, supra note 2, at 993.
The law accepts a limited right to protest and strike and in this sense acknowledges, in a reluctant and fearful manner, that violence cannot be written out of history. During recent public disorders and protests in the miners strike, the poll tax riots and the anti-globalization demonstrations, many commentators condemned the protesters calling them undemocratic. The argument was that in western democratic and rule of law states, people have sufficient instruments to put pressure on governments and change policies and laws through the available democratic channels. And yet, the history of Britain and the West is replete of protests and riots and strikes which, condemned as they were at the time, contributed hugely to the freedoms and rights we take for granted. The Diggers and Levellers, the Gordon riots and the Reform protests, the suffragettes and the civil rights movements, the protesters in East Germany, Prague, Bucharest and Belgrade, to name only a few obvious cases, have changed constitutions, laws and governments.

Protests mostly challenge the conserving violence of law, breaking minor public order regulations in order to highlight greater injustices. As long as protesters ask for this or that reform, this or that concession however important, the state can accommodate it. What it is afraid of is the “fundamental, founding violence, that is, violence able to justify...or to transform the relations of law and so to present itself as having a right to law.”11 But the characteristic insecurity the law feels in the face of its own foundation makes it portray radical protests and desperate attempts to bring about reform by unconventional means onto challenges to its founding authority, acts of revolutionary upheaval. The American civil rights marchers were often painted as communists, the striking miners were called the “enemy within” and the protesters of Eastern Europe agents of the CIA. This exaggerated response to popular protest shows however that “for a critique of violence – that is to say, an interpretative and meaningful evaluation to it – to be possible, one must first recognize meaning in a violence that is not an accident arriving from outside law.”12

Justice and law

There is no law without enforcement but the force necessary for law’s operation is exercised in the name of justice. Indeed the force of law can be interpreted as either necessary application or as violence through an act of judgment. There is no natural or physical violence despite phrases like “violent earthquake”; violence is an unacceptable use of force and belongs to the symbolic order of law and morality. Force can be evaluated, assessed and condemned as violence according to moral

---

11 Id. at 990.
12 Id. at 991.
criteria, highest amongst them justice. Law and justice are not opposed; they are linked in a paradoxical way. When law violates its established procedures and harms someone; when it does not recognize or uphold rights which have been given already or are reasonably expected; when it breaches basic principles of equality and dignity – in all these cases the law acts unjustly according to its own internal criteria of justice. We can call this first type of justice, legal justice because it is internal to the law and operates when the law matches its own standards and principles.

But legal justice is only one facet of justice. A different conception of justice starts from the statement of the Jewish philosopher Emmanuel Levinas that justice exists in relation to the other person. The other is a singular, unique finite being with certain personality traits, character attributes and physical characteristics. But to me, she is also an infinite other, this finite person puts me in touch with infinite otherness. As phenomenology has argued, I cannot know the other as other, I can never comprehend fully her intentions or actions, I can never have an appropriate adequation or presentation, because no immediate access or perception of otherness exists. The otherness of the other means that she is never fully present to me; I can approach her only by analogy of the perceptions, intentions and actions available to my own consciousness. As a result while I have to be just to the other as a finite being with specific demands and desires, I can never be fully just because the infinity of the other makes the giving of justice impossible. We need criteria in order to be just to the other but these do not correspond to the demands of justice. Indeed any attempt to turn justice into a theory (as some Marxists did) or a series of normative statement and commands (as Kantians do) is necessarily a violation of justice. Theories and laws need to be applied; but every application would turn the uniqueness of the other into an instance of the concept or a case of the norm and would immediately violate their singularity. The only principle of justice is respect the singularity of the other. It takes the form of a universal imperative, an absolute command, but this is a strange law indeed law may be a misnomer, because unlike other theories of justice it gives no advance instructions or advice except to say be unique in your encounters with singular others.

The infinite dwells in the finite, justice dwells in the law but also challenges the law since the law must forget the infinity of the other. The law has to deal with many others and it must compare and contrast them. To do that it puts them on the same scale, it compares them by using tools like, rights, duties, common denominators that will allow the different to become similar and the other same. Justice is immanent to the law but this immanence means that law is unequal to itself, it contains within itself what opens to a new law, a new politics, a new place or non-place (utopia). Justice lies within the law as a gap a chasm, which judges both specific instances of injustice and violence but also the overall direction of the law.
Both inside and outside, justice is the horizon against which the law is judged both for its daily routine failings and for its forgetting of justice. Whether we see the law as a historical institution or as a system of rules and decisions, its operations can be subjected to deconstruction which either discovers the violence of origins in daily operations or unravels the ordered bi-polarities (fact-values, public-private, objective-subjective) and shows that they cannot stabilize the legal system. But this deconstructive operation is precisely the work of justice about which we cannot say that here it is, in front of us, full and fully revealed. Deconstruction is justice.

---

Deconstruction is Justice*

By Elisabeth Weber**

This provocative assertion, sharply contrasting with the decades-old criticism of deconstruction as an aesthetizing apolitical and ahistorical exercise, recapitulated in 1989 the stakes of an infinite task and responsibility that, in spite of and because of its infinity, cannot be relegated to tomorrow: “[...] justice, however unpresentable it may be, doesn’t wait. It is that which must not wait.” It is in the spirit of such urgency, of a responsibility that cannot be postponed, that Jacques Derrida was an active and outspoken critic and commentator on issues such as South Africa’s Apartheid, the Israeli-Palestinian conflict, the bloody civil war in his native Algeria, human rights abuses, French immigration laws, the death penalty, and on what Richard Falk has termed “the great terror war”.2

In our era -- the era French historian Annette Wieviorka has called the “era of the witness”3 -- questions of answering to the other’s call, questions of responsibility have gained, within the humanities, a significance that they never had had in non-Jewish Western thought before. This development would be unthinkable without the immense contribution of Jacques Derrida’s writings. Throughout his oeuvre and his life, he witnessed to the unheard, over-shouted or silenced voices of those who have largely been excluded by the dominant currents of Western thought -- who have been, as Toni Morrison’s novel Beloved puts it, “disremembered and

---


** Professor, Department of Germanic, Slavic and Semitic Studies, University of California Santa Barbara. She has published, *inter alia*, JUDISCHES DENKEN IN FRANKREICH: GESPRÄCHE MIT PIERRE VIDAL-NAQUET, JACQUES DERRIDA, RITA THALMANN, EMMANUEL LEVINAS, LÉON POLIAKOV, JEAN-FRANÇOIS LYOTARD, LUC ROSENZWEIG (1994). She is also the editor of JACQUES DERRIDA, LIMITED INC. (1990); and JACQUES DERRIDA, POINTS DE SUSPENSION (1992). My heartfelt gratitude goes to my friend and colleague Julie Carlson for her astute and inspiring comments and suggestions. Email: weber@gss.ucsb.edu.

---


unaccounted for.” What is more, Jacques Derrida formulated the necessity of being fully aware of the risk and aporias of this task of memory: that speaking for and remembering the other carries in itself the seed of a second betrayal. The difficulties surrounding the questions of memory and justice are “not infinite simply because they are infinitely numerous, nor because they are rooted in the infinity of memories and cultures (religious, philosophical, juridical, and so forth) that we shall never master.” Rather, they are infinite in themselves, because they are inhabited by a series of “aporias” that make justice “an experience of the impossible”, that is, of the incalculable and the unpredictable. Far from encouraging resignation, or a turning away from politics and history, these aporias actually render more urgent the demand of justice. One of these aporias can be found in the tension between the uniqueness of the address and the name and the necessity of the generality of the law:

“An address is always singular, idiomatic, and justice, as law (droit), seems always to suppose the generality of a rule, a norm or a universal imperative. How are we to reconcile the act of justice that must always concern singularity, individuals, irreplaceable groups and lives, the other or myself as other, in a unique situation, with rule, norm, value or the imperative of justice which necessarily have a general form, even if this generality prescribes a singular application in each case?”

As Christoph Menke succinctly formulates it: The “deconstructive unfolding of the tension between justice and law” occurs “in the name of an experience that no political stance can capture, but that nevertheless affects any politics as its border, and therefore as its interruption.”

Such an “experience” is given in the name, which is why the question of the name is at the very heart of Jacques Derrida’s thought. The demand for justice is not separable from the uniqueness of the gift of the name and the implications of this gift. In a reflection on the “final solution”, Derrida describes how the experience of the name affects politics as its “border”, and as its “interruption”: “[…] one cannot

---

4 Derrida, supra note 1 at 947.
5 Id. at 947.
6 Id. at 949.
think the uniqueness of an event like the final solution, as extreme point of mythic and representational violence, within its own system. One must try to think it beginning with its other, that is to say, starting from what it tried to exclude and to destroy, to exterminate radically, from that which haunted it at once from without and within. One must try to think it starting from the possibility of singularity, the singularity of the signature and of the name, because what the order of representation tried to exterminate was not only human lives by the millions, natural lives, but also a demand for justice; and also names: and first of all the possibility of giving, inscribing, calling and recalling the name.”

One must try to think it starting from the possibility of singularity not only because “there was a destruction or project of destruction of the name and of the very memory of the name, of the name as memory,” but also because this name is in fact indissociable from “bare life.”

The ability to give a name is only given to those who have been called themselves. Naming is intrinsically marked by the fact and the conscious and, more importantly, unconscious recognition that we have been called ourselves, by the inscription, in other words, of a call that, as Emmanuel Levinas put it, preceded our ability to answer. This is the law at the “origin” of all laws: we have been called, and, to use Jean-François Lyotard’s formulation, we are hostages to this call, whether we know and affirm it or not. Now more than ever in the era of the witness, one of our tasks is to bear witness to the uncanny strangeness of this call that emanates as much from the Other as from myself, “the bearer of an internal alterity.”

The fact that naming the irreplaceable ‘you’ is in its very core marked by what Derrida calls “iterability” inscribes the institution in this unique event. It is only in its iterability (in other words, recognizability) that the address can be heard. But this iterability, this paradoxical repetition at the origin, does not contradict unicity: It makes it possible in the first place. It is what could be called the excess of the institution within the call. We can exhaust the call as little as we can exhaust the fact that we were born. It has called us into a life of relation and infinite contingency and makes itself heard as the radical openness and vulnerability that is ours, and that is called being alive. This infinite finitude could be called the excess of the call within the institution (the institution of language as well as the institution of laws and rights). Derrida’s thought untiringly probes these two

---

8 Derrida, supra note 1 at 1042.

9 Id.


“excesses,” the excess of the institution within the call, within singularity, and the excess of the call and its singularity within the institution. Put otherwise, it explores a logic of the phantom, a “hauntology” that has far-reaching consequences for a political theory. The reflection on the ‘final solution’ is here again exemplary: “I ask myself whether a community that assembles or gathers itself together in order to think what there is to be thought and gathered of this nameless thing that has been called the ‘final solution’ does not have to show, first of all, its readiness to welcome the law of the phantom, the spectral experience and the memory of the phantom, of that which is neither dead nor living, more than dead and more than living, only surviving, the law of the most commanding memory, even though it is the most effaced and the most effaceable, but for that very reason the most demanding.”

The necessity of welcoming the ‘memory of the phantom’ marks Derrida’s commitment to justice in its entirety and finds its philosophical counterpart in concepts, introduced already in Derrida’s earliest writings, such as the “trace”, “différance”, and the “supplement”. If “deconstruction’s affair”, in Anselm Haverkamp’s words, is not “the proven validity of results, nor the cutting of Gordian knots”; if, rather, deconstruction sets out to find the “most complicated interlacement” of these knots, then one locus of a particularly complicated interlacement visited by Derrida over and again is the question of memory, as memory of the phantom. The question is not so much how to “address the phantom,” and whether one can question or address it, as whether “one can address oneself in general if some phantom does not already return.” And, referring to Shakespeare’s Hamlet, Derrida continues: “If, at least, he loves justice, the ‘scholar’ of the future, the ‘intellectual’ of tomorrow would need to learn it [to address himself to the other], and of him [the phantom].” In order to address oneself to the other in the search for justice, one has first of all “to welcome the law of the phantom,” precisely because this “law of the phantom” is the “most effaced and effaceable” and, for that very reason, “the most demanding,” the most urgent.

“Beloved” is, in Morrison’s novel, the name on the tombstone of a dead girl, of whom the reader never learns the living name. The violence of her death and the brutality of slavery that caused it make her haunt the lives of her mother, her brothers, and of all their relations. It is of her, the returned and disappeared ghost, that Morrison writes: “Disremembered and unaccounted for, she cannot be lost because no one is looking for her, and even if they were, how can they call her if

---

12 Derrida, supra note 1 at 973.
they don’t know her name?”15 Beloved’s memory is, indeed, “the most effaced and effaceable”, and, as Morrison’s book powerfully shows, “the most demanding.” So unbearably demanding that, in the end, her apparition is chased back into invisibility: “It was not a story to pass on.”16 The challenge that Derrida’s thought addresses to us is to realize the need to “learn,” from the other, from the nameless, from the phantom, how to address ourselves to her; how to learn her name with the keen awareness that looking for that name and learning it bears in itself the risk of “losing,” forgetting, betraying it in its singularity.

Such “learning” is all but confined to a philosophical or literary meditation. It requires a wide-awake political awareness of which the following quotes, from more recent texts by Derrida, give a first, and by no means exhaustive, impression:

“In our ‘wars of religion’, violence has two ages. The one […] appears ‘contemporary’, in sync or in step with the hypersophistication of military tele-technology – of ‘digital’ and cyberspaced culture. The other is a ‘new archaic violence’, if one can put it that way. It counters the first and everything it represents. […] A new cruelty would thus ally, in wars that are also wars of religion, the most advanced technoscientific calculability with a reactive savagery that would like to attack the body proper directly, the sexual thing, that can be raped, mutilated or simply denied, desexualized – yet another form of the same violence.”17

“The dominant power is the one that manages to impose and, thus, to legitimate, indeed to legalize (for it is always a question of law) on a national or world stage, the terminology and thus the interpretation that best suits it in a given situation.” In the contemporary context of politics, religion, and the “war against terror”, more than ever, “radical changes in international law are necessary […] I would be tempted to call philosophers those who, in the future, reflect in a responsible fashion on these questions and demand accountability from those in charge of public discourse, those responsible for the language and institutions of international law. A ‘philosopher’ (actually I would prefer to say ‘philosopher-


16 Id. at 274- 275. See DERRIDA, supra note 14 at 165 (“The specter, as its name indicates, is the frequency of a certain visibility. But the visibility of the invisible. And visibility, by essence, is not seen, which is why it remains 

deconstructor”) would be someone who analyzes and then draws the practical and effective consequences of the relationship between our philosophical heritage and the structure of the still dominant juridico-political system that is so clearly undergoing mutation.”

Derrida writes:

“We would have to analyze every mutation in the structure of public space, in the interpretation of democracy, theocracy, and their respective relations with international law (in its current state, in that which compels or calls it to transform itself and, thus, in that which remains largely to come within it), in the concepts of the nation-state and its sovereignty, in the notion of citizenship, in the transformation of public space by the media, which at once serve and threaten democracy, and so on. Our acts of resistance must be, I believe, at once intellectual and political. We must join forces to exert pressure and organize ripostes, and we must do so on an international scale and according to new modalities, though always while analyzing and discussing the very foundations of our responsibility, its discourses, its heritage, and its axioms.”

“Deconstruction is justice,” since it calls for an untiring, in principle infinite, because never “finished,” analysis of the philosophical heritage and its juridico-political systems, an analysis that is inseparable from an equally infinite responsibility. If hasty critics construe this doubly "infinite" call as condemning us to paralyzed inaction, they are merely acknowledging that this call is unbearably demanding, so unbearably demanding that its fidelity to the most effaced and effaceable ones should be chased back into invisibility, illegibility, inaudibility. But that is their problem. Any careful reader of Derrida’s texts knows that the work waiting to be done cannot wait.

---

18 Jacques Derrida, Autoimmunity: Real and Symbolic Suicides, in PHILOSOPHY IN A TIME OF TERROR 105-6 (Giovanna Borradori ed., 2003).

19 Id. at 126 (translation slightly modified).
Amnesty: Between an Ethics of Forgiveness and the Politics of Forgetting

By Peter Krapp*

Let them swear to a solemn covenant, while we cause the others to forgive and forget the massacre of their sons and brothers. Let them then all become friends as heretofore, and let peace and plenty reign.
(Homer, Odyssey)

A. Introduction

Given the remarkable consistency in Jacques Derrida’s work over several decades, it is not hard to draw a line from “Force of Law: The ‘Mystical Foundation of Authority’” to his last seminars, on pardon and forgiveness. The aporias of forgiveness are analogous to those of the gift and of justice he had analyzed in detail in previous decades, as Derrida states in “To Forgive: The Unforgivable and the Imprescriptible” – to that extent his last seminars and lectures were part of the same deconstructive project on the possibility of justice. At the same time, Derrida postulates that forgiveness is an experience outside or heterogeneous to the rule of

* Assistant Professor of Film and Media Studies at the University of California, Irvine. He is the author of DEJA VU: ABBERRATIONS OF CULTURAL MEMORY (2004) and he edited MEDIUM COOL, a collection on contemporary media theory (2002 / Southern Atlantic Quarterly 101:3). Since 1993, he has curated the Derrida bibliography and website www.hydra.umn.edu/derrida. He has translated, studied with, and published on, Jacques Derrida. Email address: peter@krapp.org.

law. In considering this juncture in Derrida’s work, this paper will juxtapose the logic and history of amnesty with Derrida’s analysis of pardon: the latter pivots on a monotheistic heritage, a Biblical-Koranic sense that is demarcated from the former concept, that of amnesty between an ethics of forgiveness and the politics of forgetting.

In its ceaseless questioning of origins, foundations and borders, deconstruction finds one of its “preferred asymmetries” in the rubbing of law against justice, and in the aporia confronting those who would assert a positive grounding of power. Authority, Derrida sought to demonstrate, might be legitimated in various ways, but returning to a founding principle will destroy it; hence he called Benjamin’s procedure a practice of “performative tautology,” or a “synthesis a priori.” The mystical foundation of force is a “legitimating fiction” – but this is not to say that justice could be deconstructed. Indeed it was Derrida’s claim that that while the law can be deconstructed, justice is ultimately undeconstructible. Responses to Derrida’s reading of Benjamin in “Force of Law” focused mostly on deconstruction as a theory of justice in relation to contemporary legal philosophy. This theory, if it is one, would seem to present itself in the aporetic shape of encoding infinite justice into a finite decision: justice requires an impossible mediation of the urgency of judgment and the infinite demands on exhaustive knowledge, a suspension, yet enforcement, of the rules, and an awareness, yet also an overriding, of undecidability. Justice is therefore, in Derrida’s formula, an experience of the impossible – and much the same goes for the gift, and for forgiveness. Derrida wonders whether “the non-juridical dimension of forgiveness, and of the unforgivable – there where it suspends and interrupts the usual order of law – has not in fact come to inscribe itself, inscribe its interruption in the law itself.”

Inversely and by extension I would argue that the question is not only whether this metaphysics is inscribed in the code of law, to the extent that justice remains inscribed in religious ethics, but also whether law or justice might make an experience of reconciliation possible that goes beyond institutional (academic or religious) sanctimony.

---


B. A History of Amnesty

A provisional history of the concept of amnesty might usefully be told in its particular relation to ending civil war. The archaic wish for forgetting accompanies the inscription of cultural continuity from the Odyssey to the present day. One finds poetic (and not merely tragic) cultural production taking hold in this intersection, and the literary canon reflects this also in Schiller and Kleist, for instance, on the topic of amnesty. Between an ethics of virtual forgetting and the politics of memory, the shared horizon of culture and history constitutes the possibility of analyzing amnesty, as distinct from grace, pardon, or forgiveness. The recent global proliferation of requests for forgiveness and reconciliation has created a sophisticated forum of political, philosophical, and psychoanalytical debates. However, perhaps owing to its own conceptual logic of a break with the past, there is no cultural history of amnesty. It is easy to compile dates – Cromwell’s English revolution ended 1660 with the “Act of free and general pardon, indemnity and oblivion,” on May 29, 1865, President Andrew Johnson issued a “Proclamation of Pardon and Amnesty” – but what is the trajectory such examples trace? From the first historically recorded amnesty, in Athens 403 BC, and to our post-World War II and post-Cold War present, amnesty joins a political decree – a ban on recalling a certain misfortune – to an individual oath: I shall not recall. The complex logic of this rejected memory deserves our most critical attention. To outline the conceptual logic of amnesty, one could focus on two occasions when there was a call for amnesty in Germany, after 1945 and again after 1989; neither resulted in an actual declaration of amnesty, of course. In the interest of establishing a pacified national identity after World War II, certain legal circles called for an end to de-Nazification in the early 50s, by means of an amnesty for all but the worst offenders. It is worth noting that the US rejected a general amnesty


6 Nicole Loraux, De l’amnistie et son contraire, in USAGES DE L’OUBLI (1988), translated in two versions as Of Amnesty and its Opposite, in NICOLE LORAUX, MOTHERS IN MOURNING 83 (1998) and in NICOLE LORAUX, THE DIVIDED CITY: ON MEMORY AND FORGETTING IN ANCIENT ATHENS 145 (2002). See, also, Louis Joinet, L’amnistie. Le droit à la mémoire entre pardon et oubli, 49 COMMUNICATIONS 213 (1989). Some point out that the amnesty of 403 BC was perhaps not the first known amnesty in Athenian history; there are sources that claim it was modeled on an amnesty after the Persian Wars. See DANIELLE S. ALLEN, THE WORLD OF PROMETHEUS: THE POLITICS OF PUNISHING IN DEMOCRATIC ATHENS 237-242 (2002); and ALFRED P DORJAHN, POLITICAL FORGIVENESS IN OLD ATHENS: THE AMNISTY OF 403 BC (1946).
for war criminals, but selectively paroled German war criminals in its custody in exchange for their help in the Cold War. As historians have demonstrated, the State Department gave this political scheme a legal framework, but the Army Judge Advocate branch opposed and attempted to delay it.\footnote{See \textit{MICHAEL CALDWELL MCHUGH, WITH MALICE TOWARDS NONE: THE PUNISHMENT AND PARDON OF GERMAN WAR CRIMINALS, 1945-1958} (Doctoral Dissertation, Miami University, 1991; DAI-A 52/07, p. 2676, Jan 1992).} After the fall of the Berlin Wall, there was again a call for amnesty for those on both sides who worked as spies, soldiers, guards, politicians, activists etc. to keep the two German states apart. And given the monotheistic structure of the scene of forgiveness, it is surely no accident that access to the archive of Stasi-files was first administered by an ordained minister, who could not prevent the office from becoming his eponymous institution (Gauck Behörde).\footnote{See \textit{Christian Meier, Erinnern – Verdrängen – Vergessen}, 50 MERKUR 937 (1996).} The general assumption appears to be that all ethical positions require a metaphysical commitment; but perhaps this is not true to the same extent of amnesty.\footnote{\textit{Carl Schmitt, Amnestie oder die Kraft des Vergessens, in STAAT, GROßRAUM, NOMOS} 218-221 (1995), 218-221. This article first appeared anonymously on November 10, 1949 as \textit{Amnestie - Urform des Rechts}, in CHRIST UND WELT. A modified version was printed on January 15, 1950 in \textit{SONNTAGSBLATT}, Hamburg. Attributed to one Walter Masuch, it was plagiarized in \textit{DIE ZEIT} on September 12, 1950, and finally appeared in \textit{Carl Schmitt’s name in DER FORTSCHRITT}, Essen, with the title \textit{Das Ende des kalten Bürgerkrieges. Im Zirkel der tödlichen Rechthaberei - Amnestie oder die Kraft des Vergessens.} Schmitt marshals as his crown witnesses Aristotle’s \textit{The Athenian Constitution}, Xenophon’s \textit{Hellenica}, JP Kenyon on \textit{The Stuart Constitution}, and the Dialogue between a Philosopher and a Student of the Common Law by Thomas Hobbes. Contemporary with Schmitt’s intervention were similar arguments by Ernst Achenbach, \textit{Generalamnestie!}, 6 \textit{ZEITSCHRIFT FÜR GEOPOLITIK} 321 (1952) and \textit{FRIEDRICH GRIMM, AMNESTIE ALS VÖLKERRECHTLICHES POSTULAT} (1951).} One lawyer calling for amnesty after World War II was Carl Schmitt. First anonymously and then in his own name, he argued that a war of everyone against everyone was a civil war, and “even the cold war turns into a cold civil war.”\footnote{However, in contrast to Schmitt, Renan warned that advances in historiography might pose dangers to politics. \textit{See Ernest Renan, Das Plebiszit des Vergesslichen, FRANKFURTER ALLEGIEMEINE ZEITUNG} (March 27, 1993). One of the rare serious inquiries into the conditions of amnesty in Germany (after 1945 versus after 1989) is the collection \textit{AMNESTIE ODER DIE POLITIK DER ERINNERUNG} (Gary Smith and Avishai Margalit eds., 1997).} In what he described as a vicious circle of self-righteousness, revenge was being taken in the name of the law, and the origins of peace in mutual forgetting were no longer being remembered. Of course, strict mnemonics would have us suffer the curse of total recall - and we would forget how forgetting can play a significant role in creating a nation, as Ernest Renan put it at the end of the 19th century.\footnote{\textit{See Ernest Renan, Das Plebiszit des Vergesslichen, FRANKFURTER ALLEGIEMEINE ZEITUNG} (March 27, 1993). One of the rare serious inquiries into the conditions of amnesty in Germany (after 1945 versus after 1989) is the collection \textit{AMNESTIE ODER DIE POLITIK DER ERINNERUNG} (Gary Smith and Avishai Margalit eds., 1997).}

Other institutions also play a crucial role in the \textit{mise-en-scène} of forgiveness: a community,
a Church or Temple or Mosque, a profession, a group of representatives, of survivors or victims. One obvious problem with the institutionalization of memory and forgetting, and with the institutionalization of forgiveness in particular, is that it seems to undermine and undo what Derrida calls the “solitude of two, in the sense of forgiveness,” which “would seem to deprive any forgiveness of sense or authenticity that was asked for collectively.” Put differently, the scene of forgiveness hinges on confiding in the other, then asking, and being granted, forgiveness in a singular gesture. Making a public spectacle of it would seem to pre-empt the possibility of this scene being sincere – it becomes a display, it appears as a mere immodesty, it is taken for a distraction. Certainly this becomes the more untenable the larger the transgression – and since, as Derrida emphasizes, the need for forgiveness is the greater the greater the injury was, it becomes most necessary and most pure in the case of the unforgivable. However, what remains of the logic of forgiveness when one is faced with the immense guilt of war crimes, of crimes against humanity, of institutionalized persecution and genocide? “As I will not cease to repeat,” Derrida stresses, “it is only against the unforgivable, and thus on the scale without scale of a certain inhumanity of the inexpiable, against the monstrosity of radical evil that forgiveness, if there is such a thing, measures itself.” It is thus also measured against collective guilt, total guilt, despite the logic of singularity inherent in forgiveness. The world wars illustrate how violence can become a systemic, a total situation. Schmitt appeals to the ancient category of amnesty because it seems to offer a solution to a situation where nobody can occupy the sovereign position of deciding about impossible forgiveness, and nobody is able to ask, privately or publicly, for collective forgiveness of inexpiable crimes.

One of the motivations for the Cardozo conference on “Deconstruction and the Possibility of Justice” was to address the question whether deconstruction amounted to a coherent ethical program, particularly since some critics had gone so far as to suggest that it basically lapsed into accommodating conservativism. Drucilla Cornell argued that deconstruction, despite being portrayed as the rejection of any metaphysics, was merely the exposure of “the quasi-transcendental conditions that establish any system, including a legal system.” This meant that

---

11 Derrida, supra note 2 at 25.

12 Id. at 34.


even Carl Schmitt’s radical distinctions were subject to deconstruction – in a way that Schmitt himself may have been implicitly admitting when he observed that only amnesty can end the cold civil war. But as Derrida writes, Schmitt failed to take into account, in his attempted analysis of cold civil war, how “the police and spy network – precisely, the police qua spy network (the ‘specter’ of the modern State of which Benjamin speaks in ‘For a Critique of Violence’) – points to what, precisely in the service of the State, ruins in advance and from within the possibility of the political, the distinction between private and public.”15 This catachresis of the traditional distinction between private and public has been theorized by other observers of the 20th century; here, we are interested above all in the stumbling block it seems to represent for what Derrida describes as the “singular, even quasi-secret solitude of forgiveness” which “would turn forgiveness into an experience outside or heterogeneous to the rule of law, of punishment or penalty, of the public institution, of judiciary calculations, and so forth.”16 Without following this trajectory of asking what Schmitt would have made of the control society, of data mining and cyber-crime, of the clipper chip and information warfare, suffice it to indicate here that despite all technological innovation that surely exerts structural effects, Derrida’s thought remains consistent even as it moves from Montaigne and Pascal, to Benjamin and Schmitt, into the 21st century.

C. Amnesty versus Forgiveness

It is crucial to distinguish between certain modified forms of recollection or of forgetting that come into play in politics and in jurisprudence, before raising other questions regarding forgiveness and amnesty. The latter, which can be understood as mutual forgetting, stands almost diametrically opposed to the former, insofar as forgiveness in its long monotheistic tradition conjures up the past to the extent of making it present again, repeating the injury, opening the wound, so that its full extent may indeed be forgiven. While amnesty has as its goal an instrumentalized amnesia, forgiveness strives for difference in repetition. However, Derrida brackets off the question of forgetting, indicating only that “forgiving is not forgetting (another enormous problem).”17 The price of forgiving or forgetting is debated not only in the context of recent national and international politics; the representation of a certain split consciousness about the collective and individual past is intricately connected with issues of accountability and responsibility, above all in matters of a politics of memory. Certainly repudiation of the past hinders us from learning to

16 Id.
17 Derrida, supra note 2 at 23.
distinguish between false values and ideals, and those worth remembering, and from being able to recognize clearly their relevance for the present. On the other hand, forgiveness neither presupposes nor ends in forgetting; on the contrary, it presupposes a lively recollection of injustice. Just as forgetting is a blockage of reception – one no longer gets it – forgiveness could be described as a stoppage in circulation. Beyond the apparent immediacy and reciprocity of give and take, we encounter the limits of such an economy; we encounter aberrations of mourning which have to do with inhibitions, anxieties, and melancholy. With the consideration of altruism and forgiveness we go to the limits of memory and forgetting. Repetition can push itself to the front as a resistance against remembering, as Derrida warned with Freud; and undoubtedly, such compromising repetition without repetition structures the scene of forgiveness, where an injury is called up again, to its full extent, without being literally repeated.

A general amnesty would allow one to go on “as if nothing had happened,” imposing silence about the memory of the unforgettable. Pardon, by contrast, is a modification of forgetting that does not affect the irrevocable, nor repress its memory. In fact, forgiveness requires the exact recall of the injury to be forgiven, and reinscribed as modified memory. By the same token, it is important to distinguish clearly between kitsch as a pathetic aestheticization of a mortified and artificially revived past, and recall of certain events in history that are incommensurable, unforgivable, inexpiable. In either case, history is irreversible – that means the past cannot return as past, nor we to it, and any regret felt about this realization is still a mortification of the past, in the mode of kitsch. The remorse code that communicates a revisiting of the impardonable or irreparable, however obliquely, is the inverse impossibility. Here, Derrida insists that a pardon either forgives the impardonable or it is not truly a pardon; it must be unconditional, without exception or restriction. By extension, I would argue, amnesty, understood as a politics of forgetting, is a product of negotiation; unlike forgiveness, amnesty does not invoke the religious, monotheistic perspective Derrida recognizes in forgiveness throughout its history. Although both forgiveness and amnesty may denote an ethics of forgetting, forgiveness is neither ‘prescription’ nor amnesty proper. Amnesty seeks to efface psycho-social traces “as if nothing had happened,” while prescription, in the French legal sense, is only the suspension of any legal or


19 Nicole Loraux formulates this structure as „faire taire le non-oubli de la mémoire.” See LORAUX, LA CITÉ DIVISÉE, supra note 6 at 171.

20 RICOEUR, supra note 5 at 586.
penal consequences of the act committed. Arguably, the difference between amnesty and pardon is not simply one of private versus social spheres. It is Lyotard’s “universal proposition” that “all politics is a politics of forgetting, and that nonforgetting (which is not memory) eludes politics.” Both forgiveness and amnesty are modifications of collective memory and forgetting. Forgiveness conjures up the past to the extent of making it present again, repeating the injury, opening the wound, so that its full extent may indeed be forgiven. If amnesty may be understood as mutual forgetting, it remains diametrically opposed to the asymmetry of forgiveness, which throughout its long monotheistic tradition is inseparable from investing someone with the power to forgive. Selective or collective amnesty, by contrast, whether in the context of the South African “Truth and Reconciliation Commission,” or in Chile, or after the Vietnam War, invokes no higher power than the law. If forgiveness goes to the limits of memory, amnesty tests the limits of forgetting. In either case, repetition can push itself to the front as a resistance against remembering. Undoubtedly, such repetition-without-repetition also structures the scene of forgiveness, where an injury is called up again, to its full extent, without being literally repeated. While forgiveness is most necessary in situations that are so exceptional, traumatic, or catastrophic as to fall out of history, amnesty remains firmly within the political necessities of normalization and continuity.

D. Politics and Ethics

Amnesty is neither suspension of a duty to punish, nor abolition – the limits amnesty draws imply that past and present cases end with its declaration. An act of grace can only be granted by a sovereign or head of state, usually to individuals,

---


23 Helmut Lethen, Damnatio Memoriae und die Rhetorik des Vergessens, in SCHWEIGEN. UNTERBRECHUNG UND GRENZE DER MENSCHLICHEN WIRKLICHKEIT 159-168 (Dietmar Kamper and Christoph Wulf eds., 1992); MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998); DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS (1999).


rarely to a collectivity. The law, however, figures sovereignty differently: a deed may be punishable, not punishable, or require mitigating considerations. Legal systems serve to decide, case by case or in principle, what distinguishes each situation. Jurisprudence provides formal limits on punishment, such as a prohibition against retroactive pursuit consequences after legislation (nullum crimen sine lege) and the prohibition against advance parole or pre-emption. Two principal limits to amnesty are equality and security. Until the French Revolution, amnesty in France was the right of the monarch, an act of clemency only limited by a list of "crimes irremissibles" such as murder, rape, or attack on the king. What distinguishes such clemency from amnesty is that the latter constitutes forgiveness without forgetting, while amnesty is a total effacement of the deed and its consequences. The affordance of protection from prosecution for a crown witness makes the inequality of selective effacement evident; to avoid any suspicions of impropriety of such a covert "amnesty," the prosecution usually has to demonstrate substantial benefits to the system. Where a legal system provides the possibility of ceasing prosecution, reducing sentences, or suspending the remainder of a sentence, one should not speak of amnesty; on the other hand, and by the same token, amnesty is not to say that the deed was not wrong, it is not a denial of punishable acts, nor is it an excuse or a way of removing legal grounds. Amnesty proper only says that despite the specific act, no prosecution and no expected consequences are to follow.

Just as it must remain impossible for criminals to count on amnesty, it must not be stalled in parliamentary negotiations. Of course it cannot be sprung on the judiciary and the public without discussion - but if amnesty is not swift and sudden, it is in danger of becoming a mere political tool. To ensure that amnesty as an intrusion of politics into law remains an exception, an amnesty’s goals must be made as clear as its distinction from pardon and forgiveness. History provides plenty of examples resembling amnesties based on obvious calculations – a tax measure that may fill state coffers, a political measure that may protect partisans, an early release program to ease the burden on the prison system, a declaration voiding certain laws to foster reform, a post-revolutionary declaration of new law and order, or an election promise bordering on a advance parole. In many or all of these


27 Compare book 2, chapter 5 of Rousseau’s Contrat social and book six, chapter 16 of De l’esprit des lois by Montesquieu. Kant likewise excluded amnesties in circumstances where they might give rise to danger; see METAPHYSIK DER SITTEN 460 (Werke vol IV).
examples, one may detect a hint of self-dealing. Argentina, for instance, passed an amnesty for the military and the secret service in the course of transition from military junta to democracy in 1983, which the newly elected President Alfonsin then had to declare null and void; the parliament confirmed this by annulling the law on December 19, 1983. Examples like this raise the question how amnesty, in its suspiciously generalized and generalizing complicity with forgetting, could become one definition of politics, as that which begins when vengeance stops.

E. Virtual Forgetting

Of course amnesty does not in all cases come at the end of war, nor inevitably in the service of peace: participation in the First World War, the French promised, could extinguish (a certain amount of) guilt; and to this day, a similar pact is part of the recruitment efforts of the French Foreign Legion. But for the most part, amnesty is a historical companion to political unrest. There were few amnesties in Germany between 1871 and 1914, some during WWI, and quite a few right after. There were amnesties every year in the Weimar Republic, commonly as a means to solidify political power. And although the concept was being discussed in the late 1940s, there were no amnesties in Germany after WWII until the violence of 1968-69 was addressed politically in 1970. Except for the use of the term “amnesty” in tax law and immigration law, one would have to search long and hard for recent considerations of amnesty. The last sustained discussion of amnesty in the US was in 1974, as a means of pacifying the country in the aftermath of the Vietnam War, specifically of the draft and of anti-war demonstrations.28 The sharp distinctions between these 20th century contexts are crucial to an appreciation of the benefits of political transparency, especially since the discussion of amnesty for draft evaders may have done more good than an actual amnesty decree could have done.

Clearly if jurisprudence, if philosophy ignored the concept of amnesty, the world might be less prepared for a resolution of current and future conflicts. At the same time, just as the use of selective presidential pardon has come under considerable suspicion, amnesty as a political instrument must be carefully limited by legislation and jurisprudence to avoid abuse. To the extent that punishment secures the conditions for a free society that protects individual and collective rights, amnesty must remain an exception; inversely, there must be cases that remain ineligible for amnesty, such as torture and genocide, war crimes and crimes against humanity. On the other hand, the assumption that amnesty is a check on state power in the name of grace or forgiveness has to be qualified carefully. Judicial activism or other

forms of political interference in the justice system will lead to abuse; but the state monopoly on violence can also result in over-use or under-use of its power, and thus leave citizens either unprotected or make them the victims of unjust judicial persecution. Therefore if there were no limits to amnesty, the state would have abandoned law, but if there was no amnesty as a limit to the force of law, the system would abandon the principles it vows to uphold. And to the extent the legal system depends on testimony, on recall, it continues to prize individual and cultural memory, and the story of amnesty as virtual forgetting is not being told.
Epilogue: in lieu of conclusion

By Florian Hoffmann*

How could one conclude the preceding collection of texts and create the closure necessary for the recognizability, citability, and, indeed, untouchability of this “Special Section on Derrida” within the *German Law Journal*? And how could one determine the multiple significations of each and all these texts, and connect them through a single thread? And, finally, how is one to respond to the preceding questions? Do they call for an analytical reflection on the structural indeterminacy of conclusion, or for an ethical reflection on its justice?

The answer to all these questions must, of course, consist of an uneasy gesture towards *différance*, the necessary and desired quest for closure in space and time, and the impossibility of ever attaining it. All texts in this collection circle around a word, notably a name, Jacques Derrida, the signification of which, however, remains ultimately elusive; it leaves its traces all over these texts, indeed, it seems to haunt each of them in a ghost-like manner, though, like a ghost, it always escapes. It is also such an escape that underlies the logic of this homage, namely that of the other of that word, that is, the flesh, the person Jacques Derrida, who has escaped far beyond our reach.

But this escape is not the end of the end. It is just the end of our attempt to conclude, to “find” the end of his word. Yet, it leaves intact, and, indeed, is a precondition for the necessary, but entirely arbitrary ending of our words on his word, for the inherently violent but inescapable imposition of a final full stop, a cut off point, a dead-line. Such an end, however, is not one that pretends to fullness of meaning and being, but one that is secretly premised on something beyond it, an after-word, an epilogue - different, but thereby definitive of that which is ended, as J.D. reflections on Plato’s *Pharmacy* have famously illustrated.1 Hence, while an

---

* Florian Hoffmann is an Assistant Professor of Law at the Pontifícia Universidade Católica do Rio de Janeiro (PUC-Rio); he is also the Deputy Director of the Department of Law’s human rights centre, the Núcleo de Direitos Humanos. He holds a BSc(Econ) in Law and Government from the London School of Economics, an LLM. (*Mestrado em Ciências Jurídicas*) from the PUC-Rio, and a PhD in Law from the European University Institute, Florence. He is one of the co-editors responsible for this Special
epilogue is, prima facie, meant to authoritatively determine and, thus, petrify the word that precedes it, it thereby resurrects the latter by bringing it back to life after and beyond death.

Hence, rather then to try to conclude this particular collection of essays, or pretend to issue final judgement on J.D.’s work, this epilogue hopes to raise -not to answer (!)- the question of what the epilogue of Jacques Derrida is or will be. It is a question about which he himself increasingly reflected, with a mix of fascination and puzzlement, during his final ‘war with himself’. One of his starting points in this reflection was, of course, Walter Benjamin’s distinction between surviving (überleben) and living on (fortleben), and his transposition of it onto the act of publishing, which, to him signified, the death of the author, and, yet also the precondition for her/his survival. The life of the text dies once the author forcibly finishes it, yet it comes back to life once it is read. The text, thus, survives, and with it the hope that, thus, the author lives on, though it is never more than a hope, and one about which J.D. for one, was not, it would seem, always sure.

What will remain, what will be the legacy? Will this oeuvre have been an end point in itself, the final echo of an intellectual movement of which, as he knew, J.D. was frequently considered to be the last survivor. And will this movement’s multiple forms of self-conscious epi-modernity fall like, as an unsympathetic blogger put it, the constructs of the Late Scholastics once the society, culture, and characters that sustained it are no longer present? Or are we, on the contrary, in the very beginning of something of which we have seen, not least through J.D.’s grand eye-opening exercise, only the tiniest of fractions yet? Is it, perhaps, as another follower of that “movement,” the prophetic Michel Foucault observed early on, namely that “by a light that may either be –we do not yet know which- the reviving flame of the last great fire, or an indication of the dawn, we see the emergence of what may perhaps be the space of contemporary thought?”

And what about law? What legacy will there be in and through the many movements J.D. inspired, from Critical Legal Studies to Legal Pragmatism, from legal deconstruction to autopoietic legal theory? How will those equally many who felt infernally threatened by his exposition of their all too shaky foundations react

Dedication, and has had a passion for Derrida ever since he attempted to deconstruct Ronald Dworkin’s Law’s Empire in his Master’s thesis.

1 See Plato’s Pharmacy, in Dissemination (1983).


to and be affected by the dawn of J.D.’s epilogue? The only thing that can be said at this stage is that both the legacy of inspiration and the legacy of fear are likely to emerge within a tension J.D. has thematized in a text, *Force of Law*,⁴ that is present in virtually all contributions to this collection. One of the central themes in *Force of Law* is, of course, the tension between law and justice, which can be said to be played out also in relation to the question of legacy. For, no doubt, the machine-like logic of the professional academy, regardless of whether on the inspiration or fear side, is bound to ‘legalize’ the epilogue, i.e. to categorize and canonize, and in many other ways forcefully conclude his word; it will create schools out of his thought, regardless of his own rejection of any such framing, and out of their institutional in-fighting will emerge temporarily predominant perspectives, *codices Derrideani*, which will pretend to govern the legacy. Yet, this law of the epilogue will not be able to annihilate the ever open question of justice, that is, the ethical question of how we can and how we should act as the creators of the epilogue. The answer to that question involves, for each of us individually, the difficult task of assuming responsibility for the many unfounded and unfoundable decisions through which we contribute our part to the legacy. For the justice of legacy implies that that responsibility cannot be externalized and projected onto some ready-made Derridean intentions, or be produced merely by the economy of academic professionalism; it must be ours, and ours alone. Hence, while we are bound to obey the law, the call for justice, if we want to heed it, means that we must continuously attempt to subvert that law.

Let us, thus, take up the second possibility contemplated by J.D. in his last interview, namely that we are only at the very beginning of reading him – *Derrida est mort…vive Derrida!*

---

DEVELOPMENTS

The New Law Against Unfair Competition: An Assessment

By Manuela Finger and Sandra Schmieder*

A. Introduction

July 8, 2004, marked a cornerstone for the German law against unfair competition. The amending Statute Against Unfair Competition (UWG 2004) came into force on that day. That day also ended a long discussion among researchers who had called for a thorough modernization of the UWG. In particular, researchers criticized the prohibitions on sales promotion; these prohibitions are now abolished. Furthermore, the new UWG addresses European Union demands for greater liberalization and consumer protection, especially with respect to the electronic communications sector. The new law is a complete reorganization of the old act of 1909. The revised UWG is much more liberal, but still guarantees a high standard of protection for consumers and competitors.

This article will analyze the new law against the background of EC law and the legislative history (Section B.). The modified structure and provisions of the new UWG will be discussed in detail (Section C.). This analysis will include: a comment on the intent behind the UWG 2004, a description of the scope of the new provisions, a comparison with the old law, and an assessment of the new provisions. Critical comments on some aspects of the UWG 2004 will then be raised (Section D.).

* Manuela Finger is Rechtsassessorin and research assistant to the Chair of Prof. Dr. Fezer at the University of Konstanz; Dr. Sandra Schmieder, LL.M. (Berkeley) is Rechtsreferendarin and research assistant to the Chair of Prof. Dr. Martin Ibler at the University of Konstanz.


B. Background – History of the Act

At the end of 2000, the German law against unfair competition still recognized significant restrictions on reduced-pricing sales of goods. Such sales, excepting a range of particular goods, were only allowed: on 12 days in the summer and winter, when a business celebrated its 25th year of foundation, or in the case of rummages. Cash discounts, rebates and free gifts were restricted in special laws outside the UWG, namely the Rabattgesetz (statute on discounts) and the Zugabeverordnung (regulation governing free gifts with sales). Having hindered the application of modern advertisement practices applied in international trade, these particular provisions had proven a disproportionate constraint on the offer of goods. The regulation governing free gifts with sales and the statute on discounts were effectively cancelled without substitution on July 25, 2001. The enactment of the e-commerce directive was the specific impetus behind this amendment. Despite this first step towards a liberalization of the German law against unfair competition, the UWG still restricted special reduced-pricing sales. This remaining structure was inconsistent with the goal of creating a comprehensive, more entrepreneur-friendly, liberal legal framework concerning the offer of goods. Hence, an additional revision of the UWG was required to fully modernize Germany’s law against unfair competition.

European demands also fueled the amendment of the UWG. While the European Union had not yet enacted competition legislation, it had demonstrated the desire to harmonize European laws against unfair competition. The proposal for a regulation concerning sales promotion in the internal market intended to unify the provi-

---

4 Sec. 7, 8 UWG 1909.


7 See the explanatory statement of the new law, BT-Drs. 15/1487, 12.


9 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (O.J. L 178, 1). Pursuant to the country of origin principle in Art. 3, entrepreneurs must only comply with the national laws at their business location. This provision could have resulted in a discrimination of German entrepreneurs, if the stringent provisions on discounts and giveaways had remained in force (see also http://www.bundesregierung.de/artikel/413.26160/Rabattgesetz-und-Zugabeverordn.htm).

10 See sec. 7, 8 UWG 1909.
sions on free gifts, discounts, and games of luck. The proposal for a directive concerning unfair business-to-consumer (B2C) commercial practices in the Internal Market went one step further. Rather than simply addressing separate areas like the proposed regulation concerning sales promotions, it dealt with the entire law against unfair competition. The directive was based on the Green Paper on European Union consumer protection, with the core aim of liberalizing the provisions on commercial practices without lowering consumer protection. These two European harmonization approaches already emphasized the need to change the UWG, although the final enactment of the directive may soon oblige the German parliament to revise the UWG a second time. Similarly, the need to transpose the EC-Directive 2002/58 concerning data protection for electronic communications into national law further signaled the need for change.

Due to these domestic and European demands, the German Government established an expert committee within the Department of Justice in 2001. This committee was tasked with making suggestions for a modernization of the UWG. The new law would conform to European standards and describe further developments towards a European law against unfair competition. The committee’s recommendations led to the reenactment of the UWG in its revised form.

C. The New UWG

The new UWG addresses the shortcomings of the UWG 1909. Such antiquated provisions as the restrictions on special sales found in Sec. 7-8 UWG 1909 have been

---


15 See the explanatory statement of the new law, BT-Drs. 15/1487, 12.


18 Explanatory statement of the new law, BT-Drs. 15/1487, 12.
abolished. The revised structure is much more modern, provisions are more transparent, and the demands of Art. 13 of the EC-Directive 2002/58[19] concerning unsolicited communications have been met.

The revised UWG consists of five chapters. Chapter one contains the core of the substantive law, including the purpose of the UWG 2004 and the definition of fundamental terms. More specifically, this chapter determines which acts of competition are unfair and, thus, prohibited. Chapter two comprises both civil remedies as a legal consequence of an infringement upon competition and statutory limitation rules. Chapter three refers to procedural issues and chapter four deals with criminal sanctions. Chapter five contains the final provisions.

I. Purpose of the Act

Unlike the UWG of 1909, the new UWG formally defines the purpose of the act in its first section. The former Sec. 1 UWG (the statutory ban of unfair acts of competition) persists, now as Sec. 3 UWG 2004.[20]

Section 1 UWG 2004 now explicitly provides that the law against unfair competition protects competitors, consumers and other market participants against unfair behavior. This tripartite protection accords with the hitherto existing scope of protection[21] and still secures the public interest in undistorted competition. For the first time, however, the parliament has explicitly mentioned the consumer as a subject of protection. Previously, the drafters had responded to the demands of consumers associations[22] by simply crafting the established case law into statutory law.[23]

II. Definitions – Scope of Protection

The definitions in Sec. 2 UWG 2004 are important for the scope of protection provided by the new UWG. An “act of competition” is still broadly defined as any

[20] See infra text at [3.3.1].
[22] Explanatory statement of the new law, BT-Drs. 15/1487, 13.
behavior aiming to foster marketing, distribution and the purchase of goods and services, either for intrinsic or extrinsic purposes. \(^{24}\) By referring to other market participants,\(^ {25}\) the UWG 2004 still protects entrepreneurs who have no direct relationship to the party infringing upon fair competition. Similarly, the new UWG still provides protection for entrepreneurs who work in a branch of business different from that of the violating party. \(^ {26}\) The definition of “news” clarifies that the new UWG only regulates information distributed by electronic communication services to a limited number of persons, such as by telephone, fax and e-mail. Hence, “news” in radio and television remains the subject of special regulations and is especially protected by the law on telecommunications (TKG\(^ {27}\) and TDG\(^ {28}\)) and the media laws of the Länder (federal states).

III. Competition Infringement

Section 3-7 UWG 2004 set forth the actions prohibited by law since they constitute infringements upon fair competition.

1. The General Clause of Sec. 3 UWG 2004

The former general clause of Sec. 1 UWG, the statutory ban of unfair acts of competition, is now included in Sec. 3 UWG 2004. This provision is the core of the substantial law against unfair competition. Whereas the former Sec. 1 UWG solely referred to a behavior “contrary to public policy” to define prohibited commercial practices, Sec. 3 UWG 2004 uses a more precise definition based on the term “unfair,” which has supplanted the antiquated term “public policy.” In this respect, the new law has become more compatible with EC law, which makes frequent use of the term “unfairness.”\(^ {29}\)

\(^{24}\) Sec. 2 para. 1 no. 1 UWG 2004.

\(^{25}\) Sec. 2 para. 1 no. 2 UWG 2004.

\(^{26}\) Explanatory statement of the new law, BT-Drs. 15/1487, 16. See also to the hitherto existing law Baumbach/Hefermehl, Wettbewerbsrecht, 22. Aufl., Einl. UWG Rdn. 226 zum mittelbaren Wettbewerbsverhältnis.


\(^{29}\) Explanatory statement of the new law, BT-Drs. 15/1487, 16.
Thus, the section 3 UWG 2004 prohibition can be broken down into the following terms: (1) acts of competition that are (2) unfair and (3) capable of materially distorting competition (4) by harming competitors, consumers or other market participants (5) are prohibited. With its reliance on an "act of competition," Sec. 3 UWG 2004 maintains that the new law does not protect against ordinary torts in business.\footnote{Explanatory statement of the new law, BT-Drs. 15/1487, 16.} The term “materially distorted”\footnote{Sec. 3 UWG 2004.} points out that the new UWG provides no protection against irrelevant nuisances. Nonetheless, an infringement upon competition requires neither injury nor grievous harm under Sec. 3 UWG 2004. Thus, even though its structure has changed, the new UWG still guarantees a high standard of protection.

Since it has been successful in the past, the new law also uses a general clause as the principal means of protection.\footnote{Explanatory statement of the new law, BT-Drs. 15/1487, 13.} Consequently, the determination of an infringement upon competition still requires an appreciation that thoroughly balances the affected values and interests of the injured party, the public interest, and the violating party. Fortunately, the general clause is now supplemented by a non-exclusive list of samples of unfair acts of competition, which helps to construe and to apply the new law.\footnote{See sc. 4-7 UWG 2004.} The UWG 2004 thus follows the approach of modern laws on competition insofar as the numerous samples provide legal certainty. While they do restate established cases, they take up current issues as well. This approach makes the revised UWG much more transparent, but still allows for a flexible case-by-case resolution of new issues with which courts may be confronted in the future.\footnote{Explanatory statement of the new law, BT-Drs. 15/1487, 13, 16.} Small businesses and foreign companies, especially, may benefit from this greater legal certainty.

2. **Samples of Unfairness, Sec. 4-7 UWG 2004**

Section 4 UWG 2004 already includes a large list of samples of unfair competition.\footnote{See also Günter Zettel, *Verbotstatbestände im neuen UWG*, MONATSSCHRIFT DES DEUTSCHEN RECHTS 1099 (2004).} Nevertheless, it must be stressed that the mere pertinence of a sample listed in Sec. 4-7 UWG 2004 does not constitute a *prima facie* case of an infringement upon competition. Rather, the other requirements of Sec. 3 UWG 2004 must also be ful-
filled; market participants must be injured and competition must be materially distorted. For example, Sec. 4 UWG nos. 3 and 4 addresses acts of competition that conceal their advertisement purposes and sales promotions methods that do not state explicitly the conditions wherein discounts and free gifts are granted. Not only do these provisions protect consumers, but they protect competitors as well. Furthermore, Sec. 4 UWG nos. 5 and 6 regulate competitions and games of luck. Pursuant to these provisions, it is unfair if an entrepreneur either fails to explicitly inform about the respective participation criteria or if he/she couples participation with the purchase of his goods or services. Such unfairness exists when participation in the competition is predicated on the consumer dialing a special number – like a 0190-number – for which higher rates are charged. However, the true chances to win need not be disclosed. Furthermore, ordinary competitions or games of luck in periodicals are not prohibited. It is important to emphasize that the commercial activities of municipalities cannot be enjoined by the means of the UWG. The parliament has clarified that the Gemeindeordnungen of the Länder (Local Government Laws of the federal states), which only allow municipalities to pursue commercial activities under special circumstances, are not laws that aim to protect fair competition in the sense of Sec. 4 no. 11 UWG 2004.

Section 5 UWG 2004 continues the samples of unfair behavior. It declares that deceptive advertisement is unfair. This provision is an essential reorganization of the revised UWG. First, it summarizes the hitherto existing law: the standard for deceptive behavior is the recognition of a reasonable and consumer possessing average information. Moreover, it introduces two new sections, which specifically address advertising with price reductions and advertising by bait. The new section concerning price advertisement establishes the important presumption that advertising with a reduced price is a deceptive method, provided that the prior

---

36 Explanatory statement of the new law, BT-Drs. 15/1487, 17, 19, 20.
37 Explanatory statement of the new law, BT-Drs. 15/1487, 18.
38 Explanatory statement of the new law, BT-Drs. 15/1487, 18.
40 Explanatory statement of the new law, BT-Drs. 15/1487, 13.
41 Explanatory statement of the new law, BT-Drs. 15/1487, 19.
42 Sec. 5 paras. 4 and 5 UWG 2004.
43 Sec. 5 para. 4 UWG 2004.
price was only offered for an inadequately short period. Given this presumption, the burden of proof of the non-deceptiveness of the price reduction lies with the advertiser. Other price reductions are generally allowed, unless the claimant can establish their deceptiveness. Similarly, Sec. 5 UWG 2004 declares advertising by bait to be an improper method when the advertiser is incapable of satisfying the expected demand from the outset. The advertiser must prove that he/she had a sufficient quantity of goods available.

In addition, Sec. 6 UWG 2004 provides that comparative advertisement is unfair when, for example, it refers to goods and services that have a different purpose, or when the comparison might lead to confusion among the market about the origin of goods and services. Sec. 6 UWG 2004 conforms with Sec. 2 of the UWG 1909.

Section 7 UWG 2004 declares unambiguously that unreasonable harassment is an unfair practice. Until now, this interpretation was solely an unwritten practice based upon the construction of the general clause of Sec. 1 UWG 1909. Section 7 UWG 2004 also transforms Art. 13 EC-Directive 2002/58 concerning data protection for electronic communications into national law. This provision thoroughly grants protection to any market participant from advertising by e-mail, fax or automatic solicitation machines where it is obviously contrary to his will and occurs without prior consent. The parliament has found unwanted solicitation by entrepreneurs via fax to be an especially disturbing advertisement method. Furthermore, the provision addresses the fact that private persons in their residences need special protection. In particular, the parliament has banned unwanted phone solicitation of consumers without their prior consent to business conversation, such advertisement is impermissible. Until this point, the parliament has fashioned the restrictive

44 Sec. 5 para. 5 UWG 2004.
45 No. 1.
46 No. 3.
49 Sec. 7 para. 2 no. 1, 3 and 4.
50 Sec. 7 para. 2 no. 2 UWG 2004. See infra text at 4.4.
51 Sec. 7 para. 2 no. 2 UWG 2004.
so-called “opt-in” solution into law.\textsuperscript{52} Departing from this strictness, Sec. 7 para. 3 UWG 2004 provides an important exception for advertisement by e-mail. This provision encompasses both entrepreneurs and consumers. Advertisement by e-mail is presumed to be legal provided that: (1) the advertiser previously received the customer’s electronic address in connection with the sale of goods and services; (2) the advertiser has fully informed the customer that the solicitation can stop at any time; and (3) the customer need not pay higher rates as basic transfer rates to terminate further solicitation. Although this provision still restrains advertisement by e-mail, it does give considerable advantage to advertisers by explicitly carving out such an exception. In this way, the new UWG clearly fosters the utilization of new promotion methods by e-mail.

Lastly, the new UWG no longer explicitly prohibits special sales. Where regulation is required, the legislator rightly acknowledges the prohibition of deceptive advertisement\textsuperscript{53} and grants sufficient possibilities to enjoin unfair behavior.\textsuperscript{54} Consequently, reductions of the entire line of goods are now permissible, as well as year-round and rummage sales.\textsuperscript{55} Moreover, advertisement with the term “sales” is allowed.\textsuperscript{56} Previously restricted, reduced-price sales of insolvency goods are also admissible now. In modern markets characterized by informed and self-responsible consumers, such antiquated restrictions are no longer reasonable.\textsuperscript{58}

\textbf{IV. Consequences of an Infringement Upon Fair Competition}

A party infringing upon fair competition may fear civil remedies as well as criminal sanctions.

1. Civil Remedies

The civil remedies against unfair acts of competition can be found in Sec. 8-10 UWG 2004.\textsuperscript{59} The injured party may demand injunctive relief or sue the violating party.

\begin{footnotes}
\item[52] For a critical assessment of this solution see infra text 4.4.
\item[53] Sec. 5 UWG 2004.
\item[54] Explanatory statement of the new law, BT-Drs. 15/1487, 14.
\item[55] Explanatory statement of the new law, BT-Drs. 15/1487, 14.
\item[56] Explanatory statement of the new law, BT-Drs. 15/1487, 14.
\item[57] Sec. 6, 6a, 6b UWG 1909.
\item[58] Explanatory statement of the new law, BT-Drs. 15/1487, 15.
\item[59] See, e.g., formerly sec. 13, 19 UWG of 1909.
\end{footnotes}
for damages. As before, injunctive relief is expeditiously enforceable by preliminary injunction.60

The main change in the civil remedies section is the implementation of a third civil claim: the right to claim the violating party’s profits.61 In addition, since it was seen as irrelevant,62 the right of revocation due to false and deceptive advertisement63 has been abolished. The short statutory limitation period for damages was lengthened from 6 months to 10 years, provided that the claimant had no knowledge of the infringement or the violating party.64 In this respect, the parliament has responded to the very critics who had challenged the overly-short period of the statute of limitations for claiming damages.65

The civil remedies of the new UWG are still exclusive.66 Furthermore, standing remains limited to competitors, consumers associations, chambers of commerce and other associations.67 Nevertheless, standing was the subject of controversial discussion within the legislative procedure leading to the enactment of the UWG 2004.68 Consequently, a consumer can only complain to a consumer’s association, which can then bring a suit on behalf of the consumer. Similarly, individual entrepreneurs cannot sue unless they compete directly with the violating party. This stipulation follows from the definition of competitors in Sec. 2 para. 1 no. 3 UWG 2004.

a) Injunctive Relief and Compensatory Damages

The hitherto existing remedies – injunctive relief and the right to claim damages – have undergone some changes. The arrangement of the respective provisions has become clearer.

60 Sec. 935, 940 ZPO (German Code of Civil Procedure) can more easily proof the urgency of a preliminary injunction (sec. 12 para. 2 UWG 2004).
61 Sec. 10 UWG 2004, see below under [3.4.1.2].
62 Explanatory statement of the new law, BT-Drs. 15/1487, 14.
63 Sec. 13a UWG 1909.
64 Sec. 11 para. 2 UWG 2004.
65 Statement of the Bundesrat, BT-Drs. 15/1487, 35 f.
67 Sec. 8 para. 3 UWG 2004.
68 See, e.g., sec. 13 para. 2 UWG of 1909.
The new provision on injunctive relief constrains the claimant insofar as he/she might try to resolve the dispute out of court. Although the claimant is not absolutely obliged, failure to do so risks the awarding of court costs when the violating party immediately acknowledges the propriety of the claim. This procedure thus recommends that claimants should now warn the violating party before they bring an action for injunctive relief. The violating party must compensate the claimant for the cost of such notice. Pursuant to the explanatory report to the new law, the violating party may not have to pay for legal expenses if the claimant is an association or a chamber, which ordinarily have well trained staff to handle legal issues.

Concerning the new provisions on compensatory damages, competitors are also now entitled to charge a violating party with negligible breaches. Previously, they could only charge a violating party with willful acts under the old UWG. Newspaper publishers are the sole category of potential violators whose liability remains limited to willfulness.  

b) Right to Claim the Violating Party’s Profits

The right to claim the violating party’s profits addresses prior prosecution inefficiencies experienced when unfair acts of competition harmed many persons, but each individual suffered damages of a negligible quantum. In such instances, even though the violating party had gained considerable profit, neither consumers associations nor competitors could justify bringing claims compensatory damages. The parliament has now resolved this inefficiency in Sec. 10 UWG 2004, which allows claims for the profits that a violating party has willfully achieved by injuring a multitude of customers. The requirement of injury to a multitude of customers excludes cases where the injured party is only an individual, e.g. in the instance of

---

69 See sec. 93 ZPO (German Code of Civil Procedure). Explanatory statement of the new law, BT-Drs. 15/1487, 25.
70 Sec. 12 para. 1 UWG 2004.
71 Sec. 12 para. 1 UWG 2004.
72 See sec. 93 ZPO (German Code of Civil Procedure). Explanatory statement of the new law, BT-Drs. 15/1487, 25.
73 Sec. 9 cl. 1 UWG 2004.
74 Sec. 13(6) UWG 1909.
75 See sec. 93 ZPO (German Code of Civil Procedure). Explanatory statement of the new law, BT-Drs. 15/1487, 25.
76 See sec. 93 ZPO (German Code of Civil Procedure). Explanatory statement of the new law, BT-Drs. 15/1487, 25.
77 Sec. 10 para. 1 UWG 2004.
direct marketing by phone. The key feature of the right to claim the violating party’s profits is that the profits do not belong to the claimant, but must be transferred to the Federal treasury. Moreover, compensatory damages or fines already paid by the violating party are deducted from the profits subject to the claim.

2. Criminal Sanctions

Except for a structural rearrangement, the criminal provisions of the UWG 1909 have been mostly unaffected by the reenactment. Deceptive advertisement is still liable to prosecution without proof of damages. Thus, the criminal liability of the UWG goes beyond the Strafgesetzbuch (StGB – German Criminal Act), which prohibits fraud only if the claimant suffers from financial disadvantages. Furthermore, the new UWG prohibits betrayal of trade secrets, as well as the unauthorized use of technical drafts. Punishment takes the form of fines and prison sentences of up to 5 years.

V. Procedural Questions

Turning towards the procedural rules, the new law does not change much. As in the UWG 1909, courts at the seat of the violating party have jurisdiction to hear the case. Competitors may also bring their case at the place where the infringement was committed. Chambers of commerce, consumers associations, or others are only entitled to bring their case where the infringement occurred when the violating party has neither a business location in Germany nor a German domicile. Alternatively, disputes may be resolved by arbitration.

78 Explanatory statement of the new law BT-Drs. 15/1487, 24.
79 Sec. 10 para. 2 UWG 2004.
80 Sec. 10 para. 2 UWG 2004.
81 Sec. 16 UWG 2004.
82 Sec. 263 StGB.
83 Sec. 17, 19 UWG 2004.
84 Sec. 18, 19 UWG 2004. Cf. sec. 17, 18, 20, 20a UWG of 1909.
86 Sec. 14 para. 2 UWG 2004.
87 Sec. 15 UWG 2004, cf. sec. 27a UWG of 1909.
D. Critical Evaluation

The new UWG seems to strike a careful balance between entrepreneurial flexibility and protection for consumers and other competitors. However, some newly enacted provisions have been criticized, such as the lack of standing for individual consumers. The remainder of this article discusses these asserted deficiencies.

I. No Obligation to Inform

Starting with likely criticisms of the UWG 2004 from the consumer’s point of view, it can be argued that the lack of comprehensive obligations to inform results in insufficient protection. Such obligation to inform would have clearly benefited the consumer. This advantage, however, would have been outweighed by the constraints on competition. Furthermore, comprehensive obligations to inform were not really necessary, since the consumer is already sufficiently protected by the numerous prohibitions of Sec. 3-7 UWG 2004. Moreover, comprehensive obligations to inform would have been inconsistent with the parliament’s acknowledgment that the consumer is a self-responsible and prudent person. Since the European Court of Justice also adheres to this impression of a consumer, the absence of such obligation to inform was also consistent with European standards.

II. No Special Right of Revocation

The new law has also been criticized for failing to provide for a consumer’s right of revocation. However, the creation of such a right in the UWG was not needed. Indeed, while the UWG 2004 does not itself recognize a right of revocation, a consumer is not necessarily bound to a contract. Rather, the Bürgerliches Gesetzbuch (BGB – Federal Civil Code) grants rights of revocation in the case of unfair acts of business. The consumer has a right of revocation pursuant to Sec. 312 and 312d BGB. Furthermore, the provisions implementing the e-commerce directive in na-

89 Günter Zettel, Verbotstatbestände im neuen UWG, MONATSSCHRIFT DES DEUTSCHEN RECHTS 1099, 1102 (2004).
90 Explanatory statement of the new law, BT-Drs. 15/1487, 19.
tional law grant protection for unwanted advertisement. Moreover, the guarantee provisions of soundness protect the consumer against insufficient information. Courts may also find lack of proper quality of goods if the purchased good does not fulfill the promises made by the entrepreneur. Considering this broad bundle of revocation rights, the legislator has rightly avoided the creation of a special right of revocation in the UWG 2004.

III. No Standing for Consumers

Within the legislative procedure, some drafters of the UWG argued that the reenactment should have provided standing for consumers. Yet, enforcement considerations did not require such a right. In fact, consumers have standing and are not left unprotected since they can initiate a suit by way of consumer’s associations. In the past, such associations have effectively protected individual consumers. It is also extremely doubtful that, if individual consumers had standing, the UWG could be better enforced. Given the burden of preparing for trial and the related expenses for legal advice, it is unlikely that individual consumers would enforce such individualized rights (even if provided the legal opportunity to do so).

IV. Profits only for the Federal Treasury

Within both the legislative proceedings and the legal literature, the newly-created right to claim the violating party’s profits has been the most controversial topic for discussion. It was argued that Sec. 10 UWG 2004 should allow claimants to keep the profits, since the transfer to the Federal treasury involves a cumbersome bureaucracy that will result in additional costs. This argument is not convincing. Because it can make use of the civil proceedings initiated by private entities, the Federal treasury actually saves costs when spared the expense of claiming profits directly from the violating party.

However, criticism of the right to claim the violating party’s profits is apposite insofar as the claimant bears the costs of litigation while the Federal treasury reaps

---

93 See sec. 434 paras 1, 3 BGB.
94 Explanatory statement of the new law, BT-Drs. 15/1487, 14 f.
95 Explanatory statement of the new law, BT-Drs. 15/1487, 22.
97 Statement of the Bundesrat, BT-Drs. 15/1487, 34.
the rewards. It was stressed that this transfer of profits may lessen consumer’s associations or competitors’ will to sue.\textsuperscript{98} Although the UWG might be better enforced were claimants to receive the profits, the former number of claims does not support such fears.\textsuperscript{99} If all profits belonged to the claimant, the right to claim the violating party’s profits would be rendered into some form of punitive damages. Such a transformation would be contrary to the entire German civil law.\textsuperscript{100} Instead, an acceptable compromise would have been to grant claimants some percentage of the profits. Without such claimant incentives, it is doubtful that the new right to claim the violating party’s profits will fulfill its very purpose – the resolution of enforcement inefficiencies with regard to negligible individual damages. Indeed, the absence of such benefits leads to a prediction that the provision will remain an inefficient paper tiger.\textsuperscript{101}

V. Opt-in Solution

The new law has chosen the opt-in solution to regulate direct marketing.\textsuperscript{102} “Opt-in” means that direct marketing is only permissible with a consumer’s prior consent. Alternatively, direct marketing could have been declared permissible, provided that the consumer has the right to end the marketing at any time (“opt-out” solution). It could be argued that the opt-in solution is not liberal enough and, in fact, constrains innovative commercial practices. Since EU-law did not require such a conservative solution, most other European countries have more liberal laws.\textsuperscript{103} Thus, the opt-in solution may involve the spectre of a distortion of competition within Europe.

Supporters of the opt-in solution have argued that merely allowing consumers the right to end the call (the opt-out solution) would have been insufficient consumer protection.\textsuperscript{104} Theoretically, consumers may end the call at any time. In practice,

\textsuperscript{98} Statement of the Bundesrat, BT-Drs. 15/1487, 34 f.
\textsuperscript{99} Statement of the Bundesregierung, BT-Drs. 15/1487, 43.
\textsuperscript{101} Astrid Stadler/Hans-W. Micklitz, Der Reformvorschlag der UWG-Novelle für eine Verbandsklage auf Gewinnabschöpfung, WETTBEWERB IN RECHT UND PRAXIS 559, 562 (2003); Günter Zettel, Das neue Gesetz gegen den unlauteren Wettbewerb, MDR 1040, 1043 (2004).
\textsuperscript{102} Sec. 7 para. 2 no. 2 UWG 2004.
\textsuperscript{103} Statement of the Bundesrat, BT-Drucks. 15/1487, 31 f.
\textsuperscript{104} Also see the current case law. See Explanatory statement of the new law, BT-Drs. 15/1487, 21. Statement of the Bundesregierung, BT-Drs. 15/1487, 42.
though, it might be difficult to do so, particularly if consumers are elderly persons. Moreover, it was emphasized that efficient protection of privacy does not allow for a mere opt-out solution. Up to this point, it has been stressed that privacy is strongly protected by the constitutional right to the free development of one’s personality provided by Article 2 para. 1 of the Grundgesetz (GG – Basic Law / Constitution), especially as that right interacts with the right to human dignity protected by Article 1. 1 GG.105 Correspondingly, it was rightly concluded that direct marketing requires prior consent. By installing the phone line, the consumer does not impliedly permit solicitation. Rather, it must be assumed that the installation occurred for private, and not commercial, purposes. The force of this logic is especially apt in the context of a market comprised of a multitude of entrepreneurs that can constantly solicit unwilling consumers. One might further contend that privacy is already disturbed in the minute that the consumer answers the call. In this scenario, the opt-out solution only provides the means to halt an ongoing violation of the right of personality; it can neither prevent nor undo the infringement. Thus, from a constitutional point of view, the opt-in solution is the proper regulating method for direct marketing by phone.

Additionally, economic considerations do not militate against the opt-in solution. There are two reasons why it is doubtful that there will be a negative impact on the German market with the opt-in solution. First, entrepreneurs who decide to use the German market are likewise bound to the UWG. Second, entrepreneurs employing direct marketing usually operate outside of Germany. In these respects, the opt-in solution will not have detrimental effects on investments in a German direct marketing industry.

E. Conclusion

The revised UWG 2004 profits both entrepreneurs and consumers. The act stands for flexibility and liberalization. It is more clearly arranged than the former law and thus more transparent. This added transparency does not, however, sacrifice the flexibility requisite to coping with new challenges resulting from new business practices. The UWG 2004 allows the offer of goods in attractive ways, but still guarantees consumer protection. Compared to the old law, the new UWG is an acceptable framework for the regulation of business practices. Indeed, the careful work that characterizes this framework may yet fulfill the large ambitions of its drafters to spur the German economy by transforming it into a flexible business location.

105 Explanatory statement of the new law BT-Drs. 15/1487, 21, 42.
Conference Report – Legal Unity Through Specialized Courts on a European Level?

By Stefan Kirchner*

A. Introduction

After last year’s successful Academia Juris Internationalis1 workshop on local products,2 Prof. Dr. Thilo Marauhn and Dr. Sebastian Heselhaus (Academia Juris Internationalis Franz von Liszt, Faculty of Law, Justus-Liebig-University, Giessen) organized the second Jean Monnet - Workshop in the Senate Hall of the Main Building of Justus-Liebig-University in Giessen, Germany, on 2 July 2004.

The German concept of different judicial tiers of specialised courts has led to an institutional diversification of legal protection but also at times to differences between different judicial tiers.3 Article III-3594 of the Treaty establishing a Constitu-

---

1 Diploma in International Law (University of Helsinki); Justus Liebig - University in Giessen, Germany, Email: kirchner@justice.com.


3 See BVerfGE 58, 300 (Nassauskiesungs-decision by the Federal Constitutional Court on property rights). Also see the jurisprudence of other high ranking federal courts: BGHZ 6, 270; BGHZ 64, 220; BVerwGE 15, 1; BVerwG, DOV 1974, pp. 390 et seq. The conflicting opinions between the different high courts arises from Germany’s multi-tier court structure in which, e.g., administrative courts form a separate tier, as do “ordinary” courts dealing with criminal and private law matters, labour law courts etc. Each tier has its own highest federal court, as the court of last instance. The German Federal Constitutional Court, unlike many national Supreme Courts in other countries, is not a court of last instance but is restricted to only dealing with questions of constitutional law.

4 Art. III-359 of the future constitution for Europe reads as follows: “1. European laws may establish specialised courts attached to the High Court to hear and determine at first instance certain classes of action or proceeding brought in specific areas. They shall be adopted either on a proposal from the Commission after consultation of the Court of Justice or at the request of the Court of Justice after consultation of the Commission. 2. The European law establishing a specialised court shall lay down the...
tion for Europe⁵ allows for the creation of specialised courts and chambers,⁶ raising the question: which tasks would such courts and chambers have. On one hand, it is suggested that more specialised courts could lead to an increase in plausibility and transparency for Europe’s judiciary; but Prof. Dr. Thilo Marauhn, M.Phil. (Wales), in his opening speech queried whether expectations for the “European Judicial Culture” might still be too high. Article III-359 of the future EU-Constitution was to be the normative starting point for the discussions during the workshop, which otherwise has not received much attention in the general public’s discussion of the Constitution. This provision of the draft Constitution also must be seen in the context of the entire legal process of European integration, which represents a continued development including, but not limited to the Treaty of Nice.⁷

B. Germany’s Specialised Judiciary in the Process of European Integration

I. Legal Protection Against EU Acts Through Specialised Courts

The first round of presentations focused on the “service-function” Germany’s specialised courts might have for European Law and was opened by Sebastian Heselhaus. Prof. Dr. Rüdiger Rubel, judge at the Bundesverwaltungsgericht (German Federal Administrative Court) and honorary professor at the faculty of law of Justus-Liebig-University, spoke on the role of legal protection before specialised German courts as a contribution to the effectuation of community law. The fact that the rules on the organisation of the court and the extent of the jurisdiction conferred upon it. 3. Decisions given by specialised courts may be subject to a right of appeal on points of law only or, when provided for in the European law establishing the specialised court, a right of appeal also on matters of fact, before the High Court. 4. The members of the specialised courts shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office. They shall be appointed by the Council of Ministers, acting unanimously. 5. The specialised courts shall establish their Rules of Procedure in agreement with the Court of Justice. Those Rules shall require the approval of the Council of Ministers. 6. Unless the European law establishing the specialised court provides otherwise, the provisions of the Constitution relating to the Court of Justice and the provisions of the Statute of the Court of Justice shall apply to the specialised courts.”

⁴ The text used for the purposes of this article is the Treaty establishing a Constitution for Europe, 6 August 2004, CIG 87/04, available online at http://ue.eu.int/igcppdf/en/04/cg80/cg80087_en.pdf (Please note that at the time of the conference the latest version available was the Provisional consolidated version of the draft Treaty establishing a Constitution for Europe as amended by the 17 / 18 June 2004 Intergovernmental Conference.)

⁵ According to Marauhn, the fact that the draft Treaty for the creation of a Constitution of the European Union differs in some parts from the text adopted in late June 2004 shows that substantial work had been done during the 17 / 18 June 2004 Intergovernmental conference.

⁶ O.J. 2001 C 80, pp. 1 et seq.
Bundesverfassungsgericht (German Federal Constitutional Court) in Solange II⁸ decided not to measure European law against the human rights standards of Germany's Grundgesetz is, in the words of Rubel, the best service German courts could have done for the project of European integration. Yet, in order to compensate for the loss of control, the domestic courts' duty to bring a case before the European Court of Justice if necessary has been widened substantially: the Bundesverfassungsgericht will no longer examine the material correlation between European law and German fundamental rights, but will more closely examine whether or not the German courts have complied with their duty to bring a case to the European Court of Justice pursuant to Art. 234 (3) EC Treaty. Rubel noted that the specialised courts, such as the Bundesverwaltungsgericht, tend to give a lot of effect to European norms.

Rubel continued by emphasizing the effectuation of community law through procedural rules. While European law relativizes the member states' autonomy in creating procedural rules, enough flexibility remains for the courts to be effective. While German courts will provide legal protection against national acts based on community law, Rubel explained, they will also have to address community law questions.

As an example Rubel explained that European Law will often go beyond national legislation when it comes to serving the interests of individuals. In this context he raised the question whether the German Schutznormtheorie is still feasible, or if the door has already been opened by European Law for a form of actio popularis. Rubel offered as an example the Council Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water.⁹ The Schutznormtheorie is used to identify norms which confer subjective rights upon individuals. This is the case if the norm serves the interests of the individual who wants to bring his or her case before the administrative courts.¹⁰ Yet, the directive concerning the quality of bathing water does not mention such subjective rights in its core text but merely refers to them in its preamble. Although strict European limits might give the impression that subjective rights have been widened, not everybody who might have subjective rights deriving from the norm in question is able to bring a case for a violation of those rights. The fact that a European Directive regulates the quality of bathing water for the benefit of individuals does not lead to the introduction of an actio popularis due to the procedural requirements established by Germany's courts: the Bundesverwal-

⁸ BVerfGE 73, 339.
⁹ OJ. 1976 L 31, pp. 1 et seq.
¹⁰ BVerwGE 92, 313 (317).
tungsgericht no longer defines the potential plaintiffs through the norm,\textsuperscript{11} but includes in the Schutznormtheorie the requirement that individuals have to be closely and individually affected ("qualifiziert betroffen") in order to be able to bring a case.\textsuperscript{12} In Rubel's example, a person living in Northern Germany would not be able to bring a claim based on alleged violations of the bathing water quality directive in a lake in Bavaria, while, for example, local residents affected by the violations in question would be able to do so.

Although it is accepted that European law might broaden the understanding of what constitutes a subjective right, such a subjective right, according to Rubel, is not, in itself, sufficient to allow for any form of actio popularis. Rubel concluded that fears that the actio popularis might find its way into the German legal system through European law are unfounded.

Another issue addressed by Rubel was the consequence of errors committed in the process of issuing any form of official act, e.g. an act of administration or Verwaltungsakt.\textsuperscript{13} If, for example, the formal requirements for the creation of a Verwaltungsakt - such as the requirement that the person against whom the act is directed first have the opportunity to be heard\textsuperscript{14} - are not met, the Verwaltungsakt is only void if the result was affected by the error in question. This idea of Ergebnisrelevanz is also applied by German courts to cases dealing with matters of European Law; although Rubel noted that some opposition has been voiced against this practice. Recently this idea had been widened beyond the required Ergebnisrelevanz. It is now also the case that, in order for a Verwaltungsakt to be deemed void, Offensichtlichkeit is also required. Offensichtlichkeit means that the error, which has been found to be relevant, must now also be obvious. This creates an even greater hurdle for those seeking legal protection against administrative acts. Furthermore, such errors can be "cured" at a later stage, for example when the person against whom the administrative act is addressed complains about it.\textsuperscript{15} Also rules on the "curing" of such errors, Rubel explained, can be transferred to cases dealing with European law. But even if European law is being enforced on a national level through means other than an act of administration, there usually will be no significant differences with respect to the

\textsuperscript{11} This approach was taken prior to the Bundesverwaltungsgericht's decision reported in NVwZ 1987, pp. 409 et seq.

\textsuperscript{12} BVerwGE 101, 157 (165).

\textsuperscript{13} For a definition of an act of administration under German Law, see § 35 Verwaltungsverfahrensgesetz (VwVfG).

\textsuperscript{14} § 28 Verwaltungsverfahrensgesetz (VwVfG).

\textsuperscript{15} This initial complaint or Widerspruch is a requirement for further legal action before the courts.
enforcement of German law. The courts in Germany’s specialised court structure, therefore, are fit to examine cases in which the outcome depends on European rules. European law has already gained a substantial degree of importance before German courts, but the education of students, clerks and practitioners still lags behind the needs of everyday legal practice.

II. The Importance of Reference Procedures for Germany’s Specialised Courts

Prof. Dr. Carl-Otto Lenz, currently of Baker & McKenzie and formerly an Attorney-General at the European Court of Justice, addressed the importance for Germany’s specialised courts of the reference procedure of Art. 234 EC-Treaty. According to Lenz, the lack of specialisation of the European Court of Justice remains a core problem. Lenz noted that neither the President of the Court nor the rapporteur or the Attorney General, both of whom are involved in the proceedings, will typically be familiar enough with the legal questions relevant to the case in question, which at times can be very detailed and require a high degree of specialized knowledge.

The treaty of Nice addressed this problem by giving the Court of First Instance the competence to hear cases brought pursuant to Art. 234 EC-Treaty. This lead Lenz to question whether the European Court of Justice is sufficiently informed to decide on cases which require highly specialized legal knowledge. If this were not the case, the reference procedures should fall into the realm of the future European specialized courts. Lenz further noted that the European Court of Justice also has a number of sources from which to acquire the specific information required to decide the case. Among these sources are the domestic court’s questions as well as the statements made by the parties in the original case before the national court now before the European Court of Justice by reference. These sources, when combined with the Court’s possibility to request information from national authorities, led Lenz to conclude that the European Court of Justice will be able collect enough information to reach a conclusion in cases brought under Art. 234 EC-Treaty. After all, according to Lenz, the primary goal of the reference procedures is to ensure one unified interpretation of the community law. Specialized courts, could not achieve this, no matter how qualified they are.

III. European Influences on Legal Protection in Germany’s Specialized Court Structure

Dr. Volker Röben of the Max-Planck-Institute for Foreign and International Public Law in Heidelberg (Germany) then examined the impact of European Law on Germany’s specialized courts. Röben explained that, due to a lack in competence, it would be impossible to achieve a unified system of legal protection on the European level. To the contrary, the member states are tasked with ensuring the avail-
ability of such procedures.16 Yet, Röben explained, Art. 47 of the Charter also allows European institutions to concern themselves with procedural rules on the national level, provided that the impact of European legislation on national procedural rules is made clear and that the national autonomy on procedural issues is not infringed upon. On the other hand, European influences on procedural rules could help enforce European law. In essence, Röben suggested that these problems are best being solved in a form of practical concordance.

C. The Introduction of Specialised Courts in the European Judicial System

I. The Future of the European Court of Justice - Supreme Court or Constitutional Court?

Dr. Christoph Sobotta, legal referent in the cabinet of Attorney-General Prof. Dr. Juliane Kokott at the European Court of Justice, started the next session with a presentation on the future of the European Court of Justice and the future functions of the Court. He particularly focussed on the following question: whether the Court will be more like a Supreme Court or a Constitutional Court. Sobotta sought to transfer German legal concepts, here the specific functions of the Bundesgerichtshof and the Bundesverfassungsgericht, to the European level.

The distinction between a Supreme Court and a Constitutional Court raises questions about which competencies the European Court of Justice should have; which tasks should it be charged with fulfilling and which matters should be brought before the European Court of Justice rather than the Court of First Instance? While a Supreme Court would be competent to hear cases on all legal issues and would be charged with the task of maintaining legal unity, a Constitutional Court would address a limited number of cases on questions of fundamental importance.

Given the recent discussions on the creation of more chambers of the Court of First Instance (which might in the long term lead to the development of a structure resembling the specialised court systems in Germany) and suggestions in the Council earlier this year to allow for more direct complaints to the Court of First Instance, Sobotta urged that ensuring legal unity and maintaining one comprehensive legal order on a European level should be paramount. This, in turn, would require one court to be in charge of all matters regarding European law. This solution, Sobatta noted, also raises the question, whether one general court could acquire and maintain the specific knowledge required in many fields of law. Sobatta especially highlighted questions of patent law as an example of cases giving rise to the necessity of specialised knowledge.

16 Art. 10 EC-Treaty.
II. The Court of First Instance: An Interim Balance

Professor Dr. Werner Schroeder, LL.M. (Leopold-Franzens-University, Innsbruck, Austria), gave an overview of the activities of the Court of First Instance, which is becoming more and more important. Among the tasks of the Court of First Instance are, apart from the improvement of legal protection and the quality of the jurisprudence, the support of the European Court of Justice, enabling the latter to concentrate on preserving and developing a unified European legal order. Yet, the Court of First Instance has time and again been concerned with issues of a much more fundamental nature. Schroeder referred to the decision in Jégo Quéré, in which the Court of First Instance, acting pursuant to the right to effective legal protection, implemented a wider understanding of the requirement that a plaintiff be directly affected by the act against which legal recourse is taken. It was also the Court of First Instance, which, in max.mobil, first referred to the Charter on Fundamental Rights. The European Court of Justice on the other hand, has so far failed to take the - albeit non-binding - Charter, which will be incorporated into the future Constitution, into account. The Court of First Instance therefore is more than merely a(ny) first instance court, and the European Court of Justice is not the only judicial body dealing with constitutional issues. Schroeder accordingly suggested widening the tasks of the Court of First Instance while restricting the European Court of Justice to the role of a Court of last-instance as well as a Constitutional Court. Although he didn't mention the U.S. Supreme Court expressis verbis, such a change might make European law more accessible abroad.

III. The European Judicial System after the Treaty of Nice

Prof. Dr. Stefan Kadelbach of the University of Münster continued by elaborating on the European judicial system after the Treaty of Nice, which entered into force in early 2003. Although the Treaty of Nice was intended to prepare the Union for the 1 May 2004 enlargement, according to Kadelbach, the system as it is right now, still required further reforms. This need is chiefly caused by the lack of relief provided to the European Court of Justice through the Court of First Instance, which in turn is not to be blamed on the CFI but rather on a dramatic increase of the caseload, due to the increased legislative activity on the European plane, in particular after the 1986 and 1995 enlargements. The 2004 enlargement will most likely aggravate the situation even more. Furthermore, Kadelbach noted that the caseload of the Euro-
pean Court of Justice was enlarged by the Treaty of Amsterdam, in particular Art. 68 (1) EC-Treaty and Art. 35 EU-Treaty.

The Treaty of Nice initiated a reform of the European judicial system, which is to lead to a three-level-structure, consisting of the European Court of Justice, the Court of First Instance as well as the future specialized courts. Against a decision of the specialised courts, or the "chambers" as they are still referred to in this pre-constitutional era, an appeal is possible to the Court of First Instance. In the extraordinary case that the unity of community law is at stake, the case may be brought before the European Court of Justice, as the final instance.

While the workload for the courts might be eased by these structural changes, Kadelbach pointed out that the possibilities for the individual citizen to bring a case before a European court have not been improved by the Treaty of Nice. Even the European Parliament will not feel a significant improvement when it wants to bring a case before the European courts. At the same time, Kadelbach pointed out the risk that an increasing number of specialised European courts could threaten the unity of the jurisprudence of the European courts, which in turn will increase the responsibility of domestic courts regarding effective legal protection.

D. Specialised Courts as an Integral Part of Germany's Judicial Culture

I. Judicial Organisation and the Self-perception of Judges in Germany in its Historic Context

During the third part of the workshop, which was moderated by Prof. Dr. Christoph Benicke (Giessen), the specialized court system was examined in its function as an integral part of Germany’s legal, and in particular judicial, culture. Former presiding Judge at the Oberlandesgericht (Higher Regional Court) Bonn, Dr. Theo Rasehorn, addressed how judges perceived themselves, while taking into account the historic perspective in the 1933-1945 NS-era. Although judges then, as well as today, considered themselves to be largely independent, they remain bound within an entire apparatus which today consists, according to Rasehorn, in the hierarchical

---

20 Art. 220 (2) and Art. 225a EC-Treaty Luxembourg, the seat of the European Court of Justice and Court of First Instance, added a separate declaration to the Treaty of Nice to the effect that the functions currently assigned to Alicante are to remain there even after the creation of the third level of courts. This suggestion is now being followed by Art. III-359 of the future constitution.

21 Art. 225 (2) and Art. 225 a, subpara. 3 EC-Treaty

22 Art. 225 (2) subpara. 2 EC-Treaty

23 The only exception being Art. 230 subpara. 2 EC-Treaty
organisation within the judiciary. Following the thesis of the best-selling author and law professor Bernhard Schlink, Rasehorn claims that guilt can also occur by not clearly separating oneself from the crimes of the past. The perceived independence of Germany’s judiciary, according to Rasehorn, was shaky and, in his words "built on sand,” especially given the fact that current German judges fail to distance themselves from some 50,000 death penalties imposed by German judges between 1933 and 1945.

II. Conflicts Between Specialized Courts and Constitutional Courts from a Legal Psychologist’s Point of View

Prof. Dr. Karsten-Michael Ortloff, a presiding judge at Berlin's Administrative Court who works as Berlin's Court Mediator, then addressed the conflicts between specialized courts and constitutional courts from a legal-psychological perspective. Ortloff also stated that a judge could never be completely free of influence in his or her decision-making process. Such influence does not necessarily have to come from the outside; neither do they have to be recognized by the judge in question. Decision-making processes, according to Ortloff, are often voluntary in nature, which is reflected in the fact that some courts are more (or less) likely to refer a case to the Bundesverfassungsgericht or to the European Court of Justice. In this voluntary process, the judges’ view of themselves indeed plays a great role. Yet, Ortloff disagreed with Rasehorn’s claim that the judge’s self-perception has not changed since 1945. In particular, Ortloff referred to the fact that the social sciences so far have paid attention to witnesses, victims and delinquents but have not taken into account the judges’ behavior. As an indicator for judicial conflicts, Ortloff identified the degree to which decisions by other judges are accepted. At the specialised courts in particular, the decisions by the constitutional courts are not necessarily respected. As an example Ortloff cited the disputes regarding Art. 14 GG in the wake of the Federal Constitutional Court’s aforementioned Nassauskiesungsentscheidung. One reason for such conflicts is to be seen, according to Ortloff, in the tension between the dogmatics of normative interpretation on one hand, and a more voluntary decision-making process on the other. If the latter elements are marginal, which usually is the case when it comes to dogmatically compulsory interpretations of legal norms, a judge is more likely to be persuaded by another judge’s decision and hence more likely to accept it. Yet judges in specialized courts are aware of the fact that the decision-making process at constitutional courts is also not free of voluntary elements, making it harder for judges at more specialized courts to accept judgements rendered by constitutional courts. However, if a judge

24 SCHLINK, VERGANGENHEIT, SCHULD UND GEGENWÄRTIGES RECHT 29 (2002).

25 Supra note 3.
is aware of his or her own voluntary decision-making process, problems of acceptance are more likely to diminish.

Ortloff concluded by asking legal psychologists and social scientists to examine the jurisprudence of courts beyond their mere legal importance, but to consider these phenomena more closely by means of empirical analysis and by analysing the jurisprudence more closely.

III. Specialised Courts and the Relation Between Europe's Citizens and the Judicial System

Afterwards Prof. Dr. Jörg Pirrung, judge at the Court of First Instance, addressed the question if and how a more specialized court structure could bring Europe's judicial system closer to its citizens. The starting point for Prof. Pirrung's examination of the issue was the fact that, in principle, citizens can only seek legal protection before European courts indirectly. Yet the number of cases has risen dramatically, which indicates a high degree of acceptance of the European judicial system by Europe's citizens. Still, the distance - both geographically and perceived - between the courts and the citizens could remain an obstacle to a wider acceptance of Europe's courts by its now 450 million citizens.

This physical distance could however be limited with the introduction of a third level of courts, which in turn leads to the question of where the specialized European courts are to be located and how they are to be staffed. Even if the physical distance could be bridged, there is no guarantee, Pirrung concluded, that the overall distance to the European judiciary, which is still felt by many Europeans, can be bridged quickly. From the point of view of the Court of First Instance, however, Pirrung concluded that recent developments are promising.

E. Concluding Remarks

This year's conference was co-sponsored by the Faculty's Alumni Organisation, represented by its head, Prof. Dr. Walter Gropp, as well as the law firms Baker & McKenzie and Freshfields Bruckhaus Deringer. The conference was concluded with a round-table discussion including Prof. Dr. Marauhn, Dr. Thomas Wagner (Freshfields Bruckhaus Deringer) and Prof. Dr. Richard Giesen (Universität Giessen), in which a look into the future of Europe's judicial system was attempted. The conference proceedings of this year's Jean Monnet workshop will be published by the Tübingen-based legal publisher Mohr Siebeck in the following months.
"New Foundations for European and Global Governance? The Achievements of Europe's Constitutionalization." This was the title of the two-day conference organized by the European Community Studies Association (ECSA) of Austria and the Europainstitut of the University of Economics and Business Administration. The meeting was set in the beautiful atmosphere of the Banqueting Hall of the Bank of Austria building in the centre of Vienna on 29 and 30 November 2004.

As the title suggests, the theme of the conference was ambitious – and so was the composition of its participants. The participants included predominantly European and International law specialists, as well as economists, political scientists, historians and sociologists representing a range of nations: Austria, Belgium, Finland, Italy, the Netherlands, Portugal, Switzerland and the United Kingdom. The goal was to discuss the role of the European Union in a globalized world. The discussions took into account the potential impact of the Treaty establishing a Constitution for Europe (hereinafter: the Constitutional Treaty or CT), but also drew a general picture of Europe, including its international relations, the interface between European and international law and politics, as well as the suitability of European integration as a role model for global constitutionalization.

In the face of the broad scope of questions, the organizers sought to tackle the theme from several clearly defined perspectives. The six panels each dealt with different cornerstones of constitutionalization and integration: (1) the constitutional foundations, (2) conceptions of international relations, (3) institutional aspects and competencies, (4) and (5) the constitutionalization and globalization of different policy fields, as well as (6) conflicts between EU and international law. Almost all the panels consisted of scholars of different academic disciplines, either as reporters or discussants of the respective contributions. Most of the panels were, moreover, chaired by distinguished practitioners in the field of European and In-
ternational law from Austrian governmental departments, the Federal Chancellery, the Ministry for Foreign Affairs and the Ministry for Economics and Labor. The conglomeration of the different perspectives regarding the substantive appraisal of the topic, enhanced by the angles of different academic disciplines and cultural traditions and the confrontation of science and political practice, resulted in challenging, sometimes provocative and consistently thought provoking discussions.

The titles of the panels were already thought provoking. Under the heading “Democracy, Legitimacy, Efficiency or Anything Else?” (Panel 1), Stefan Griller (University of Economics and Business Administration, Vienna) looked at the essence of democracy at the European Union and the global level. He inquired whether it was, again and again, the question of legitimacy and democracy, or whether there was a pragmatic way forward, instead? Griller wondered whether the deletion of Thukydides’ quotation (“Our Constitution…is called a democracy because power is in the hands not of a minority but of the greatest number?”1) from the preamble shortly before the end of the Intergovernmental Conference was justified? Griller stated that, at the level of the European Union, democracy, as a constitutional principle in all Member States and as an integral principle of EU law (Art 6 TEU) was imperative. Europe thus stood under the obligation to essentially assure structural congruency and preserve the basic ideas of democracy, the identity of the governing and the governed and the equality of citizens as carriers of democracy and a source for legitimacy.2 For Griller, the core of the current democratic deficit within the EU was consequently the remoteness of decision taking from the citizen, as well as the still limited co-decision rights of the European Parliament in the legislative process. Another factor included the fragmented accountability of the members of the Council towards their respective national parliaments, which, moreover, was not working well in practice. And whilst, under this perspective, unanimity might be considered as a guarantor for democracy, in the sense that it mirrored the preferences of all Member States, Griller asserted that, as a rule, it was in practice and for technical reasons detrimental to decision making in the European Union. Instead, absolute majority decisions would be the core feature of democratic decision taking, allowing for decision by the greatest possible number in the process of dynamic law making. Altogether, at the EU level, Griller concluded that Thukydides was right and, what’s more, that there was no alternative to democracy and legiti-

1 Thukydides, II, 37.

2 The requirements of input democracy may, according to Stefan Griller, be complemented, by output-oriented factors, such as openness, participation, accountability, effectiveness and coherence. See also Daniel Halberstam, The Bride of Messina or European Democracy and the Limits of Liberal Intergovernmentalism, in Altneuland: The EU Constitution in a Contextual Perspective, JEAN MONNET WORKING PAPER NO. 5/04.
And whilst, in Griller’s view, there were important steps in the proposed new Constitution in optimizing the principle of democracy in the European multi-level system, many additional steps, and particularly enhancing parliamentarism, should still remain desirable.

At the global level, in contrast, Stefan Griller evaluated the situation as categorically different. The fundament of public international law was rather the principle of the equality of states, irrespective of their internal structure, than democracy and human rights. And although recent developments at the WTO level in the context of the Seattle and Cancun negotiation rounds saw some sort of strengthening of input democracy, the perspective of international lawmaking by an international “parliament” was, in Griller’s view, utopian. Under these circumstances, he considered it as even more important to promote democracy and human rights by peaceful means at the global level, which was moreover mandatory for the European Union under the EU-Treaty (Art 11) and the Constitutional Treaty (Art III-292). Yet, as a flipside to the lack of common universal democracy standards and because, in contrast to the European Union, a structural congruency at the global level did not exist and was not in sight, Griller suggested that the transferal of powers of the EU to international organizations (IO) should be subject to limitations. Fundamental policy choices had to be taken at the EU level or subject to the consent of the Union. Whereas international treaties fixing policy choices remained possible, he argued that majority decisions, by which the European Union could be outvoted, had to be restricted to more technical issues. And challenged upon his further policy conclusions, linking the levels of Member States, Union and the global world, Griller proposed that the European Union should be a member of IO’s in all these cases, where it held sole or shared competence in a given area of Union law. In this regard, it was noteworthy that the new Constitutional Treaty opened the case for sole EU-membership to the WTO, even though joint representation would most probably continue in the light of national political concerns.

A more complementary than direct “criticism” from the political scientist’s point of view followed in the intervention of Gerda Falkner (Institute for Advanced Studies, Vienna). She raised the question, to what extent the notion of “governance” might

---

3 For a critical and multifaceted interpretation of the quotation from Thukydides, see Uwe Walter, Was Volkes Wille erstrebt, FRANKFURTER ALLGEMEINE ZEITUNG, (12 DECEMBER 2003).

be helpful in the democracy-debate at the EU level. In essence, her contribution pointed to the fact that there was still a long way from theory to practice, from law making to implementation. And she contended that it was similarly important to derive from the final results of decision making the extent to which these actually reflected the outcome of democratic principles. To this end, she made a number of observations. First, that the development of EU-governance took place beyond the level of constitutional law or law itself. Several dimensions, such as the modes of decision, the binding character of a piece of law, the competence of the European Court of Justice, the legal basis of a measure as well as the margin of maneuver for its implementation needed to be considered. Second, the increased importance that was attached to the involvement of an ever wider group of stakeholders in the decision making since the White Paper on European Governance\(^5\) had resulted in a pay-off between ever more extensive consultations of such groups, albeit in a non-binding way, and the subsequently more narrow scope for "real" decision making. Antagonistic was, in this regard, also the position of the European Parliament which should feed into the debate the views of its electorate, yet lacked a correspondingly strong role in decision making. And looking at the level of enforcement, Falkner observed that there were major implementation failures and that the Commission was, to date, not able to adequately perform its control function for a lack of time and resources. She derived this conclusion from a collaborative research project carried out under her direction at the Max Planck Institute for the Study of Societies.\(^6\) Notwithstanding the common constitutional values characterizing Europe’s constitutionalization process, Falkner concluded that there was still a large variance between Member States in the style of reacting to a duty of implementation, even splitting Europe into three worlds - that of law observance, of domestic policies and of neglect.

Moving away from Europe’s worlds of compliance to the global sphere, Panel 2 under the heading “Empire or Community”\(^5\) brought together an interesting complement; confronting a lawyer’s perspective on the repercussions of Europe’s constitutionalization in the world with an historian’s and political scientist’s view on Europe’s conceptions of the future of international relations. Erika de Wet (University of Amsterdam) departed from the premise that there was an emerging international constitutional order, consisting of an international community, an international value system and, albeit rudimentary structures for its enforcement. This value system was essentially inspired by the UN Charter with its universal membership and the dual role of both a sectoral constitutional regime for peace and security as well as a key connecting factor linking, in both substantive and struc-


\(^6\) For further information refer to http://www.mpifg.de/socialeurope.
tural terms, the different communities into the international community. Otherwise, De Wet associated the international constitutional model with the intensification in the shift of power and control over public decision making away from the nation state towards international actors of a regional and sectoral nature.

On this basis, her object of investigation was the inspiration that was drawn from the process of European constitutionalization for the transfer of specific constitutional concepts to the sectoral constitutional orders, such as the UN and the WTO. The focus of her analysis was thereby the feasibility and implication of the introduction of the principle of institutional balance into the legal order of the United Nations, essentially with a view to the concern, how the ever expanding power of the Security Council could be curtailed in the absence of a centralized judiciary. She thereby observed a categorical difference in the substance of the principle of institutional balance at EU and UN level and emphasized that a rigid transposition of domestic concepts to the post-national level must be avoided. The core of the principle at the post national level was to prevent the extension of power of one organ at the expense of another. Insignificant was thus the exact nature of the Security Council's powers, as either executive or legislature. The core question was, instead, whether these powers were extended at the expense of the constitutional structure foreseen in the UN Charter. In this regard, she pointed out that the extent of control by the other principal organs of the UN for ensuring a an institutional balance, by the ICJ and the General Assembly for example, was and will continue to be limited.

De Wet thus underlined the potential of the national courts to maintaining the vertical balance of power between the UN and Member States, as well as protecting the fundamental values which were inherent in their own constitutional order as well as that of the UN. Similar as in the European Union, the symbolic threat of rejecting binding measures adopted by a supranational, or respectively international, organ could be applied as a mechanism for ensuring the boundaries of the institution's power and the maintenance of a balance of power within and amongst overlapping constitutional orders. Thus, in essence, the "nuanced relationship between EU institutions and national courts" could, according to Erika de Wet, serve as a role model for global constitutionalization. In the absence of any centralized system for judicial review in the UN and in the light of the constantly expanding powers of the Security Council, national courts might provide the last (or even the only) resort for providing a measure of control over ultra vires Security Council decisions.7

---

Wolfram Kaiser’s (University of Portsmouth) point of departure was comparable to Erika de Wet’s, yet with a different connotation and objective of analysis. Nicely wrapped in Robert Kagan’s well-known statement “Europeans are from Venus and Americans from Mars,” he sought to explain why, in spite of continuing broadly compatible norms, values and objectives for the future global order, the EU and the US now diverged so fundamentally on the methods to achieve global constitutionalization, which had resulted in the most serious transatlantic rift since the end of World War II. In conformity with David Calleo, Kaiser described Europe’s vision of world order as pluralist; that is, “multipolar, balanced and multilateral,” and shaped in accordance with the Community ideal. By this last point Kaiser emphasized the high degree of institutionalization, legal penetration and developed mechanisms for peaceful interest mediation. Similar to De Wet, Kaiser perceived this vision as also including a control over any imperial ambitions, through an institutionalized system of checks and balances.

Yet, rather than building on the transposition of the Union’s constitutional concepts on the international order, Kaiser looked at the roots for the strongly diverging concepts of a global order between the US and the EU and examined to what extent the clash of globalization models limited the Union’s aspirations of “global Community building.” To a large extent, he traced the preferences for a global order in the twenty-first century back to fundamentally different historical experiences. He located the roots for Europe’s vision in the collective experience of internecine war, hegemonic ambitions and community-building, strengthened by the experience of European constitutionalization as a success story and the conviction by many Europeans of the superiority of their societal model. In contrast to Europe, the US lacked the experience of a foreign war on their soil as well as external hegemonic threats, except of the British Empire in its formative years. According to Kaiser, America’s social and political fabric was based on a vibrant, religiously underscored narrative of American exceptionalism.

The cleavage between the two concepts was, in Kaiser’s view, particularly strong as a result of the unilateralist doctrine pursued by the United States in reaction to the external security threats following September 11, which severely limited the EU’s aspirations for effective, multi-polar global constitutionalization. This was particu-

---

8 ROBERT KAGAN, PARADISE & POWER (2003), AT 3.

9 David P. Calleo, The Broken West, 46 SURVIVAL NO. 3, 29-38, 30 (2004); This is seen in contrast to the US administration’s aim of a unipolar, hegemonic and unilateral international system.

10 In conformity with Ivo Daalder, Wolfram Kaiser saw Europe’s most important success clearly in eliminating “the possibility of a return to internecine conflict through an ever greater commitment of sharing sovereignty.” See Ivo Daalder, The End of Atlanticism, 45 SURVIVAL NO. 2, 147-166, 150 (2003).
larly apparent in the example of the Kyoto Protocol and the International Criminal Court. Equally obstructive to the EU's vision of global constitutionalization was the Bush administration's inclination towards the use of military methods and direct foreign intervention, sharply contrasting with the EU's preference for so-called "soft power."\textsuperscript{11}

Kaiser noted, however, a pitfall to Europe's aspirations of global Community building in the danger that might result from applying (and extending) the European constitutionalization experience and model beyond "culturally compatible" societies that were keen on their socialization into the Community culture. In this context, he pointed to the danger that the EU may succeed in transferring constitutional forms, but without sufficient political substance. This risk was, in his view, particularly pertinent at the time of the present ideological void which resulted from the end of the Cold War and the most recent enlargement round.

In conclusion, Kaiser envisaged three potential scenarios resulting from the present cleavage: either a new transatlantic bargain with an American shift towards less Empire and more Community; a less appealing alternative, involving an increasing US unwillingness to remain globally engaged, resulting in American withdrawal and isolation; and the most worrisome, the persistence of US imperial fantasies, long enough to defeat the constitutional dreams of Europe.

Despite of these dismal prospects the ensuing discussions, initiated by Advocate General Miguel Poiares Maduro (European Court of Justice, Luxembourg/University of Lisbon) were lively and went to the heart of the notion of constitutionalism used by both speakers. Following up Wolfram Kaiser's contribution, Poiares Maduro questioned whether a notion of constitutionalism that was based not so much on shared values and loyalty but on the self-perception of the success of Europe's constitutionalization process was not a rather limited vision. He wondered whether transposing Europe's concept of constitutionalism to societies without acceptance by the political community would not create false legitimacy, and eventually come close to transgressing the borderline to imperialism.

And also Erika de Wet's analysis on the principle of institutional balance came to the fore. In Poiares Maduro's view her concept of institutional balance, in fact, united three different constitutional concepts, namely that of implied powers, judicial review and institutional balance. De Wet contended that it was feasible to further shape these concepts, but she emphasized that, in any event, it was possible only to transpose the \textit{essence} of the principles to the global level. And it was this

core content of international constitutional concepts that the national courts would be called upon to apply.

Panel 3, placed under the mystic heading “Kafka Reloaded?”, led away from a value debate to the secrets of economic facts and figures. It contrasted intriguing data based on an in-depth analysis of power indices with regard to the Council voting system with the apparent shift of the constitutional weights from the supranational to the intergovernmental sphere as enacted in the Constitutional Treaty. To this end Mika Widgrén (Turku School of Economics), who opened the panel, embarked on a critical analysis of the Council voting procedure as it works under the current system as well as compared to the Constitutional Treaty. The results presented under the aspect of measuring the power implications, turned out to be a matter of teasing out the devil in the details.\(^\text{12}\)

In his view, the June 2004 EU summit failed to solve the enlarged EU’s decision-making problems. He particularly criticized the postponed implementation until 2009 of the relevant Constitutional Treaty rules which provided for double-majority voting rules and would radically alter and improve the situation. In his introductory remarks Widgrén emphasized that the EU was both a union of states and a union of people. Choosing one voting rule meant opting exclusively for one side of this coin, which unavoidably nourished the EU’s legitimacy dilemma. According to Widgrén, it was only by chance that the existing qualified majority vote-weighting scheme had managed to maneuver between the two extremes. However, the last enlargement round generated the absolute necessity of creating a new and more legitimate voting system. Whereas it was relatively simple to assure union-of-states legitimacy (by attributing equal power to all Member States), ensuring union-of-people fairness would imply, according to Widgrén, a power distribution in the Council that was proportional to the square root of each nation’s population (the so-called Penrose rule). Practical appliance of the square root rule was likely to be located in a gray area between weighted voting and dual rules.

Against this background, the evaluation conducted by Widgrén together with his colleague Richard Baldwin (Graduate Institute of International Studies, Geneva) of the currently applicable dual-majority schemes, focused on two elements: firstly the decision-making efficiency which was evaluated by means of the concept of passage probability, secondly the scheme’s power distribution with regard to the individual Member States which was gauged according to a specific numerical measure of power called the “normalised Banzhaf index” (NBI).

\(^{12}\) Widgrén’s contribution was based on a paper written by Mika Widrén together with Richard Baldwin, Council voting in the Constitutional Treaty. Devil in Details, CEPS Policy Brief nr. 53, July 2004 (2004).
The conclusions drawn by Widgrén emphasized the improved legal situation created by the Constitutional Treaty as compared to the Nice compromise. The former would not only significantly strengthen the EU’s capability to act, but also enhance transparency and remain neutral to further enlargement. The huge variations of the EU with regard to the population size profile of its member nations created legitimacy problems for dual majority systems. In summary, the above mentioned observations represented a fascinating economist’s view, but as Bruno de Witte (European University Institute, Florence) later also observed, from a more socio-political perspective one should add the different political “weight” and practical capability to exercise influence possessed by each Member State. Thus, it is difficult to fully subscribe to the frequently propagated assumption that the present system does not work properly compared to the still theoretical alternatives, since the continuous progress achieved under the Treaty of Nice belies conclusions that are too one-dimensional.

In his comments, Bruno De Witte demonstrated his respect for the literary theme in the panel’s title in a less mathematical but more Viennese sense, by referring to the letters written by Franz Kafka to his unfortunate love in Vienna. He generally agreed that consequences of a particular mode of decision making will engender kafkaesque dilemmas which provided support for the argument that the aspect of a Member State’s ability to see a matter passed does count; and this despite several political scientists hinting at the rare proofs which confirm that power-sharing had ever became crucial in the decision making process. In order to avoid poorly conceived compromises comparable to the voting system in the Treaty of Nice, De Witte pleaded to never leaving such decisions to the last minute, given the fact that the idiosyncratic sensation of infallibility inherent to most Head of States would get even stronger when assembled to decide on collective action.

Having clarified his position, De Witte drew the attention of the audience to the issue of competencies. He observed that the Constitution remained rather cautious with regard to internal policies limiting most surprisingly, the majority of legal innovations to the field of the Common Foreign and Security Policy (CFSP). This observation was even more startling given that the Laeken Mandate on the Future of Europe contained four objectives directly affecting EU membership and citizenship and aiming at the creation of a Constitution for the citizens. However, as De Witte pointed out, the objective to better link the EU to its citizens was paid at the price of democracy and full accountability and control. In his view some significant amendments had been reached by the Convention’s proposal and then during the
IGC but the prominent role attributed to the foreign relation dimension strongly challenged the inherently inward looking aspect of any substantial process of Constitution-building.

The indeed strong dynamic of the foreign relations dimension was taken up by the members of Panel 4. Piet Eeckhout (King’s College, London) and Ernst Ulrich Petersmann (European University Institute, Florence) developed their reports under the broad heading “Constitutionalizing and Globalizing European Policies.” Eeckhout elaborated on the aspect of constitutional coherence and consistency in the field of the EU’s external action, examining this theme through the lens of the Constitutional Treaty. He observed massive residue from the current pillar structure in the field of CFSP, leaving the CFSP outside any standard legal territory. This was particularly due to the fact that the Constitution failed to envisage a role for the Court of Justice and to conceptualize competencies for conducting the CFSP. The unique character of current CFSP instruments such as common positions or joint actions allowed for decisions on any aspect of foreign and security policy that the Head of Governments may think expedient. However, it was generally acknowledged that the external legal provisions of the EU were not matched by a respective external political role, and any comprehensive concept to bridge the gap between law and policy in this area were still well out of sight.

Against this backdrop, Eeckhout welcomed the creation of an EU foreign minister and one external action service, provided that these innovations would be implemented properly. He strongly pleaded for lifting the veils of intergovernmentalism and supranationalism, judging the current tension between the administrations of the Council and of the Commission to be wholly unproductive and unnecessary. In Eeckhout’s view the importance of the entire debate on coherence was partly rooted in the issues of “mixity”14 and EU membership of international organizations.15 Strikingly the Constitutional Treaty did not make reference whatsoever to either mixed agreements or the EU joining international organizations, although evidence suggested that at least legally speaking the Member States which were members of the UN Security Council were required to involve the EU in certain UN negotiations and decisions.16 In order to consolidate coherence in the field of the

---

14 “Mixity” means that the European Community and the Member States enter into agreements jointly, in the form of a mixed agreement.

15 See also, among others, Pascal Gauttier, Horizontal Coherence and the External Competencies of the European Union, 10 EUROPEAN LAW JOURNAL 23-41 (2004); Inge Gavaere / Jeroen Capiau / An Vermeersch, In-Between Seats. The Participation of the European Union in International Organizations, 9 EUROPEAN FOREIGN AFFAIRS REVIEW 55-187 (2004).

16 Compare Article III-305 para. 2 CT.
EU’s external action, but also with regard to coherence between internal and external policies, there would be a great need for proactive cooperative practice in this area.

Similar to Wolfram Kaiser, but from a legal and political perspective, Petersmann looked at the *sui generis* character of the European approach to international constitution building by contrasting the respective US vision (as illustrated by the US National Security Strategy)\(^\text{17}\) and the EU vision (as reflected by the European Security Strategy).\(^\text{18}\) The prevailing US foreign policy paradigm was shaped by the so-called “embedded international liberalism,” notwithstanding that it contained numerous policy failures. The European view reflected a more multilateral approach focusing on the UN security system and international law.

However, Petersmann argued that, for various reasons, the existing state-centered and power-oriented UN system did not offer an appropriate legal framework for realizing the foreign policy goals prescribed in the Constitution. Moreover, he contended that the EU’s legal structure after the merger of the pillars would remain incomplete in many respects. Hence, the Union could not unilaterally “constitutionalize” its external policies according to the principles enacted in Article III-292 of the Constitutional Treaty without having comparable restraints on multi-level governance outside the Union. On the other hand, Petersmann clarified that the EU Constitution’s mandate of further “constitutionalizing” multilevel governance in the wider Europe and in international institutions would remain Europe’s most important foreign policy challenge.

Based on the EU’s own high standards of constitutional protection of human rights this should eventually lead to full-membership of the Union in all UN institutions in areas in which the EU exercised foreign policy power. He illustrated his point by referring to the positive repercussions of the EC membership in the WTO, since the Union achieved sustained success in the transformation of the power-oriented GATT trading system into the more rules-based WTO legal and dispute settlement system. He attached particular weight to the global protection of human rights, a concern which should be primarily promoted by the EU’s vast range of instruments for advancing rights-based, democratic and other constitutional reforms of international organizations as well as by a comprehensive EU security strategy focussing on civil security and respect for human rights.

\(^{17}\) *National Security Strategy of 17 September 2002*, see www.usinfo.state.gov.

\(^{18}\) *European Security Strategy: A secure Europe in a better world* of 12 December 2003
Mads Andenas (British Institute of International Comparative Law, London) observed in his comments that before exporting the EU legal model to the global stage it should be clarified, whether the available toolbox (the Constitutional Treaty) was appropriate to achieve the pre-defined goals. He drew attention to the fact that even the most fundamental aspects, such as the rule of law, were generally read through a national lens and were assessed from a national perspective, so that, for example, German or American scholars would likely achieve diverging results when reflecting on the same topics, solely based on their respective politico-legal traditions.

This remark immediately sparked off a lively discussion, which led back to the arguments put forward in the preceding Panels, on the question whether a global understanding of the rule of law existed or if one had to contend oneself with a vague and amorphous meaning of that widely propagated concept. To Andenas, it seemed perfectly conceivable to excavate a core meaning of the rule of law, such as the indispensable condition of legal review, after having, however, stripped-off the various restrictions attached to it by different legal systems. Against this backdrop Petersmann referred to the current position of the US Congress, which bluntly refused to be bound by international law since, according to the Congress, it was not a legitimate but a power oriented system. Consequently any global concept of the rule of law was not desirable at least from the perspective of the US American Congress.

In order to meet the above mentioned concerns, Bruno de Witte proposed the exportation of EU principles of good governance via international agreements instead of struggling within the WTO in order to influence it. This argument met some resistance since promoting the rule of law, for instance, in China would necessitate a global forum such as the WTO. All together, exporting the regional EU model to the global level must be perceived as a bold venture not at least due to the fact that, on the one hand, a lot of underdeveloped countries were governed by non-democratic regimes and, on the other hand, most international organizations lacked the necessary input legitimacy.

The practical examination of these questions was reserved for the second day, which was dedicated to the role of the EU in international fora. Panel 5, under its intriguing heading “Integrating Integration?”, analyzed conflicts, incidents, policies and institutional aspects of the EU, the WTO and the UN. Panel 6 took over the international debate from a more specific point examining Europe’s role in the world with the theme “Hormones and Democracy.” Giacinto della Cananea (University of Urbino) stressed the fact that the originally predominant central role of the states in basic public functions, nowadays, had undergone a change into the “role of intermediaries between regional and global institutions and their internal
articulations.” New institutions, such as the EU and the WTO, had not been created with the purpose of replacing the states but rather with the underlying idea of challenging economic and social problems in a globalized world. Della Cananea thus brought forward the question on how the institutional framework of the new **pouvoirs publiques** should be shaped and whether the liberal and democratic principles of polities could survive Europeanization and globalization.

The more basic problem of coherence in global economic policy-making was examined by Bart De Meester (University of Leuven) who focused on the general role and the potential of the EC to (inter-)act in IOs. Whereas it was up to the statute of an IO itself to lay down the basis for any possible EC-involvement, it was Community law that defined the exercise of the EC’s specific powers. De Meester recalled that the EC could be involved in IO’s, whether as a member or not. He illustrated the first scenario of the EC as a member by mentioning WTO negotiating rounds and actions in the Codex Alimentarius Commission, which provided for both exclusive and non-exclusive EC competence. If an issue fell within exclusive EC competence, Member States were limited in their actions both internally and externally. The major problem herein was drawing the exact line between the EC’s and the Member States’ competence in a specific case and, thus, defining the respective voting right. According to De Meester, the more delicate situation involving the EC not being a member in IO resided practically only in situations of exclusive EC competence, when only the Member States were represented inside the IO. In that case Member States must represent the interests of the EC in the IO and act loyally (Article 10 of the EC-Treaty).

In order to demonstrate the practical relevance of those rather theoretical aspects, De Meester referred to the WHO and recalled that the EC was not a member and, thus, had no right to vote. To give an example, De Meester cited current negotiations on the International Health Regulations (IHR), an international instrument covering measures for preventing the transboundary spread of infectious diseases, that went on within the WHO. He recalled the existence of bilateral relations between the EC and the WHO due to common interests of both organizations in health-related issues. However, these examples of rather informal cooperation should not be confused with real involvement of the EC in decision-making in the World Health Assembly. This, De Meester emphasized, did not exist. The most famous example of successful EC-WHO cooperation was the WHO Framework Convention on Tobacco Control, which, according to De Meester, was a very special case since there existed a special WHO-resolution authorizing regional economic integration organizations to negotiate on that specific convention.19 For the

---

time being, in the IHR-revision, there did not exist an equivalent provision authorizing the Commission to open negotiations. But even if there was such an authorization, it should be borne in mind that this would not make the EC a member of the WHO and, being a non-member, the EC could not participate in a conclusive manner in decision-making and ratification. As a result, the duty of loyal cooperation committed the Member States to act in the interest of the EC in such contexts, regardless of whether an issue of exclusive or non-exclusive competence was at stake.

De Meester furthermore underlined that policy-making in the EC did not happen in a vacuum but in a globalized world with many linkages to different IOs which could result in conflicts between IO and between IO and Member States. As an example De Meester referred to the WHO, which had been granted observer status on the WTO Committee on Sanitary and Phytosanitary Measures (SPS Committee). Since the SPS Agreement did not cover all measures for the protection of public health, not all of the IHR measures automatically also fell into the scope of the SPS Agreement. Currently, no representatives of the WTO were included in the Intergovernmental Working Group on the IHR Revision, apart from technical meetings with the WTO Secretariat. Nevertheless, De Meester observed in the IHR-revision the adoption of WTO-relevant standards. However, he argued that this did not imply recognition and presumed consistency under the SPS Agreement. Still, a Panel or the Appellate Body might consider these measures in a concrete dispute on health measures as a tool of interpretation. It goes without saying that these non-WTO international rules could not modify or add to the existing WTO rules.

To illustrate the diverse modes of interaction between international organizations, more specifically the EC, the WHO, the Codex Alimentarius Commission and the WTO, De Meester referred to the negotiations on the Framework Convention on Tobacco Control and on the IHR-revision, which showed overlaps of rules and conflicts. He drew attention to the emerging risk for incoherence because of the fact that the EC was not a member of the WHO whereas it was an active member of the WTO and of the Codex Alimentarius Commission. Thus, the only way to avoid incoherence in different international fora required the EC to limit possible actions of its Member States in IOs. This example highlighted the lack of real EC-membership in IOs as the cause for coordination problems of Member States’ actions and EC competencies resulting in conflicts between rules developed in different international fora. Full membership of the EC in IOs dealing with issues that fell into its exclusive competencies could help avoid such conflicts.


In return, Della Cananea demonstrated a “relational” analysis of the EU and the WTO. He looked at the EU as a twofold innovation based on both the states and their peoples. Regarding the role of the EU in WTO decision-making procedures, he pointed to the formation of clubs and the increasing use of dispute resolution procedures, which seemed striking to him as the EU usually favored political negotiations. He argued that there was a contrast between the EU and WTO-systems regarding agricultural products, culture and public health, which particularly concerned the different standards of protection applied and as well as the relevance of scientific evidence of risk. In her intervention Lorenza Sebesta (University of Bologna) stressed the existence of a clear difference between pouvoir publique in the EU and the WTO. She regarded the WTO as a forum for bargaining on the basis of objective facts. According to her, the main idea behind the WTO was the creation of an organization with the aim of imposing international liberalization of the market. In contrast, she considered the EU as a place where principles actually matter, focusing rather on the well-being of its people than on the economy.

Della Cananea perceived the hormones case as a good example of those different factors. Maria Rosaria Ferrarese (University of Rome) joined his argumentation and referred to the strong decision-making power of the WTO, its dramatic economic effects and to the variety of issues that one single dispute could possibly imply. In the hormones case, economic and trade issues, including non-economic concerns such as health, confidence in science, etc., were at stake. Moreover, Ferrarese stressed the importance of the WTO as a powerful organization concerned with issues of political, social and economic relevance, the territorial aspect and the more or less worldwide membership to WTO.22

The hormones case also served as an example with which to examine challenges to governance in detail. Thomas Cottier (University of Berne) provided an overview of the structure and implications of the WTO SPS Agreement. Extensive non-tariff trade barriers based upon national food standards and policy, but also recommendations by the Codex Alimentarius Commission served as a background. In his presentation, Cottier resumed the structure of the SPS Agreement as “food standards to be mandatorily based upon agreed international food standards.” However, he pointed to the right to impose stricter domestic standards, for example in the case of positive scientific evidence of risk to human, animal or plant health. As a whole, he explained that the SPS Agreement left a deliberate choice to strengthen the impact of internationally agreed standards, to reverse the burden of proof for stricter domestic standards etc. Concerning the negotiations of the agreement, he recalled that it had been negotiated under the EC ban on import of hormone-treated meat.

22 For international economic governance played by WTO concerning non-economic concerns, see also STEFAN GRILLER, INTERNATIONAL ECONOMIC GOVERNANCE AND NON-ECONOMIC CONCERNS (2003).
meat and that it had been limited to SPS-specialists. Moreover, consumer interests had not really been taken into account.

Cottier put forward the need to review governance against the background of a persisting increase of WTO law and policies and an inextricable link between foreign and domestic policies. Though Cottier already observed a beginning progress in the domestic reform of governance, he still felt the need for continuously fighting fragmentation and specialization within national governments and EC decision-making processes. Regarding the state of domestic governance in Europe, he drew attention to a lack of parliamentary traditions in foreign trade policy formulation in Europe and of foreign economic policy expertise in political parties. Cottier came up with some suggestions for a domestic reform of governance, i.e., the creation of interagency task forces for the preparation of negotiating positions, open hearings and debates with all interest groups, thus, a well-structured and transparent process of negotiations and the inclusion of the European Parliament.

Taking into consideration the state of WTO governance, he observed purely intergovernmental structures, operating together with the strict consensus principle in decision-making, a lack of effective procedures to hear other IOs representing public goods, and fragmentation and specialization. For a reform of WTO-governance Cottier perceived some constraints, such as well-established diplomatic traditions in trade rounds. In order to pursue a WTO reform of governance in negotiations, he pointed to the requirement of establishing public hearings of non-trade concerns and of fighting fragmentation. He argued that cross-border coherence (horizontal issues) should be taken into account and that the consensus principle should be given up for the benefit of weighted voting. As possible factors for weighted voting he mentioned the contribution to the WTO, the GDP, market openness and population. In his concluding remarks Cottier pleaded for a short-term reform for coherence in domestic procedures and transparency (hearings, parliamentary involvement and coherence), whereas in the WTO he discerned the need for a long-term reform, which depended upon overcoming the consensus diplomacy.

In her comments, Ferrarese examined the WTO’s governance and its challenges to democracy from the political scientist’s point of view. The hormones case itself showed the difficulty of drawing a link between international global organizations and democracy. Notwithstanding the inconsistencies between the hormones case and democracy, she identified some signals of democracy in international law. She perceived the hormones case as a good example of international governance and examined its most important aspects, such as the relationship between democracy and international governance. Whereas in terms of globalization, governance had mainly been placed opposite to democracy, she perceived at the same time some “seeds” of international democracy, including: transparency, participation, interna-
tional cooperation of different states, and multilateralism. Moreover, Ferrarese pointed to the importance of responsible political choices whenever science left a certain degree of uncertainty to politics. She recalled the difficulty of transferring the democratic process in the international and global sphere. She concluded that governance affecting our lives must be balanced by more democracy. Issues present in the hormones case, such as health, security and environment, should be articulated coherently taking into account the background of different visions.

In conclusion, it can be derived from the various panels that there are undoubtedly repercussions for Europe’s model of constitutionalization in the world. There was obvious agreement among the panelists that the process of European constitutionalization may be an important foundation towards a uniform approach that might, in the long run, shape the development of the global legal order. There was, however, also agreement that there are substantive differences regarding the constitutional concepts operating at the EU and international level, starting from democracy and legitimacy to the balance of powers and the rule of law. Therefore, the prevailing approach among the panelists seemed to be that, that which may be transposed to the global level will be reduced to an essence of constitutional principles. Limitations to such transposition are discerned, on the one hand, in the different traditions and perceptions of concepts for a global order, particularly between the US and the EU. On the other hand, the possibilities are reflected in the acceptance of international constitutional law by the political communities and, henceforth, in the enforcement of such principles. In turn, at the international level, it is perceived that the lack of real EC-membership in IOs can cause coordination problems for Member States’ actions and EC competencies resulting in conflicts between rules developed in different international fora. Full membership of the EC in IOs concerning issues that fall into exclusive EC-competencies could help to avoid such conflicts. Also, the need to enhance formalized cooperation and establish more coherence in the linkages between IOs was expressed. Accordingly, the challenge has been determined to be to review governance against the background of persisting fragmentation and specialization.

The inspirations drawn from the conference may be summarized by the conclusion that new foundations for European, and even more for global governance, where the constitutionalization process is only in the fledgling stages, will have to be built on core constitutional values. Thereby, European constitutionalism and, as its most recent achievement, the Constitutional Treaty, has the potential to serve as an inspiring role model; potentially one that may be difficult to digest but which is irresistible in its core essence, just as the Sacher Torte enjoyed in the after-hour.