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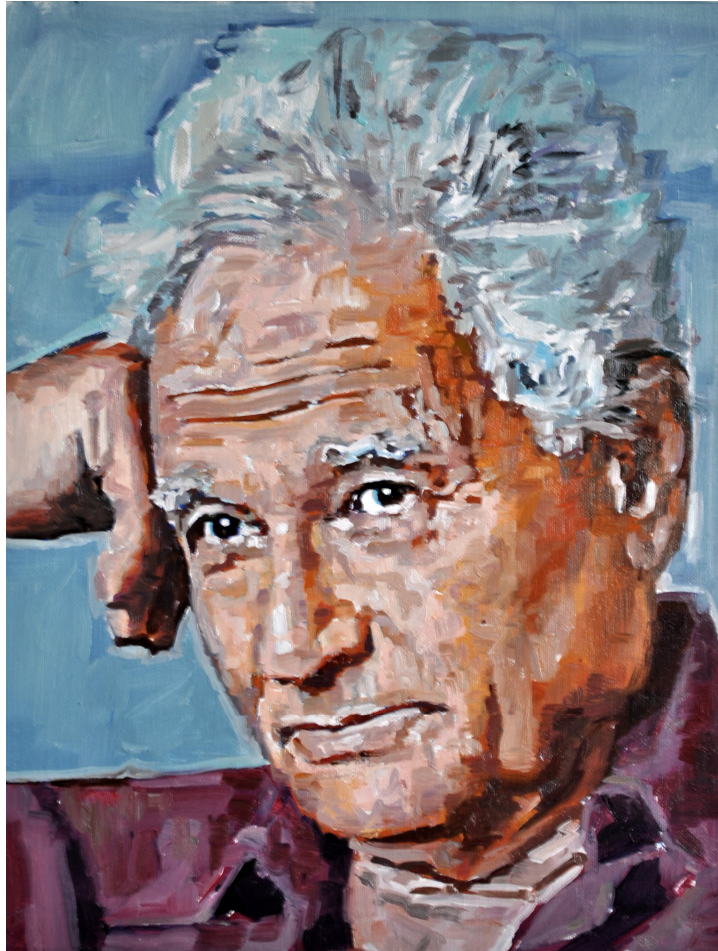
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DECONSTRUCTION

AND LAW:



*A prelude to a deconstructive theory of
judicial interpretation*

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INTRODUCTION

Since Derrida appeared on the legal radar in the 1980's, his texts have been discussed and referred to in numerous legal works. Such references have varied from the sympathetic to the downright hostile. Almost without exception, the hostile readings are characterized by a superficial reading of Derrida... [and] the sympathetic readings unfortunately sometimes fare little better... [being] similarly informed by a lack of appreciation for Derrida's broader [deconstructive] project...¹

Jacques de Ville, *Law as Absolute Hospitality*

The purpose of this thesis is to reconsider (in the wake of the many *mis*-considerations recognized by de Ville) the question of what a legal “deconstruction” might entail – especially one which would be performed by a judge; when the stakes are at their highest. From the very start, this project requires two clarifying notes:

1. I use the word “deconstruction” as shorthand for the interpretive style and philosophy of French theorist, Jacques Derrida. This means that, when I ask how deconstruction might relate to the practice of legal interpretation, I am asking (in a very specific sense) how *Derrida's* work relates to legal interpretation – not how the work of Hillis Miller² or Paul de Man³ or any other self-professed “deconstructionist” relates to it.
2. Rather than trying to criticize Derrida, I simply want to offer as faithful and honest an interpretation of his work as I can muster. This isn't to imply that Derrida is somehow immune from criticism, but rather that, for me, a reinterpretation which strives to grasp Derrida's philosophy *on his terms* is a non-negotiable pre-requisite to any such criticism.

Keeping these notes in mind, I now want to kick-off my analysis by re-asking a question (*the* question perhaps) which has plagued readers of Derrida from the time of his earliest publications – the question as to the “nature” of deconstruction (i.e. the question of “what it is?”). We should not be thrown off by the seeming simplicity of this question; on the contrary – it demands a lengthy and complex answer, and we should therefore waste no time getting to it. With this in mind, let us proceed.

¹ Jacques de Ville, *Law as Absolute Hospitality* (Routledge, 2011) p.2

² See, for example, Paul de Man, *Allegories of Reading* (Yale University Press, 1982)

³ See, for example, J. Hillis Miller, *The Ethics of Reading* (Columbia University Press, 1989)

CHAPTER ONE:
WHAT IS
DECONSTRUCTION?
(OR THE “SPIRIT” OF
DECONSTRUCTION)

“Mark the first page of a book with a red ribbon, for the wound is inscribed at its beginning...”

Edmond Jabes, *The Book of Questions*⁴

⁴ Quoted in Jacques Derrida, “Edmond Jabes and the Question of the Book” in Jacques Derrida, *Writing and Difference* (Routledge, 2001) p.83 – Hereafter referenced as “Jabes and the Question”

WHAT IS DECONSTRUCTION? (OR THE “SPIRIT” OF DECONSTRUCTION):

INTRODUCTION:

What is deconstruction?

“Nothing”⁵ declares Derrida – a declaration which is but one of his many answers to the above question.⁶ What kind of answer is this? An oxymoronic one, certainly: has the mere inscription of the word “deconstruction” not already marked it as *some-thing* – a word or a sequence of letters or a marking on *this* page? The paradoxical question then, is how can something (i.e. deconstruction) can also be nothing? How a thing can also be no-*thing*?

The answer, I think, is implied in the last word of this question – no-*thing*. Deconstruction is no-*thing*. Does this not already hint at some other mode of categorization? Deconstruction clearly *is* – I am writing about it; you are reading about it – but it is not a thing. And yet, what else can the word “is” point toward except a “thing”? This is the paralyzing difficulty of writing/speaking about deconstruction: if it is not-a-thing *then it is not*, and if it is not, then aren’t we out of lexicological options?⁷ In other words, does Derrida’s defining deconstruction as “nothing” not put it beyond language (and even beyond comprehension) in general?

The answer (as I see it) is both yes and no. To briefly explain: the nothingness of deconstruction is an essentially self-inflicted wound – a by-product of its own complex movement. We can certainly try and describe this movement, but this description will fail unless it includes the recognition of its own invalidity; unless it simultaneously posits and refuses itself.⁸ In this sense, the only way to really build upon Derrida’s seemingly hollow definition is by:

⁵ Jacques Derrida, “Letter to a Japanese Friend” in David Wood & Robert Bernasconi, *Derrida and Différance* (Northwestern University Press, 1988) p.5 – Hereafter referenced as “Letter to a Japanese Friend”

⁶ For example: “All sentences of the type ‘deconstruction is X’ or ‘deconstruction is not X’ a priori miss the point, which is to say that they are at least false” – *ibid*, p.4

⁷ Derrida’s response to this difficulty was often to write “sous rature” (i.e. “under erasure”) by scoring out words like “is” or “thing” – words which he felt to be both theoretically misleading and indispensable. We might hijack this technique (and Derrida’s own words) as an additional means of clarification: deconstruction “~~is~~ [an] ill-named ~~thing~~” – ill-named because it is named at all, but named nonetheless because it has to be. For a more extensive explanation of this technique, see Gayatri Chakravorty Spivak, “Translator’s Preface” in Jacques Derrida, *Of Grammatology* (John Hopkins University Press, 1997) p.xiv – Hereafter referenced as “OG” (excluding Spivak’s preface)

⁸ This was always Derrida’s approach to talking about deconstruction – to keep revising himself in the recognition that his words would never quite touch their object. This approach can be sharply distinguished from, for example, Wittgenstein’s claim that we must pass over the “beyond” of language in silence. See Johan van der Walt, “Law and Deconstruction” in Veitch, Christodoulidis & Farmer, *Jurisprudence: Themes & Concepts* (Routledge, 2012)

1. Tracing what I have called the “movement” of deconstruction;
2. Explaining why this movement blocks and effaces the possibility of its own description, and;
3. Suggesting that, given its penchant for self-effacement, deconstruction is best understood as something mystical – a “spirit” perhaps – rather than the tightly-hemmed and repeatable method which many literary theorists (for example) have supposed it to be.⁹

In one sense, this proposed “spirit” of deconstruction will be no safer from its own effects than a more technical interpretation. But in another sense, talking about deconstruction as a certain kind of “spirit” can, I think, help us to see what might otherwise be concealed – namely that deconstruction is never about its seeming objects (i.e. Western philosophy and language) but about that which exceeds them: the “unsayable,”¹⁰ the “impossible,”¹¹ the mystical.

⁹ In particular, see Rodolphe Gasche, *The Tain of the Mirror* (Harvard University Press, 1986) pp.255 – 318. Hereafter referenced as “Gasche”

¹⁰ Johan van der Walt, “Law and Deconstruction” in Veitch, Christodoulidis & Farmer, *Jurisprudence: Themes & Concepts* (Routledge, 2012)

¹¹ For a summary of the link between deconstruction and the impossible, see Martin McQuillan, “Introduction: Five Strategies for Deconstruction” in Martin McQuillan, *Deconstruction: A Reader* (Routledge, 2001) pp.3 – 8

SECTION I: THE APORIA OF THE BEGINNING

“We must begin somewhere, but there is no absolutely justified beginning...”¹²

Geoffrey Bennington, *Derridabase*

This is one incarnation of the aporia which, I think, always lies at the heart (i.e. the “beginning”¹³) of Derrida’s work. “We *must* begin”¹⁴ – but we have no-*where* to begin, no “absolutely justified” point of departure. What does this mean? Specifically:

1. What “we”?
2. In what sense *must* we begin?
3. In what sense must we *begin*?
4. What is it about this sense of “beginning” that is so unjustifiable (and even, as we will see, “unjust”¹⁵)?

The purpose of this section is to answer these questions by constructing a point-by-point explanation of Derrida’s/Bennington’s aporia. Although the type of explanation which I want to give is perhaps more readily identifiable with discussions of aporia in Derrida’s later work (i.e. in the wake of his so-called “ethico-political turn”¹⁶) I want to try and fuse it with the terminology and vital concerns of his earlier writings: especially his preoccupation with the “institution of the sign”¹⁷ as an existential baseline. This is not, for me at least, a forced or synthetic fusion. Rather, it is simply my way of highlighting the deep-set continuity between the various “turns” of Derrida’s work – a continuity which, I think, enables us to talk about a cohesive/enduring “spirit” of deconstruction over and above what may seem like focal shifts in Derrida’s thought. With these concerns in mind, let us proceed to the explanation.

¹² Geoffrey Bennington, *Derridabase* (University of Chicago Press, 1993) p.15 – Hereafter referenced as “Bennington”

¹³ This should, I think, be taken with a grain of salt. Because if Derrida’s work refuses the possibility of an “absolutely justified beginning” then there will be no “absolute” justification for my suggestion that there is a *proper* “heart” of Derrida’s work. However, as the first term of the aporia suggests, we still “must begin” – even if the most we can give is a persuasive or “strategic” (see Bennington, p.15) justification for this beginning.

¹⁴ Derrida uses these exact words: “we must begin *wherever we are*” – See *OG*, p.162

¹⁵ See section two of this chapter (and also my discussion of Derrida’s “Force of Law” in chapter two) for an explanation of this claim.

¹⁶ Pheng Cheah, “The Untimely Secret of Democracy” in Pheng Cheah & Suzanne Guerlac, *Derrida and the Time of the Political* (Duke University Press, 2009) p.74

¹⁷ *OG*, p.44

Phase I: “...we must begin...”

- ❖ “To begin” – without suffixation but referring specifically to “us” (i.e. human beings) – can be taken to denote one’s entry into existence.
- ❖ For Derrida, as for Heidegger, our lives are always “bound up in relations of practical concern.”¹⁸ We don’t exist at odds with the world (as some disconnected, “Cartesian”¹⁹ “thinking thing”²⁰) but “in-the-world... with-others”²¹ – a la Heidegger’s *Dasein*.
- ❖ However, our ability to cope with the “in-ness”²² or “facticity”²³ of life is far from naturally endowed. Rather, it depends upon our recourse to an artificial “technique” which “supplements”²⁴ our naked, biological existence (i.e. what the Greeks called “*zoe*... the simple fact of living common to all living beings”²⁵). That “technique” is language.
- ❖ To explain: without language, we would exist *amongst*-others rather than “with” them in the Heideggerian sense. The “detour of the sign”²⁶ then, is what allows us to transcend this state of solitary “amongst-ness” by providing us with the ability to interact, to engage, and to be “with-others” (i.e. “in-the-world” in a meaningful sense).
- ❖ In other words, language arrives on the scene as a matter of sheer necessity – as *the* practical arrangement which ensures our ability to cope with the inescapable social requirements of “factual”²⁷ life.

¹⁸ Jeff Collins & Howard Selina, *Introducing Heidegger* (Totem Books, 2010) p.61 – Hereafter referenced as “Introducing Heidegger”

¹⁹ Rene Descartes, *Meditations on First Philosophy* (Cambridge University Press, 1996) especially pp.12 – 23

²⁰ Simon Critchley, “Being and Time: ‘Being-in-the-world’” at

<http://www.guardian.co.uk/commentisfree/belief/2009/jun/22/heidegger-religion-philosophy?intcmp=239>

²¹ *Introducing Heidegger*, pp.55 – 63; It is also worth noting Simon Critchley’s definition of Heidegger’s “Being-in-the-world”: “the world itself is part of the fundamental constitution of what it means to be human... I am not a free-floating self or ego facing a world of objects that stands over and against me... rather... the world is part and parcel of my being, of the fabric of my existence” – See Simon Critchley, “Being and Time: ‘Being-in-the-world’” at

<http://www.guardian.co.uk/commentisfree/belief/2009/jun/22/heidegger-religion-philosophy?intcmp=239>

²² *ibid*, p.61

²³ Maurice Merleau-Ponty, *Phenomenology of Perception* (Routledge & Kegan Paul Ltd, 2005) p.vii

²⁴ See *OG*, pp.141 – 157

²⁵ Giorgio Agamben, *Homo Sacer* (Stanford University Press, 1998) p.1 – Hereafter referenced as “Agamben”

²⁶ Jacques Derrida, “Différance” in Jacques Derrida, *Margins of Philosophy* (The Harvester Press, 1982) p.9 – Hereafter referenced as “Différance”

²⁷ John D. Caputo, *Radical Hermeneutics* (Indiana University Press, 1987) p.1 – Hereafter referenced as “Radical Hermeneutics”

- ❖ For Derrida, this turn to language – which he refers to as a “moment of economy”²⁸ – does “not depend upon a choice that could have been avoided”²⁹ or redirected. This is largely because of the practical necessity of interaction, but also (and this is crucial) because we never experience anything like a pre-linguistic “moment” – even one in which our recourse to language would be pre-determined. Rather, when we enter the world, *we simultaneously enter language as an unavoidable inheritance*: we receive it, “like the law”³⁰ says Saussure.
- ❖ We might object: it *is* possible to conceive of a life untouched by language – one raised in silence, kept in the dark.³¹ But for Derrida, the non-lingual character of *even this life* melts away when we take the “logic of the supplement”³² into account. To explain: “there is no idyllic state of nature before the advent”³³ of language because such a state would – insofar as language is our ticket to the social realm – still *feel* the anti-social ache of its lack, which is to say that it would still be haunted by the dream (*and the essentiality*) of language in its social promise.³⁴
- ❖ And so language (i.e. the concept of the sign) is always at the beginning³⁵ – not as some external add-on (i.e. one which would impose itself upon our “bare life”³⁶ as an artificial enhancement) but as an integral/irreducible part of our existence. However: the status of this existence-in-language (and “in-the-world”) is far from clear cut, and many of the statements above will require amendment or even refutation according to the terms of the second phase/pole of Derrida’s aporia.

²⁸ OG, p.7

²⁹ *ibid*, p.7

³⁰ Bennington, p.26 (paraphrasing Saussure)

³¹ For example, Peter Stillman, Jr. in Auster’s *City of Glass* – a character whose father raised him in silence as a means of linguistic experimentation. See Paul Auster, “City of Glass” in Paul Auster, *The New York Trilogy* (Faber & Faber, 2004)

³² Christopher Norris, *Derrida* (Fontana Press, 1987) p.98 – Hereafter referenced as “Norris”

³³ *ibid*, p.98

³⁴ This should be distinguished from Aristotle’s claim (in *The Nichomachean Ethics*) that nature can be receptive/facilitative to the unnatural. Derrida’s “supplementarity” is more radical: it involves arguing that the supposedly unnatural already lives within the natural – that the unnatural (i.e. the technical) is a necessary part of nature (i.e. primordiality) and that this puts the very idea of nature (i.e. self-sufficient, enclosed purity) into question.

Reference: Aristotle, *The Nichomachean Ethics* (Wordsworth Editions Ltd, 1996) p.33

³⁵ Bennington agrees: “Derrida... asserts, from the beginning, that the sign is at the beginning... which will very rapidly imply that there is no beginning.” In other words, since the sign is a mark of secondariness, any attempt to suggest its primordiality will also be the destruction of primordiality itself (“putting into question the value of *arkhe*” – “Différance” p.6) – See Bennington, p.24

³⁶ See Agamben, p.120 (amongst many other pages)

Phase II: “...there is no absolutely justified beginning...”

- ❖ “To begin” – philosophically speaking – is to think (or perform) in a “metaphysical”³⁷ fashion. For Derrida, this means “returning strategically, ideally, to an origin or to a priority thought to be simple, intact, normal, pure, standard, self-identical, in order then to think in terms of derivation, complication, deterioration, accident, etc...”³⁸
- ❖ This gesture can be understood in several ways. In a narrow sense, it can refer to a way of thinking which Derrida recognizes as endemic across the history of Western philosophy – namely the tendency to construct grandiose theories of “knowledge” which work from some self-standing point of “conceptual bedrock”³⁹ (e.g. “Plato’s forms, Hegel’s dialectic... Nietzsche’s will-to-power”⁴⁰, etc.) towards a “reconstruction in order.”⁴¹ But in a broader sense – as Irene Harvey notes – metaphysics is also Derrida’s name for the ever-invasive “condition” (in every sense of the word: habitat, disease, etc.) of our linguistic existence. In other words, metaphysics = language itself.⁴²
- ❖ Here’s one way to think about this equation: the idea of language is the idea of the “postal principle”⁴³ – of the division of the sign into packaging (i.e. the signifier, or phonic/graphic substance) and contents (i.e. the signified, or conceptual identity). This means that when I speak/write, there is an implied assumption that anyone who receives my words as sounds/shapes will also receive certain “irreducible kernel[s]”⁴⁴ of meaning which would, by definition, be “simple, intact... pure”⁴⁵ etc.

³⁷ Alternative definition: “[The] structure of... seeking for answers, for understanding, for conceivability, for meaning itself” – See Irene Harvey, “Derrida and the Concept of Metaphysics” in *Research in Phenomenology* (Volume XIII) p.116 – Hereafter referenced as “Harvey”

³⁸ Jacques Derrida, *Limited Inc.* (Northwestern University Press, 1998) p.236

³⁹ Jack Balkin, “Deconstructive Practice and Legal Theory” (96 *The Yale Law Journal* 1987) p.746

⁴⁰ David Wood & Robert Bernasconi, *Derrida and Différance* (Northwestern University Press, 1988) p.xi

⁴¹ Bennington, p.15

⁴² Harvey, p.117; also, consider the following excerpt from Derrida’s *Positions*: “...‘everyday language’ is not innocent or neutral... it is the language of Western metaphysics” – See Jacques Derrida, *Positions* (Continuum, 2004) p.18 – Hereafter referenced as “Positions”

⁴³ *Radical Hermeneutics*, p.160

⁴⁴ *OG*, p.44

⁴⁵ “communication... in effect implies a *transmission charged with making a pass, from one subject to another, the identity...* of a *meaning* or of a *concept* rightfully separable... from the signifying operation” – See *Positions*, p.22

- ❖ However, according to Derrida, “there is no intact kernel”⁴⁶ – no fleck of conceptual substance from which a given sign is inseparable. I shall return to this later, but for now it should be enough to say that Derrida thinks of meaning in much the same way as Nietzsche⁴⁷ – as determined, in the end, by a certain “residual... freedom”⁴⁸ possessed by the language-user rather than the sovereignty of some static signified.⁴⁹
- ❖ One consequence of this “de-kernelization” is that it tends to negate the possibility of genuine (i.e. meaningful) social contact. This is not to say that the functional/practical benefits of language are an illusion, *but rather that they come at the cost of any social experience/engagement which would exceed this practicality.*
- ❖ Consider the following by way of explanation: for Derrida, every instance of language-use carries the performative assumption that some-*thing* (i.e. some “kernel”) will be received by other homo-lingual “users” who come into contact with it. But if these kernels are subjectively determined (as Derrida suggests) then a second assumption kicks in – namely that our subjective operations are similar enough to facilitate inter-subjective coalescence.⁵⁰
- ❖ This is why social contact via language can never be genuine: because it depends upon the implied assumption that no other is actually *Other* – an assumption which reduces others to “interior representation[s]” whose subjective trajectories necessarily correspond to those of the *representing* subject. In other words, communication is never *between* subjects, but *within* them (i.e. between one subject and an array of dead-eyed holograms).

⁴⁶ Jacques Derrida, *The Ear of the Other* (Schocken Books, 1985) p.115

⁴⁷ “Ultimately, man finds in things nothing but what he himself has imported into them...” – Friedrich Nietzsche, *The Will to Power* (Vintage, 1968) p.327; also, consider the following quote from Derrida’s *Grammatology*: “Nietzsche, far from remaining *simply* (with Hegel and as Heidegger wished) *within* metaphysics, contributed a great deal to the liberation of the signifier from its dependence or derivation with respect to... truth or the primary signified” – *OG*, p.19

⁴⁸ David Wood, “Différance and the Problem of Strategy” in David Wood & Robert Bernasconi, *Derrida and Difference* (Northwestern University Press, 1988) p.66

⁴⁹ Consider the following quotes as illustrative of this “residual... freedom” thesis:

1. “...everything comes down to the ear you are able to hear me with... all will be listening to me with one or the other sort of ear... to which the coherence and continuity of my trajectory will have seemed evident from my first words...” – Jacques Derrida, “Otobiographies” in Jacques Derrida, *The Ear of the Other* (Schocken Books, 1985) p.4
2. “...my remarks... would have no interest except on the condition of being unwrapped in one fashion or another, everyone having his or her own idea on that subject and thus his or her own impatience...” – Jacques Derrida, *Points... Interviews, 1974 – 1994* (Stanford University Press, 1995) p.175

⁵⁰ Although there is (in reality) no order to these assumptions – they are interlinked and inter-implicating.

- ❖ This is the cruel logic of language. We need it to (meaningfully) enter the world – to cope with the basic requirements of “factual” life – *but it can’t enable any more than a superficial entrance into this world because it never really lets us experience anything beyond ourselves*⁵¹ (i.e. no point of “radical alterity”⁵²). This is why Derrida, in *Positions*, refers to language as a “simultaneous impediment and progress”⁵³ – because in terms of its basic function, it is both road and roadblock/poison and cure.⁵⁴
- ❖ This all adds together to explain why there is “no absolutely justified beginning.” Simply put, *there is no absolute at all* – no pure truth, no irreducible kernel, and no facilitative sameness between subjects. There is, to borrow Derrida’s famous words, “nothing outside the text”⁵⁵ – no “transcendental signified”⁵⁶ against which our language-use can be referenced and justified.

⁵¹ Two additional notes:

1. This means that we have to go back (partially) on our prior suggestion that we live “with-others” rather than merely “amongst” them. In functional/practical terms, this suggestion still holds. But any sense of meaningful engagement – *of really experiencing others* – is an illusion.
2. And in this sense, we might say that Derrida’s life-view is an undecidable suspension between Heidegger’s “facticity” and Cartesian solitude. In other words, we are in a certain sense both “with” *and* “amongst” others.

⁵² Gasche, p.148

⁵³ *Positions*, p.17

⁵⁴ In “Plato’s Pharmacy” Derrida picks up on Plato’s use of the Greek word “pharmakon” – a word which can signify both poison and cure (much like the English word “drug”). Although Plato uses the term with specific reference to the status of the written word, Derrida claims (as we will see) that all language can be subsumed under the concept of writing and that the “pharmakon” label, therefore, is *applicable to every linguistic form*. See Jacques Derrida, *Dissemination* (University of Chicago Press, 2004) pp.63 – 171

⁵⁵ *OG*, p.163

⁵⁶ Norris, p.85

Chapter Plan: The “Spirit” of Deconstruction

Derrida’s aporia – the “aporia of the beginning” – leaves us with a torrentially bleak portrait of human existence. Its status as an aporia (an impasse, a dead end, etc.) seems to trap us in a “prison-house”⁵⁷ of language; doomed to live our lives alone. And yet, in this experience of what Derrida calls “undecidability”⁵⁸ (i.e. a tragic suspension between two poles or oppositional movements) we can catch a faint glimmer of something alternative and refreshing – something which is utterly foreign to the order of metaphysics. *This* (i.e. counter-metaphysical foreignness) is what really interests Derrida, and my task now is therefore to explain:

1. The difficult method through which this foreignness is exposed;
2. The “spirit” or character of this foreignness, at least as Derrida sees it;
3. And why the exposure of this foreignness is so called-for; so necessary.

The remainder of this chapter will address the first two of these points, with point three saved for chapter two. I will address the first point over the course of three sections relating to Derrida’s first extended assault on metaphysical security: *Of Grammatology*. The first two of these sections will offer an introduction to the *Grammatology* – its style, its themes, and its relationship to the aporia of the beginning. The third section will focus specifically on “method” – the limits within which Derrida instigates and regulates his “deconstruction” of metaphysics. As for the second point, it has already been hinted at through the logic of Derrida’s aporia. But I will return to it – especially in section six – so as to explicitly set out some of Derrida’s earlier, “quasi-transcendental”⁵⁹ attempts to conceptualize this mystical beyond. These concepts will then be re-spun in chapter two, as we begin to spill into the third point: the “why?” of deconstruction; the sense in which it is always so called-for.

⁵⁷ A term borrowed from Christopher Norris: the “prison-house of concepts” – see Christopher Norris, *Deconstruction: Theory and Practice* (Routledge, 2002) p.4

⁵⁸ See Rodolphe Gasche, “Infrastructures and Systematicity” in John Sallis, *Deconstruction and Philosophy* (University of Chicago Press, 1987) p.10

⁵⁹ See Bennington, pp.267 – 284

SECTION II: METAPHYSICS = REPRESSION (AN EXTENDED NOTE...)

Before pursuing my chapter plan, I want to make a quick addition to the previous section by recalling my earlier claim that a particular “beginning” (i.e. a metaphysical hark-back to ideality) will not only lack “absolute” justification, but will also be (in a certain way) unjust. Pending a more detailed description, we can – for now – restrict ourselves to blaming this “unjustness” on two features of the metaphysical gesture:

1. Its lack of any “absolute” justification (as per the previous section) *and*;
2. Its negative impact upon what Derrida calls the “Other”⁶⁰ – a term which most typically refers to the other language-user.

One way of understanding this negative impact is in terms of repression. To explain: the language-user’s performative return to ideality marks, as Freud says of repression, a “withdraw[al of] interest”⁶¹ – specifically from those flickers of signifying potential which lie beyond the presumed pinpoint of ideality; beyond the supposedly “true”⁶² meaning of the words used. This might seem like an innocuously passive movement, but then again – following Derrida’s line in texts like “Force of Law”⁶³ – can inaction and disinterest not be just as violent as active aggression? Isn’t *this* the moral of K’s bureaucratic nightmare in *The Castle*⁶⁴?

Far from being a matter of merely theoretical importance, the repressive character of metaphysics/language has what we could expediently refer to as “real world” consequences – specifically regarding the language-user’s existence-with-others. This is because (as I suggested before) language can only let us see others as pre-accounted self-reflections, thereby repressing any meaningful conception of their individuality or depth. And from here, it is hard not to see a heavily implied politics of negative imposition – of conceit, of narrow-mindedness, and of self-importance. But I digress: let us keep these ideas in mind and keep the rest for chapter two.

⁶⁰ And, as Derrida suggests, the question of justice (i.e. ethics) begins with the “Other” – “there is no ethics without the presence of the other” – see *OG*, pp.139 – 140

⁶¹ Sigmund Freud, “‘Psychoanalysis’ and ‘Libido Theory’” in Sigmund Freud, *The Penguin Freud Reader* (Penguin, 2006) p.118

⁶² But these flickers never quite die away: “each phrase remains pregnant with everything left unsaid” – See Gilles Deleuze, *Foucault* (Continuum, 2006) p.4

⁶³ See Jacques Derrida, “Force of Law: The Mystical Foundation of Authority” (11 *Cardozo Law Review* 1990) p.945 – Hereafter referenced as “Force of Law”

⁶⁴ See Franz Kafka, *The Castle* (Penguin Modern Classics, 2007)

SECTION III: SOME NOTES ON “OF GRAMMATOLOGY”

Of Grammatology (perhaps Derrida’s most famous and widely-read book) picks up where I left off in the first section: with the problematic of language/representation. It begins with an interesting observation – namely that the West’s (“that is... the world[s]”⁶⁵) collective attitude to language has always been organized according to a certain sub-categorical hierarchy. And for Derrida, the classic formulation of this hierarchy lives on the first page of Aristotle’s *On Interpretation*:

“Spoken words are the symbols of mental experience and written words are the symbols of spoken words... just as all men have not the same writing so all men have not the same speech sounds, but mental experiences, of which these are the primary symbols, are the same for all, as are those things of which our experiences are the images...”⁶⁶

“Mental experiences” (or “affections”⁶⁷) are the “truths” which are supposed to be packed up and delivered by the linguistic postal service, but what about this seeming division between speech and writing? From the outset, we can say that these are (for Aristotle) not simply two ways of doing the same thing. On the one hand, speech – given its “relationship of essential and immediate proximity with the mind”⁶⁸ – is valorized as the “first signifier”⁶⁹ (“fully present...to itself, to its signified, to the other...”⁷⁰). On the other hand, writing is seen to threaten this purportedly natural relationship between mind and voice because of its:

1. *Durability* (i.e. temporal extendability) and;
2. *Transportability* (i.e. spatial extendability).

These attributes create a supposed risk of losing the original signified (i.e. the “true” meaning of the author’s thoughts) and, as a result, writing is promptly demoted to the level of a re-representation (“the signifier of the signifier”⁷¹).

⁶⁵ Why the West as “the world”? As a recognition of Western imperialism/globalization? Or perhaps to suggest that, even if this gesture is a mark of the Western tradition, *it is really a means of coping with a difficulty which is universal*. See “Freud and the Scene of Writing” p.247 for the original quote: “of the West, that is, of the world...”

⁶⁶ *OG*, p.30... p.11

⁶⁷ Depending on the translation of “On Interpretation” – see Sean Gaston, “Introduction” in Gaston & MacLachlan, *Reading Derrida’s Of Grammatology* (Continuum, 2011) p.xvi

⁶⁸ *OG*, p.11

⁶⁹ *ibid*

⁷⁰ *ibid*, p.8

⁷¹ *ibid*, p.7

For Derrida, Aristotle's "phonocentrism"⁷² (*which would become fully endemic throughout the West*) is caught up in a strange and uncomfortable logic. To recall section one: language is – by definition – an unnatural or artificial technique ("secondariness itself"⁷³ says Bennington) which arrives on the scene only to represent "nature" (i.e. that which is "simple, intact [and]... pure"). And yet, despite its synthetic/technical character, Aristotle claims that language still has a *proper* mode of transmission based on a supposedly "natural unity"⁷⁴ between the signified and the purely phonic signifier. In other words, language is an unnatural technique nonetheless subject to a "natural order"⁷⁵ of form.

Derrida's explanation for this strangeness (and for why it has always gone unnoticed) begins with the claim that the West's phonocentric bias stems from a deeper, more fundamental presumption – namely that of the atomic (i.e. metaphysical) or directly transitory character of language.⁷⁶ This presumption, as Heidegger⁷⁷ first recognized, is always the presumption of a certain kind of *presence*. To explain: language can only signify that which exists (whether in tangible or conceptual terms) and the idea of existence or "Being" has always been, according to both Heidegger and Derrida, conceived of in terms of presence⁷⁸ – to be "in-the-world" is to have presence in it, *which is to say that Being is directly equivalent to presence*. In this sense, to borrow Derrida's oft-used phrase, metaphysics can always be described as the "metaphysics of presence"⁷⁹ – as he says in *Writing and Difference*: "all the names related to fundamentals... or to the center have always designated and invariable presence."⁸⁰

This alignment between presence and fundamentality means that nature – as the marker of that which is fundamental, primordial, etc. – becomes indelibly linked with presence, to the point where nature is nothing but the untouched, pure, "full presence"⁸¹ (i.e. existence) of things as they are.

⁷² Derrida's preferred term for the privileging of speech over writing (which is also roughly interchangeable with the term "logocentrism" – the latter placing more emphasis on the privileged position accorded to "mental experience" as the source and truth/meaning) – See *OG*, pp.6 – 26

⁷³ Bennington, p.24

⁷⁴ Richard Beardsworth, *Derrida and the Political* (Routledge, 1996) p.9 – Hereafter referenced as "Beardsworth"

⁷⁵ *ibid*; also see Beardsworth, p.11 for a discussion of this logic in relation to Saussure's thesis of the "arbitrariness of the sign."

⁷⁶ This is what Spivak means when she says that "phonocentrism-logocentrism relates to centrism itself – the human desire to posit a... beginning and end" – See Gayatri Chakravorty Spivak, "Translator's Preface" in *OG*, p.lxviii

⁷⁷ James M. Giarelli, "On the Metaphysics of Presence" at <http://www.ed.uiuc.edu/EPS/PES-Yearbook/2000/giarelli%2000.pdf>

⁷⁸ Isn't this actually implied semantically? Think about it: language re-presents, which is to say that it *makes present again*. Doesn't this "again" already mark the object of language as a sort of primary presence?

⁷⁹ For a brief and basic explanation of this term, see Jack Balkin, "Deconstructive Practice and Legal Theory" (96 *The Yale Law Journal* 1987) p.747

⁸⁰ Jacques Derrida, "Structure, Sign and Play in the Discourse of the Human Sciences" in Jacques Derrida, *Writing and Difference* (Routledge, 2001) p.353 – Hereafter referenced as "Structure, Sign and Play"

⁸¹ *OG*, p.73

In other words, presence *is* nature. This is why Aristotle is able to proclaim a nature-of-the-unnatural without feeling the need to further explain and justify himself – because the bond of spatial/temporal presence between mind and voice automatically brings the idea of nature into the equation. To put it simply: it is the “naturalness” of the bond, *and not anything within speech itself* (as a secondary technique) which justifies the West’s phonocentrism, which is to say that language can (at least by the logic of “Being as presence”⁸²) be an unnatural practice which is internally regulated by a natural order.

So: this is where the *Grammatology* begins, by suggesting two things:

1. Western discourse ceaselessly privileges speech over writing;
2. This privilege pivots on an underlying (*and essential*) metaphysical presupposition – namely the presupposition of the irreducible (*and fully present*) kernel.

The question then, is where the *Grammatology* moves from these theoretical/historical observations. I have already suggested that Derrida distrusts the central presumptions of language/metaphysics, and that he therefore sees injustice in the West’s cross-board depreciation of the written word. But the question remains as to where this distrust comes from? Out of what argument/method? The next three sections will attempt to articulate an answer.

⁸² “Structure, Sign and Play” p.353

SECTION IV: “THE QUESTION OF THE BOOK”⁸³

In section one, I suggested that the “aporia of the beginning” *is also at the beginning* (i.e. at the “heart”) of Derrida’s work. In this section, I want to try and back up this claim by making another, interlinked claim, namely that the *Grammatology* – taken as a whole, and considered in terms of a certain relationship between its style and its logic – can be understood as an intricate metaphor for Derrida’s aporia. There are several reasons for making this claim:

1. As suggested, the word “aporia” is used somewhat scarcely in Derrida’s early work, and demonstrating its concealed centrality in a text like the *Grammatology* will, I think, serve to back up my theory of a mystical but constant “spirit” of deconstruction which ties together the focally distinguishable “turns” of Derrida’s philosophy.
2. Seeing the *Grammatology* as a book with a broad/overarching purpose can help us to find a deeper, more contextual understanding of its strategies and arguments. This will be of particular relevance in the next section, where I will be taking a more focused look at the *Grammatology*’s second chapter (“Linguistics and Grammatology”⁸⁴).

Keeping these reasons in mind, let us proceed – starting with one of the most persistent and revealing symbols at work in the *Grammatology*: the “idea of the book.”⁸⁵ For Derrida, this is closely linked to the aforementioned idea of the postal principle, relying on an “essentially theological conception of the book”⁸⁶ (e.g. the Bible) as something which tells “the truth about things”⁸⁷ in a grand, over-arching sense. Of course, few books are as self-assured or englobing as the Bible, but for Derrida, this is merely a matter of degree since (as per section one) language *always* presumes its own ability to reference something true/prior; to invoke a supervisory signified from which the text is inseparable. So when Derrida says – in *Positions* – that the *Grammatology* is primarily aimed at questioning the “unity of the book”⁸⁸ he means that it is aimed at questioning the metaphysical presuppositions of language (i.e. the postal principle, the transcendental signified, etc.)

⁸³ Reference to “Jabes and the Question”

⁸⁴ *OG*, pp.27 – 73

⁸⁵ Ian Maclachlan, “The Idea of the Book” in Gaston & Maclachlan, *Reading Derrida’s Of Grammatology* (Continuum, 2011) p.32

⁸⁶ *ibid*, p.34

⁸⁷ Richard Rorty, “Philosophy as a Kind of Writing” in *New Literary History* (Vol.10, No.1, Autumn, 39:1978) p.146 – Hereafter referenced as “Rorty”

⁸⁸ See *Positions*, p.3

However – and this is where we get caught back up in the aporia of the beginning – Derrida’s rail against the self-certainty of the book leaves the *Grammatology* stranded in what we might call a self-imposed identity crisis.⁸⁹ On the one hand, since it argues against the possibility of the book (i.e. the possibility of metaphysical fulfillment) the *Grammatology* seems to demand a fresh label for itself – something other than the term “book.”⁹⁰ On the other hand, as Christopher Norris remarks, the *Grammatology* still “looks and reads very much like a book... [arguing] its way with a notably book-like persistence and fixity of purpose.”⁹¹ Perhaps a few examples are in order to clarify Norris’ claim:

1. The phrase “irreducible kernel” – my go-to phrase for explaining the major metaphysical assumption behind language – is actually a quote from the *Grammatology*: “and that... [i.e. secondariness]... is the only *irreducible kernel* [my emphasis] of the concept of writing.”⁹² Although Derrida’s “critique”⁹³ of metaphysics (i.e. “bookishness”) goes against the idea that signs are linked to irreducible kernels of sense, this quote seems to find Derrida doubling back on himself by attributing just such a “kernel”⁹⁴ to the concept of writing.
2. Although the *Grammatology* argues (in a very Nietzschean way) that there is no truth as such beyond subjective determination, it could be seen to betray this argument by positing a somewhat Hegelian/totalizing version of Western history: a single, sweeping narrative which explains the movement of the social world according to the operation of a certain philosophical idea-cluster – the metaphysics of presence. In other words, Derrida proposes a particular, definitive, unified history while arguing (wholeheartedly) against the very possibility of such a history.

⁸⁹“...the sign becomes... a volatile object unsure of its vocation” – See Beardsworth, p.7

⁹⁰ Derrida frequently opted for terms like “text” or “essay” (for example: “...one can take *Of Grammatology* as a long essay...” – *Positions*, p.4) – the usefulness of which, I think, comes down to their academic connotations. First of all, academic texts or essays are always marginal contributions to much larger (and ultimately endless) fields of study. Second of all, academic works back up their arguments by referencing other texts – *by referring to other instances of language-use rather than always trying to present their own self-standing truth*. Of course, academic texts are never any more free from the performative truth-claims of language than any other form of language-use, but the implications to which they are connected do serve as expedient metaphors for certain ideas which lie beyond the conventional reach of language (i.e. as the “language of Western metaphysics” – *Positions*, p.18)

⁹¹ Norris, pp.63 – 64

⁹² *OG*, p.44

⁹³ I have emphasized the word “critique” because Derrida was always keen to distance himself from it (even though it does, I think, describe one aspect of Derrida’s bearing upon the metaphysical tradition) – See, for example, “Letter to a Japanese Friend” p.3 – “deconstruction is neither an *analysis* nor a *critique*...”

⁹⁴ However, elsewhere, Derrida has used the word “kernel” as I use it here: to denote the true, fixed, stable meaning which language assumes without ever quite capturing. See Jacques Derrida, *The Ear of the Other* (Schocken Books, 1985) p.115

The question then, is whether these moments of apparent self-effacement are cracks in Derrida's argument, or whether they are somehow part of it. And the answer, for me, is the latter. To explain: the aporia of the beginning asserts that language is *both necessary and insufficient*, which means that the only way to propose the insufficiency of language (i.e. to question the self-evidence of metaphysical norms) is to do so – necessarily – in the very language which our proposal puts into question.⁹⁵ In *Writing and Difference*, Derrida occasionally filters this difficulty through the symbolism of the book, noting how:

“only in the book, coming back to it unceasingly, drawing all our resources from it, could we indefinitely designate the writing beyond the book”⁹⁶ and;

“every exit from the book is made in the book.”⁹⁷

Since the book (i.e. language/metaphysics) is the unshakeable condition of our existence, Derrida's own theory could not – if it is to be consistent with its own terms – hope to avoid the performative assumptions which are tied to the book. And this means that, rather than being inconsistencies within an otherwise relentless storm of anti-metaphysical criticism, Derrida's occasionally totalizing and “bookish” language can actually be seen to *support* the general thrust of his aporetic argument, reminding us that Derrida is not simply “against” metaphysics, *but with it too*, alongside it in its sheer necessity (“both with and against”⁹⁸ says Caputo). And in this light, Derrida's now-signature phrase, “there is nothing outside the text” shines all the more clearly – there is no referent, but neither is there a way to say this without assuming one.⁹⁹ In other words, to be is *always* “to-be-in-the-book.”¹⁰⁰

⁹⁵ This is the major thrust of Derrida's infamous criticism of Foucault's project in his book, *Madness and Civilization*. For Derrida, Foucault errs in believing that he can analyze the language of metaphysics (which Foucault calls the “language of reason”) from a point of externality (i.e. of scientific disinterest) since – in Derrida's view – we can never crack into a realm beyond that of our inherited language. Instead, *we have to work within it*, even when faced with the urge to try and disregard it or write it off. See Jacques Derrida, “Cogito and the History of Madness” in Jacques Derrida, *Writing and Difference* (Routledge, 2001) pp.36 – 76

⁹⁶ Jacques Derrida, “Ellipsis” in Jacques Derrida, *Writing and Difference* (Routledge, 2001) p.371

⁹⁷ “Jabes and the Question” p.92

⁹⁸ *Radical Hermeneutics*, p.121

⁹⁹ This is why (as I said in my introduction) an accurate definition of deconstruction will simultaneously posit and refuse itself. Perhaps the most important aspect of this section is that it makes this explicit for the first time in my argument.

¹⁰⁰ “Jabes and the Question” p.93 – There's also a very interesting (and strikingly similar) quote from Jabes on this page: “the world exists because the book exists...”

SECTION V: PURE INTERPRETATION

Two Saussures:

So: I have argued that the *Grammatology* – taken as a somewhat synthetic whole – can be viewed as an effort to expose the aporetic quality (i.e. as per my “aporia of the beginning”) of our existence-in-language. In light of this claim, we must now ask *how* Derrida instigates this exposure; by what method, in what style, etc. The short answer (the one which I will be fleshing out over the course of this section) is that the *Grammatology* proceeds interpretively; by meticulously re-reading a number of texts which Derrida deems exemplary of the Western (i.e. phono-centric/metaphysical) tradition, and by doing so through a particular lens – a deconstructive “text-view”¹⁰¹ we might say – which is beautifully summed up on the first page of Spivak’s preface to the *Grammatology*:

“Jacques Derrida is maitre-assistant in philosophy at the Ecole Normale Supérieure... Jacques Derrida is also this [*Of Grammatology, Writing and Difference*, etc.] collection of texts...”¹⁰²

This isn’t a fresh observation from Spivak, but rather her attempt to take on a certain element of Derrida’s voice; to speak for him and his text-view. To explain: for Derrida, there are always two – two Platos, two Rousseaus, two Saussures, etc. The first (i.e. the individual) bears the burden of the “entire uncritical tradition which he inherits”¹⁰³ – of the personal, ideological limits which fence-in and disable the potentiality of his discourse. The second, on the other hand, defies these limitations. As Plato suggested, writing (i.e. a “collection of texts”) is endowed with the ability to slip free of its author’s grasp.¹⁰⁴ This doesn’t just mean freedom from the author’s paternal wisdom, *but also from their numerous defects*, including the “ideological blinders”¹⁰⁵ (i.e. “metaphysical presuppositions”¹⁰⁶) which stunt their intellectual growth. And in this sense, the de-individualized text is charged with critical potential; ready to turn against its author’s intentions and understandings at any moment.

¹⁰¹ Which must scrupulously distinguished (as I have stressed) from deconstruction itself. See Gasche, pp.121 – 176

¹⁰² See Gayatri Chakravorty Spivak, “Translator’s Preface” in *OG*, p.ix

¹⁰³ *OG*, p.46

¹⁰⁴ See Plato, *Phaedrus* (Oxford University Press, 2009)

¹⁰⁵ See Duncan Kennedy, *Sexy Dressing, Etc.* (Harvard University Press, 1993) p.220

¹⁰⁶ *Positions*, p.31

So when, for example, Derrida reads Saussure's *Course on General Linguistics* – in chapter two of the *Grammatology*¹⁰⁷ – it is only ever with an eye for this duplicity; for this “tension between gesture and statement”¹⁰⁸ (i.e. between Saussure and Saussure¹⁰⁹). On the one hand, according to Derrida, Saussure's text plays an “absolutely decisive critical role”¹¹⁰ – investing in theses which seem to de-privilege the core values (e.g. presence/unity) of the metaphysical enterprise. On the other hand, the *Course* remains inhabited by a plethora of logo/phono-centric “truths” which overhang and de-radicalize Saussure's most explosive discoveries. To understand how this works (and to see how Derrida's “deconstructive” reading is always the “vigilant practice of this [gesture vs. statement] textual division”¹¹¹) let us now take a closer look at each of Derrida's two Saussures.

¹⁰⁷ See Jacques Derrida, “Linguistics and Grammatology” in *OG*, pp.27 – 73

¹⁰⁸ An explanatory note is necessary here to clarify what Derrida means by “gesture” and “statement.” First of all, deducing the “gesture” of a text means asking the following questions: what effect do the words on the page *actually* have?; what ~~logical~~ pathways do they open/close?; what type of potential do the words carry if they are received with an “open mind”? Second of all, deducing the “statement” of a text means asking what the text *claims* it is doing – i.e. what the author's declared intentions and objectives appear to be – see *OG*, p.30

¹⁰⁹ Or (to borrow Paul de Man's phrase) between “blindness and insight” – See Paul de Man, *Blindness and Insight* (University of Minnesota Press, 1983)

¹¹⁰ *Positions*, p.18

¹¹¹ *ibid*, p.31

Saussure #1:

“Saussure: ‘Language and writing are two distinct systems of signs; the second exists for the sole purpose of representing the first.’”¹¹²

And so, in Saussure, the Aristotelian formula repeats itself – writing as a “particular, derivative, auxiliary form of language in general.”¹¹³ In fact, does Saussure not go further? If we take him at his word, writing isn’t even a “form” of language, but a stand-in; a cheap substitute that we can call upon in the absence of language (which has a “definite and [far more] stable oral tradition that is *independent* of writing”¹¹⁴). In other words, writing is *sub-language* (“not a guise for language but a disguise... a garment of perversion and debauchery”¹¹⁵) while speech – given that the exorcism of writing is so clean, so total – *becomes nothing less than language in its entirety*.

“Why?” asks Derrida. Why is writing so readily and totally dismissed? Moreover: why the “rabid tone”¹¹⁶ – the “strain of rhetorical excess”¹¹⁷ (that which is perhaps most evident in Saussure’s vilification of the “tyranny of writing”¹¹⁸)? “The tone counts”¹¹⁹ says Derrida:

“...it is as if, at the moment when the modern science of the logos would come into its autonomy and its scientificity, it became necessary again to attack a heresy...”¹²⁰

These tonal discrepancies (“discursive inequalities”¹²¹ to quote Gasche) have traditionally been excluded “from the canon of philosophical themes.”¹²² The philosopher (in the most classic sense) is supposed to bracket-off flurries of literary surplus, whittling the text down to its bones: a series of straightforward propositions listed in the “sparse, pure, transparent language”¹²³ of deductive logic.¹²⁴ But if it were possible to simply “whittle” away all but the disinterest of science, why would Saussure – a social scientist no less – not have done this himself?

¹¹² *OG*, p.30

¹¹³ *ibid*, p.7

¹¹⁴ *ibid*, p.41 (Quoting Saussure – my emphasis on “independent”)

¹¹⁵ *ibid*, p.35 (Quoting Saussure)

¹¹⁶ J. Claude Evans, *Strategies of Deconstruction* (University of Minnesota Press, 1991) p.160

¹¹⁷ Christopher Norris, *Derrida* (Fontana Press, 1987) p.88

¹¹⁸ *OG*, p.38 (Quoting Saussure)

¹¹⁹ *ibid*, p.34

¹²⁰ *ibid*

¹²¹ Gasche, pp.124 – 136

¹²² *ibid*, p.135

¹²³ Richard Rorty, “Deconstruction and Circumvention” in *Critical Inquiry* (Vol.11, No.1, Sep 1984) p.2

¹²⁴ In other words, philosophical discourse is prone to selective blindness – the only discrepancies for which it can account are those which could be termed “logical” in the most traditional terms.

It would be understandable if Saussure was merely prone to lapses in scientific equity, but he goes much further, at times even slipping into the “accent of the moralist or preacher.”¹²⁵ The question lingers – why?

Derrida’s answer, nodding to Freud, is that Saussure’s disjointing moralism can be explained as his attempt to deal with the “return of the repressed”¹²⁶ figure of writing. To explain: writing is (as I have suggested already) repressed/devalued on the basis of its *durability* and *transportability* – factors which threaten to disconnect words from the “mental affections” which they are meant to represent. However, since writing and speech are so indelibly¹²⁷ and basically linked, *speech can never be fully insulated against this threat of disconnection*, and as a result, has to keep reasserting itself against the “haunting”¹²⁸ afterglow of writing.¹²⁹ And for Derrida, the driving force of this reassertion is Saussure’s own very “basic” and very human “desire... [for] reassuring certitude”¹³⁰ – for the comfort of being in control of one’s existence.¹³¹ This is why Saussure’s rhetoric is so strained and over-the-top: because he is desperately trying to satisfy a (dare I say) *fundamental* life-drive.

¹²⁵ OG, p.34

¹²⁶ Sigmund Freud, “Repression” at [http://files.meetup.com/382157/Freud%20-%20Repression%20\(1915\).pdf](http://files.meetup.com/382157/Freud%20-%20Repression%20(1915).pdf) – p.2984

¹²⁷ By which I mean that they are always linked by their shared status as representative techniques – even if we distinguish their properly represented objects, as Aristotle does: “spoken words are the symbols of mental experience and written words are the symbols of spoken words” and as Saussure repeats: “language and writing are two distinct systems of signs; the second exists for the sole purpose of representing the first...”

¹²⁸ In *Specters of Marx*, Derrida talks about the possibility of a “hauntology” which would exceed ontology (noting the inaudible play between these words). This links in with our current discussion of the “return of the repressed” because Derrida suggests that this hauntology – *this science of ghosts* – would entail a “step beyond” repression, which is to say that the logic of the ghost is (for Derrida) precisely that which exceeds metaphysics. See Jacques Derrida, *Specters of Marx* (Routledge, 1994) p.26 – Hereafter referenced as “Specters of Marx”

¹²⁹ As Derrida says in “Freud and the Scene of Writing” – repression isn’t expulsion or exclusion, *but interior containment*. In other words, the repressed is always “on the scene” and requires a continual exertion of force against it for the repression to remain effective – see “Freud and the Scene of Writing” pp.246 – 247

¹³⁰ “Structure, Sign and Play” p.352

¹³¹ I think of this as a rough fusion of Nietzsche’s “will-to-power” and Freud’s “pleasure principle” – one which would roughly entail a need to construct “truths” (i.e. to *control* one’s surroundings – a la Nietzsche) as a way of avoiding the abyssal anguish of senselessness (i.e. to avoid pain/displeasure, a la Freud).

Saussure #2:

“in language there are only differences without positive terms”¹³²

“language has neither ideas nor sounds that existed before the linguistic system, but only conceptual and phonic differences that have issued from the system”¹³³

“The idea or phonic substance that a sign contains is of less importance than the other signs that surround it”¹³⁴

For Derrida, the above quotes signal the point where we really “have to oppose Saussure to himself”¹³⁵ – specifically in the sense that his marking of “difference as the source of linguistic value”¹³⁶ directly undercuts the central presupposition of the West’s phonocentrism: that of a meaning which is “present in and of itself.”¹³⁷ To explain: “difference is never in itself a sensible plenitude”¹³⁸ *but the no-man’s land between two sites of supposedly self-contained identity* – i.e. two kernels. The trouble is, if we accord privileged status to this no-man’s land rather than the sites themselves (as Saussure does) then the sites will no longer be self-contained (i.e. *since they depend on something other than themselves*) but parasitic, always, upon the other terms within the system. And just like that – in one fell, theoretical swoop – language becomes an introverted network of bloodsuckers, while meaning (the “naked presence of the thing itself”¹³⁹) becomes a pipe dream, lost in a “mirror-play of signifiers.”¹⁴⁰

This is the real tension of the *Course*: on the one hand, speech (i.e. language itself, according to Saussure #1) is granted priority over writing (“the signifier of [a] signifier”¹⁴¹); on the other hand, language (as a network of differential relations) is impliedly reduced to a “tissue of signifiers”¹⁴² – a representative-sans-referent, just like writing.¹⁴³ This provides us with fresh layer of explanation for Saussure’s seemingly strained tone – namely that the fulfillment of his metaphysical desire for

¹³² Jacques Derrida, “Différance” in Jacques Derrida, *Margins of Philosophy* (The Harvester Press, 1982) p.11 (Quoting Saussure) – Hereafter referenced as “Différance”

¹³³ *ibid*

¹³⁴ *ibid*

¹³⁵ *OG*, p.52

¹³⁶ *ibid*

¹³⁷ “Différance” p.11

¹³⁸ *OG*, p.53

¹³⁹ *Radical Hermeneutics*, p.191

¹⁴⁰ *ibid*, p.187

¹⁴¹ *OG*, p.7

¹⁴² *Radical Hermeneutics*, p.133

¹⁴³ “...‘signifier of the signifier’ no longer defines the accidental doubling and fallen secondarity... [but] the movement of language: in its origin” (*OG*, p.7)

fixity and truth now requires him to overcome the debilitating and self-defeating potentiality of his own logic. Rather than tackling it head on, Saussure tries to avoid this logic by pleading ignorance; by closing his eyes¹⁴⁴ to its more uncomfortable (i.e. counter-metaphysical) implications.¹⁴⁵ But for Derrida, this achieves nothing: once its potentiality is out of the box, there is no way to put it back in (i.e. *no way to unsay the said or un-imply the implied*).

Derrida's next move is to follow this previously undeveloped logic – to try and release it from Saussure's repressive disinterest by speaking for it, by putting some much needed flesh on its bones. However, this development is *not* – and Derrida was always quick to emphasize this point – some sort of textual psychoanalysis whereby the “repressed” logic of the text is exposed as its underlying “truth”¹⁴⁶ (which would, by definition, be just another kernel – albeit a well-hidden one). Nor is it one move towards some sort of dialectical (i.e. Hegelian) reconciliation whereby the metaphysical and critical poles of the text could be sublated to reveal a simple, unified, true meaning prior to their division.¹⁴⁷ Quite the opposite: Derrida's approach is to try and shun the metaphysical desire for unity (i.e. the very desire which he claims to have blinded Saussure) by affirming and suspending the contradictions and inconsistencies of the text through – as noted in the introduction to this section – a “vigilant practice of... textual division.”¹⁴⁸ We need to take a closer look at what this means in the next section, but first, let us briefly recount (as matter of clarification) the more insistent features of Derrida's reading.

¹⁴⁴ Hence Paul de Man's phrase, “blindness and insight” – See Paul de Man, *Blindness and Insight* (University of Minnesota Press, 1983)

¹⁴⁵ I will provide a brief explanation of what this means (i.e. of how Saussure closes his eyes) in the next section.

¹⁴⁶ See “Freud and the Scene of Writing” pp.246 – 247

¹⁴⁷ See *Positions*, p.41 – “[deconstruction] must sign the point at which one breaks with the system of the *Aufhebung* and... speculative dialectics”

¹⁴⁸ *Positions*, p.31 – a phrase which we could then translate as something like this: *the investigation, explanation, and maintenance of textual division...*

“At a point of almost absolute proximity to Hegel...”¹⁴⁹:

“To understand Derrida, one must see his work as the latest development in [a] non-Kantian, dialectical tradition”¹⁵⁰

Richard Rorty, “Philosophy as a Kind of Writing”

Although I have claimed that Derrida’s work is *directly* opposed to Hegelian dialectics, Rorty’s suggestion (i.e. that Derrida belongs to a certain “dialectical tradition”) can still make sense – perhaps even in a way which will deepen (or at least focus) our understanding of deconstruction. To explain: Derrida’s philosophy (to make a purely expedient assertion) comprises two discrete phases: a first, dialectical, and a second, non-dialectical. The first phase covers the adoption and application of Derrida’s bipartite text-view, and a consideration of why this text-view is “dialectical” will serve the additional function of better acquainting us with its more operative/insistent features. Consider the following:

1. According to Rorty, Derrida’s work is dialectical because it falls within a particular “tradition of... thinking that begins with Hegel’s *Phenomenology of Spirit*”¹⁵¹ and weaves its way to Derrida via Heidegger. This tradition shuns the Kantian quest for “veridicality and world-disclosure”¹⁵² in favour of an ongoing (indeed, “interminable”¹⁵³) process of reinterpretation which seeks to evaluate the texts of “a certain sequence of historical figures”¹⁵⁴ (Plato, Aristotle, etc.) in terms of their argumentative rigour and coherence – *not their representative accuracy* (i.e. their connection to an extra-textual “reality”¹⁵⁵).

¹⁴⁹ *Positions*, p.40

¹⁵⁰ Richard Rorty, “Philosophy as a Kind of Writing” (39 *New Literary History* 2008) p.104 – Hereafter referenced as “Rorty”

¹⁵¹ Simon Critchley, “Deconstruction and Pragmatism: Is Derrida a Private Ironist or a Public Liberal?” in Simon Critchley, *Ethics-Politics-Subjectivity* (Verso, 1999) p.91

¹⁵² *ibid*

¹⁵³ *Positions*, p.39

¹⁵⁴ Rorty, p.103

¹⁵⁵ Hegel and Derrida, I believe, can also be linked by their tendency to view the texts they read as part of a meta-narrative whereby philosophy “works itself pure” (to borrow Dworkin’s phrase – *Law’s Empire* [Hart, 1998] p.400). For Hegel, philosophy is always oscillating, projecting itself gradually, dialectically, towards a particular teleological endpoint. But for Derrida, there is no discernible endpoint – no grand scheme according to which we can make sense of philosophical history. This doesn’t mean that the phrase “works itself pure” is inapplicable to Derrida, but that for him, the word “pure” should be supplemented by something else – “free” perhaps. There is no purity as a point of finality and fulfillment, but there is a certain unending path to purity which *must* be negotiated by constantly wrestling discourse “free” from its ideological inhibitors (Derrida’s work being the latest attempt to move beyond the inhibitions of previous visionaries – Nietzsche, Freud, Heidegger, etc.); Derrida: “the time for overturning is never a dead letter” – *Positions*, p.39

In this sense, Derrida's work could be aptly described as ~~pure~~¹⁵⁶ interpretation: a mode of reading which never transcends the text "toward something other than it, toward [a] referent"¹⁵⁷ or a static signified. Even when Derrida makes arguments which seem to be about "reality" – about truth, nature, and "things" (i.e. "transcendental"¹⁵⁸ arguments) – they are never actually *his*¹⁵⁹ arguments, but incarnations of the "unexploited possibilities"¹⁶⁰ of a given text. This means that the ~~purity~~ of Derrida's interpretation comes from its depth; from its willingness to treat the text not just as a sequence of words, but as an electric cocktail of multi-directional logics. And when we understand this aspect of his interpretive lens, we can also understand why Derrida would claim that deconstruction never depends on any sort of subjective movement or decision: because it is happening – *already and always* – within the text itself.¹⁶¹

2. For many theorists (e.g. Bertell Ollman¹⁶² or Paul Diesing¹⁶³ or Howard Sherman¹⁶⁴) the definitive aspect of dialectical thinking lies in its commitment to viewing objects, at any point in time, as moments within a continuous process of interaction between opposing forces. For example, when Hegel looked at a particular period of social history (e.g. the "Greek World"¹⁶⁵) he saw it as a snapshot of an ongoing tug-of-war "between private interest and communal values"¹⁶⁶ – not a simple back and forth, but a sort of pulsating ascent; a movement of "mutual learning and reconciliation"¹⁶⁷ through which society gradually moves beyond its deficiencies to a point where private autonomy (i.e. freedom of conscience) and communal values fall perfectly in sync.

¹⁵⁶ My use of the word "pure" is influenced by the opening interview in Asif Kapadia's documentary, *Senna*. Kapadia's subject (Brazilian racing driver, Ayrton Senna) describes his early experiences of racing go-karts as "pure racing" – free from politics, from economics, from greed, etc. Of course, Derrida is suspicious of the idea of such insulated purity (i.e. since it is so firmly metaphysical) – hence my decision to place it "under erasure." However, I find it a useful term provided it is taken a certain way: not as a marker of some Godly ability to avoid the direct reference, *but as a marker of Derrida's deliberate decision to try – as far as possible – to read texts on their own terms, not in terms of some transcendental referent.*

¹⁵⁷ Rorty, p.106 (Quoting Derrida's *Grammatology*)

¹⁵⁸ To borrow a key phrase from Geoffrey Bennington, Derrida never makes transcendental arguments, only "quasi-transcendental" ones which comment on the futility of transcendental arguments. In Socratic terms, we might say that Derrida is trying to explain why we know nothing, rather than trying (hopelessly) to know anything. I shall explain this point later – See Bennington, p.267

¹⁵⁹ As Rorty says, Derrida does "not have arguments or theses" – See Rorty, p.103

¹⁶⁰ Gasche, p.136

¹⁶¹ "Deconstruction is never the effect of a subjective act or desire" – Gasche, p.123

¹⁶² "Dialectics is... a way of thinking that brings into focus the full range of... interactions that occur in the world" – Bertell Ollman, *Dialectical Investigations* (Routledge, 1993) p.10

¹⁶³ "...dialectic is a continuing process of interaction between two opposites" – Paul Diesing, *Hegel's Dialectical Political Economy* (Westview Press, 1999) p.29

¹⁶⁴ "...dialectics means an approach to problems that visualizes the world as an interconnected totality undergoing minor and major changes due to internal conflicts of opposing forces" – Howard Sherman, "Dialectics as a Method" in *Insurgent Sociologist* (Summer, 1976) p.57

¹⁶⁵ See Peter Singer, *Hegel* (Oxford University Press, 1983) chapter 1

¹⁶⁶ *ibid.*, p.45

¹⁶⁷ Paul Diesing, *Hegel's Dialectical Political Economy* (Westview Press, 1999) p.30

This aspect of dialectical theory (excepting the metaphysical idea of everything falling “perfectly in sync”) is, I think, applicable to Derrida in two ways. The first is obvious: Derrida is a “dialectical” reader simply because he thinks of the text in terms of opposing forces – two Saussures, “metaphysical presuppositions... [and] critical motifs”¹⁶⁸ etc. But as I suggested, Derrida’s reading resists the urge to reconcile these forces, to raise them up towards a single, “true” meaning of the text – the textual equivalent of the end of Hegel’s history. In this sense (and this is the second way) Derrida’s “double”¹⁶⁹ reading can be seen as a sort of “negative dialectic... whose point is to give no comfort”¹⁷⁰ so much as to affirm, as Nietzsche did, the chaotic senselessness which prevails beyond the comfort of metaphysics. And to reiterate my earlier point, it is this – this senseless, non-metaphysical “foreignness” – which animates and drives Derrida’s entire project.

¹⁶⁸ *Positions*, p.31

¹⁶⁹ Or “clotural” reading as Simon Critchley calls it – See Simon Critchley, *The Ethics of Deconstruction* (Blackwell, 1992) pp.88 – 97

¹⁷⁰ *Radical Hermeneutics*, p.198

Derrida vs. Hegel – The Break:

Now: the method of ~~pure~~/deep interpretation which I have located in Derrida's reading of Saussure remains constant, which is to say that it doesn't suddenly give way to some radically divergent substitute which would usher in the second, non-dialectical phase of deconstruction. Rather, *Derrida uses this same method* – this tentative, meticulous way of “following... the unstable limit... of a text”¹⁷¹ – to drive directly against Hegel's ambitiously comprehensive “system of the *Aufhebung*” and to offer up his own “quasi-transcendental” system (which is really a non-system; a system-against-“systematicity”¹⁷²) in its place. We might say then, that Derrida's debt to Hegel (vast as it may be) is heavily qualified, and that my emphasis upon this debt – while expedient in its underlining of the divisive, intra-textual characteristics of the deconstructive text-view – should be taken with a grain of salt.

In my chapter plan, I claimed that Derrida is always trying to tap into a certain “counter-metaphysical foreignness” – something in excess of the inescapable(?) order of metaphysics. Hegel, on the other hand, is more interested in finding ways to *systematize and purify all manifestations of supposed foreignness* (i.e. to “de-foreignize”¹⁷³ them) by folding every other into the “reassuring certitude”¹⁷⁴ of the same. In other words, Derrida's break with Hegel is inscribed, from the start, in his deliberate and project-defining break with the so-called metaphysics of presence.¹⁷⁵ And this means that it is not the break which we have to account for in the next section, but how Derrida uses his quasi-dialectical text-view (i.e. method) to account for and conceptualize that which lies beyond the break; beyond the metaphysics of repression.

¹⁷¹ A fuller version of this quote is useful here since it provides a concise summary of Derrida's interpretive approach: “Derrida reads with two hands, following assiduously and indefatigably the unstable limit that divides what we might call the logic of a text... from the intentions that attempt to govern that text, the author-ity that tries to dissolve or control [its] aporias” – See Simon Critchley, “On Derrida's *Spectres of Marx*” in Simon Critchley, *Ethics-Politics-Subjectivity* (Verso, 1999) p.145

¹⁷² Rodolphe Gasche, “Infrastructures and Systematicity” in John Sallis, *Deconstruction and Philosophy* (University of Chicago Press, 1987) p.3

¹⁷³ See Gasche, pp.35 – 59

¹⁷⁴ See Jacques Derrida, “Structure, Sign and Play in the Discourse of the Human Sciences” in Jacques Derrida, *Writing and Difference* (Routledge, 2001) p.352

¹⁷⁵ It might be useful here to think about Hegel in terms of Simon Critchley's description of his philosophy as a “discourse on and of the end.” If we say that Derrida begins by questioning the possibility of the justifiable beginning (let alone the justifiable end of Hegelianism) then doesn't a certain chasmic, motivational gap between Derrida and Hegel become clear? Hegel wants to find an end, while Derrida – by preaching the necessity of a perpetual beginning – wants to declare the *impossibility* of such an end. See Simon Critchley, “On Derrida's *Spectres of Marx*” in Simon Critchley, *Ethics-Politics-Subjectivity* (Verso, 1999) p.150

SECTION VI: *DIFFÉRANCE* (AND THE “INFRASTRUCTURAL CHAIN”...)

In this section, I want to tie up a number of loose ends in my argument. Firstly, I have been delaying (since section one) in giving a much needed account of why Derrida adopts his Nietzschean belief in the futility of objective reference – *the* belief which completes and animates my aporia of the beginning; which makes it an aporia *as such* insofar as it thwarts/frustrates the fundamental goal of language (i.e. inter-subjective connection/understanding). Secondly, I have raised the question, through my comments on the last few pages, of how Derrida manages to do anything positive (i.e. any sort of substantive “work”) while staving off the Hegelian “temptation to liquidate negativity and difference”¹⁷⁶ – specifically in the sense that such liquidation seems to be the only substantive way of dealing with contradiction. And thirdly, I still need to follow Derrida’s reading of Saussure to its conclusion: to the full and radical liberation (and as Caputo puts it, deconstruction is “always performed in the name of liberation”¹⁷⁷) of Saussure’s critical logic.

These points can, I think, be adequately addressed through an exposition of “différance”¹⁷⁸ – one of the most renowned and enduring¹⁷⁹ concepts to emerge out of Derrida’s early texts. But first, I want to pre-orient this exposition by noting a certain double relation between *différance* and my aporia of the beginning – the lynchpin of Derrida’s theoretical landscape as I have depicted it thus far. In one sense, *différance* and the aporia of the beginning are directly equivalent: they are both ways of describing what I have called “counter-metaphysical foreignness” (which is to say that they both name a certain condition of disunity and suspense; a ~~logic~~ *logie* which exceeds the borders of classical, philosophical logic). But in another sense, the aporia of the beginning is but a hypothesis to a more intricate thesis of *différance*; a rudimentary blueprint for its comprehensive system (a “system beyond Being”¹⁸⁰ as Gasche puts it). In other words, *différance* presupposes and then accounts for my initial aporia. Keeping this duality in mind, let us now move to consider the “meaning” of *différance*, point-by-point.

¹⁷⁶ Gasche, p.154

¹⁷⁷ *Radical Hermeneutics*, p.192

¹⁷⁸ The meaning of which is concisely summarized in *Positions*, pp.7 – 11

¹⁷⁹ Indeed, Derrida never stopped using the term “différance” – it continues to make frequent appearances as late as in the posthumously published seminar series, *The Beast and the Sovereign*. See Jacques Derrida, *The Beast and the Sovereign: Volume I* (University of Chicago Press, 2009)

¹⁸⁰ Gasche, p.178

What is *différance*?

It is not Derrida's: This first point stems directly from what I said in the last section. On the one hand, there can be no disagreement that *différance* is a Derridean neologism, which is to say that both the graphic imprint (and I say graphic rather than phonic since the shift from difference to *différance* is inaudible¹⁸¹; a “mute mark... [or] a tacit monument”¹⁸² says Derrida) and its attachment to certain philosophical implications were born (chronologically speaking) with Derrida. But on the other hand, this neologistic connection between Derrida and *différance* is only a matter of his naming what was previously unnamed¹⁸³ (i.e. the discontinued/repressed potentiality of the text). Remember: deconstructive interpretation is ~~pure~~ deep interpretation, which means that Derrida's seemingly original concepts are never his, but those which are discovered unknowingly or accidentally by other writers.¹⁸⁴ And *différance* – even as it has become so readily identifiable with Derrida – has just such a heritage: it is (in loose terms) a heterogeneous “condensation of Nietzschean, Saussurian, Freudian, Levinasian, and Heideggerian (even Hegelian)”¹⁸⁵ conceptualizations of difference; a condensation which is “all the more interesting in that it does not claim exhaustively to capture each of these”¹⁸⁶ variations.

It is spacing/temporization: Rather than providing a lengthy and extensive breakdown of these lines, I want to focus specifically on how *différance* is developed (or perhaps merely “read”) from “Saussure's principle of semiological difference.”¹⁸⁷ As we have seen, this principle holds that “the idea or phonic substance that a sign contains is of less importance”¹⁸⁸ than “the spacing by means of which... [signs] are related to each other.”¹⁸⁹ For Derrida, this thesis cannot – logically speaking – avoid complicity with a second movement, one which is temporal rather than spatial and which undermines Saussure's dogmatic retention of identity (i.e. “calm, present, and self-referential

¹⁸¹ Note the significance of this with regard to Derrida's angle in the *Grammatology* – doesn't the possibility of inaudible shifts undermine the total, pure, unequivocal privilege accorded to speech over writing?

¹⁸² “Différance” p.4

¹⁸³ As Derrida puts it, he lets it “impose itself... [upon him] in its neographism” – See “Différance” p.3

¹⁸⁴ Indeed, deconstruction *itself* was born in this manner, emerging (specifically) as a radical interweaving and development of Husserl's “abbau” and Heidegger's “destruktion” (amongst others) – See Gasche, pp.109 – 120

¹⁸⁵ David Wood & Robert Bernasconi, *Derrida and Différance* (Northwestern University Press, 1988) p.xi

¹⁸⁶ *ibid*

¹⁸⁷ Robert Bernasconi, “The Trace of Levinas in Derrida” in Wood & Bernasconi, *Derrida and Difference* (Northwestern University Press, 1988) p.13 (Quoting Derrida) – Additional Note: There are three reasons for my decision to focus solely on Saussure. Firstly: we have already dealt with his theory (and Derrida's reading of it) and so need no further introduction to it. Secondly: Derrida often begins explanations of *différance* via Saussure – perhaps because he feels it to be a more relatable and understandable point of entry than many others (see, for example, “Différance” or *Positions*). And thirdly: it would be difficult (given the limited space available) to summarize the relationship between *différance* and, for example, Heidegger's ontic-ontological difference, without slipping into destructive/reductive oversimplification.

¹⁸⁸ “Différance” p.11 (Quoting Saussure)

¹⁸⁹ *Positions*, p.24

unity”¹⁹⁰) as merely “less important” than difference. To explain: if each sign functions only by referring to and distinguishing itself from other signs, then signification can only ever be a way of navigating *intra*-systematically – of diverting us through a “chain of... substitutions”¹⁹¹ or signifiers.¹⁹² This means that the quest for a pre-existent, pre-systematic reality (i.e. *the* quest of language) is always postponed, “temporized”¹⁹³ or deferred, and it is precisely this movement (this “detour... [or] relay”¹⁹⁴) which is imposed upon Saussure’s *intended* thesis by the “a” of *différance* – thereby setting us up to define Derrida’s coinage loosely as a “nonunitary synthesis”¹⁹⁵ comprising and co-implicating the supposedly heterogeneous concepts of spacing and temporization/difference and deferral.¹⁹⁶

It “would not merely be opposed to identity”¹⁹⁷: Although *différance* is – at least in one of its guises – a radicalization of Saussurian difference, this doesn’t mean that it is simply the inversion of the conventional relationship between identity and difference, and it doesn’t mean that it is simply the setting up of one side of Saussure’s text (i.e. the counter-metaphysical one) as “truer” than the other. On the first point, since *différance* is posited as the logic of the semiotic system, and since this logic heralds the purely *intra*-systematic wiring of the system, it must follow that all concepts/expressions – including identity, difference, and the binary opposition of the two – are merely “determination[s] or... effect[s]”¹⁹⁸ of *différance*, which is to say that *différance* not only produces identities, *but also differences and even the concept of difference itself*. On the second point, the radical logic of Saussure’s text is only privileged to the extent that it seems to “account for the heterogeneity”¹⁹⁹ of the *Course*, and this means that it isn’t positioned so much as the “truth” of the text as it is a way of explaining the appearance and prevalence of its seemingly multiple “truths” or logics. Furthermore, to suggest or affirm the futility of linguistic reference always entails, by a paradoxical turn, a simultaneous *affirmation* of metaphysics and linguistic atomization, since these ideas are so inseparably entwined with language. And this means that, even as it is strictly derived from one side of Saussure’s text, the logic of *différance* can still be seen as an *affirmation of both sides* – one which elucidates the status of the text as irreparably “cut or torn.”²⁰⁰

¹⁹⁰ “Différance” p.11

¹⁹¹ *ibid*, p.26

¹⁹² “look up the signified of an unknown signifier in the dictionary and you find more signifiers” – Bennington, p.33

¹⁹³ *ibid*, p.8

¹⁹⁴ *ibid*

¹⁹⁵ Gasche, p.195

¹⁹⁶ As Christopher Norris puts it, the difference between Derrida and Saussure lies largely in the extent to which Derrida lets differ “shade... into defer” – See Christopher Norris, *Deconstruction: Theory and Practice* (Routledge, 2003) p.32

¹⁹⁷ David Wood & Robert Bernasconi, *Derrida and Différance* (Northwestern University Press, 1988) p.x

¹⁹⁸ “Différance” p.16

¹⁹⁹ Gasche, p.135

²⁰⁰ Bennington, p.305

It is not a “master-word”²⁰¹: At this stage, we may be tempted to see *différance* as a sort of “scrambling” device that disrupts the relation between subject and object; between language-user and world. This is a somewhat helpful viewpoint, but it is far from being unqualified. First of all, it would be a mistake to think of *différance* as solely and thoroughly disruptive, since it is also the productive structure which *enables* signification; which makes it (i.e. basic/practical human interaction) possible. Secondly – and this point cannot be too heavily emphasized – not even the subject/object distinction (and this includes the concepts of subject and object taken on their own, *as self-evident and basic as they may seem*) can be “sheltered from... [the] effects”²⁰² of *différance*, which is to say that they cannot be taken as anything other than contingent²⁰³ by-products of a “systematic play”²⁰⁴ of differences. Indeed, *even différence* – in its appearance as a sort of epistemological bedrock – is “plunged into what it attempts to name”²⁰⁵ and, in this sense, always steals itself away; destroying itself in its coinage and its utterance. As Derrida puts it: “however excellent, unique, principal, or transcendent... [*différance*] governs nothing, reigns over nothing, and nowhere exercises any authority... there is no kingdom of *différance*...”²⁰⁶

It is the basis of a Socratic/negative epistemology: This last point on the self-effacing and therefore self-dethroning character of *différance* reveals, I think, a clear link between Derrida and Socrates²⁰⁷ (who Derrida calls “the disturbing man of question and irony”²⁰⁸).²⁰⁹ I say this with a particular mind for Socrates’ infamous claim – towards the end of “Book I”²¹⁰ of Plato’s *Republic* – that he felt his only real knowledge to be of his complete lack of knowledge. The paradox of Socrates’ claim (i.e. *that to know nothing would underwrite and exclude even the knowledge of this lack*) is, to my mind, the very same paradox which arises out of Derrida’s non-kingdom or ~~kingdom~~ of *différance*. To explain: *différance* names the existential condition which disables epistemology in general (i.e. the possibility of objective/unfiltered truth) – and yet, how else can we negate epistemology except by making a certain epistemological claim? This is why deconstruction is an

²⁰¹ *ibid.*, p.79

²⁰² *ibid.*, p.74

²⁰³ Which is to say that they have “not fallen from the sky” – See *Radical Hermeneutics*, p.195

²⁰⁴ “*Différance*” p.11

²⁰⁵ Bennington, p.73

²⁰⁶ “*Différance*” p.22

²⁰⁷ Although perhaps, if we are looking for an ancient Greek precursor to Derrida, Heraclitus (who Caputo refers to as the “philosopher of the flux par excellence and a hidden hero for... Derrida” – See *Radical Hermeneutics*, p.202) is just as promising a candidate. After all, Derrida’s first use of the term “deconstruction” was immediately preceded by and equivocated to the term “de-sedimentation” – a term which essentially means allowing debris to be picked up and swept away in the river-flow; *in the flux*. See *OG*, p.10

²⁰⁸ Jacques Derrida, *Of Hospitality* (Stanford University Press, 2000) p.13

²⁰⁹ A number of other theorists have affirmed this link. See, for example, Judith Butler, *Jacques Derrida*, at <http://www.lrb.co.uk/v26/n21/judith-butler/jacques-derrida> (“it is interesting that Derrida the philosopher should find in Socrates his proper precursor”); or *Radical Hermeneutics*, p.195 (“I favor the Socratic analogy when dealing with Derrida: the practitioner of disruptive strategies”)

²¹⁰ Plato, *The Republic*, at http://www.gutenberg.org/files/1497/1497-h/1497-h.htm#2H_4_0004

“ongoing, always unfinished work”²¹¹ – because its purported foundations (i.e. *différance*) inevitably become ensnared and caught back up in the epistemological/metaphysical movement which Derrida is always at pains to “interrupt”²¹²/suspend. And in this sense, *différance* is but one link “in a chain that in truth it will never have governed.”²¹³

It is “supplementarity”²¹⁴ et al²¹⁵: Gasche refers to this “chain” as *infrastructural*, and the various links and substitutions which it contains and gives rise to are basically recognitions (*but not avoidances*) of the metaphysical complicity of even an inverted, self-reflexive epistemology like Derrida’s. What then, are some of the other links in this chain? One example (which is unlocked via Derrida’s scrupulous reading of Rousseau in the *Grammatology*) is “supplementarity” – another “~~arche~~”²¹⁶ concept which plays off the sense in which the word “supplement” lives a double life as both an addition/attachment to “something that is already full... in itself”²¹⁷ and a mode of compensation which “fills a void”²¹⁸ or makes up for a fundamental lack. Although it is born out of an interpretation of Rousseau, the aporetic logic of the supplement can be applied to Saussure and his theory of difference in order to show how supplementarity asymmetrically reflects *différance*, thereby serving as an alternative metaphor for the very same condition. To explain: Saussure’s discourse is metaphysically tempered, and it therefore restricts the role of difference to that of a supplement *in the first sense* – an external attachment which is required *only* to the extent that it enables the representation of a fixed, prior meaning. However – and this point is key – this first, metaphysical definition of the supplement cannot be separated or insulated from the second, and just as Saussurian difference implies its own radicalization (i.e. *différance*) so too must a limited, “Saussurian” supplementarity imply a more radical system in which each term needs to be supplemented by every other (i.e. *in which every supplement is itself in need of supplementation*) so that the quest for a self-standing signified can only take us along a never-ending “chain of supplements.”²¹⁹

²¹¹ *Radical Hermeneutics*, p.192

²¹² *Positions*, p.38

²¹³ “Différance” p.7

²¹⁴ See *OG*, pp.141 – 157

²¹⁵ The “et al” stands for a plethora of other Derridean “infrastructures” such as “arche-trace” – see Arthur Bradley, *Derrida’s Of Grammatology* (Edinburgh University Press, 2008) pp.69 – 78; and “iterability” – see Jacques Derrida, *Limited Inc.* (Northwestern University Press, 1998) pp.1 – 21

²¹⁶ Which goes under erasure because (as Derrida says) “what is put into question [by *différance*] is precisely... the value *arkhe*” – See “Différance” p.6

²¹⁷ Arthur Bradley, *Derrida’s Of Grammatology* (Edinburgh University Press, 2008) p.102

²¹⁸ *OG*, p.145

²¹⁹ Arthur Bradley, *Derrida’s Of Grammatology* (Edinburgh University Press, 2008) p.105

It is always “to come”²²⁰: All of this means that a full revelation of the condition named by *différance* must never – by the logic of *différance* itself – be any closer to us than a speck on the horizon, which is to say that it must be perpetually to-come. So when Derrida writes (in *The Politics of Friendship*) that “the friends of truth are without *the* truth”²²¹ he is referring (I think) to the more thoughtful, tentative practitioners of deconstruction; those who understand that his own, limited brand of deconstruction, in its exposure of the pre-metaphysical logic of *différance*, positions itself as little more than the methodological servant of a higher end or “spirit” – one which exceeds the service of its servant and begs for the most radical and even self-destructive version of Socratic inquiry. Inversely: since this “spirit” is born out of *différance*, it must also keep its eyes on the past, justifying itself (ceaselessly) in the strength of its conceptual birth. And in this sense, we could say that the “spirit” of deconstruction is always caught between two debts: one to its past, and one to its future; one to its father (i.e. Derrida and his various conceptualizations) and one to its own radical independence (i.e. its *inability not to* break free; to ruin the “truth” of its own existence).

²²⁰ Jacques Derrida, *The Politics of Friendship* (Verso, 2005) p.41 – Hereafter referenced as “The Politics of Friendship”

²²¹ *ibid*, p.43

CONCLUSION:

*I see you coming, you the arrivants to come, you the arrivant thinkers, you the coming, the upcoming...the new philosophers, my readers to come, who will be my readers only if you become new philosophers – that is, if you know how to read me... if you can think what I write in my stead...*²²²

Jacques Derrida, *The Politics of Friendship*

So: with the previous six sections in mind, we can return to our initial question – what is deconstruction? My analysis has tended toward two answers. On the one hand, I have provided an account of Derrida’s work which leans heavily upon Gasche’s scrupulous interpretation in *The Tain of the Mirror*. Gasche holds that “deconstruction starts with a systematic elucidation of [textual] contradictions”²²³ and proceeds towards the “grounding”²²⁴ of these contradictions through the synthetic production of what he calls “infrastructures” (i.e. operative logics of disunity and aporia which are “discovered by analyzing the specific organization of”²²⁵ the contradictions for which they purport to account). Although my analysis – especially in the last few sections – has largely respected and reiterated this account, I do not accept Gasche’s claim that deconstruction is inseparably bound to Derrida’s own formal movements, nor do I accept the related claim that its relevance is purely philosophical in the narrowest, most institutional sense. This is because of what I called the “spirit” of deconstruction – the “powerful will to explication”²²⁶ which radicalizes the Socratic mindset and which cuts deconstruction loose from all senses of methodological rigidity.

Of course – as suggested – it would be wrong to consider deconstruction solely in terms of this “spirit” since this would risk our misunderstanding it (e.g. by missing how the deconstructive spirit moves far beyond what is ordinarily called the Socratic approach, just as Hegel’s dialectic does) and since it would deprive the “spirit” of the terms upon which it is explained and (“strategically”²²⁷) justified. We might say then, that there are two deconstructions: one historical/methodological/Derridean, and one which is more mystical and enduring – a timeless “spirit” of deconstruction which casts its eyes into the “the perhaps”²²⁸ of the future (even if it can never quite pay off its debts to the past; *to the first deconstruction*). While neither version is

²²² *The Politics of Friendship*, p.41

²²³ Gasche, p.135

²²⁴ *ibid*, p.142

²²⁵ *ibid*

²²⁶ Jacques Derrida, “Violence and Metaphysics” in Jacques Derrida, *Writing and Difference* (Routledge, 2001) p.102

²²⁷ See Bennington, p.15

²²⁸ *The Politics of Friendship*, p.42

dispensable, it is (I think) this latter one – the timeless “spirit” of deconstruction – which is of most importance when working towards a relationship between deconstruction and any “non-philosophical”²²⁹ discipline such as law. And by this I mean that we can emphasize this “spirit” (*without forgetting its justificatory heritage*) as a way of looking towards a new formulation of deconstruction, and as way of trying to be not simply “new philosophers” as Derrida puts it, but new lawyers, legal theorists, etc.

As Derrida says of his prospective descendants:

“In any case, I am *not asking them to be like me...*”²³⁰

And (perhaps even more revealingly) in *Specters of Marx*, Derrida says:

“...a certain spirit of Marxism... wants itself to be in principle and explicitly open to its own transformation, re-evaluation, self-re-interpretation... [and] deconstruction has never had any sense or interest, in my view at least, except as a radicalization, which is to say also *in the tradition* of a certain Marxism, a certain spirit of Marxism...”²³¹

²²⁹ And I believe that this is how we can avoid Gasche’s main criticism of literary deconstructionists; his basic charge being that they fail to comprehend the *specifically philosophical nature* of deconstruction (a nature which means that its formal movements make little sense when applied to alternative disciplines) – See Gasche, pp.255 – 270

²³⁰ *The Politics of Friendship*, p.42

²³¹ *Specters of Marx*, pp.110 – 115 (“but a radicalization [which] is always indebted to the very thing it radicalizes” p.116)

CHAPTER TWO:

WHY USE

DECONSTRUCTION?

(OR THE “ETHICS” OF

DECONSTRUCTION)

“Got my finger on the trigger

But I don’t know who to trust

When I look into your eyes

There’s just devils and dust”

Bruce Springsteen, “Devils and Dust”²³²

²³² Bruce Springsteen, “Devils and Dust” (Sony, 2005)

WHY USE DECONSTRUCTION? (OR THE “ETHICS” OF DECONSTRUCTION):

INTRODUCTION:

“Why bother with deconstruction?”²³³

Good question. To rephrase: on what grounds can we justify our working within my proposed “spirit” of deconstruction? Do we gain anything from deconstruction? Or is deconstruction – as so many of its critics have accused it²³⁴ of being – *a dangerous negation of all gains*; an intellectual terrorist cell which burns and bombs²³⁵ the great structures of Western thought (e.g. Platonism, structuralism, etc.) with no mind or regard for their replacement? In other words:

“Is deconstruction consistently anti-foundationalist? Or is there a foundationalist claim in deconstruction which cannot be pragmatized: justice, for example?”²³⁶

The answer to both of these questions (and the following chapter will emerge as little more than an expansion of this answer) is yes. To explain: deconstruction *is* consistently anti-foundationalist, *but only for the paradoxical sake of a certain foundation* – an “ethical demand”²³⁷ for anti-foundationalism which serves as an anti-foundational foundation; an anti-teleological telos. In other words, the “spirit” of my first chapter (i.e. of the recurrent question) is undergirded and justified according to a particular conception of justice – one which calls for us to rail-against the repressive forces of metaphysical conceit. And this means that, to answer my original question, we should “bother” with deconstruction because it yields ethical gains; *because it is the right thing to do*. Let us proceed for an explanation.

²³³ Simon Critchley, *The Ethics of Deconstruction* (Blackwell, 1992) p.1 – Hereafter referenced as “Critchley”

²³⁴ See, for example, Michel Foucault, “My Body, this paper, this fire” in *Oxford Literary Review* (Vol.4, No.1)

²³⁵ “deconstruction... once learnt, is as simple, and destructive, as leaving a bomb in a brown paper bag outside (or inside) a pub” – Robert Poole (quoted on the back cover of *OG*)

²³⁶ Simon Critchley, “Deconstruction and Pragmatism” in Simon Critchley, *Ethics-Politics-Subjectivity* (Verso, 1999) p.84

²³⁷ Critchley, p.1

SECTION I: “THE ETHICS OF DECONSTRUCTION”²³⁸

In this section, I want to try and characterize – by way of a three phase analysis – the transition from conventional, metaphysical ethics to an ethics of deconstruction. Given my suggestion that metaphysics is an irreducible human confinement, we can say from the outset that every *possible articulation* of ethical responsibility belongs to the order of metaphysics, and that a deconstructive (i.e. counter-metaphysical) ethics must entail the radical questioning or “critique”²³⁹ of ethical pronouncement itself; an *ethics-against-ethics* we might say – one which “will differ markedly from the traditional conception of ethics *qua* region or branch of philosophy.”²⁴⁰

There are surely countless ways of rooting and explaining this anti-ethical ethics. Perhaps the most popular approach – and there is certainly good reason for this popularity²⁴¹ – is to position Derrida as an almost unflinching disciple of Emmanuel Levinas: a thinker with whom he holds a great many terminological and theoretical similarities. However, Levinas is not the only figure to whom the ethics of deconstruction can be linked, and I want to try and show this by offering an alternative line of descent which marks two other theorists – Immanuel Kant and Georges Bataille – as collusively influential to at least the same extent as Levinas.

This is certainly not to suggest that theorists following the Levinasian line are on the wrong track. Rather, it is merely my attempt to keep with the “spirit” of deconstruction which I tried to divulge in the last chapter. As I suggested, this means refusing to be wooed and entranced by the comforting dominance of dominant interpretations, and instead keeping our minds open to the manifold possibilities which lurk (for Derrida) within every theory and every text. This isn’t a license to force, mould or rewrite texts, but in this instance at least, no such force would be needed anyway: Derrida’s later, *explicitly*-ethical works are littered with nods to both Kant and Bataille, and what these reveal, when thought through, is that the ethics of deconstruction can actually be conceived at the end of an almost dialectical exchange between the two. To explain this claim, the following section will offer a brief account of each thinker’s relative moral stance: first Kant, then Bataille, then Derrida. With this scheme in mind, let us proceed.

²³⁸ See Critchley – especially pp.1 – 48

²³⁹ *ibid*, p.3

²⁴⁰ *ibid*, p.2

²⁴¹ See Critchley – especially pp.9 – 13

Kant's Conditional Ethics of Respect:

Kant's theory – in its barest form – is that the moral worth of an action depends on two things: firstly whether the action complies with a certain “formal principle of volition”²⁴² which Kant calls the “moral law”²⁴³ (or the “categorical imperative”²⁴⁴) and secondly whether the action is chosen and performed “out of respect... for the moral law”²⁴⁵ and not in the pursuit of some other (i.e. non-moral, *since there is but one moral law*) end. These criteria, in turn, should be backed up by two additional notes: firstly that compliance with the “categorical imperative” is a matter of *purely rational deduction*, and secondly that “respect... for the moral law” means, as we will see, *respect for humanity* (“whether in your own person or in the person of any other”²⁴⁶).

What then, is Kant's “categorical imperative”? The classic formulation – in Kant's *Groundwork of the Metaphysics of Morals* – is that we should only perform an action if we can consistently will that the rational maxim to which it is connected “should become a universal law.”²⁴⁷ This formulation is clarified by John Rawls, who translates Kant's imperative as follows: actions should stem from a “sincere legislative intent,”²⁴⁸ which is to say that the actor must be able to will and affirm a “perturbed social world”²⁴⁹ in which *everyone is always* permitted to act as he/she hopes to in the present time. Rawls' formula, in turn, spawns two questions through which moral worth can be deduced:

1. What if we were the direct recipients of our own proposed action?
2. What if we were never the direct recipients of our action, but simply belonged to a society in which it was commonly performed and endorsed?

If the answer to either of these questions is that we would have been somehow injured or “robbed... of what we require”²⁵⁰/need, then we cannot *consistently or sincerely* will our maxim as universally permissible, and we must conclude that our action is prohibited by the moral law.

²⁴² John Rawls, *Lectures on the History of Moral Philosophy* (Harvard University Press, 2000) p.153 – Hereafter referenced as “Rawls”

²⁴³ See, for example, Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Cambridge University Press, 1998) pp.3 – 4; Hereafter referenced as “Kant”

²⁴⁴ *ibid*, p.31

²⁴⁵ Rawls, p.153

²⁴⁶ Christine M. Korsgaard, “Introduction” in Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Cambridge University Press, 1998) p.xxii

²⁴⁷ Kant, p.15

²⁴⁸ Rawls, pp.169 – 170

²⁴⁹ John Rawls, “Themes in Kant's Moral Philosophy” in Eckart Forster, *Kant's Transcendental Deductions* (Stanford University Press, 1989) p.84

²⁵⁰ *ibid*, p.85

Now: Kant's moral law (*as with all laws*) is rooted in a particular conception of "justice and beneficence"²⁵¹ – specifically one which (as I see it) revolves around the idea that we should always treat others as we wish to be treated; that other people deserve the same "respect"²⁵² as we might accord ourselves out of self-interest (i.e. as if we had a personal stake in their protection, contentment, etc.). The derivative implication here is that there must be "something special"²⁵³ about human beings which entitles us to respect, and for Kant, this "something special" is none other than our capacity for moral thought/action – what Rawls refers to as our "moral personality."²⁵⁴ There are two aspects of this personality: our rationality (i.e. that which allows for our deduction of moral worth) and our freedom/autonomy to act on these deductions – even against any opposing "inclination."²⁵⁵ The compounding of these abilities is, for Kant, what lifts us above our animality – thereby making us unique amongst the other inhabitants of the earth and granting us membership to what Kant calls a "kingdom of ends"²⁵⁶ (with an "end" being that which deserves respect *in itself*).

At this point, we may wish to applaud Kant's efforts, since he has seemingly managed to devise and ground an ethical system which turns each of us – *every subjectively-conceived other* (every "rational being" whether a saint or a "murderer"²⁵⁷) – into *proper* (i.e. deserving) objects of empathy and respect. For some, this sort of cross-board inclusion may seem like the ultimate ethical gesture, but for me – and in keeping with my proposed "spirit" of deconstruction – this is far from the case. I say this because Kant's gesture (i.e. his manner of grounding our ethical responsibilities) only achieves universal inclusion by simultaneously *excluding and disregarding* the radical "otherness"²⁵⁸ which sets each of us apart, and which makes ethical engagement such a tough and therefore admirable pursuit – specifically in the sense that we can never hem in what Derrida calls the "risk of the perhaps"²⁵⁹: the insistent chance that the other will meet us in an aggressive/harmful fashion. In other words, Kant's other is only ever a toothless and predictable self-reflection: a de-radicalized other "whose otherness is mere appearance."²⁶⁰ More on this later.

²⁵¹ Rawls, p.158

²⁵² Roger Sullivan, *An Introduction to Kant's Ethics* (Cambridge University Press, 1994) pp.70 – 71

²⁵³ Linda Zagzebski, "The Uniqueness of Persons" in *The Journal of Religious Ethics*, Vol.29, No.3 (Fall, 2001) p.401

²⁵⁴ Rawls, p.209

²⁵⁵ See, for example, Kant, p.3

²⁵⁶ *ibid*, p.41

²⁵⁷ See Immanuel Kant, "On a Supposed Duty to Lie From Altruistic Motives" in Peter Singer, *Ethics* (Oxford University Press, 1994)

²⁵⁸ See, for example, Critchley, p.6

²⁵⁹ *The Politics of Friendship*, p.42

²⁶⁰ Johan van der Valt, "Hospitality and the Ghost" (2002 *J. S. Afr. L.*) p.363

Bataille's Transgressive Ethics of the "Summit":

The gap between Kant's ethics and the theory to which I now turn – Bataille's non-propositional "morality of the summit"²⁶¹ – could hardly be greater or more chasmic. This gap can, I think, be aptly described via three distinctions:

1. As Michel Surya suggests, Bataille distinguishes his own sense of moral worth from "social and political morality"²⁶² *in general* – a bracket which includes not only Kant's approach, *but every conceivable system of positive moral pronouncement*²⁶³ (a recognition which [given my previous suggestion that Derrida's ethics involves a "radical questioning of ethical pronouncement itself" – see p.40] should make Bataille's connection to Derrida all too clear).
2. Whilst Kant's theory attempts to define and regulate the way we relate to one another (i.e. as human/rational beings) Bataille's ethics refuses such limitations. Instead, Bataille sees ethics (and I say this loosely and preliminarily) as a matter of relating to a more general, non-specific sense of otherness and alterity – one which presupposes a "dangerous breaking-loose"²⁶⁴ from "accepted"²⁶⁵ social standards; a sort of mystical quest for "drunkenness"²⁶⁶ and radical "transgression."²⁶⁷
3. Whilst Kant sees the ultimate object/glory of morality as the transcendence of our animality (accrediting ourselves – both in the singular and the plural – with a unique sense of "inalienable dignity"²⁶⁸ on account of this transcend-ability) Bataille's moral aim is the sheer opposite: to stage a sensible "return to non-linguistic animal life"²⁶⁹ and to reclaim our animality²⁷⁰ *as an irrevocable component of our being*.

²⁶¹ Michel Surya, *Georges Bataille* (Verso, 2010) p.425 – Hereafter referenced as "Surya"

²⁶² *ibid*, p.432

²⁶³ Several quotes may be helpful as illustrative of Bataille's position: firstly, "the moral ends usually proposed... seem dull and false" in Georges Bataille, *The Bataille Reader* (Blackwell, 1997) p.331 – Hereafter referenced as "Bataille"; secondly, "the break with [conventional] morality gives the air we breathe a truth so great..." in Bataille, p.332; and thirdly, "rarely will we find anything resembling ethical pronouncement [from Bataille]" in Peter Conner, "Mysticism and Morality in Georges Bataille" in *Assemblage*, No.20 (April, 1993) p.30

²⁶⁴ Bataille, p.195

²⁶⁵ To quote Bataille, there is no less than a "necessity for trampling accepted morality" – See Bataille, p.335

²⁶⁶ Peter Conner, "Mysticism and Morality in Georges Bataille" in *Assemblage*, No.20 (April, 1993) p.30

²⁶⁷ Surya, p.427

²⁶⁸ See, for example, Roger Sullivan, *Immanuel Kant's Moral Theory* (Cambridge University Press, 1989) p.372

²⁶⁹ Johan van der Walt, *Law as Sacrifice* (Birkbeck Law Press, 2005) p.134 – Hereafter referenced as "Law as Sacrifice"

²⁷⁰ To quote Surya, we must find a way for "the being to spring up once more in each of us" (p.245); what would entail something of a "fall into the animal muck" (p.453)

From these points, this much should be clear: Bataille locates moral worth not in any particular conception of “God, justice... [or] reason”²⁷¹ (i.e. the traditional bases of morality) but in the most potent and even reckless anti-authoritarianism – one which characterizes all forms of social ordering as hypnotizing effacements “of the individual’s total character.”²⁷² In opposition to these effacements, Bataille anticipates a certain inverted, reinvigorated “moral summit”²⁷³ which he calls “sovereignty”²⁷⁴ – a state which is realized in certain fleeting *experiences* which exceed the “inauthenticity”²⁷⁵ and ideological partiality of our densely-clouded social existence (thereby returning us, albeit momentarily and without explanation, to a certain forgotten/repressed “truth”²⁷⁶ of our existence).

Once again, we can bring Derrida back into play here because of his explicit consideration, in *Writing and Difference*, of Bataille’s “sovereignty” and its relationship to a similar concept from Hegel’s *Phenomenology* (“lordship”). As Derrida explains, each concept refers to a state which is ultimately attained “at the height of death”²⁷⁷ (with death being *the* “moral summit”; *the* moment in which the ghosts of man/society may be “fully revealed”²⁷⁸). But where Hegel looks to death as a “moment in the constitution of meaning... [and] the presentation” of truth, Bataille laughs²⁷⁹ – not because he thinks he can outsmart Hegel on this point, *but because Hegel is so bold as to think he can outsmart death*. We could perhaps sum up Hegel’s audacity – at least as Bataille sees it – via three points:

1. For Bataille, “death has no meaning”²⁸⁰ or sense, and Hegel – he who “knows no other aim than knowledge”²⁸¹ – errs in believing otherwise (i.e. that death can be appropriated, systematized, and even profited from).

²⁷¹ Surya, p.430

²⁷² Bataille, p.336

²⁷³ Georges Bataille, *On Nietzsche* (London: The Athlone Press, 1992) p.19

²⁷⁴ See Bataille, pp.313 – 320

²⁷⁵ See, for example, Martin Heidegger, *Being and Time* (Blackwell, 1962) p.220

²⁷⁶ Not a truth which can be “known” or appropriated in the most conventional sense, but one which can nonetheless be *experienced* – fleetingly, perishably...

²⁷⁷ Jacques Derrida, “From Restricted to General Economy: A Hegelianism Without Reserve” in Jacques Derrida, *Writing and Difference* (Routledge, 2001) p.321 – Hereafter referenced as “From Restricted to General Economy”

²⁷⁸ “The real order does not so much reject the negation of life that is death as it rejects the affirmation of intimate life, whose measureless violence is a danger to the stability of things, an affirmation that is *fully revealed only in death* [my emphasis]” – see Bataille, p.212

²⁷⁹ As Derrida says: “burst of laughter from Bataille” – see “From Restricted to General Economy” p.323

²⁸⁰ Bataille, p.211

²⁸¹ “From Restricted to General Economy” p.324

2. To quote Derrida, “it does not suffice to risk death if the putting at stake is not permitted to take off, as a chance or accident, but is rather invested as... work.”²⁸² In other words, Hegel’s prospective candidate for “lordship” *never actually experiences anything in his risk*, because it is only ever conducted with an eye for a certain “effect and profit”²⁸³ – not as a raw, untempered, unpredictable “expenditure”²⁸⁴ (i.e. one which would experience death as “immanence”²⁸⁵ – *risk is not the same as immanence*).

3. To really gain from death – to really *experience* (without *understanding*) its abyssal “nothingness”²⁸⁶ – would not simply be to risk it, *but to actually die*, and to lose the life in which such a gain could be sensed, perceived and enjoyed. As Bataille puts it, “for man finally to be revealed to himself he would have to die, but he would have to do so while living – while watching himself cease to be.”²⁸⁷

This last point is not just directed at Hegel, but at Bataille himself, who knows all too well that the *real summit* (i.e. the most stark, pure escape from dull, “inauthentic” life) is unlivable, unsustainable and impossible. This doesn’t negate the possibility of certain minor transgressions – ritual sacrifice, erotic experience, the indulgent consumption of festivals (all of which are linked to death as similar instances of unproductive expenditure²⁸⁸ – but these are only ever ways of trying to do the impossible; *to live the deathly summit*. And with this recognition, we could summarize Bataille’s ethical stance as follows: ethics is a matter of resisting “all forms of constraint” (or repression, noting the link to my prior comments on deconstruction) but this is impossible. *Ethics – in its truest form – is impossible*.

²⁸² *ibid*, p.330

²⁸³ *ibid*, p.322

²⁸⁴ See Bataille, pp.167 – 181

²⁸⁵ Bataille describes the experience of death as a “return to *intimacy*, of *immanence* [my emphasis] between man and the world” – see Bataille, p.210

²⁸⁶ See Georges Bataille, *On Nietzsche* (London: The Athlone Press, 1992) p.19

²⁸⁷ “From Restricted to General Economy” p.325

²⁸⁸ See Bataille, pp.210 – 219

Derrida's Unconditional Ethics of Hospitality:

*“...inasmuch as it is... the manner in which we relate to ourselves and to others, to others as our own or as foreigners, ethics is hospitality; ethics is so thoroughly coextensive with the experience of hospitality...”*²⁸⁹

Jacques Derrida, *On Cosmopolitanism and Forgiveness*

My remarks on Bataille's “morality of the summit” have, I think, revealed a fairly clear-cut kinship between his Nietzschean philosophy of exposure and Derrida's deconstruction. Bataille and Derrida are both fundamentally anti-authority (i.e. anti- ideological inhibitors) and they both think/write in search of certain impossible “transgressions” which would let us experience something in excess of all authorit(ies). However, when Derrida finally came – in the late 80's/early 90's²⁹⁰ – to comment explicitly on the underlying ethical implications of his work, the resultant system (i.e. non-system or ~~system~~) was far from a restatement of Bataille's implied morality of “evil”²⁹¹ (where “evil” stands for the supersession of all conventional configurations of “good”).

The major difference at stake here (i.e. between Bataille's ethics and Derrida's) is that for Derrida, the object of transgression is always to better serve the “interhuman relationship”²⁹² – *the* relationship which lies at the heart of more traditional moral theories like Kant's. And in this sense, the ethics of deconstruction can taken to mark a kind of return to Kant; a strange “turn-back” which pairs the solidity of Kant's metaphysics with Bataille's *counter*-metaphysical quest for the summit. Is this really surprising? After all, I have already stressed the sense in which Derrida *always affirms* metaphysical pronouncement and systemization as indissolubly necessary – which is to say that, at the very least, Derrida knows that Bataille's overarching super-law (his “great law”²⁹³ or “*the* law”²⁹⁴) of transgression would be nothing without a certain stock of minor, formal *laws*²⁹⁵ (i.e. positive ethical pronouncements like those formulated by Kant) which compensate for and limit the dangerous impracticality of ceaseless chasing excess.

²⁸⁹ Jacques Derrida, *On Cosmopolitanism and Forgiveness* (Routledge, 2001) p.17

²⁹⁰ Here, I mean to include seminal texts like “Force of Law” and *Specters of Marx*, both of which stand as gargantuan contributions to the unfolding of Derridean ethics.

²⁹¹ Surya, p.429

²⁹² Critchley, p.9

²⁹³ Jacques Derrida, *On Cosmopolitanism and Forgiveness* (Routledge, 2001) p.18

²⁹⁴ Jacques Derrida, *Of Hospitality* (Stanford University Press, 2000) p.79 – Hereafter referenced as “Of Hospitality”

²⁹⁵ On this point, see *Of Hospitality*, pp.75 – 81, particularly the following quote and its immediate surroundings: “in order to be what it is, *the* law thus needs the laws, which, however, deny it, or at any rate threaten it, sometimes corrupt and pervert it” (p.79)

However: the more significant sense of Derrida's "turn-back" – aside from his recognizing the unflinching necessity of metaphysics – is (as suggested above) his sharing of Kant's belief that we are positively obliged to treat each other well; with respect. The only catch is that, whereas Kant sets about (repressively) grounding his obligation in a particular conception of human nature, *Derrida revokes every such ground*, opting instead to treat the "interhuman" obligation as an *inexplicable and unconditional necessity* – a pressing but mystical demand which can be felt/sensed rather than fully understood. The mysticism of this demand can be conceived (to make things really interesting) *as yet another volte-face*, this time moving from Kant back to Bataille (who is often seen "as a mystic rather than... a philosopher"²⁹⁶). And what we can take from this back-and-forth (I think) is that Derrida's ethics pushes these two thinkers into a sort of dialectical exchange where each compensates for the insufficiencies and blindspots of the other.

The only way to put this interpretation to the test – to assess its "fit"²⁹⁷ as Dworkin might say – is to read it alongside what Derrida *actually says* about ethics. Although there is too little space here to extensively explore what I called his "nods"²⁹⁸ to Kant and Bataille, a brief relay of Derrida's theory – specifically as it appears in his short but pivotal book, *Of Hospitality* – should suffice in providing some basic support for my argument. To this end, consider the following points:

1. Derrida finds a certain truth in Socrates' complaining that he is "not even... treated as a foreigner"²⁹⁹ in his native Athens. For Socrates, the official (i.e. legal/institutional) reception of the foreigner ("not simply the absolute other"³⁰⁰ but the identifiable/verifiable non-national) is always an accommodating one, since the hospitable host will "naturally excuse"³⁰¹ the plethora of linguistic and cultural differences which mark the foreigner *as such*. The citizen, on the other hand, is accorded nowhere near this level of tolerance – even though he will inevitably (by the logic of *différance*) have his "own idiom [and]... way of speaking"³⁰² in much the same way as the foreigner.

²⁹⁶ Surya, p.431

²⁹⁷ See Ronald Dworkin, *Law's Empire* (Hart, 1998) *especially chapters six and seven*.

²⁹⁸ In spite of spatial limitations, here are two examples of such "nods" (one for each thinker): firstly, see Derrida's discussion of Kant in part one of *Of Hospitality* (pp.65 – 73) and secondly, note his later use of the term "transgression" – a term which (as we have seen) plays a pivotal role in Bataille's philosophy (see *Of Hospitality*, p.75)

²⁹⁹ *Of Hospitality*, p.19

³⁰⁰ *ibid*, p.21

³⁰¹ *ibid*, p.19 (Quoting Socrates/Plato)

³⁰² *ibid*, p.21 – Derrida's line here is also demonstrated by another excerpt from the same text: "In some respects at least, I have more in common with a bourgeois intellectual whose language I don't speak than with some French person who, for this or that reason, social, economic, or something else, will be more foreign to me in some kinds of connection" – see *Of Hospitality*, p.133

2. This means, for Derrida, that each of us is a foreigner to every other, and that the only way to do each other justice is to treat each other accordingly. But what does this “accordingly” mean? In other words, how *should* we receive the *foreigner*? How can we do him/her justice? On the one hand, it is plain enough that any reception begins – indeed, can only begin – with questions (e.g. “what is your name?” or “where have you come from?”). But on the other hand, aren’t these questions really *demands* (i.e. in the sense that every question demands an answer) in much the same way as Kant demands our rational autonomy? And if they are, would it not be more “just and loving... not to question”³⁰³ but to *simply receive* the foreigner: not as a foreigner in the knowable/verifiable sense but as “something altogether other”³⁰⁴ – “an anonymous new arrival”³⁰⁵ who we welcome and accept without conditions, without demands, and without anything tantamount to “police inquisition”³⁰⁶?

3. This is certainly where ethical worth lies for Derrida – in “absolute, hyperbolic, unconditional hospitality”³⁰⁷ and in the accompanying “risk”³⁰⁸ that our open arms will be met by a dangerous criminal; a “parasite”³⁰⁹ rather than a friend. But even as this risk injects ethical depth and “value”³¹⁰ into our engagement with others, so it also destroys the very possibility of realizing such “value” since it screams out (as a risk; *because of its status as risk*) to be curbed as much as to be pursued. This means that Derrida’s law of “unconditional hospitality” *must* – as a *matter of an opposing ethical duty* – be actively legislated against so as to ensure a level of practical protection for both ourselves and our families/communities. And in this sense, we can say that Derrida’s conception of justice has the structure of an aporetic double bind: we have an obligation to serve justice (i.e. “pure” hospitality) as an ideal, but only against an opposing obligation to be ever-mindful of how this ideal enters the world (i.e. of its potential effects). The ideal might come first³¹¹ – but it cannot come last³¹² and it cannot be realized.

³⁰³ *ibid*, p.29

³⁰⁴ *The Politics of Friendship*, p.36

³⁰⁵ *Of Hospitality*, p.25

³⁰⁶ Jacques Derrida, “The Principle of Hospitality” in *Parallax* (2005, vol.11, no.1) p.7 – Hereafter referenced as “The Principle of Hospitality”

³⁰⁷ *Of Hospitality*, p.135

³⁰⁸ It is important to note the link with Bataille here – a link which is evident elsewhere when Derrida talks about a “welcome without reserve and calculation” and “an exposure without limit” – see “The Principle of Hospitality” p.6

³⁰⁹ *Of Hospitality*, p.61

³¹⁰ Bataille’s preferred term for denoting moral worth – See Surya, p.432

³¹¹ To quote Derrida, “it is always in the name of pure and hyperbolic hospitality that it is necessary... to invent the best arrangements... the most just *legislation* [my emphasis] – see “Principles of Hospitality” p.6

³¹² And this is because we don’t exist in a utopian world of ideal principles, but in a natural/practical world; a “factual” world. In this sense, Derrida’s ethics could be taken as an amendment of Kant’s infamous distinction between the natural law of the “starry heavens... and the moral law within” (see Rawls, p.160). For Derrida, *both* laws are crucial in deducing moral/ethical worth, even though they are in the frustrating position of being mutually exclusive (hence Derrida’s belief in the impossibility of ethical fulfillment).

These points only give us scantest impression of Derrida's ethics, but they are (I think) enough to do two things:

1. They support my claim that Derrida's ethics can be seen as the "sublated" product of the two other theories which I have analyzed in this section, and;
2. They support – given that they point to the same conceptual conflict (i.e. between the ideal and the practical) that I have highlighted with reference to the "aporia of the beginning" – my claim as to the absolute continuity of Derrida's theoretical focus.

With these points in mind, let us now proceed to the next section for a deeper, more thorough explanation of Derrida's ethics and for a first glimpse at how it relates to legal theory.

SECTION II: THE TRAGEDY OF THE (JUDICIAL) PROCESS

The last section – because it was so focused on parentage – lacked detail with regard to Derrida’s own thoughts on ethics. To remedy this lack, I now propose a “close reading”³¹³ of Derrida’s seminal text, “Force of Law: The Mystical Foundation of Authority”³¹⁴ – an essay which is often cited as the watershed moment of his supposed “ethico-political”³¹⁵ turn. Initially conceived as a keynote address for a *Cardozo* law symposium, “Force of Law” can be gauged primarily as a treatise on the relationship between deconstruction, law and justice. And in this sense, a focused reading can serve us doubly by:

1. Deepening our understanding of Derrida’s ethics, and;
2. Introducing us to Derrida, the legal theorist, and to the prescriptive implications which his philosophy holds for specifically *legal* interpreters.

To these points, we could even add a third, because “Force of Law” also stands as one of Derrida’s more clear-cut attempts to divulge the central aporia of my first chapter, which means that it can, I think, help to imply the career-long consistency of Derrida’s position – a consistency which is so crucial to my theory of a cohesive “spirit” of deconstruction. Also: all three of these points are – on my reading – dealt with most cogently in the first half of Derrida’s text, and I will therefore be making this first half my primary focus. With all of this in mind, let us now turn to the text.

³¹³ Christopher Norris, “Introduction” in Jacques Derrida, *Positions* (Continuum, 2005) p.xxiii

³¹⁴ Jacques Derrida, “Force of Law: The Mystical Foundation of Authority” (11 *Cardozo Law Review* 1990) – Hereafter referenced as “Force of Law”

³¹⁵ See, for example, Michael Rosenfeld, “Derrida’s Ethical Turn and America” (Vol.27:2 *Cardozo Law Review* 2005) p.815 (where Rosenfeld refers to “Force of Law” as the essay which “more than any other single work marks the advent of [Derrida’s] ethical turn”)

“Force of Law: The Mystical Foundation of Authority”

“The mystic curiosity of deconstruction is mentioned right up there in the title of the essay that catapulted deconstruction into the concerns of twentieth century legal theory – the mystical foundation of authority. Derrida was upfront and considerate enough to state the concern of the essay straight away...”³¹⁶

Johan van der Walt, “Law and Deconstruction”

In concurrence with the above remarks, I want to begin by attempting a base-level explication of Derrida’s title. There are two divisions which strike me as particularly useful to this end: the first is between the two title phrases, “force of law” and “the mystical foundation of authority”; the second is between two ways in which these phrases relate to one another – one relatively non-specific/colloquial, and one which relies directly upon Derrida’s infamous theory of language as *différance*. With these divisions in mind, let us start by examining the more basic (i.e. “non-specific”) implications behind the first title phrase.

Early on in the text, Derrida picks up on the English word “enforceability”³¹⁷ – an idiom which he claims to be “invaluable”³¹⁸ because of its ability to remind “us that there is no such thing as law... that doesn’t imply *in itself...in the analytic structure of its concept*, the possibility of being enforced”³¹⁹ via police action. In other words, the concept of law is, by definition, inseparable from the incessant threat that violence³²⁰ (i.e. “law-preserving violence”³²¹ to quote Walter Benjamin) will be dealt out upon non-compliers. To adopt a somewhat colourful comparison, the symbol of the guard dog could be summoned as an apt characterization: sure, the dog can bark, but to *guard* (i.e. to obtain the most basic and “generic sense of efficacy”³²²) it also has to bite – especially when faced with the ever-looming figure of the Holmesian “badman”³²³ (*he who will do as much as he can get away with*).

³¹⁶ Johan van der Walt, “Law and Deconstruction” in Veitch, Christodoulidis & Farmer, *Jurisprudence: Themes & Concepts* (Routledge, 2012)

³¹⁷ “Force of Law” p.925

³¹⁸ *ibid*, p.935

³¹⁹ *ibid*, p.925

³²⁰ A fact which, according to Robert Cover, is all too often forgotten/neglected by legal theorists. See Robert Cover, “Violence and the Word” (95 *Yale Law Review* 1985 – 1986)

³²¹ Costas Douzinas, “Violence, Justice, Deconstruction” in *German Law Journal* (Vol.06, No.01) p.172 (Quoting Benjamin)

³²² Giorgio Agamben, *The State of Exception* (University of Chicago Press, 2005) p.37 – Hereafter referenced as “The State of Exception”

³²³ Oliver Wendell Holmes, “The Path of the Law” at http://www.constitution.org/lrev/owh/path_law.htm

From this recognition of an “intimate”³²⁴ connection between law and violence, Derrida asks how we can effectively “distinguish between... [the] force of the law... and the violence that one always deems unjust”³²⁵ (i.e. illegal/anti-social violence). The common presumption – especially “in the modern epoch”³²⁶ of Western democracy – is that the first, physical “force of law” is inseparably bound to a second, moral “force” which justifies it. For me, this perception can be traced to (at least) three features of modern law:

1. Its democratic production (i.e. by *representative* bodies);
2. Its “untouchability”³²⁷ (i.e. in a rule-of-law-*not-men* sense) and;
3. Its general know-ability;

The merits of the first two are well-known, and require no added explanation here. However, it is, I think, well-worth offering a brief explanation of my third point – perhaps something like this: “know-ability” gives the violence of law a forewarned character which other forms of violence lack. And, if we accept Nietzsche’s claim that (one of) our most basic instinct(s)³²⁸ is the pursuit of control, we can understand the justification of legal violence precisely on the grounds that we can avoid it (i.e. *control* its infliction upon us) by adjusting our own conduct.

This is where the “mystical foundation of authority” comes in. Because no matter how democratic or untouchable or knowable the laws of a given system seem, there can be no denying that there will have been, without exception, a system-founding act which lacked all of these legitimating features. To explain: the founding act – *as a nothing-to-something beginning* – can refer back to no law (i.e. no sense of “anterior legitimacy”³²⁹) which would anticipate or justify it. And this means that – as a child of what we might call unjustified or justification-pending “imposition”³³⁰ – the system is infected, from the start, by the purportedly exorcized violence which, in the perception of its exorcism, gives law its moral sheen. As Derrida puts it:

“the violence of the foundation... must envelope the violence of conservation *and cannot break with it* [my emphasis]...”³³¹

³²⁴ Costas Douzinas, “Violence, Justice, Deconstruction” in *German Law Journal* (Vol.06, No.01) p.172

³²⁵ “Force of Law” p.927

³²⁶ *The State of Exception*, p.37

³²⁷ *ibid*

³²⁸ See Friedrich Nietzsche, *Beyond Good and Evil*, at <http://www.gutenberg.org/files/4363/4363-h/4363-h.htm>

³²⁹ “Force of Law” p.927

³³⁰ “an *imposition* without a *present* justification” – Drucilla Cornell, “The Violence of the Masquerade: Law Dressed up as Justice” (11 *Cardozo Law Review* 1990) p.1058 – Hereafter referenced as “Cornell”

³³¹ *ibid*, p.1055 (Quoting “Force of Law”)

To gain a fuller grasp of this logic, we might look to Giorgio Agamben's recognition of the way in which the phrase "force of law" has been used as a "technical legal term"³³² for the status of binding executive orders. Such orders, for Agamben, are especially characteristic of "state[s] of exception"³³³ – situations where the difficult particularity of a "political crisis"³³⁴ is dealt with by suspending inflexible, formal law in favour of sovereign decree. In these instances, the "force of law" (i.e. its "capacity to bind"³³⁵) is separated out from the "formal essence"³³⁶ (i.e. the democratic, untouchable, knowable essence) which legitimates it. And for Agamben, this means that:

"The state of exception is an anomic space in which what is at stake is a force of law without law (which should therefore be written: force of ~~law~~). Such a force-of-~~law~~, in which potentiality and act are radically separated, is certainly something like a mystical element, or rather a *fictio* by means of which the law seeks to annex anomie itself..."³³⁷

"Something like a mystical element" writes Agamben – an "element" which mirrors Derrida's "mystical foundation" to the utmost point of precision. To explain: the state of exception – as a period in which state-sanctioned violence loses its more traditional lines of justification – is not so much a legal anomaly as it is the "return of the repressed"³³⁸ truth of the system; the moment in which, by appearing as little more than imposition-for-its-own-sake, the law drops its moral mask to (temporarily) revel in the groundless violence of its origin. In other words, *what is commonly called the exception is not an exception at all, but the secret rule; the condition which simultaneously enables* (i.e. because the legal system "must begin" somewhere – in a space prior to itself and its justification) *and de-legitimizes* (i.e. because "law never catches up with... [the] projected justification"³³⁹ of its origin) *every legal pronouncement*, thereby putting law (i.e. as a purportedly moral concept) firmly under erasure. As Drucilla Cornell summarizes:

"the difference between acceptable and unacceptable violence... is ultimately not cognitively accessible in advance... [and therefore] the practical erasure of the mystical foundation of authority by the legal system must be told as a horror story"³⁴⁰

³³² *The State of Exception*, p.38

³³³ *ibid*, pp.1 – 31

³³⁴ *ibid*, p.1

³³⁵ *ibid*

³³⁶ *ibid*, p.38

³³⁷ *ibid*

³³⁸ Sigmund Freud, "Repression" at [http://files.meetup.com/382157/Freud%20-%20Repression%20\(1915\).pdf](http://files.meetup.com/382157/Freud%20-%20Repression%20(1915).pdf) – p.2984

³³⁹ Cornell, p.1049

³⁴⁰ *ibid*, pp.1048... 1050

Now: the argument above is only the first way in which we can understand the interaction between Derrida's title phrases. I initially called this the "non-specific" way of understanding these phrases, and by this I mean that the sense and success of Derrida's argument are not necessarily reliant – *in logico-theoretical terms* – on his earlier discoveries regarding language and *différance*, which is to say that his argument could (in theory) be well-made by someone who disregarded these discoveries.³⁴¹ However, we should not stop here, because the "non-specific" version of Derrida's argument can be enriched exponentially by pointing out the more "specific" ways in which the title and the essay as a whole tie in with Derrida's broader theory (i.e. with his ~~system~~ of *différance*). After all, Derrida says himself that the "question of language and idiom"³⁴² lies right "at the heart"³⁴³ of his thoughts on law – a recognition which indicates, at the very least, an *intentional* connection between his legal and linguistic theories.³⁴⁴

The immediate result of this inter-theoretical connection is this: law is but one example of linguistic expression, and the de-legitimation of law's origin – and of all of its subsequent moves insofar as they rely on that origin – must have therefore been presupposed and (arguably) accomplished by Derrida's earlier de-legitimation of *every* origin (i.e. every attempt at an "exit from language"³⁴⁵) via *différance*. This means that the originary groundlessness which haunts the system – which makes it a ~~legal~~ system in Agamben's terms – is not a problem which is unique to law so much as an active manifestation of *the* problem which Derrida finds behind all attempts to generate sense; to exercise our "will to power"³⁴⁶ over the world. In other words, it is the "*différance* of law"³⁴⁷ which keeps it estranged from its purported moral referent in a "nothing outside the [legal] text" sort of way.

³⁴¹ In fact, Robert Cover made a strikingly similar argument without relying on any aspect of Derrida's thought. See Robert Cover, "Violence and the Word" (95 *Yale Law Review* 1985 - 1986). It is also notable that Costas Douzinas has spoken of the way that what I called the "non-specific" argument is made *more problematic and more troubling* by the "violence of language itself" – a recognition which suggests, I think, that Douzinas would agree with my claim that the "non-specific" argument is logically isolatable from Derrida's theory of language. However, as I shall now argue, being logically isolatable does mean that isolation is wise in a *practical* sense. For Douzinas quote, see Costas Douzinas, "Violence, Justice, Deconstruction" in *German Law Journal* (Vol.06, No.01) p.173

³⁴² "Force of Law" p.925

³⁴³ *ibid*

³⁴⁴ Although there is also, I think, a strong *non-intentional* connection here – not least because "Force of Law" is Derrida's text, which is to say that it is already implicated with a certain "signature" (see Bennington, pp.148 – 165) and a certain corpus which we can hardly avoid taking into account.

³⁴⁵ Beardsworth, p.33

³⁴⁶ Quotes: "a living thing seeks above all else to discharge its strength – life itself is will to power" (Note 13) and; "explaining our entire instinctive life as the development and ramification of one fundamental form of will... the will to power" (Note 36) – See Friedrich Nietzsche, *Beyond Good and Evil*, at <http://www.gutenberg.org/files/4363/4363-h/4363-h.htm>

³⁴⁷ Beardsworth, p.29

With this in mind, we can now take a shot at a slightly more contextual and layered interpretation of Derrida's title. First of all, we can recognize *différance* as the "mystical foundation of authority" in the sense that:

1. It prevents legal authority from appealing to "anything but its own mystique"³⁴⁸ and;
2. It is itself a sort of "mystical" beyond; a logic of disunity which exceeds the only logic/language (i.e. of metaphysics) within which we can think/speak it.

Second of all, we can reinterpret the phrase "force of law" as the violence which lives within law-as-language. This violence poses a particular problem in the sense that:

1. It is connected to such serious, real-world consequences (i.e. because it is backed up by the physical "force of law") and;
2. It ensures that every legal act – apart from reiterating and affirming the groundlessness of the origin – also stands as a sort of groundless origin *in itself*, at least insofar as it either creates and imposes a false unification of idioms (i.e. as with legislative acts) or substitutes a personal and equally unverifiable idiom for this first, false unification (i.e. as with judicial acts).

When we put all of this together – the double violence (i.e. physical and linguistic) of law and the de-legitimation of its every movement (i.e. insofar as every act constitutes a fresh and "absolutely [un]justified" point of departure) via *différance* – we get to the groundbreaking claim that law is tainted, at every turn, by a deep and ineradicable sense of "philosophical bankruptcy"³⁴⁹ which extinguishes every claim of its inherent moral force. In other words, law is only ever "force without justice,"³⁵⁰ "violence masqueraded as"³⁵¹ something more.

³⁴⁸ *Law as Sacrifice*, p.197 (Quoting "Force of Law")

³⁴⁹ Cornell, 1051

³⁵⁰ "Force of Law" p.937 (Quoting Pascal)

³⁵¹ Cornell, p.1047

“Aporia[s] of judgment”³⁵²

“...if right or law stems from vengeance... can one not yearn for a justice that one day, a day belonging no longer to history, a quasi-messianic day, would finally be removed from the fatality of vengeance”³⁵³

Jacques Derrida, *Specters of Marx*

Derrida’s assertion that law is “force without justice”³⁵⁴ is a bold one. It is bold, in particular, because it goes against the West’s deep-set belief that justice is a matter of giving “everyone his own”³⁵⁵ (i.e. of compensating the injured and injuring the injurers³⁵⁶) and that law – given that it has the force to compel this giving – is the righteous path to justice itself. The problem which Derrida finds in this conception, as we have seen, is that we lack any “absolutely justified” way of determining where such justice might lie, which ultimately means that the violent enforcement of any *particular* determination of justice is always in violation of something higher – a “summit” of justice where the dream of taking a “step beyond repression”³⁵⁷ (i.e. beyond the unjustified repression of metaphysics) comes alive in the name of the Other. And for Derrida, this “step” is none other than that of his own deconstruction. “Deconstruction... [the insistent spirit of the question, of the suspense of the *Aufhebung*, of fearless affirmation] is justice.”³⁵⁸

It is perhaps unsurprising then – given that deconstruction is so thoroughly concerned with interpretation; with *intra-textuality* and the focused study of linguistic coherence – that Derrida should turn his attention, about half way through his *Cardozo* address, to the role of the judge and the non-dischargeable obligations which are placed upon him by the ethics of deconstruction. Apart from being complicit with (and repeating) the groundless violence of the origin, the judge must also – by the logic of Derrida’s *différance* – be guilty of linguistic violence; of inflicting his own interpretive idiom upon the present-parties and (if *stare decisis* applies) upon the system itself. Worse still, this double-edged violence – *this violence of the past* (i.e. of the origin) *and of the*

³⁵² *Law as Sacrifice*, p.205

³⁵³ *Specters of Marx*, p.25

³⁵⁴ “Force of Law” p.937 (Quoting Pascal’s *Pensees*, available at <http://www.ntslibrary.com/PDF%20Books/Blaise%20Pascal%20Pensees.pdf> – although Derrida’s interpretation of Pascal’s phrase is a little different from the one found here)

³⁵⁵ Johan van der Walt, “Law and Deconstruction” in Veitch, Christodoulidis & Farmer, *Jurisprudence: Themes & Concepts* (Routledge, 2012)

³⁵⁶ According to Johan van der Walt, the idea of justice as a matter of fulfilling deserts is an Aristotelian one which has now become – or can at least be argued to have become – “one of the pillars of western legal thinking.” See Johan van der Walt, “Law and Deconstruction” in Veitch, Christodoulidis & Farmer, *Jurisprudence: Themes & Concepts* (Routledge, 2012)

³⁵⁷ *Specters of Marx*, p.26

³⁵⁸ “Force of Law” p.945

present (i.e. of the fresh, interpretive origin) – *is always also connected to the promise of future violence*; the physical “force of law” which is given immediate warrant by the “word”³⁵⁹ of the judge. To quote Robert Cover: “legal interpretation takes place in a field of pain and death... a judge articulates her understanding of a text, and as a result, someone loses his freedom, his property, his children, even his life.”³⁶⁰

The stakes then, could hardly be higher. And with these stakes – *with his own violent tendencies lurking at every turn* – the judge is effectively stranded between two poles of non-negotiability. On the one hand, his obligation to negotiate the minefield of these tendencies is non-negotiable in its status as an ethical demand. On the other hand, this minefield is non-negotiable in itself, which is to say that its successful, non-violent traversal is utterly impossible. Does this not ring a little familiar by now? The judge “must begin” his deliberations, but he is doomed to begin (and to proceed) in a manner lacking “absolute” justification. This is (evidently) a situation-specific reiteration of my first chapter aporia, and in his *Cardozo* address, Derrida allows this aporia to divide itself across three practical but non-exhaustive manifestations regarding the judge’s quest for justice. To these manifestations (i.e. these “aporia[s] of justice”³⁶¹) I now turn.

³⁵⁹ Even Ronald Dworkin, a seemingly conservative legal theorist (at least compared to Derrida) cannot help but recognize this: “people often stand to gain or lose more by one judge’s nod than they could by any general act of Congress or Parliament.” See Ronald Dworkin, *Law’s Empire* (Hart Publishing, 1998) p.1

³⁶⁰ Robert Cover, “Violence and the Word” (95 *Yale Law Journal* 1985 – 1986) p.1601

³⁶¹ John Caputo, *Deconstruction in a Nutshell* (Fordham University Press, 1996) p.135

“First aporia: epokhe and rule”³⁶²: Most people in Western democracies believe that judges should always restrict themselves to deciding cases on points of law – that their decisions should be “programmable, deducible... computable”³⁶³ applications of prior legal rules rather than arbitrary acts of imposition. However, as we have seen, Derrida believes that every legal act is a certain type of arbitrary imposition, which is to say that, at root, there is no way to distinguish between the acceptable impositions of the legislature and the supposedly unacceptable ones of so-called “judicial activists”³⁶⁴ – both of which are flatly de-legitimated by the *différance* of law. The question then, is how judges should respond to the violent impositions of the legislature? In respectful subservience? Or in violence; by re-evaluating and amending the law as they see fit (“as if ultimately nothing previously existed of the law”³⁶⁵)? The answer, according to Derrida, is that justice calls for a simultaneous and therefore impossible commitment to (and practice of) *both* options:

“...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”³⁶⁶

For me, this fits fairly straightforwardly with what I have said so far – particularly with the “aporia of the beginning” from my first chapter. We need law, in practical terms, for the sake of social order. But given the unjustified/unjust status which Derrida’s theory attaches to every conceivable legal provision, we also need to keep questioning whether this or that law³⁶⁷ – or at least our favoured interpretation of this or that law – really gives us the “best arrangements”³⁶⁸ through which to pursue the (albeit unreachable) ideal of justice (i.e. “an exposure without limit... without reserve and without calculation”³⁶⁹).

³⁶² “Force of Law” p.961

³⁶³ John Caputo, *Deconstruction in a Nutshell* (Fordham University Press, 1996) p.137

³⁶⁴ And for Derrida, the term ‘judicial activist’ would, I think, refer to every judge – at least in the sense of their having a particular idiom and way of seeing things. For a classic introduction to the more conventional use of the “activist” label, see Holmes’ dissent in *Lochner v. New York*, available here – http://www.law.cornell.edu/supct/html/historics/USSC_CR_0198_0045_ZD1.html (although Holmes never uses the term itself, the accusations which he wages against Justice Peckham and the majority are identical to those which are clustered under the “activist” label)

³⁶⁵ “Force of Law” p.961

³⁶⁶ *ibid*

³⁶⁷ As John Caputo puts it, the deconstructive approach is such that “instead of answering questions, it [always] keeps them astir” – See *Radical Hermeneutics*, p.188

³⁶⁸ “The Principle of Hospitality” p.6

³⁶⁹ *ibid*

“Second aporia: the ghost of the undecidable”³⁷⁰: It is relatively uncontroversial, I think, to say that all litigation stems from some level of disagreement. There might be disagreement over the facts to which a given law should be applied, or there might be disagreement about which law should be applied to these facts. There might even be disagreement over what law is (“theoretical disagreement”³⁷¹ as Dworkin puts it) and, derivatively, over which types of propositions and principles are deserving of legal status. Whatever the point of contention, the judge – at least according to the popular iconology of the West – arrives on the scene to put disagreement to bed; to say once and for all which side is right and which is wrong. And for Derrida, this means that the judge can never exercise his authority “without a decision that *cuts*, that divides”³⁷² – a decision that, even as it tries to do justice by and perhaps also through the law, will *always* inflict a heightened level of physical and linguistic injustice upon the losing party by denying his idiom and by violently ripping something from him in the process (i.e. “his freedom, his property, his children, even his life”³⁷³).

This is why “there is no moment in which a decision can be called presently and fully just”³⁷⁴ – because a decision can only give with one hand, can only affirm one side while it does violence to and represses the idiomatic singularity of the other. This means that the possibility of justice – since every decision is one-sided, repressive, unjust, etc. – must live in a certain *pre-decise* moment, one in which neither claim has been stamped as truer than the other; where each still bristles with the viability which all things possess before the brutal but utterly unavoidable “economy of repression.”³⁷⁵ However, to give in to this “ordeal of the undecidable”³⁷⁶ – to perpetuate its suspense in the name of the ideal – is “not just either, for only a decision can be just.”³⁷⁷ In other words, the ideal is once again nothing without the practical, even as the practical kills the ideal. *This is aporia*; mutual destruction:

“one cannot speak directly about justice, thematize or objectivize justice, say ‘this is just’ and even less ‘I am just’, without immediately betraying justice...”³⁷⁸

³⁷⁰ “Force of Law” p.963

³⁷¹ Dworkin, p.5

³⁷² “Force of Law” p.963

³⁷³ Robert Cover, “Violence and the Word” (95 *Yale Law Journal* 1985 – 1986) p.1601

³⁷⁴ “Force of Law” p.963

³⁷⁵ *Specters of Marx*, p.25

³⁷⁶ *ibid*, p.935

³⁷⁷ *ibid*, p.963

³⁷⁸ *ibid*

“Third aporia: the urgency that obstructs the horizon of knowledge”³⁷⁹: Even if justice makes the suicidal demand for the decision which kills it, we may still take comfort in the hope that this decision can be approached with care, and that its ultimate groundlessness can perhaps be somewhat made up for if the judge makes a genuine and determined effort to take each side seriously (i.e. to begin by assuming the viability of each claim and the resultant “undecidability” of the case). However, Derrida is quick to burst this bubble by suggesting that a “just decision [*which would be impossible anyway*] is always required immediately”³⁸⁰ – in a moment of raw, screaming urgency. To quote Derrida:

“...a just decision... cannot furnish itself with infinite information and the unlimited knowledge of conditions, rules or hypothetical imperatives that could justify it... and even if it did have all that at its disposal, even if it did give itself time, all the time and all the necessary facts about the matter, the moment of decision, as such, always remains a finite moment of urgency and precipitation... since it always marks the interruption of the juridico- or ethico- or politico-cognitive deliberation that precedes it, that must precede it”³⁸¹

There are, I think, two layers of this urgency. The first is the simple social/political urgency which calls for the decision for the sake of order and progress – to keep things moving and to keep disagreements from dragging on ad infinitum. This, however, is preceded by a second sense of urgency: *that which kicks in because of the inevitable prematurity of the decision*; because the decision – no matter how long it could be mulled over, no matter how much the first kind of urgency could be curbed – will always arrive before it has been able to “absolutely” justify itself; in a moment of “madness”³⁸² and as a “leap”³⁸³ of faith. And this means that, once again, we are faced with a conflict between the ideal and the practical, the dream and the reality: the dream begs for care, meticulousness, and the dedicated gathering of applicable resources; the reality is that we never have time for these things – not because time is short but because *no amount of time* could deliver the sure-fire justification which we seek.

³⁷⁹ *ibid*, p.967

³⁸⁰ *ibid*

³⁸¹ *ibid*

³⁸² “the instant of decision is a madness” – “Force of Law” p.967 (Quoting Kierkegaard – a quote which also appears in Jacques Derrida, “Cogito and the History of Madness” in Jacques Derrida, *Writing and Difference* [Routledge, 2001] p.36)

³⁸³ John Caputo, *Deconstruction in a Nutshell* (Fordham University Press, 1996) p.137

Conclusion: The Tragedy of the (Judicial) Process

“If the tragic tradition proclaims a crisis in the dialectical politics of reciprocity, deconstruction does something similar, although Derrida prefers to speak of an ‘aporetic moment’ rather than a crisis... the moment when symbolic systems come up against aporias which cannot be argued away by dialectical logic... [in other words] if deconstruction has one truly distinctive feature it could be... [the affirmation of] the indissoluble aporia which always disrupts symbolic structures. Deconstruction thereby proves itself an heir to the tragic tradition”³⁸⁴

Danie Goosen, “Deconstruction and Tragedy: A Comparison”

Where can we go from here? The judge – assuming that we buy into the “aporetics”³⁸⁵ of Derridean morality – is trapped, hapless and helpless, in the inescapable jaws of a Catch-22. Every move he makes, however measured and tentative, will be the wrong one. Every thought in his mind, however well-intentioned, will be a violent, one-sided denial. So to repeat: *where can we* – as the judge’s hypothetical, ethical advisers – *go from here?* What advice can we give? The most “natural”³⁸⁶ response (following the likes of Nietzsche and Freud) is surely to seek out a point of unification; a metaphysical annulment to ease the displeasure of our confusion. But this would hardly be in keeping with Derrida’s broader project, would it?

Not at all. In fact, we have already encountered Derrida’s starkest judicial prescription – namely his controversial proclamation that “deconstruction is justice.” This means, contrary (at least seemingly) to Derrida’s claims elsewhere, that justice *is possible* in a mystical, fleeting sense; in the almost non-existent moment when a judge sees the tragic plurality of his interpretive options. In other words, the ethics of deconstruction demands that judges must (as far as possible) seek out the tragedy of legal texts/situations – not as a trivial or “supplementary”³⁸⁷ obligation, but as *the obligation which makes their decision a decision*: not a *just* decision of course, but simply a decision in the sense of a real, unscripted “event.”³⁸⁸

³⁸⁴ Danie Goosen, “Deconstruction and Tragedy: A Comparison” (1998 *Acta Juridica* 21) p.32

³⁸⁵ See, for example, John Caputo, *Deconstruction in a Nutshell* (Fordham University Press, 1996) p.31

³⁸⁶ By which I mean to reference Nietzsche’s will-to-power and Freud’s early formulations of the pleasure principle. See Friedrich Nietzsche, *The Will to Power* (Vintage, 1968) and Sigmund Freud, *The Penguin Freud Reader* (Penguin, 2006) for explorations of these ideas.

³⁸⁷ By which I mean to reference the Derridean concept of “supplementarity” described earlier.

³⁸⁸ “the event of what *may happen*” – *The Politics of Friendship*, p.30

Tragedy then, is one more way – the most *explicitly*-ethical way perhaps – of describing the counter-metaphysical heart of Derrida’s work. We should take note though: Derrida’s view of tragedy is distinct from, for example, the one espoused by Hegel in his “reading”³⁸⁹ of Sophocles’ *Antigone*. For Hegel, the tragedy of the *Antigone* is not in the indissolubility of its inter-system dispute (i.e. between the “human [and the]... divine”³⁹⁰) but in the fact that this dispute plays out between two characters who are blind to its status *as a dispute* in a genuine, philosophical sense. This means that, in Hegel’s eyes, tragedies (like the *Antigone*) are not tragic because they are logically insoluble, but because their solubility can only reveal itself through a dialectical unfolding which plays out – and here’s the tragic rub – *in the very failures and frustrations and agonies which it would have avoided had it been available in foresight*.

For Derrida, Hegel errs here in much the same way as he does (to hark-back to my last section) in his consideration of death. In other words, he (wrongly) imports a sense of productivity into the concept of tragedy when, in truth, the tragedy of tragedy is that it yields nothing at all; that it is doomed to repeat itself regardless of how many Greek plays its victims might have studied. And this means that, in terms of the *Antigone*, Derrida’s hero (and the ultimate role model for the deconstructionist judge) might just be the bumbling guard who comes before Creon bearing bad, and possibly self-implicating news:

“Sir, I wouldn’t exactly say I was panting to get here. Far from it. As a matter of fact, I was more for turning back. I was over a barrel. One part of me was saying, ‘Only a loony would walk himself into this’ and another part was saying, ‘You’d be a bigger loony not to get to Creon first’... But when all was said and done there was only thing for it: get here, get it out and get it over no matter what... what will be, says I, will be...”³⁹¹

Here we have it – the two features of the decision which the judge must (as a matter of morals) recognize:

1. Its *un*-decidability and;
2. Its *must*-decidability.

³⁸⁹ Derrida confronts this reading in *Glas* – for a blow-by-blow account of this confrontation, see Simon Critchley, “Derrida’s Reading of Hegel in *Glas*” in Simon Critchley, *Ethics-Politics-Subjectivity* (Verso, 1999) pp.1 – 28; for the original confrontation, see Jacques Derrida, *Glas* (Lincoln and London: Nebraska University Press, 1986); and for the original reading by Hegel, see Georg Wilhelm Friedrich Hegel, *Aesthetics* (Oxford, Clarendon, 1975)

³⁹⁰ Beardsworth, p.85

³⁹¹ Seamus Heaney, *The Burial at Thebes: A Version of Sophocles’ Antigone* (Farrar, Straus and Giroux, 2004) p.12

CONCLUSION:

“Got my finger on the trigger

But I don’t know who to trust

When I look into your eyes

There’s just devils and dust”³⁹²

Bruce Springsteen, “Devils & Dust”

Having opened this chapter with the above excerpt, I now want to close by finally explaining its relevance. My interpretation is this: the judge is the one with his “finger on the trigger” – poised (and absolutely required, as per the necessity of metaphysics) to issue his decision. But for Derrida, as we have seen, there is no “absolutely justified” way of knowing “who to trust” (i.e. which way to decide). This is because the judge can only see “devils” (i.e. his own ideological weaknesses and inhibitions – those which he projects into the presumed consciousness of the “Other”) and “dust” (i.e. *nothing else*) in the eyes of those he confronts; the parties before him. In other words: the judge can never see past himself; can never see more than his own, tired truth; can never see what he would need to see to *really* “trust” in his decision.

Even here – in my (temporary/expedient) reduction of Derrida’s ethics into four lines of a pop song – we can hardly miss the recurrence of the aporia of the beginning: of the war between the ideal and the practical which lives within the concept of ethics as an aporetic headache. And as I have suggested, *it is this headache* (i.e. this tragedy) which the judge must feel above all else, or rather, which he must *strive* to feel over and above the destructive one-sidedness of his psyche. Sure, his decision *will* be violent, *but the judge can enter this violence having first experienced something else* – a radical openness (or even an abyssal terror) which is completely foreign to the order of violence (i.e. metaphysics) itself. *This* is what deconstruction begs of the judge; this is why deconstruction is so (as I put it in chapter one) “called-for” – because it is offers us *something* (a “flicker” or a “snap” perhaps) *other than violence*.

³⁹² Bruce Springsteen, “Devils & Dust” (Sony, 2005)

CHAPTER THREE:
LEGAL
DECONSTRUCTION-
ISM: FROM THEORY
TO PRACTICE

“Deconstruction has a tremendous stake in interpretation: but what would it tell us when the interpretation intersects with, or, better yet, is presented as, practice?”³⁹³

Antonio Negri, “The Specter’s Smile”

³⁹³ Antonio Negri, “The Specter’s Smile” in Jacques Derrida et al, *Ghostly Demarcations* (Verso, 2008) p.14

LEGAL DECONSTRUCTION(ISM): FROM THEORY TO PRACTICE

INTRODUCTION:

I have thus far defined deconstruction as a sort of “ethically-spirited” interpretation; a brand of reading (or perhaps merely “perception”) which strives for openness as an ethical “aspiration.”³⁹⁴ Given the vagueness of this aspiration – and given the sense in which it seems to precede *all action*, all politics, etc. – we must now ask whether there are *any* positive prescriptions which might guide the interpreter (i.e. the legal interpreter – specifically the judge) in its pursuit. In other words, what happens when we move from theory to practice; when we branch out (beyond the abstract mysticism of Derrida’s writing) into the domain of action and consequence?

To answer this question, I have chosen to examine two versions of what we might call contemporary legal “deconstructionism”³⁹⁵ – one proposed by Yale Law Professor, Jack Balkin, and one proposed (*implicitly* I might add) by CLS radical/Harvard Law Professor, Duncan Kennedy. These are not necessarily the best or most Derrida-faithful attempts to integrate deconstruction into the legal realm, but they *do* represent (for me) the two classic integrative mindsets – that which seeks to tame/de-radicalize and that which seeks to extend/radicalize. To explain who does what and how successful they are, let us now proceed to the analysis – starting with Balkin.

³⁹⁴ See Lon Fuller, *The Morality of Law* (Yale University Press, 1977) chapter 1

³⁹⁵ And the addition of the (ism) is to denote the growing “trendiness” which has led to many of the “contemporary” encounters with deconstruction – see, for example, Robert Locke, “Deconstructing Deconstructionism” at <http://archive.frontpagemag.com/Printable.aspx?ArtId=24199> – an article which repeats the trendy conflation between deconstruction and post-structuralism.

SECTION I: JACK BALKIN'S "DOMESTICATION OF DECONSTRUCTION"³⁹⁶

Jack Balkin's "Deconstructive Practice and Legal Theory"³⁹⁷ – published three years prior to "Force of Law" – is perhaps the earliest *comprehensive* attempt to introduce deconstruction to a legal audience. To be sure, many theorists ("particularly feminists and members of the Critical Legal Studies [i.e. CLS] movement"³⁹⁸) had already tried to integrate Derridean ideas and "techniques"³⁹⁹ into their respective legal theories, but never – at least to my knowledge – in a way which directly referenced or explained the deeper, philosophical roots of those ideas. In a sense then, Balkin's essay arrived on the scene in much the same vein as *The Communist Manifesto*: as a spectral exposure, one which would give flesh and substance to a spirit which had been "haunting"⁴⁰⁰ Anglo-American law departments for at least a decade; "the specter of" deconstruction.

Despite its timely ambition, Balkin's account of deconstruction begins with a pretty grave mistake – namely a malignant mistreatment of Derrida's most basic thoughts on language. For Derrida, as we have seen, language is inescapably idiomatic, which is to say that communication is always a matter of language-users translating the personal and therefore *untranslatable* idioms of others. In Derrida's view, this "idiomacy" serves to up the stakes of interpretive care, deepening our responsibility toward the "Other" by disabling any hope of its discharge (i.e. by making it a "responsibility without limit"⁴⁰¹) or fulfillment. Balkin's mistake is that he follows Derrida's idiomacy thesis to the opposite conclusion, assuming that interpretive/interpersonal responsibility dies along with the possibility of atomic communication. And with this, Balkin assumes his own license – supposedly granted by Derrida himself – for interpretive "selectivity"⁴⁰² and "alteration"⁴⁰³:

"In explaining Derrida's practices to a legal audience, I will focus on those areas of his work that have most relevance to legal writing and thought. This... requires selection, editorial judgment, and reinterpretation..."⁴⁰⁴

³⁹⁶ See Pierre Schlag, "Le Hors de Texte, C'est Moi: The Politics of Form and the Domestication of Deconstruction" (11 *Cardozo Law Review* 1989 – 1990) p.1631 – Hereafter referenced as "Schlag"

³⁹⁷ Jack Balkin, "Deconstructive Practice and Legal Theory" (*Faculty Scholarship Series*, 1987) at http://digitalcommons.law.yale.edu/fss_papers/291 – Hereafter referenced as "Balkin"

³⁹⁸ Jack Balkin, "Deconstruction's Legal Career" (Vol.27:2 *Cardozo Law Review* 2005) p.720 – Hereafter referenced as "Deconstruction's Legal Career"

³⁹⁹ See Balkin, p.2

⁴⁰⁰ See Karl Marx and Friedrich Engels, *The Communist Manifesto* (Oxford Paperbacks, 2008)

⁴⁰¹ See Jack Balkin, "Transcendental Deconstruction, Transcendent Justice" (92 *Michigan Law Review* 1994) p.1153 – Hereafter referenced as "Transcendental Deconstruction"

⁴⁰² "Deconstruction's Legal Career" p.722

⁴⁰³ Balkin, p.4

⁴⁰⁴ *ibid*

This enables Balkin to follow a frustratingly narrow line of analysis, and to define deconstruction – in opposition to Derrida’s many claims to the contrary⁴⁰⁵ – as “an analytic tool”⁴⁰⁶; a formalistic and non-ethical⁴⁰⁷ practice which involves little more than the “identification of hierarchical oppositions, followed by a temporary reversal of the hierarchy”⁴⁰⁸ as a means of intellectual revelation. On the one hand, this *is* a fairly accurate definition of the CLS brand of deconstruction(ism) which was already “viral”⁴⁰⁹ within legal circles. On the other hand, Balkin’s own mission statement – to go about “explaining *Derrida’s* [my emphasis] practices to a legal audience”⁴¹⁰ – seems to clarify his intent to start afresh; to “bracket”⁴¹¹ out the CLS appropriation and return to Derrida for the answers which his appropriators always seemed to skim over in haste.⁴¹² Two questions stand out in this respect:

1. What is deconstruction? And;
2. Is there any space for talking about or *using* deconstruction in the context of legal theory/interpretation?

These questions are, of course, the same ones to which this thesis is a response, and my interest in Balkin – as the first (Anglo-American) legal theorist to confront them directly/in-depth – is therefore unsurprising. But despite his resolve to start afresh, Balkin’s account (as suggested above) ends up looking more like a reflection of the CLS appropriation than a renewed confrontation with Derrida. And the problem with *this*, as I shall now argue, is that the CLS appropriation – at least insofar we might suppose its fidelity to Derrida’s texts and theories – is a misfire, specifically on account of its very un-Derridean emphasis on the formal/technical moves of works like the *Grammatology*. To explain this point, let us now take a closer look at Balkin’s repetition.

⁴⁰⁵ Most notably: “Deconstruction is not a method and cannot be transformed into one. Especially if the technical and procedural significations of the word are stressed. It is true that in certain circles (university or cultural, especially in the United States) the technical and methodological ‘metaphor’ that seems necessarily attached to the word deconstruction has been able to seduce or lead astray. Hence the debate that has developed in these circles: can deconstruction become a methodology for reading and for interpretation?” – See “Letter to a Japanese Friend” p.3

⁴⁰⁶ Balkin, p.48

⁴⁰⁷ “deconstructive techniques... have no necessary ethical stance... it is easy enough to produce deconstructive arguments for both sides of any policy question” – See “Deconstruction’s Legal Career” p.738

⁴⁰⁸ Balkin, p.5

⁴⁰⁹ Pierre Schlag, “A Brief Survey of Deconstruction” (Vol.27:2 *Cardozo Law Review* 2005) p.745

⁴¹⁰ Balkin, p.4

⁴¹¹ By which I mean to reference Husserl’s phenomenological method – a major influence of Derrida’s own thought. See, for example, <http://plato.stanford.edu/entries/husserl/> (the *Stanford Encyclopedia of Philosophy* article on Husserl)

⁴¹² “[CLS scholars] assumed *pretty much without question* [my emphasis] that they could adapt deconstructive techniques to critique unjust legal doctrines” – See “Deconstruction’s Legal Career” p.720

Madness Before Method:

“Deconstruction is not a method... or... a set of rules and transposable procedures...”⁴¹³

Jacques Derrida, “Letter to a Japanese Friend”

The question over the supposedly non-methodological character of deconstruction has been given many a cold shoulder over the years – especially by theorists on an “interdisciplinary mission”⁴¹⁴ (i.e. those hoping “to ‘apply’ deconstruction”⁴¹⁵ to seemingly fresh fields of study). Balkin follows suit:

“Derrida and his followers have always insisted that deconstruction is not a method, and that it cannot be reduced to a set of techniques. But this assertion is undermined by their actual practices of reading and argument. After all, if deconstruction was to be perpetuated in the next generation of graduate students, these students had to learn how to do it, and this meant that there had to be some set of skills that could be transmitted from teacher to pupil...”⁴¹⁶

Several points are worth flagging here. First of all, Balkin’s shoulder isn’t completely cold, which is to say that he is *at least trying* to engage with Derrida’s warning directly. Second-off, Balkin is (somewhat) rightly mindful of the tension between this warning and the tenacious recurrence of certain “repeatable and teachable”⁴¹⁷ techniques in Derrida’s work (e.g. “the inversion of hierarchies”⁴¹⁸). But from here, we run into trouble. “Graduate students... *had* to learn how to *do*” deconstruction, he says. Why did they *have* to? And on what grounds can we say that deconstruction is something which can be *done*?⁴¹⁹ These questions are especially pressing since Derrida has been so explicit in saying otherwise. For example, apart from the “Japanese Friend” quote above we might refer back to one of the conclusive quotes of my first chapter: “I am not asking them [i.e. the new philosophers/deconstructionists] to be like me”⁴²⁰ – does this not already hint at a more Wittgensteinian “spirit”⁴²¹ of deconstruction, one which values the openness of inspiration over the repressiveness of flat instruction?

⁴¹³ “Letter to a Japanese Friend” p.3

⁴¹⁴ Schlag, p.1651

⁴¹⁵ *ibid*

⁴¹⁶ “Deconstruction’s Legal Career” p.722

⁴¹⁷ *ibid*

⁴¹⁸ Balkin, p.5

⁴¹⁹ As I have claimed already, Derrida always refused such estimations: “deconstruction... does not await the deliberation, consciousness, or organization of a subject” – See “Letter to a Japanese Friend” p.4

⁴²⁰ *The Politics of Friendship*, p.42

⁴²¹ This is a reference to Wittgenstein’s wish that his work would “stimulate” the thoughts of others, not turn them into blind disciples. See Ludwig Wittgenstein, *Philosophical Investigations* (Wiley-Blackwell, 2009) p.4

To make this point clearer, we can return to the “first aporia”⁴²² of justice in Derrida’s *Cardozo* text. There is no justice, says Derrida, in the computerized application of a rule, which means that deconstruction – since it “is justice”⁴²³ – cannot simply be a matter of applying fixed rules or techniques (i.e. of “following a rule”⁴²⁴). But to give a thorough explanation of *this*, we could go back even further, perhaps even all the way back to Derrida’s inaugural use of the word “deconstruction” in the *Grammatology*:

“The ‘rationality’... which governs a writing thus enlarged and radicalized, no longer issues from a logos. Further, it inaugurates the destruction, not the demolition but the *de-sedimentation* [my emphasis], the de-construction, of all the significations that have their source in that of the logos... particularly the signification of truth.”⁴²⁵

I have emphasized the word “de-sedimentation” here because, as a non-symmetrical rival to deconstruction, it brings us – even in its most colloquial guise – so much closer to the anti-methodological character of its stablemate. To explain: sedimentation appears in nature as a consequence of river-flow, which is to say that it occurs as a (dare I say) *natural* happening rather than a subjectively-induced performance. The flowing river picks up and deposits material. *Picks up and* deposits. In other words, it must de-sediment (i.e. loosen and collect) for sedimentation to be possible. In conceptual terms, the river – the very metaphor which Heraclitus used for his philosophy of the “flux”⁴²⁶ – represents Derrida’s *différance*: the condition which ensures the aporetic simultaneity of metaphysics (i.e. sedimentation) and deconstruction/de-sedimentation. Deconstruction then, as de-sedimentation, is all about reminding ourselves that structures (truths, meanings, conventions, etc.) are merely incidental deposits which can just as easily be given back up to the “flux” from whence they came. And this means that nothing – not even a purposively anti-stasis “technique”⁴²⁷ – is any more secure from being sent back into motion than any other, which is to say that Derrida’s attempted affirmation of *différance* (i.e. as *arkhe*) can only retain its integrity by divorcing itself from *every-thing*; by following up every instance of unavoidable sedimentation with a fresh burst of “foundational”⁴²⁸ scrutiny.

⁴²² “Force of Law” p.961

⁴²³ *ibid*, p.945

⁴²⁴ *ibid*, p.961

⁴²⁵ *OG*, p.10

⁴²⁶ See, for example, *Radical Hermeneutics*, p.2

⁴²⁷ Balkin, p.2

⁴²⁸ In this sense, we might liken the self-reflexive character of Derrida’s thought to the most radical and relentless form of Cartesian skepticism. See Rene Descartes, *Meditations on First Philosophy* (Cambridge University Press, 1996)

As damning as it may seem, we should not count Balkin out on this point alone. On the contrary: we now have to ask whether, in the most pragmatic sense, Balkin's method-specific version of deconstruction might still be valued as the best available means of turning Derrida into an *influential* legal theorist. Leaving aside (for now) the question of whether this remains desirable in light of my notes above, we can suggest *at least* two senses of pragmatic worth behind Balkin's approach:

1. It's "revelatory"⁴²⁹ potential: If deconstruction is fundamentally against methodological rigidity (if it is, to quote Paul de Man, a "resistance to theory"⁴³⁰) then we might ask why (and by what justification) Derrida constantly relies on the same revelatory procedures? The answer, I think, is that they are the best way – in Derrida's eyes, and pending the discoveries "of the future"⁴³¹ – of opening up a text to its ghosts. In other words, perhaps Balkin is not misinterpreting Derrida's stance so much as he is realizing that, from a purely practical perspective, he needs a set of effective and proven tools (i.e. like Derrida's) through which to instigate deconstructive liberation.
2. It's capacity to overcome institutional resistance: As Pierre Schlag notes, "legal thinkers will often be annoyed and... react dismissively"⁴³² when things get too airy-fairy or philosophical. Derrida – given his mysticism, his preoccupation with aporia, his obscure and technical vocabulary, etc. – is a prime candidate for this sort of knee-jerk resistance, which means that his work is unlikely to have a meaningful (i.e. widespread/lasting) influence on the legal community unless it is carefully marketed. And for me, the most obvious marketing strategy to this end would surely look something like Balkin's – one which highlights and plays-off the more procedural/formal (i.e. conventionally *legal*) lines within Derrida's work.

Now: Derrida was always quick to emphasize the ever-pressing need for pragmatic trade-offs and sacrifices; for metaphysical economies, as I called them earlier. However, the trade-offs suggested above – as persuasive as they may be – are, for me, not quite enough to justify Balkin's highly selective "formalization"⁴³³ of deconstruction. There are two reasons for this:

⁴²⁹ Balkin, p.48

⁴³⁰ Paul de Man, *The Resistance to Theory* (University of Minnesota Press, 1986) – also, for a summary of some of de Man's key arguments regarding deconstruction/Derrida in this book, see Christopher Norris, "Law, Deconstruction, and the Resistance to Theory" (15 *Journal of Law and Society* 1988) pp.173 – 186

⁴³¹ By which I mean to reference Derrida's call to a "philosopher of the future" – See *The Politics of Friendship*, p.45

⁴³² Schlag, p.1632

⁴³³ *ibid*, p.1642

1. Although Balkin's version of deconstruction does possess a certain revelatory/de-sedimenting power *in itself*, this power can always be abused to serve the pre-determined preferences of a given interpreter. To explain: if deconstruction is purely (or primarily) technical, then it is solely (or primarily) a matter of which steps the interpreter follows. This, of course, stands in direct opposition to my claim that deconstruction is all about undertaking an ethical quest to "see things from the Other's"⁴³⁴ perspective, since we can *deliberately* shut out the "Other" (e.g. by using so-called "deconstructive techniques"⁴³⁵ to undermine an interpretation to which we are politically/morally opposed) while maintaining the utmost fidelity to Balkin's proposed methodology. And since (as I said in chapter two) it is the *moral/ethical* character of deconstruction which makes it so worthwhile, the *de-moralization* which comes with Balkin's subordination of mindset (i.e. the aspirational desire for raw hospitality) to method is also the *de-valuation* and *de-necessitation* of deconstruction itself.

2. To quote Pierre Schlag, "the risk [with Balkin's approach] is that, at the very moment that deconstruction is making its entry into the law, the legal thinker will once again situate his self outside the reach of deconstruction"⁴³⁶ by folding deconstruction cosily into the "self-indulgent traditional discourse"⁴³⁷ of law. In other words, when Balkin assumes that "deconstruction must... be altered, changed... [and] modified"⁴³⁸ to meet the "needs and concerns of the legal academy"⁴³⁹ he is effectively instituting a "violent hierarchy"⁴⁴⁰ in which law is privileged and protected against the foreign influx of *extra*-legal theories like deconstruction. The negative effects of this are at least twofold. First off, it *de-radicalizes* deconstruction (i.e. disrupts its quest from ethical openness) by creating an out-of-bounds shelter for the dearest assumptions of legal discourse; by assuming that law is a thoroughly stable institution which can subsume deconstruction as "just another... objectified resource-field for legal arguments."⁴⁴¹ Second-off, *it disconnects us from the fuller implications of Derrida's work as a philosophy and as the basis of an all englobing super-system*, the result of which is that we will be more prone to misunderstanding Derrida – even in terms of his more basic proclamations – because we are encountering him so far out of context.

⁴³⁴ "Transcendental Deconstruction" p.1169

⁴³⁵ *ibid.*, p.1137

⁴³⁶ Schlag, p.1640

⁴³⁷ *ibid.*

⁴³⁸ "Transcendental Deconstruction" p.1132

⁴³⁹ "Deconstruction's Legal Career" p.719

⁴⁴⁰ As Derrida says, every conceptual coupling is really a "violent hierarchy [whereby] one of the two terms governs the other" – See *Positions*, p.39

⁴⁴¹ Schlag, p.1637

The last few pages, by swinging from anti- to pro- to anti-Balkin, give us a good sense of the theoretical tightrope required to turn Derrida into an *influential* legal theorist. In many ways, our task is really to find an Aristotelian “mean”⁴⁴² between two modes of integrative failure, and Schlag – whose approach is evidently something of a kindred spirit to my own here – sums up these modes in a passage which I can hardly avoid quoting:

If engagement of the traditional discourse describes the project of deconstruction, then deconstruction can fail in (at least) two ways. First, deconstruction can fail because it becomes too challenging, too heretical, too much of a departure from accepted discursive practices. In this case, deconstruction can fail because the traditional discourse will identify and marginalize deconstruction as unintelligible, as absurd, as beyond the pale.

Deconstruction, however, can also fail in a second and perhaps more interesting manner... [it] can fail to engage if it becomes subsumed and co-opted by the categorical regimes of traditional legal discourse...⁴⁴³

For me, it is the latter mode (“failure by cooptation”⁴⁴⁴ as Schlag puts it, Balkin’s failure as I see it) which we should be most guarded against. There are, once again, two reasons for this. The first is that deconstruction will always – even in its most diluted and simplistic form – inflame the anti-philosophical impatience of most lawyers, which is to say that its integration will always fail, *at least to some extent*, on the grounds of its beyond-the-paleness. The second is that, even if we could downplay this beyond-the-paleness to the point where deconstruction really could have a “widespread/lasting” influence on the legal profession, we could not do so (in my opinion) without simultaneously killing deconstruction; without robbing it, as a vital point, of the radical ethics *of beyond-the-paleness* which makes it so necessary/valuable as a legal phenomenon. Sure, we might have achieved integration, but of what? Deconstruction? Or a toothless and therefore pointless substitute?

⁴⁴² See Aristotle, *The Nicomachean Ethics* (Wordsworth Editions Ltd, 1996)

⁴⁴³ Schlag, p.1636

⁴⁴⁴ *ibid*

Doing Justice to Derrida's Justice:

*“the encounter between deconstruction and justice... changed both parties”*⁴⁴⁵

Jack Balkin, “Transcendental Deconstruction, Transcendent Justice”

The ethical poverty of Balkin's techno-formal deconstruction was, of course, fundamentally undermined a mere three years later by Derrida's own declaration that deconstruction is not only ethical in character but “is justice” itself. Balkin's response to this is fascinating, because rather than caving under the weight of Derrida's paternal authority, he sticks to his guns, even being so bold as to suggest that he had “improved”⁴⁴⁶ deconstruction by tailoring it – transformationally – “to the critical study of law”⁴⁴⁷ and to the practical business of producing just results even if there was nothing necessarily “just”⁴⁴⁸ about deconstruction (i.e. as a method) itself. In a sense, Balkin's willingness to walk his own path – to disregard the wishes of his theoretical “father”⁴⁴⁹ figure – is very much in keeping with the anti-authoritarian “spirit” of deconstruction. The problem is, Balkin only manages to disregard Derrida's authority by misinterpreting the key terms of his *Cardozo* address, and specifically by missing the gap between the more colloquial connotations of the word “justice” and the “quasi-transcendental” sense in which Derrida uses it. Consider the following passage by way of example:

“[According to Derrida]... deconstruction leads to justice because it reveals the limitlessness of our responsibility. Nevertheless, a responsibility without limits is not the same thing as justice. We do not necessarily increase justice by increasing responsibility. Suppose a plaintiff is injured in a traffic accident. The plaintiff picks a name at random from the phone directory and sues this person as a defendant. We do not necessarily increase justice by holding this person liable for the accident. Justice... [on the contrary] is increased by eliminating her responsibility... the demand for an increase of justice is not necessarily the demand for increased responsibility. It is rather the demand for an appropriate apportionment of responsibility. This is what ‘just’ means – neither too much nor too little, but just the right amount of responsibility for each person...”⁴⁵⁰

⁴⁴⁵ “Transcendental Deconstruction” p.1196

⁴⁴⁶ *ibid*, p.1132

⁴⁴⁷ *ibid*

⁴⁴⁸ “...deconstruction itself does not have a politics, or rather it has only the politics of those who make use [my emphasis] of it... and deconstruction itself is not just, although it may be used to pursue justice” – See Jack Balkin, “Tradition, Betrayal, and the Politics of Deconstruction” (11 *Cardozo Law Review* 1989 – 1990) p.1623

⁴⁴⁹ See, for example, Derrida's obituary in the *New York Times* –

<http://www.nytimes.com/2004/10/10/obituaries/10derrida.html>

⁴⁵⁰ “Transcendental Deconstruction” pp.1153 – 1154

Balkin's mistake here – and this goes back to my header quote on the previous page – lies in his assumption that the word “justice” stands only for the sense of “appropriate apportionment” which was initially given it by Aristotle, and that, therefore, when Derrida relates deconstruction to justice, he must be confronting this Aristotelian conception as an external invader. If this was the case, then yes, the results would be a little absurd. But as per my second chapter, Derrida's conception of justice only relates to the Aristotelian conception insofar as it interrupts and suspends it, which is to say that it occupies a space prior to or above the necessity of apportionment. This means that what Balkin calls the “encounter between deconstruction and justice” is nothing of the sort, but rather a disinterment of the *extra*-ordinary justice which had always lived within the concept of deconstruction and which sets itself apart from the unavoidable repressiveness of general, metaphysical moralities.

For me, this mistake – in all its gravity – is but one manifestation of *the* mistake, *the* failure, which infects and skews Balkin's reading from the start. To put it simply: Balkin never gives *himself* up to the “spirit” of deconstruction, which is to say that he keeps his eyes closed, wired-shut even, to the freshness and counter-colloquialism of Derrida's texts. This is why he misses the in-built “ethics of deconstruction” – because he is *so* firmly wired into the justice-as-desert formula, and because he thoughtlessly imports it into Derrida's ethics as a point of self-evidence; a proper “kernel” of meaning. And yet, what else is deconstruction for – as a technique *or* as a “spirit” – except the cutting of these wires? Here we have Balkin's unforgiveable mistake: the failure to (*try* and) cut his own wires; to shake himself free of the conventional and the received and *experience something* (i.e. something fresh, an *event*) in Derrida's texts.

SECTION II: DUNCAN KENNEDY'S DECONSTRUCTIVE ACTIVISM:

Although I have suggested that Balkin's selective legalization of deconstruction reflects (and repeats) an almost endemic misappropriation by CLS scholars, there is a sense in which one such scholar – Duncan Kennedy – might be able to shake the charges. To the familiar reader, this may seem like a bit of a stretch, not least because of Kennedy's reliance on a seemingly step-based mode of "critique"⁴⁵¹ which is strikingly similar to Balkin's deconstruction:

"There are four steps to follow as one gets ready to do some critical theory within law... *First*: identify a *distinction* [my emphasis] that drives you crazy... *Second*: find in each half of the distinction the things, traits, aspects, qualities, characteristics, or whatever that were supposed to be located in the other half, and vice versa. This is the move classically called chiasmus, and practiced most notably and repetitively by Marx and then by Derrida... in *Of Grammatology*... *Third*: put the question whether the distinction you have just destabilized corresponds to a real division in reality on hold... and instead try to figure out why the people who use the distinction work so hard to maintain belief in it in the face of their own doubts... *Fourth*: trace the consequences of the distinction..."⁴⁵²

In a number of early essays (e.g. "Form and Substance in Private Law Adjudication"⁴⁵³ and "The Structure of Blackstone's Commentaries"⁴⁵⁴) Kennedy uses precisely this sort of "deconstructive"⁴⁵⁵ or critical analysis to undermine the idea of an "empirical, value-neutral"⁴⁵⁶ approach to legal interpretation. Of course, legal realists had already presented cogent arguments for such a conclusion, but Kennedy took things a step further by suggesting that judicial resolutions of formal/structural conflict within the law should be understood as artificial resolutions of a deeper and ultimately "inescapable [i.e. *irresolvable*] conflict between... individualist and communal values"⁴⁵⁷ within Western systems. In other words, legal decisions are *pre-determined* (for Kennedy) by deep but basically arbitrary (i.e. rationally unjustifiable) value choices, which is to say that they can always be undermined – or deconstructed, as Balkin would have it – by a willing and perceptive interpreter.

⁴⁵¹ See Duncan Kennedy, "A Semiotics of Critique" (22 *Cardozo Law Review* 2001)

⁴⁵² *ibid.*, p.1189

⁴⁵³ Duncan Kennedy, "Form and Substance in Private Law Adjudication" (89 *Harvard Law Review* 1976) pp.1685 – 1778 (Hereafter referenced as "Form and Substance")

⁴⁵⁴ Duncan Kennedy, "The Structure of Blackstone's Commentaries" (28 *Buffalo Law Review* 1979) pp.205 – 382

⁴⁵⁵ By which I mean "deconstructive" in the formal/technical sense of Balkin's account.

⁴⁵⁶ Andrew Altman, *Critical Legal Studies: A Liberal Critique* (Princeton University Press, 1990) p.109

⁴⁵⁷ *Law as Sacrifice*, p.152

Although this line – especially when coupled with the claim that legal “critique” is merely a matter of following certain pre-set “steps” – seems to place Kennedy firmly within the circle of CLS misusers, I want to argue that it can actually (*and should actually*) be read “as *dictum*”⁴⁵⁸ against an overriding “spirit” within Kennedy’s work: one which emphasizes de-reification and self-reflexivity *above every indication to the contrary*. As Pierre Schlag puts it:

“Kennedy has an absolute horror of reification - most particularly the reification of his own thought. Indeed, Kennedy strives valiantly to subvert the reification of his own thinking. Reading his work, it is hard to avoid the sense that he prefers motion to stasis, verbs to nouns, Sartre to Levi-Strauss, engagement to theory, contradiction to coherence and... politics to law”⁴⁵⁹

This “horror of reification” is not just a wariness of the “bodysnatchers”⁴⁶⁰ (i.e. those who carelessly quote other theorists to reap “some surface legitimacy”⁴⁶¹ for their own projects) – it is also the product of Kennedy’s deep-set belief that philosophy is a sort of subversion *in itself*, specifically in the sense that it tends to rationalize and quantify that which cannot be rationalized or quantified: the wild, unfiltered “experience”⁴⁶² which precedes philosophy *as its unattainable object*. We should recognize this type of anti-Hegelian/anti-authoritarian attitude from my notes on Derrida, and it is therefore unsurprising that Kennedy is every bit as prone to hyper-Cartesianism (i.e. fearless self-reflexion) as he is. In fact, these tendencies run so deep in Kennedy’s work that, in an oft-cited dialogue with Peter Gabel, he went so far as to abruptly “renounce”⁴⁶³ his most influential analyses on the grounds that their subsequent “turned-into-podness”⁴⁶⁴ (i.e. reification/distortion) had made them counter-productive in terms of their capacity to bring about genuine, intra-systematic change. This is what matters for Kennedy: not veridicality but *productivity* – “verbs [and] engagement.”⁴⁶⁵ And with this in mind, we can propose the following section-goal: to explain how the above attitude manifests itself in Kennedy’s positive prescriptions, and to consider the spirited “deconstructive-ness” of these prescriptions. Let us proceed.

⁴⁵⁸ Motoaki Funakoshi, “Taking Duncan Kennedy Seriously” (15 *Widener Law Review* 2009) p.238

⁴⁵⁹ Pierre Schlag, “Politics and Denial” (22 *Cardozo Law Review* 2000 – 2001) p.1135

⁴⁶⁰ “the bodysnatchers are always nearby, and you wake up and... the whole conceptual structure has been turned into a cluster of pods” – See Duncan Kennedy & Peter Gabel, “Roll Over Beethoven” (36 *Stanford Law Review* 1984) p.7 – Hereafter referenced as “Roll Over Beethoven”

⁴⁶¹ *ibid.*, p.16

⁴⁶² “I don’t want to construct a philosophy... I do want to talk about... *experience*” – *ibid.*, p.6

⁴⁶³ “I renounce the fundamental contradiction. I recant it, and I also recant the whole idea of individualism and altruism... these things are absolutely classic examples of philosophical abstractions which you can manipulate into little structures...” – *ibid.*, p.15... 16

⁴⁶⁴ A reference to the film, *The Invasion of the Bodysnatchers* – see *ibid.*, p.38 & p.54 (the latter for a brief explanation)

⁴⁶⁵ Kennedy’s work is largely based on the pursuit of his “own brand of oppositional or opportunistic politics” – see Joanne Conaghan, “Wishful Thinking of Bad Faith” (22 *Cardozo Law Review* 2000 – 2001) p.722

Kennedy's Existentialist Ethics of Action:

“When we ask about the way these primary choices are made and our deep premises adopted, the answer is simple: through authentic action justified by an existentialist choice”⁴⁶⁶

Costas Douzinas and Adam Gearey, *Critical Jurisprudence*

The best place to start with Kennedy, for me, is his reliance on Jean-Paul Sartre's existentialism – a philosophy which “implies an ethics”⁴⁶⁷ in the same anti-authoritarian vein as Derrida's. In its most basic sense, Sartre's ethics “requires that one never relinquish the [absolute] liberty”⁴⁶⁸ of self-determination. Such relinquishment – which Sartre refers to as “bad faith”⁴⁶⁹ – occurs when an individual comes to recognize a “specific role”⁴⁷⁰ (e.g. mother/Jew/“waiter in a cafe”⁴⁷¹) as more constitutive of their selfhood than their ability to transcend that role. This isn't to deny the “factual”⁴⁷² inevitability of role adoption, and it isn't to suggest that role-adoption is a bad thing *in itself*. Rather, Sartre's objection is against our coming to see a particular role as an *immoveable and definitive component of our Being* – a belief which Sartre criticizes for its denial of:

1. Our retained ability to act outside of our role (i.e. our freedom) and;
2. Our *personal* responsibility for our role-related actions as far as they are *freely chosen*;

In a sense, Kennedy's prescriptive theory of adjudication – perhaps best displayed in “Freedom and Constraint in Adjudication: A Critical Phenomenology”⁴⁷³ and *A Critique of Adjudication*⁴⁷⁴ – entails little more than a direct imposition of Sartre's ethical standards upon the judge. And for me, the directness of this imposition is at its most readily identifiable in the following excerpt from one of Kennedy's earliest (and most influential) texts:

⁴⁶⁶ Costas Douzinas & Adam Gearey, *Critical Jurisprudence* (Hart Publishing, 2005) p.235

⁴⁶⁷ *Law as Sacrifice*, p.155

⁴⁶⁸ *ibid*

⁴⁶⁹ Jean-Paul Sartre, *Being and Nothingness* (Simon & Schuster, 1993) pp.86 – 118

⁴⁷⁰ *Law as Sacrifice*, p.155

⁴⁷¹ This is probably Sartre's most famous example of an individual in bad faith: “He applies himself to chaining his movements as if they were mechanisms, the one regulating the other... he is playing... but what is he playing? We need not watch long before we can explain it; he is playing at being a waiter in a cafe” – See Jean-Paul Sartre, *Being and Nothingness* (Simon & Schuster, 1993) pp.101 – 102

⁴⁷² *Radical Hermeneutics*, p.1

⁴⁷³ Duncan Kennedy, “Freedom and Constraint in Adjudication: A Critical Phenomenology” (36 *Journal of Legal Education* 1986) pp.518 – 562 – Hereafter referenced as “Freedom and Constraint”

⁴⁷⁴ Duncan Kennedy, *A Critique of Adjudication* (Harvard University Press, 1997) – Hereafter referenced as “A Critique of Adjudication”

“...an instrumental theory of judging lies to the judge himself, telling him that he has two kinds of existence. He is a private citizen, a subject, a cluster of ends consuming the world. And he is an official, an object, a service consumed by private parties. As an instrument, the judge is not implicated in the legislature’s exercise of force through him. Only when he chooses to make his own rules, rather than blindly apply those given to him, must he take moral responsibility... By contrast, altruism denies the judge the right to apply rules without looking over his shoulder at the results... [the judge] must accept that his official life is personal...”⁴⁷⁵

Kennedy’s line here is straightforward. The judge who sees himself “as an instrument” is lying to himself in the sense that he does not actually become robotized or automatized in the supposed transition from personal to official life. And this means that, when a judge blindly applies a law which he feels to be abhorrent, or which he feels to be purposively ill-suited to the circumstances of the case at hand, he does not do so because he *is* role-bound, but because he has *chosen* to be role-bound, because he has *chosen* a commitment to the rule-of-law (in some sense or another) above all else. This then, is where Kennedy’s notion of “bad faith” kicks in – at the point where the judge denies his freedom and passes the buck of responsibility to the legislature.

So: by Kennedy’s account, judges should only make decisions for which they are willing to accept personal, ethical responsibility; as if they were the sole member of a fairly marginal legislature. Sometimes – when the judge’s “impression of the law”⁴⁷⁶ seems to coincide with what Kennedy calls his “sense of how-I-want-to-come-out”⁴⁷⁷ (his “HIWTCO”⁴⁷⁸ for short) – this will be easy. At other times – when the judge’s initial perception of the law has to be “worked and shaped”⁴⁷⁹ to align it with his “HIWTCO” – it will be difficult. And sometimes, no amount of “work”⁴⁸⁰ (i.e. no amount of “resourceful *legal argument*”⁴⁸¹) will get the job done, which is to say that the judge will run out of the “time and energy”⁴⁸² which he needs to persuasively justify his preference. The question is, has the existentialist judge (i.e. the judge striving to avoid “bad faith”; the responsible, non-robotic judge) reached an impasse with this last scenario, or is he still ethically obliged to follow his “HIWTCO”?

⁴⁷⁵ “Form and Substance” pp.1772 – 1773

⁴⁷⁶ “Freedom and Constraint” p.519

⁴⁷⁷ *ibid*

⁴⁷⁸ *Law as Sacrifice*, p.191

⁴⁷⁹ Costas Douzinas & Adam Gearey, *Critical Jurisprudence* (Hart Publishing, 2005) p.234; Kennedy actually uses a strikingly similar metaphor when describes the law as “a mass of wet clay that two opposing potters [i.e. legal teams] are each trying to shape before it hardens” – see “Freedom and Constraint” p.526

⁴⁸⁰ “legal reasoning is a kind of work with a purpose” – see “Freedom and Constraint” p.526

⁴⁸¹ *Law as Sacrifice*, p.195

⁴⁸² “Freedom and Constraint” p.528

Kennedy's answer is a little unclear, not least because it comes in an article (i.e. "Freedom and Constraint") where he speaks through a pseudo-fictional "judge-self"⁴⁸³ rather than as the "Duncan Kennedy we have come to know"⁴⁸⁴ through his academic work. However, there is at least one very telling moment in the closing pages of "Freedom and Constraint" when Kennedy – still speaking in the voice of his "judge-self" – complains of how "terrible"⁴⁸⁵ he will feel regardless of whether he follows an apparently "unbudgeable"⁴⁸⁶ law or a conflicting sense of preference. For me, this remark, as brief and passing as it may seem, actually represents the moment when Kennedy drops his mask and reveals (or at least hints at) his *real* position. In particular, it suggests that:

1. Kennedy is an existentialist-to-the-end. To explain: his "judge-self" might feel bound by a certain "felt objectivity"⁴⁸⁷ of the rule, but if he *really* believed this, *deep down*, then he would have nothing to feel "terrible" about. We feel terrible *when we feel responsible*, which is to say that Kennedy's "judge-self" still sees an open choice before him, even if that choice is buried in his subconscious to the point where he only *feels* it (i.e. without quite *seeing* it) as a vague sense of deflation.
2. Kennedy sees the indissoluble freedom of adjudication as a *potentially* tragic asset – hence the *inevitability* of his "terrible" feeling to come. If we look back to the start of his article, we can, I think, identify the poles of this tragedy as the "two objectives"⁴⁸⁸ of Kennedy's fictitious judge. On the one hand, the presiding judge can pursue the short-term objective of reaching his present-case preference – but if he is too gung-ho in this pursuit (i.e. if he sticks with it even when the law seems plainly against him) he risks an avalanche of negative consequences (e.g. public disapproval, having his decision overturned or ignored, etc.⁴⁸⁹) which may damage his power of influence and, in turn, his ability to pursue any longer-term "law-reform"⁴⁹⁰ objective. On the other hand, if the judge prioritizes *this* objective (i.e. the longer-term one) he may – on the basis of the consequential constraints described above, and *specifically* in the case of an apparent conflict between law and preference – end up turning his back on the needs and deserts of the real lives before him, thereby negating the moral drive of his short-term goal.

⁴⁸³ To be more precise: a "liberal activist judge-self [who] pursues social justice" – *ibid*, p.527

⁴⁸⁴ *Law as Sacrifice*, p.192

⁴⁸⁵ "Freedom and Constraint" p.557

⁴⁸⁶ *ibid*, p.561

⁴⁸⁷ *ibid*, p.560

⁴⁸⁸ *ibid*, p.521

⁴⁸⁹ For a fuller account of these consequences, see *ibid*, pp.527 – 528

⁴⁹⁰ In other words, one which seeks to "move the law as much as possible" in the judge's preferred direction – see *ibid*, p.522

Kennedy's position then, is something like this: judges should *use* the law – which is to say that they should use its doctrinal “manipulatability”⁴⁹¹ – to produce just outcomes; those which appear (on the balance of the various consequences/benefits involved) to be most in-tune with their *personal* sense of justice. In addition, the anti-authoritarian-ness which animates this prescription spills over into Kennedy's own, personal belief regarding the justness of legal outcomes:

“I see myself as a political activist, someone with the ‘vocation of social transformation’ as Roberto Unger put it. I see the set of rules in force as chosen by the people who had the power to make choices in accordance with their views on morality and justice and their own self-interest. And I see the rules as remaining in force because victimized groups have not had the political vision and energy and raw power to change them. I see myself as a focus of political energy for change in an egalitarian, communitarian, decentralized, democratic socialist direction...”⁴⁹²

We should not underestimate the importance of this paragraph. In fact, we should keep it right at the front of our minds, because it is – as we will see – crucial to assessing Kennedy's status as a deconstructionist. Let us now turn to this assessment; considering Kennedy's relation to the “spirit” of deconstruction on a detailed, point-by-point basis.

⁴⁹¹ Motoaki Funakoshi, “Taking Duncan Kennedy Seriously” (15 Widener Law Review 2009) p.247

⁴⁹² “Freedom and Constraint” p.521

Kennedy as a Deconstructionist, Point-by-Point:

- ❖ As Pierre Schlag notes, Kennedy's anti-authoritarianism – one of the most notable links between his ethics of “authenticity”⁴⁹³ and Derrida's ethics of deconstruction – is limited by a seemingly arbitrary hierarchization of authorit(ies); an ordering whereby some forms of role-subsumption are presumed to be more authentic (i.e. less worthy of the “bad faith” label) than others.
- ❖ To explain the above point: Kennedy is vehemently opposed to judges who see themselves as legislative instruments, but he supports those who see themselves as instruments of their own de-formalized sense of justice. The trouble is, if the measure of an individual's “bad faith” lies in the extent to which he has syphoned off his free potentiality to an external sovereign, then surely both sets of judges – by declaring their instrumentality *at all* – are equally guilty of it.
- ❖ However, Kennedy is far too wily to miss this point, and in *A Critique of Adjudication* – the site of his most unabashed reliance on Sartre – Kennedy reworks (or perhaps simply *clarifies*) his position by suggesting that a judge who is stubbornly committed to an abstract political project (e.g. along a set of party lines) is just as guilty of “bad faith” as one who presumes his unshakeable subservience to the legislature.
- ❖ This leaves us with something like the following prescription: judges should, as far as possible, make decisions on the basis of their honest and case-specific preferences; *not* under the authoritative weight of a (personal *or* official) project. Apart from restricting the judge's existential freedom, such projects – “universalization projects”⁴⁹⁴ as Kennedy calls them – are also *extra*-personally reductive, which is to say that they subordinate the singular, non-generalizable needs of litigants (i.e. the sense in which the “case-[is]-specific”⁴⁹⁵) against some self-assured notion of a greater good.

⁴⁹³ By which I mean to reference the Heideggerian concept which is so much akin to Sartre's notion of “bad faith” – See, for example, Martin Heidegger, *Being and Time* (Wiley-Blackwell, 1978) p.220

⁴⁹⁴ See, for example, *A Critique of Adjudication*, p.43

⁴⁹⁵ Kennedy is just as mindful of this problem in his early work. Consider the following quote: “I believe that there is value as well as an element of real nobility in the judicial decision to throw out, every time the opportunity arises, consumer contracts designed to perpetuate the exploitation of the poorest class of buyers on credit. Real people are involved, even if there are not very many whose lives the decision can affect. The altruist judge can view himself as a resource whose effectiveness in the cause of substantive justice is to be maximized, but to adopt this attitude is to abandon the crucial proposition that altruistic duty is owed by one individual to another, without the interposition of the general category of humanity [my emphasis]” (“Form and Substance” p.1777) – Perhaps this sense of connection “without... interposition” is equivalent to what Kennedy would later call “intersubjective zap” (“Roll Over Beethoven” p.10): “a vitalizing moment of energy... when the barriers between the self and the other are in some sense suddenly dissolved... [*not* in the sense of] reflective understanding” (“Roll Over Beethoven” p.54)

- ❖ Now: on the upside, this prescription does seem to get the judge out of “*Sartrean* bad faith”⁴⁹⁶ – at least in the sense that a “case-specific” preference will ensure the judge’s perpetual reinvention or modification of his (unavoidable) “life-project.”⁴⁹⁷ However, my aim is not to rate Kennedy as a Sartrean, but as a *Derridean*. And from this perspective, we can reignite Schlag’s initial criticism in the sense that *every preference* – including the most tentative, “case-specific” ones – will “predestine”⁴⁹⁸ the judge’s decision in a way which kills Derrida’s moral quest for openness; for the abyssal “madness”⁴⁹⁹ of the decision.
- ❖ The question then, is whether we can apply the deconstructionist label to a thinker who is so vocal, from the very start, in advising *against* the pursuit of the litigative “perhaps” (i.e. *the moment in which both parties have a fighting chance*) to which Derrida’s “Force of Law” points.
- ❖ In forming a response to this question, we must first note the character of Kennedy’s deviation from Derrida. I have already suggested (in the fourth point of this sequence) that Kennedy is concerned by attitudes which “objectify humanity and reduce it”⁵⁰⁰ to a homogeneous essence; what we might call “universalizing” attitudes. Moreover, Kennedy believes (at least by the time of his *Critique of Adjudication*⁵⁰¹) that there is no meaningful possibility of escaping such attitudes on a personal level, which is to say that we can never quite experience the intersubjective “connectedness”⁵⁰² (i.e. “zap”⁵⁰³) of which he speaks elsewhere.
- ❖ These concerns are also – as should be all too clear – the lifeblood of Derrida’s ethics, with Kennedy’s unattainable “zap” serving as a symmetrical stand-in for concepts like “unconditional” hospitality and the gift-without-reserve. In other words, there is no *palpable* break from Derrida on the level of Kennedy’s ethical *concern*, which suggests (surely) that the break is exclusively determinable in terms of *action*.

⁴⁹⁶ *A Critique of Adjudication*, p.56

⁴⁹⁷ “I already have, as part of my life as I’ve lived it up to this moment, a set of intentions, a life-project as a judge, that will orient me among the many possible attitudes I could take to this work” – See “Freedom and Constraint” p.521

⁴⁹⁸ Cf. Jacques Derrida, *The Postcard* (University of Chicago Press, 1987) p.4 – “I can foresee the impatience of the bad reader...the fearful reader, the reader in a hurry to be determined, decided upon deciding... *it is bad to predestine one’s reading, it is always bad to foretell* [my emphasis]...”

⁴⁹⁹ A “madness” which, in its wildest form, would require the judge to do the impossible: to turn his back on both rule and preference, and to affirm a freedom more radical than the existential freedom of which Kennedy speaks – a freedom *of the abyss*.

⁵⁰⁰ *Law as Sacrifice*, p.157

⁵⁰¹ As Johan van der Walt puts it, Kennedy’s *Critique* “is post-zap... in the sense of a loss of faith in the existence or possibility of zap” – See *Law as Sacrifice*, pp.161 – 162

⁵⁰² Cf. “Roll Over Beethoven” p.54 – “a sudden, intuitive moment of connectedness... a vitalizing moment of energy... when the barriers between the self and the other are in some sense suddenly dissolved...”

⁵⁰³ *ibid*, p.10

- ❖ To pre-orient an explanation of this break, we could mark out a certain (pivotal) distinction between two forms of Kennedy's anti-authoritarianism: one existential and one socio-political. The existential comprises Kennedy's distrust of the judge's self-perceived unfreedom – a distrust which (as we have seen) stops short of the radical openness proffered by Derrida. The socio-political, on the other hand, comprises Kennedy's own penchant for democratic socialism; his deep-set desire for the liberation and mobilization of the various “silenced, suppressed... [and] forgotten”⁵⁰⁴ voices in society.
- ❖ Far from enjoying a peaceful coexistence, these forms are mutually antagonistic in the sense that a die-hard commitment to one will likely jeopardize the pursuit of the other. This means that, when Kennedy tempers the first form (i.e. by affirming the judge's *deliberate* yielding to certain pre-determining preferences) it is only – at least on my reading – to pave the way for a more extreme commitment to the second (i.e. *for the sake of political action*).
- ❖ To clarify this point, we could reframe the Kennedy/Derrida distinction as follows: to quote Susanna Lindroos-Hovenheimo, the deconstructionist judge has a “twofold task when interpreting the legal text... [one] towards the text he is interpreting... [and one] towards the particular case which he is deciding.”⁵⁰⁵ But for Kennedy – and I am reading this as a fairly direct *implication* of his work – the first task must be de-emphasized insofar as it limits the capacity of the judge to deliver “real-world” justice to those before him.
- ❖ Now: on the one hand, “real-world” justice – or to be more precise, the deliverance of *pure* (i.e. purportedly indubitable) justice through a judicial decision/political arrangement – is precisely what deconstruction is supposed to throw into question. But on the other hand, as Derrida says himself, there is something so “radical”⁵⁰⁶ and so admirable about projects like Kennedy's – projects which “aspire to something more consequential, to *change* things and to intervene”⁵⁰⁷ in the legal/social field. The question then, is why Derrida identifies with and affirms a project which seems to be so much at-odds with his own.

⁵⁰⁴ Costas Douzinas & Adam Gearey, *Critical Jurisprudence* (Hart Publishing, 2005) p.236

⁵⁰⁵ Susanna Lindroos-Hovenheimo, “Retracing One's Steps: Searching for the Ethics of Legal Interpretation” (22 *International Journal for the Semiotics of Law* 2009) p.165

⁵⁰⁶ “Derrida himself approvingly likens such... critical legal activism to the most *radical* [my emphasis] form of deconstruction” – Florian Hoffman, “Deadlines: Derrida and Critical Legal Scholarship” in Goodrich, Hoffman, Rosenfeld and Vismann, *Derrida and Legal Philosophy* (Palgrave Macmillan, 2008) p.194

⁵⁰⁷ “Force of Law” p.931

- ❖ We can respond immediately with a second question: *is* Kennedy's project at-odds with Derrida's? Perhaps Kennedy is not ignoring the judge's "textual" responsibility so much as he is redefining its proper object, which is to say that – in the most radical sense – he is using the pliability of the interpretive process to deconstruct *society-as-a-text*; to ~~re~~-democratize (i.e. ~~re~~-open) society for the sake of its "spectrified"⁵⁰⁸ (i.e. marginalized, silenced, repressed, etc.) minorities.
- ❖ In other words, maybe (*just maybe*) Kennedy's approach is more a reinvigoration of the deconstructive "spirit" than a negation of it – a radicalization which, "in order to be consistent with itself, [refuses] to remain enclosed in [a] purely speculative, theoretical"⁵⁰⁹ realm of work.
- ❖ Of course, Kennedy's politics - *as politics* - still represses; still cuts. But then again, *so does deconstruction*.⁵¹⁰ Think back to Derrida's reading of Saussure: Derrida has to release and (in a certain way) *privilege* the counter-metaphysical side of the *Course*. Only then – in the light of this realignment, this temporary "overturning"⁵¹¹ – can the multiple voices of the text be heard in their atonal unison; *in their awkward, unabashed multiplicity*.
- ❖ Can we not also see Kennedy this way? For example: if Kennedy had presided over the infamous *Bakke*⁵¹² case, his personal politics would likely have led him to rule (as the court failed to) that universities are *always* justified in prioritizing a minority student admission over a non-minority one – regardless of whether the non-minority student holds a better academic record. Now without question, this is a repressive ruling – a ruling that privileges one factor (i.e. minority status) over another (i.e. academic achievement) and which cares little for the singular, irreducible needs of any non-minority student who loses out. However: can we not say that – in a certain way – this is repression *only* for the sake of liberation; for the sake of a distant day when such measures would be needless; for the sake of a disjointed, plural, *open* society to-come (i.e. a *justice-to-come*)?
- ❖ We can only let this last question linger. Does Kennedy go too far? Or is this *exactly* what deconstruction is meant to do – to take *action* (as "we must") in the name of liberation? In other words, are Kennedy's politics the politics of deconstruction?

⁵⁰⁸ My own (made-up) term, which I use here to reference the symbolism of *Specters of Marx* – specifically Derrida's portrayal of the ghost as the "Other" of metaphysics. See, for example, *Specters of Marx*, p.12

⁵⁰⁹ "Force of Law" p.931

⁵¹⁰ "Deconstruction... is not neutral. *It intervenes* [my emphasis]" – *Positions*, p.76

⁵¹¹ See *Positions*, p.38

⁵¹² *Regents of the University of California v. Bakke* – at

http://www.law.cornell.edu/supct/html/histories/USSC_CR_0438_0265_ZS.html

CONCLUSION:

So: I have suggested that deconstruction begs for the radicalization of its own “spirit” of *radicalization* – a skeptical, inquisitive “spirit” which I have related to some of the West’s greatest minds: Socrates, Descartes, Marx, Wittgenstein, etc. I have also suggested that this “spirit” is of an (anti-)ethical character, and that its pursuit is worthwhile because of this character. Finally – in the section just passed – I have suggested that Duncan Kennedy’s argument for (emancipatory) judicial activism can be taken, perhaps, as a radical/pragmatic form of legal deconstructionism; a form which (implicitly) reinvents the textual object of deconstruction so as to better serve the needs of *society’s* others.

However, Kennedy’s deconstruction, as suggested, comes at the cost of the judge’s dedication to the (written) legal text, and we should therefore receive it for *this failure* as well as for its relative success. And in this sense, Kennedy only pushes us back towards Derrida; back to his asking us – in *The Politics of Friendship* – not to get too comfortable in the present. Instead, we must look ahead, taking Kennedy’s gains and projecting them into the future – into the vortex of “the perhaps” in which their status (i.e. as progressions *or* as abominations) is anything but certain. This is how (in order to be at least quasi-faithful to Derrida) I have to finish: by saying perhaps – to Kennedy for sure, but also to myself. *This* is deconstruction. *Perhaps*.

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