
Summary: “Introduces the reader to the positions Derrida took in various areas of philosophy, as well as clarifying how deerrideans interpret them in the present” – Provided by publisher.

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List of Abbreviations (Works by Derrida)

LIST OF ABBREVIATIONS


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Derrida/Law: A Differend

PIERRE LEGRAND

1. Before Law

In his last recorded interview, Jacques Derrida reiterated to the newspaper, *Le Monde*, his abiding love for the French language (LLF, 22–26, 31–34, 50–52). By then, Derrida had long addressed the “link” between the “irreducible experience of language” and the idea of “commitment” (OHD, 60) such that his oft-renewed pledge of allegiance to French must be received as especially meaningful. Not only did Derrida envisage himself as situated in language—“[m]y own presence to myself has been preceded by a language” (DIS, 340)—but he regarded philosophy as, inevitably, also positioned in language (PTS, 374), a stance he held against the institutional attitude assuming “a transparent translatability and an absolute univocity . . . indifferent . . . to the multiplicity of languages” (LDM, 38). Having declared to his *Le Monde* interlocutor that “[t]he experience of language” is “vital” (LLF, 34), Derrida formulated his devotion to French in compelling terms: “I suppose that . . . I love this language like I love my life, and sometimes more than one or other native French love it . . . All the French of Algeria share this with me” (LLF, 37).

Since Derrida would not regard himself as French (EO, 146), his reference to his North African roots is hardly accidental. In the 1930s and 1940s, to express oneself in French in El Biah, on the outskirts of Algiers, was to speak the language that effectively dominated the local political, economic, and cultural life. As Derrida often explained, it was to use the language of the French colonizers of Algeria, a language that had come from the métropole, from the “Capital-City-Mother-Fatherland” (MLO, 41). It was, in effect, to adopt another language. Having famously framed the matter.
in aporetical terms—"I have only one language and it is not mine" (MLO, 25)—Derrida admitted that his "attachment to the French language" could be "neurotic" (MLO, 56). For example, he was possessed with a strong compulsion to lose his Algerian accent, which he regarded as a shameful badge of provinciality: "I am not proud of it, I make no doctrine of it, but so it is: an accent—any French accent, but above all a strong southern accent—it seems incompatible to me with the intellectual dignity of public speech" (MLO, 46). Though in his work he relentlessly decried every claim to purity and steadfastly maintained that even what seemed pure had always already been tainted, he styled his demand for "pure French" as "inflexible" (MLO, 46–47).

Having ascertained that he felt "lost, fallen, and condemned outside the French language" (MLO, 56), Derrida proclaimed: "I only ever write in French and... I attach great importance to this fact" (PTS, 416). He added: "I write in a language that I insist on keeping very French" (VB, 9). Having asserted his "monolingual obstinacy" (MLO, 57), his "desire for the idiom" (PC, 360), he made his position clear: "I am very monolingual, very Francophone" (CDD, 111).

Unsurprisingly, for Derrida translation could only ever happen "in the loose sense of the word 'translation'" (MLO, 56)—a fact that even "[t]he excellence of the translation" could not overcome (SM, 21). Maintaining that "'Peter'... is not a translation of Pierre" (PSY1, 198), Derrida held that "translation is another name for the impossible" (MLO, 57), "[a] debt that one [cannot] discharge" (PSY1, 199), which is no doubt why he readily referred to "quasi-translations" (WRT, 178) and argued that "for the notion of translation we will have to substitute a notion of transformation" (POS, 19). Ultimately, there could be no dialogue across languages (ALT, 85).

Indeed, Derrida saw cross-linguistic incommunicability as unsurpassable and proclaimed that "there are only islands" (BS2, 33). He exclaimed: "What guides me is always untranslatability" (DMV, 26).

Starting, then, from the fact that Derrida emphatically styled himself a French-speaking philosopher, given his decision "[to] try to assume all [his] Francophone responsibilities" (PM, 140) and thus to resist the prevalence of English or Angloization (TWJ, 218; OHD, 23), commencing, in other words, from where Derrida was, from where he read and wrote, from the language with which his rapport was "irreducibly idiomatic" (VB, 10), from the hither side of "the idiomatic limit" (OHD, 35), prompts me to enter two related findings as regards his engagement with "law," which I deem primordial.

First, as he took an interest in matters legal, Derrida would readily have thought in terms of "droit" and "loi," two French words that may be said, when taken jointly, to approximate, but certainly not replicate, the meaning of the English word "law." In his first text expressly devoted to law, Derrida thus addressed the Frenchness of the word "loi" (AL, 206). Secondly, to the extent that Derrida was at all concerned with "law," this English term, as a word that he could "never inhabit" (MLO, 57), could only have been uncanny and thus of limited significance to him. In fact, only through the diffractive prism of the French language could "law" have been open to
Derrida’s apprehension. Otherwise said, “law” could only ever have had meaning for him as a declension of “droit” or “loi” or of “droit”-and-“loi.”

It is simply not reasonable therefore to assume that an intellectual such as Derrida showing the kind of commitment to being Francophone, that a philosopher steeped in a language where the terms “droit” and “loi” inevitably carry semantic resonances characteristic of the nomothetic legal culture that bred them, would have found himself in a situation allowing him to ascribe unaffected (and unaffected) meaning to “law” as the typical product of an idiographic legal culture such as prevails, say, in England or the United States. In this instance, the French language is shown to act, to quote from Gayatri Spivak writing as Derrida’s translator, as much as a “right of way” allowing “law” to reach Derrida-the- Francophone in translation as a “barrier” preventing the English word from getting to its destination unimpeded – the issue of how much of the economy of the English term could ever be rendered in French inevitably remaining a matter of speculation (OGC, “Translator’s Introduction,” lxxxvi). There is, if you will, an unbridgeable “differend” following from inscription-in-language, which is inscription-in-situation. Lest one accept the co-presence of radically different linguistic singularities and come to them as sites for the exploration of incommensurable dissensus, one risks falling for glib assumptions harking back in one form or another to the specious idea of “universalism” – precisely the kind of highly underwhelming result against which Derrida’s work unceasingly seeks to warn us.

To apply oneself to Derrida’s comprehension of “law,” to probe the connections between Derrida and law, thus raises a seemingly insurmountable challenge for anyone wishing to elucidate what the conjunction masks as it brings not-together the inscription of a proper noun (“Derrida”) in the French language and that of a noun (“law”) in the English language. To be sure, one cannot speak of a history (“Derrida-and-law”), but only of histories (“Derrida” and “law”). Accordingly, one is summoned to address the discord between two entities that never actually met, that were never fully in one another’s co-presence, and that only ever dealt with one another through the French language acting as mediator. Even as they were in contact via French – to be understood as a third space where the negotiation between the protagonists was brokered – the interpretans and the interpretandum remained “absolutely irreconcilable,” no matter how much we as interpreters of Derrida’s texts show ourselves willing to “live them simultaneously and reconcile them in an obscure economy” (WD, 293). In any analysis of Derrida’s work on “law,” it must be appreciated that the word “law” is very much, as Derrida’s translators, Geoffrey Bennington and Ian McLeod, have put it, “compromise English” (TRP, xiv).

2. Then, Law

Derrida acknowledged that the word “law” can point to significance as it issues “from morality, from legality or from politics, even from nature” (AL, 192). Two of
his well-known texts are especially topical as regards the possible range of imperatives or doxas, “The Law of Genre” (AL, 221–252) and “Before the Law” (AL, 181–220). But my preoccupation is with “law” in the narrower sense, as it aims to concern itself with “the legal” (Goodrich, Hoffmann, Rosenfeld, and Vismann 2008; Legrand 2009; de Ville 2011).

Most commentators analyzing Derrida’s relationship with law in this specialized meaning have focused on the text of his renowned opening address at Cardozo Law School’s conference on “Deconstruction and the Possibility of Justice” delivered in October 1989 as “Force of Law: The ‘Mystical Foundation of Authority’” (FL), the French original having subsequently been published in the form of a book, Force de loi. However, Derrida himself observed that his work had often foregrounded law (FL, 7). Unwilling to confine his hyper-cognitive desedimentation and dehierarchization practice known as “deconstruction” to a forum that would be its “proper place,” Derrida in fact surmised that “[i]f, hypothetically, it had a proper place,” it would be “more at home in law schools, . . . than in philosophy departments and much more than in the literature departments where it has often been thought to belong” (FL, 8). For him, “architecture, and for similar reasons the law, are the ultimate tests of deconstruction” (CLW, 167). He maintained that “law is essentially deconstructible” (FL, 14), which is to say that he thought that there is nothing more deconstructible than law.

One reason for the special relevance of law to the deconstructive enterprise would have to do with the fact that “[d]econstruction is not, should not be only an analysis of discourses, of philosophical statements or concepts, of a semantics; if it is going to matter, it has to challenge institutions, social and political structures, the most hardened traditions” (PTS, 213). And law, as “a profoundly traditional practice”, as a narrative that “rests upon mountains of inherited tradition, preserved, referred and deferred to by highly developed institutions and practices of tradition-maintenance” (Krygiel 1986, 239, 256), as also “that [which] exposes us to our own blindness or the limits of our historicality” (Bruns 1992, 204), is an evident focal point for the deconstructive challenge, which is about exposing what lies within law about which law has lied (even to itself), that which law, for an array of institutional reasons, has “officially” sought to dissimulate or deny, to bury or repress. It is this hidden or other side of law that primarily concerns Derrida and that he means to capture through what I will style an inventive approach. Etymologically, “invention” refers simultaneously to discovery and creation. This notion thus appears least inapt to render the archive process at work as it involves at once disclosive and ascriptive dimensions: the analyst works with the law-texts that are there and reveals their meaning, but it is he who reads those texts in order to make them meaningful.

In the end, Derrida’s goal is to think thoughts that would be more thoughtful than the established thinking that traverses law under the name “positivism,” which, in its various guises, contends that all that counts as law is what has been posited as law, ultimately by the sovereign—“positivists,” the vast majority of legal
academics, being concerned, then, with legal technique and rationalization of legal technique: fostering “legal dogmatics” through the organization of the different rules adopted by the sovereign in the form of an orderly, coherent, and systematic representation; seeking to offer an interpretive commentary of the legal provisions in force that would be judicious and rational, that would explain their reach and potential, that would eliminate or reduce their apparent flaws, obscurities, gaps, or contradictions; pursuing fixity of meaning; and adhering to a brand of writing purporting to offer itself in an unproblematic and unsituated mode, seeking to deny any political commitment or personal investment (thus, wanting to show itself as being simply “there” rather than as having arrived where it is through processes of contestation with alternative practices). Through a strategy of invagination (a folding of law back on itself, as one can do with a glove) and by dint of a careful mode of phenomenological attention allowing for a letting-be of law as world, Derrida seeks to deconstruct the presence of the posited law by uncovering law’s other language, something which will then make it possible for one to hearken to law speaking a different language than the solely descriptive, exclusively propositional language that has consistently been heard by positivists united. Crucially, the other language that is the focus of Derrida’s analysis, which, pace positivism’s enclosing juricentrism, reveals the law’s constitutive and exuberant heterogeneity, is not outside the law. It is still emphatically law’s language; indeed, it is arguably more authentically law’s language than the thin or superficial linguistic configuration to which positivism has held law. It is hyper-law rather than counter-law. It is excessively legal.

Note that Derrida’s assertion is therefore that law conceals a difference within in that the possibility of another language-of-law is inscribed within law itself, which means that the other is within the self, that it is present though invisible, not unlike a phantom. Indeed, for Derrida there is a “logic of haunting” at work when it comes to a law-text (SM, 10). Because “[the law] ghosts” (SM, 169), since “it is spectral structure that makes the law” (PM, 89), law’s interpreters have to attest to this otherness and proceed to act differentially. While positivism has promoted law’s autonomy by branding, “metaphysics”-style, everything not pertaining to the positable and posited as “simple exteriority” (OGC, 167), Derrida wishes to account for law as heteronomy. Interpreters are required to make themselves suspicious of anything that would affirm itself along the lines of a pure, detachable, and indeed separate legal identity. Instead of incessantly asking themselves what law “is” (and answering tautologically that it is what is posited as law by the law through the law-making authorities positing the law), law’s interpreters must engage, if only for authenticity’s sake, in an exigent mutation of their thinking having law as its object. They need to elicit what law exists as or writes as or speaks as, that is, to show awareness of law’s constitutive nexus of relations to space, place, and situation, to time also, to reveal attentiveness to law’s embeddedness in a multiplicity of intensities and in a plurality of forces, to law as discourse encumbered with proliferating spatio-temporal
precedence. In other terms, they must abandon ontology and practice “hauntology” (SM, 10), that is, turn themselves into “hauntologists.”

There is at least one other reason why, according to Derrida, deconstruction would spontaneously focus on law. This concerns the fact that lawyers stand at the interface of an array of pivotal tensions whose problematic terms, even as they prove as contradictory as they show themselves to be indissociable, ceaselessly inform legal discourse. Consider the following dyads, which refer to oppositions that lawyers reflexively approach as binary structures not allowing room for the presence of a third term – unless, perhaps, under the auspices of a dialectical resolution à la Hegel – and that they have indeed come to regard as marking “natural” delineations: law/non-law, positive law/natural law, legislative text/judicial decision, interpretation/transformation, certainty/discretion, private/public, equality/individuality, and so forth. Arguably, though, as it frames itself through the various techniques from which it has become inseparable – it is definition, formulation, classification, composition, arbitration, adjudication, legislation – law must contend with a restlessness attendant upon the interaction between concepts or categories that simply does not feature the discrete contours, sharp distinctions, or clear edges that are sought and assumed by lawyers (whether in good faith or not). One of deconstruction’s main messages is precisely that concepts are in effect undelineated and categories unframed, that there are no unquestionable borders. The assumption of foundational alignments, claims Derrida, is at best an instantiation of wishful thinking, an illusion of reassuring certitude in which deconstruction cannot find solace as it denies “the transcendentality or logical superhardness of the barrier that marks off the conceptual purity of X from everything that is not-X” (Staten 1986, 18).

Bearing in mind the oft-repeated accusations of nihilism castigating Derrida’s perceived self-indulgence and deconstruction’s assumed whimsy, it is important to note that in Derrida’s work the value of law is “never contested or destroyed . . . but only reinscribed in more powerful, larger, more stratified contexts” (LI, 146). It is not, then, that Derrida’s legal analysis seeks to forget legal tradition, but rather that it proposes through an exacting anamnesis to recall what law-as-tradition has wanted to forget about itself as positivism has been denying all memory of the impurity of its condition while, whether out of arrogance or fear, chasing after the chimera of the distinctively legal.

Pursuing the re-presentation of the presence of law “in the form of a presence adequate to itself” (MP, 80), Derrida argues that “the [law] [is] not reducible . . . to the sensible or visible presence of the graphic or the ‘literal’ ” (POS, 55), that “[w]hether in the order of spoken discourse or written discourse, no element can function as a sign without referring to another element which itself is not simply present” (POS, 23–24), that “[t]his sequence results in each ‘element’ . . . being constituted on the basis of the trace within it of the other elements of the chain or system” (POS, 24). Accordingly, there is a built-in dimension to law, a “structural necessity that is marked in the [law]” (DIS, 223), which operates tacitly or at least
in a manner that cannot be graphically visualized in the way the words on a page can be. That “operator” – let us refer to it as “culture” – while not at all as readily conspicuous as expressed words, leaves a range of constitutive traces within law: historical, epistemological, ideological, social, political, economic, psychological, linguistic, and so on, each of them a singular trace, a different trace, all of them ascertainable traces showing that the law is not/cannot be autarkic or “[m] onogenealogical” (OHD, 10), that even as it is said to be founded on an unconditional point of departure, a textual “ground,” law remains but a self-posed, self-authenticating, and therefore contingent event. In effect, a law-text exists as an intricate configuration of traces remaining.

In the way in which he radically complicates law – there is an “excess of signifying possibilities preceding the text” (Johnson 1993, 29), entailing that no reader can ever hope to capture the infinity of law’s constitutive networks – Derrida adopts a resolutely anti-positivist stance. For him, there is infinitely much more to law than its positivity, such that no law can be deemed fully present on account of its positivity alone. Within law, within the positivity of law, as law, as the factual concretion of each law, there is a general economy of traces, “more than one specter” (SM, 24), so that law exists as cultural text, that it is always already plural, that it is unimaginable as anything that would not be plural, that it “has always already been penetrated” (WD, 249), that it features a “non-presence of the other inscribed within the meaning of the present” (OGC, 71). For Derrida, then, law-as-it-exists is haunted by discursive traces forming complex intertwining and, in effect, never-ending semiotic chains, and it is that that law’s-interpreters-as- hauntologists are to invent (etymologically speaking) as they revisit the law with an affirmed concern for its spectrality – all the while challenging received ideas like “presence” (no law is ever all “there” as the positable and the posited because the “graphy” is never all there is to law) or origin and finitude (there is no first or last trace since any trace, itself being constituted of traces, can always be traced further).

Because law is formed of such interconnecting textual networks, it cannot usefully be envisaged as having an ultimate foundation that would allow it to be apprehended as emanating from some vanishing point. Rather, law consists of an “endless multiplication of folds, unfoldings, foldouts, foldures, folders, and manifolds” (DIS, 270). One seeking to account for law cannot therefore usefully re-present it as the distinctively legal, as a pure entity. There is, to borrow from Hillis Miller, the “uncanny inherence” of the trace to the law (Miller 1979, 88). The array of traces haunting law entails that law exists as something other than “only law” or that law can only be law as “not-only-law.” On account of the trace, otherness is inscribed within the legal along the lines of a “virus” (CIR, 91). For a text to exist as law is, indeed, for it to harbor this otherness within (which is not to say that it finds itself submerged in otherness): legality is trace-affected. In fact, the trace is always already at home within its host; it is what Derrida calls “the stranger at home” (AP, 10). Because law exists – that is, writes and speaks – as an interface of heterogeneous traces (it exists
as the social writing/speaking legally, as the political writing/speaking legally, as the economic writing/speaking legally, and so forth—it exists, in sum, as culture writing/speaking legally), the law-text exists as what is spun or woven, which is what the words “textile” and “texture” in effect bring to mind (in Latin, a “textor” is a weaver and “texere” is “to weave”). Over against Hans Kelsen, arguably the most influential modern legal theorist, who claims that “[t]he law [counts] only as positive law” (Kelsen 1967, 56), for Derrida law does not count only as that which is posited and cannot reasonably be taken to be counting only as that which is posited. Derrida’s pressing invitation to lawyers is to re-think law’s “as-ness.”

As it emphasizes the significance of the trace, of that which survives structurally within law, of that which lives on (LO), Derrida’s deconstruction of law is affirmative. Indeed, “always, deconstruction is on the side of the yes, of the affirmation of life” (LLF, 51). As it redraws the space of effectivity of law, as it defends “a quasi-logic of the phantom which, because it is the more forceful one, should be substituted for an ontological logic of presence, absence or representation” (FL, 63–64). Derrida’s deconstruction confirms law in the richness of its texture. His deterritorialization is a reterritorialization. His impugment in the form of an intertextual infinitization disputing a protectionist closure, his challenge substituting an open-texturedness for “an imposition of fundamentally classical limits upon generalized textuality”, can thus legitimately be regarded as a manifesto for law (in the same way as his deconstructive readings of canonical texts can ultimately be regarded as attempts at saving those texts). Specifically, deconstruction is for law in the sense that it purports to salvage law-as-cultural-text, to rehabilitate through a meaning-producing principle of differentiation that which had always already been present (albeit on an alternative understanding of presence) yet which has been marginalized, devalued, discarded, rejected, and, yes, excreted by positivism because it has been deemed not to be genuine law.

3. Law French

Derrida’s lesson in the dismantling of positivism’s hegemonic distortions is powerful. Yet, his reading of law, even as it allows for “the non legal or pre-legal origin of the legal” as a primordial feature of what law exists as (PF, 153) and thus for a certain prioritization of otherness, and even as it manages to surmount the sterile Cartesian dichotomy between subject and object through the notion of (the invention of the) trace, finds itself being simultaneously indebted to some of the central tenets of positivism in significant ways. Perhaps this paradox befits a philosopher having so painstakingly foregrounded the aporia. But there is more. Though Derrida traveled widely, he studied and taught in France for over 50 years, a country where law continues to be framed in uncompromisingly positivist terms; intellectual order is prized above all else; analytical studies towards the realization of an exhaustive and

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coherent conceptual system are held in the highest regard; and "critical" work is largely reduced to the exposition of the state's laws, the dominion of the statute being unceasingly extolled and adjudication, apprehended along the lines of a seemingly necessary evil, almost just as incessantly scorned. On account of a specific mixture of Kelsen's *Pure Theory of Law*, Roman-inherited *scientia juris*, a centuries-old *mos geometricus* whereby law's leading exponents aim to put it on an epistemological par with geometry, not to mention a fixation on an uncompromising form of Ramism's methodological rigorism (after sixteenth-century Paris philosopher, Petrus Ramus), positivism is still the only configuration of the legal deemed worthy of consideration by French jurists.

Whilst Derrida did not train as a French lawyer, it is implausible that his understanding of law, especially as it took shape in the early years of his intellectual life (IJD), would have remained immune to the relentless dogmatism presiding over legal discourse in France. When it came to law, Derrida's determined Francophone-ism could not have escaped the very long reach of Frenchness-at-Law, no matter how cosmopolitan he was in many other ways. Even allowing for a substantial measure of nomadism, the idea of non-inscription in legal space and, indeed, of non-location in legal time is untenable: to be Derrida-the-Francophone-at-Law was to be Derrida-in-Frenchness-at-Law-in-the-Second-Half-of-the-Twentieth-Century. Without situating Derrida within French intellectual life in France at that time, within French legal culture, within French law, and therefore within French so-called "scientific" positivism, aspects of his understanding of law would become very awkward to justify. As I have mentioned, Derrida's signal contribution to the hauntology of law, to what law exists as, to the intrinsically heteronomic "as-ness" of law – it exists as culture speaking legally, as a cultural form incorporating a labyrinthine assemblage of traces, of "influences, filiations, or legacies" (PM, 176) – does not prevent him from considering law to be also that which has been authoritatively posited. There are two principal axes aligning a side of Derrida's thought about law along unmistakably positivist lines, about law-being-law-because-it-has-been-authoritatively-posited-to-be-law – although it must be observed again that, unlike Kelsen, Derrida never lent credence to purity as his "quasi-logic" of spectrality makes clear. Indeed, Derrida refutes "the sphere of pure, immune law, intact, not contaminable by everything we would want to purify it of" (FWT, 150).

The first manifestation of Derrida's positivism pertains to his distinction between law and justice. Although of ancient lineage, this idea has more recently been prominently expressed by Kelsen who, referring to "the dualism of law and justice", writes that "justice... must be imagined as an order different from... the positive law" (Kelsen 1967, 16). Derrida formulates this differentiation in terms idiosyncratically Derridean. His initial motion is to assert both that law is deconstructible and that it must be deconstructed.

For Derrida, law pertains to the realm of the calculable. It is about claim, obligation, and entitlement (FL, 16, 24), all assessed by a third party such as a judge, whose
task is to engage in a commutative/distributive exercise meant to be kept within strictly legal boundaries, within the ambit of an application of law. The deconstructibility of law emerges from the fact of its intrinsic embodiment in an "as" narrative, a constitutive network of traces whose voice has been relentlessly silenced on the altar of upper-case Law as master-signifier, as "the posited" which, thing-like, is deemed to be visibly, ascertainably "out there," objectively and exclusively identifiable through the deployment of the correct method. The necessity of deconstruction arises on account of this suppression itself, because of the institutionalization of a dominant position not allowing or out-lawing all other voices (that I have subsumed under the label "culture") -- and it does so precisely in the name of the justice that law cannot be, and can never even hope to be, as long as it does not acknowledge at the very least the structural presence of that which is not not-law (that is, the circuits of embedded traces) and the complexity of the interpretive negotiation that must follow from this constitutive fact (FL, 14).

Derrida's contrapuntal gesture is to insist that justice is undeconstructible -- indeed that it is the only concept that is resilient enough to withstand deconstruction (FL, 15). Being "irreducible in its affirmative character", justice is that which is "owed to the other" in the sense of a "gift without exchange" (FL, 25) -- an idea which is partly indebted to the work of Emmanuel Levinas (SM, 26; Levinas 1991, 72, 89). As one acknowledges "the necessity of thinking justice on the basis of the gift" (SM, 32), one observes that "[j]ustice is an experience of the impossible" (FL, 16). More must now be said about the idea of "impossibility."

If the other was ever present in the sense that access to it were to be possible not just as other but as such, the other would no longer be other since it would find itself deprived of its otherness. A threshold disjunction or interruption is therefore a necessary condition of possibility of otherness (SM, 25). It follows that any attempt to give justice to the other, to give the other his due, must have already failed. Even as one must never stop the giving, one must never acquit the debt. The desire for justice (FL, 16), though "indestructible" (WD, 194), must not be assuaged (thus does "[j]ustice ... always ha[ve] an eschatological dimension" [TS, 20]). As a desire for the impossible (GT, 29), it must never be inscribed "under the sign of presence" (SM, 32). There is "a madness" in this, which prompts Derrida to say that "deconstruction is mad about this kind of justice" (FL, 25). Note that for Derrida the impossible is "what is most undeniably real" (ROG, 84), the Lacan-inspired intuition being that the real is what resists symbolization, lies outside imagery, exists beyond language, "exceed[s] the ideation in which it is thought, thought of as more than I can think" (WD, 98). The impossible is the real because it is that which cannot be symbolized or imagined, which is impervious to any form of capture by language. Ultimately, the impossible can only be reached contrapuntally from the standpoint of the possible. It is the im-possible.

Law/justice. There, law as "the calculation of restitution," "calculable equality," "the symmetrizing and synchronic accountability or imputability of subjects or
objects ... that would be limited to sanctioning, to restituting, and to making law” (SM, 26). Beyond the realm of the posited, beyond any law, as a kind of meta-law, as a Law of law, as law’s other, justice as that which there is that is not there yet, that is always “to-come” (FL, 27), that is infinitely deferred, and as that which, if it exists, exists in itself, which “as the experience of absolute alterity is unrepresentable” (FL, 28). (On this account, Derrida’s justice distinguishes itself from any idea of “natural law” claiming to precede the posited while purporting to encapsulate both law and justice, that is, to enunciate law as justice and justice as law.)

Having sketched this differentiation between law and justice, Derrida swiftly proceeds, in typical deconstructive fashion, to blunt anything that might come across as too sharp a delineation. Thus, he observes that although heterogeneous to one another, law and justice are not immiscible. Indeed, he claims that their very heterogeneity requires their indissociability. There cannot be justice except through law and thus by way of legal determinations; there is, if you will, “the becoming-law of justice” (Saghafl 2010, 44). And there cannot be any becoming or any perfectibility of law, any transformation of law, that does not call upon an understanding of justice that will nonetheless inevitably exceed it (ROG, 150). For example, in every act of interpretation, even though interpretation depends on the established legal order that it interprets, there is a manifestation of justice suspending the law (and thus suspending the opposition between law and justice), “[t]his moment of suspense ... [being] always full of anxiety” (FL, 20) – which, to refer to the theme of “auto-immunity” that assumed prominence in Derrida’s later work, shows “the contamination at the very heart of law” (FL, 39), that is, how law is haunted by what “always carries beyond the law” (SM, 30), by a self-destructive drive. (Note that, still in contradistinction to the idea of “natural law,” Derrida’s justice neither assumes the effacement of the posited nor an opposition to it.)

The second salient strand of Derrida’s positivism concerns the fact that, aporetically, law and force are structurally imbricated into one another – specifically, force is endogenous to law while being precisely that exogenous threat that law is meant to counter. In Derrida’s words, “law is always an authorized force” (FL, 5). He adds: “[T]here is no such thing as law ... that does not imply in itself, a priori, in the analytic structure of its concept, the possibility of being ... applied by force” (FL, 5). In other words, while force is law’s other, law contains within itself the fact of force: “That which threatens law already belongs to law” (FL, 35). Drawing on a famous statement by Pascal (Pascal 1995, 26), Derrida shows how law cannot usefully be understood apart from the idea of “enforceability” (FL, 5) – a word he keeps in English in his French text.¹ Law cannot operate as law unless it is in force (that is, unless it has come into force) and unless it is enforced in a context where its coming-into-force or its enforcement call upon the mobilization of an institutional machinery pertaining both to the executive and judicial authorities by those who have a monopoly on legitimate/legal force. Derrida’s reference to law as “authorized force” is again reminiscent of Kelsen, who claimed that law cannot subsist without force,
that law is a mode of organization of force (Kelsen 1967, 61). But I propose to
address another sense in which, according to Derrida, law is force. This question
concerns language. Derrida refers to this form of force as “arche-violence,” the Greek
“arche” suggesting primordiality (OGC, 112).

Derrida’s basic point regards violence’s inherence to language. It revolves around
the very fact of articulation (OGC, 148), which is “appellatio[n],” “classification,”
and therefore “differen[tiation]” (OGC, 110). Any articulation, thus, is a determina-
tion. Now, any determination is violent given that, as an act of meaning-creation, it
operates in a moment of decision that, as is the case with any expression of decidabil-
ity, proves simultaneously inclusive and exclusive (as I decide to refer to this tree as
an oak, I include and exclude certain characteristics). Indeed, only a discourse that
would say nothing could eschew violence; but then it would make no sense to talk
of that as a discourse (WD, 147). Thus, discourse and violence are to be seen as
arising at once as facets of a single event. In Derrida’s words, “[t]he structure of
violence is complex and its possibility – writing – no less so” (OGC, 112). This entan-
glement is emphatically relevant to law (which is not to say that Derrida reduces
juridicity to an exclusive interaction between law and violence; as we know, he allows
for justice also).

No matter how much law wishes to circumvent violence, it simply cannot proceed
only as the inevitable unfolding of a mechanistic process that would deprive it of all
articulation. No matter how technical the legal decision to be made, how seemingly
automatic, any expression of law represents a determination and, as such, shows
itself to be violent. No expression of law can be other than the making of a determi-
nation, the taking of a position – which means that, ultimately, no determination
can be other than a reassessment of the tradition. Law is, intrinsically, discursive
positionality. Paul Ricoeur helpfully makes this point as follows: “[B]etween the least
contradicted rule and its application there always remains a hiatus” (Ricoeur 1966,
174). This hiatus must mean that there is always a moment of decidability, however
fleeting, during which a course of action is retained and another rejected, even if as
being wildly implausible. Though it is asserted as a mere re-enactment of a prior law,
the legal determination-as-position cannot escape being a decision against an alter-
native claim – in other words, it cannot avoid being a denial of an alternative source
of meaning. However, the fact is that a legal determination can never appeal to a
prior law to hide its constitutive character: there is no guarantor. Any purported
restatement of a prior law is, structurally, but an invention of it. Again, the Latin
“inventio” is at once discovery and creation: as the antecedent law is discovered, it
is created. The inherence of violence to law is aptly summarized in these terms: “All
law – unlike justice – is dependent on a positing (Setzung), and no positing manages
without violence” (Hamacher 1991, 1134). In as much as legal determination is
articulation, which it necessarily is, it embodies violence and indeed reiterates it
every time that another legal intervention takes place. To paraphrase Derrida, “[a]
[law] without violence would be a [law] which would occur outside the existent” (WD, 147).

Although it is a contrivance of law in every case, the legal determination cannot however be regarded as pure violence. Otherwise, it would amount to the utter obliteration of other horizons of meaning to such an extent that alternative standpoints could not even be recognized as arguments, as that which can be refuted. The holding of different positions would become impossible. Granted that the legal decision “belongs to the structure of fundamental violence” (FL, 38), the violence at work, then, is best understood as an “economy” of violence, that is, as modulated violence (WD, 117).

Crucially, to admit the inescapability of law-as-violence does not leave deconstruction bereft as dismantlement strategy. By calling into question – by putting to the question – the alleged foundations on which law claims to be established, by “interrogat[ing] . . . the origin, grounds and limits of our conceptual, theoretical or normative apparatus” (FL, 20), by lifting the “veil” (DIS, 316), deconstruction shows that law, even law, is discursively bound to the particular horizon of its writers or promoters and, ultimately, tied to the necessary perspectivism of egoity. By claiming that law is constructed out of an intricate “interpretable and transformable” textual configuration (FL, 14), deconstruction seeks to mitigate the violence that law-as-established-discourse would otherwise continue to perpetrate upon repressed voices in the name of its own reiteration. Again, it is not so much that deconstruction seeks to destroy law-as-established-discourse (FL, 56), but that it calls upon it to show responsibility in the face of the question put to it, in the face of others, and in the face of justice. Through deconstruction, law is thus given an opportunity to justify itself, to account for itself in a way that better approximates justice by doing justice to the situation, that is, for instance, to the repressed “others” within the situation, by recognizing them as independent sources of meaning (which is an acknowledgment of the others’ legal-being-in-the-world).

Even as it seeks to minimize violence by countering the aggression of law-as-established-discourse’s totalizing presence, it is the case that deconstruction is itself a form of violence. But it is not rabid rebellion seeking to overthrow law-as-established-discourse for revolution’s sake. It is violence deployed as unfolding, as interruptive reading, in order to avoid the kind of violence that would permanently silence all positions except one. Through a radical questioning of the alleged basis of law-as-established-discourse, deconstruction operationalizes a suspension of law’s programmatic agenda suspending the epistemological relevance of otherness. Thus, deconstruction “assumes the right to contest, and not only theoretically, constitutional protocols, the very charter that governs reading in our culture” (FL, 38). As it ensures that the self-identity of juridicity is neither assured nor reassuring, deconstruction, then, adduces an “infinite demand for justice” (FL, 19). It acts in “an impure, contaminating, negotiated, bastard and violent way” (FL, 56), doing “violence
against violence” (WD, 117), violence as counter-violence, but violence as vigilance. Pure non-violence being impossible (a point that takes us back to discourse necessarily being articulation), deconstruction is that which constantly challenges law in the name of justice for those who are currently marginalized (and never, of course, the kind of “bad violence” that “does not leave room for the other”) (TS, 92).

4. Law Other-Wise

Even Derrida’s concessions to the posited cannot detract from his main message to the effect that law cannot usefully be confined to law-as-the-posited, to “das Gesetzte” (observe that the German word to render “the posited,” “Gesetzte,” is so close to that which accounts for “statute,” “Gesetz”). In this regard, Derrida’s argument is that law inherently exceeds any automation or calculation. It surpasses any possible reduction to a presently posited that would be there as such (in Derrida’s words, “[law] transgress[es] the figure of all possible representation”: PSY1, 128). There is that within law, as constitutive of law, as law, “which in no case can be ‘posed’” (POS, 77), indeed “that by means of which every position is of itself confounded” (POS, 77). What undermines the posited by necessarily overcoming it is the trace, which is the inscription of otherness in law and as law. Now, the instantiation of the trace within the structure of law shows law as situated, located, embedded, factual. And law cannot escape the trace, its “idiomatic hereness” (AP, 52). The trace is an encrypted imprint of a past that is invisibly and imperceptibly present within law and as law, which positions law. It turns law into a position (even as there are those within law who wish to claim for it a “view-from-nowhere” status). The trace pertains to law “in the analytical structure of its concept” (FL, 6). When it comes to law, then, “there is the writing + something else that would be there in addition . . . something that the law cannot do without” (Legendre 1988, 295). The economy of the trace thus demands an interpretive passage from law-as-“das Gesetzte” to law-as-“die Setzung.” In other words, even though finite or posited, law and its meaning is incessantly in movement, which means that any idea of repose is demoted or, indeed, dis-posed of, reflecting a distrust in positing and in positivity and in positivists and in the positivist Zeitgeist, which is thus ex-posed as a position on account of the dynamic presence of the traces deposited in the law-text (and de-positing the law-text). In Derrida’s own words, “[p]ositive law does not make the law” (PC, 180). As much as the “Gesetzte” is wanted, and as much as it may appear that this is what is on offer, a close examination of law as it exists, of law-as-cultural-text, shows that in effect law can only generate a “Setzung” or, more accurately, “Setzungen,” that is, positions.

After Derrida, “die Setzung” haunts “das Gesetzte” as law is shown, as a matter of structure, to exist as a “ghost story” (FL, 44). Derrida’s key lesson is thus that, even if it can mark a convenient point of departure for legal interpretation, the
posed cannot constitute a term of arrival for analysis of law. In the process, law is made responsible on account of the recognition of the presence and of the work of the trace that is always already at home within law, so much so in fact that it inheres to law, that law exists as the trace, that the trace is as law. Needless to add, the array of traces makes for a concert of sometimes “disadjusted, disharmonic, disarranged, discordant” voices within law, but then “[i]s not disjuncture the very possibility of the other” (SM, 26)? Clearly, this situation is “difficult to think through, highly unstable and dangerous” (LI, 137). It is so in a way that law and law’s interpretation would not be if they were merely reposing on the posited and incessantly reposing the posited. Here, Derrida is inviting us to opt for affirmation, that is, assert the “on” (of the trace), the “living on” of the trace (LO), as endless resistance to positivism’s “no” (to otherness), as (inherent) supplement to it. For Derrida, to uphold the trace and attest to spectrality in order to account for law is to defend an “affirmation foreign to all dialectics” (MP, 27), a view of law otherwise and, crucially, other-wise, that is, that shows itself wising towards otherness. Along the way, Derrida does not accept that law would ever be posed in the sense that it would ever be in place, that it would ever be secure. To be secure would be, literally, for law to be without care, to be careless, which, by extension, would mean to be inconsiderate. And Derrida’s rambunctious project of complication as he goes about the task of close reading, his feverish exacerbation of law as interdiscursivity, as dynamic semiosis, his approach to interpretation as feast rather than fast, precisely wants law to care and be considerate. Negativity and affirmation: Derrida is asking one to sojourn in a non-resolution that can only be polyphonical and heterophonical – that, because “[n]o one, however special his point of vantage, can get past all those doorkeepers into the shrine of the single sense” (Kermode 1979, 123), can only listen to different traces and listen differently to traces. Again, though, even if there is no positivity, there is affirmation – and, specifically, affirmation of otherness, of an ethics towards otherness. Derrida’s appreciation of the law-text as heterothesis shows how “no deconstruction is . . . apolitical” (PFI, 212), how deconstruction is, in fact, “hyper-political” (de Ville 2011, 165).

5. For Law

Once one has become aware of how the French specificity of Derrida’s thought on law informs his understanding – in addition to the familiar Husserlian, Heideggerian, or Freudian insights – one can marshal this fact beneficially to animate a post-positivist, indeed a humanist, understanding of the legal. A key insight is supplied by Derrida himself as he observes that “a written sign contains a power of severance from its context” (MP, 377), that it is iterable (MP, 314–321). Aspects of his argument on the constitution of the legal, therefore, can/must be severed from their French moorings. Interestingly, Derrida’s basic guidance is formulated in terms of a
law: “My law, the one to which I try to devote myself or to respond, is the text of the other, its very singularity, its idiom, its appeal” (AL, 66). It is, then, this abiding motion in favor of recognition and respect that justifies the move away from the rendition of the legal in tightly formatted descriptive, propositional, terms—a reductionist narrative acting as an epistemological obstacle that brings to a halt, that silences, the movement of otherness incessantly at work within the law-text—towards an acknowledgment of law as the nexus of relations out of which it emerges, that it exists as. Qualifying his positivism in significant manner as he defends the necessity of thinking at once both the law and the trace, and of resisting thinking the trace as the non-law, Derrida equips us with a strategy allowing for a letting-be of law that is also a letting-emerge-the-world-as-law—“[t]he world [being] utterly, thoroughly legal, as [one] may not know it” (Bernhard 1982, 213). Through the trace, Derrida also shows us that law and place are inextricably enmeshed, that place is not mere static backdrop to legal meaning, but that it is a dynamic constituent of it (which is not to say that law cannot be constitutive of place in its turn). Law proceeds only in and through place, such that there is no aspatial law. For law, any law, to exist “as law,” it must stand forth in terms of an experience of place. It must dwell. Derrida’s claim, in short, is for Ordnung in contradistinction to the seemingly relentless drive for evermore Ordnung being promoted by positivists. To attend to law in this way is to honor one’s debt to the singularity of the law and to the difference across laws that there is. It is to agree to be interpellated by the law-text.

Derrida also heralds the transformation of the objective spectator that positivism claims law’s reader must be, and that it assumes he can wholeheartedly be, into a spectator—a conjuror of phantoms. Not, of course, a spectator who would be governed by a universal or transcendental reason that would somehow exist independently of culture, but one who is firmly emplaced. As I have indicated, the trace, that which ghosts, falls to be invented by its interpreter who, every time, as reader—situated-in-the-world-reading-a-trace-situated-in-the-world, surmounts any purported delineation between “subject” and “object.” In the absence of objectivity, the spectator must assume substantial responsibility for his normative (and fallible) interpretive elections. To accept that he is situated firmly within contingency is for the spectator to begin to take responsibility for his own perspectival appreciations. To refute objectivity is, in the end, the way for the spectator to avoid intellectual complacency—which is precisely what engulfs one when one stops thinking of one’s re-presentation as a re-presentation and begins to see it as being endowed with a transcendental quality that would make it objective (that is, when one turns a provisional private vocabulary into a permanent public one). Allowing for an ethical space—“[t]here is no ethics without the presence of the other” (OGC, 139–140), that is to say, without singularity and difference—Derrida’s thought enhances agency as it compels the spectator to defend his inventiveness in the course of negotiations with other spectators. Derrida’s programmatic challenge for the release of law from the shackles of positivism, then, is to the effect that everything we allege to know
regarding the law manifests itself within a strictly contingent cognitive scheme, indeed within a frame that is doubly contingent on account of the law's situatedness, on the one hand, and of the law's situated interpreter, on the other—a "double bind," an expression which Derrida presses into service, in English, in a variety of settings.

In core respects, Derrida's deconstruction therefore stands for an exultation of values such as indefiniteness and unmasterability, co-specification and unsynthesizability that positivists reflexively regard as practices of articulation pertaining to a cognitive predicament rather than as supplying propitious signposts for thought. Yet, even as there takes place a tracing of the law, positivism keeps a place, as it does in Derrida's own thinking. Indeed, one's goal cannot be simply to jettison statutes and judicial decisions as if they had nothing to do with law. Rather, the point is to approach them afresh, that is, to come to them obliquely. The idea is that no formulation of the posited law can safely escape a spectral interpretation and that all formulations of the posited law must therefore be envisaged through the traces that haunt the legal. Thus, the act of interpretation is being conducted as a matter of recognition and respect for the law as it exists (rather than as positivism has wanted it to be). In this regard, Derrida is adamant: "[Reading] . . . cannot legitimately transgress the text toward something other than it" (OGC, 158), for there is "the law of the other text, its injunction. its signature" (FPU, 262). And what is arguably one of the most significant features of any tracing exercise is precisely that in so doing the interpreter does not reach beyond the law and therefore does not disqualify himself as someone purporting to ascribe meaning to legal discourse. To be sure, as the traces attest to the instability/interstitiability/interlinearity of the text, as they are taking the text beyond stasis, they can be said to connote a "beyond" of the analytic limits of the hard copy, that is, suggest a hyper-text showing in interconnected fashion discourses embedded within discourses. Instead of a hardened text, then, we have a fluid text featuring, for instance, flexibility and recursivity. (Observe that fluidity can act as a powerful trope for feminist sensibility and show tracing as a feminization of the law-text.)

Even if one must now contend with the pulverization of the logos, with the clutter of the traces brought into the covenant of significance, with structural discontinuity and ambiguity, with the distress attendant upon the pre-emptive presence of the heterotrope and the heteroclite; even if the unsettling of the alleged ontological foundations of law through a more strenuous form of interpretation assorted with a new vocabulary must reveal law's duplicity (it does not exist only as the posited that it claims to be and its preference for order cannot enable it to dispense with traces); and even if the large-scale, yet anti-monumental, reorganization of knowledge on offer must lead one to renounce the idea of law's immediacy and force the painful acknowledgment of the dissembling of those who still want us to see in law the promise of an unyieldable absolute, the fact "that the law is deconstructible is not a misfortune" for it grants the law the kind of future—the chance—that can only be reserved for that whose meaning requires incessant negotiation and would
be denied to anything that thought it had arrived, that assumed it had been posed (FL, 14). As it allows us to wrest the legal away from what would be, silo-like, the ontologically closed domain of positivism and attest to law with greater specificity and enhanced integrity, deconstruction cannot, indeed, be regarded as a "misfortune" at all.

Note


References


