

Transcendental Deconstruction, Transcendent Justice

Jack M. Balkin

Introduction

A meaningful encounter between two parties does not change only the weaker or the stronger party, but both at once. We should expect the same from any encounter between deconstruction and justice. It might be tempting for advocates of deconstruction to hope that deconstruction would offer new insights into problems of justice, or, more boldly, to assert that "the question of justice" can never be the same after the assimilation of deconstructive insights. But, as a deconstructionist myself, I am naturally skeptical of all such blanket pronouncements, even - or perhaps especially - pronouncements about the necessary utility and goodness of deconstructive practice. Instead, in true deconstructive fashion, I would rather examine how deconstructionists' claims of what they are doing - which are often refused the name of "theory" or "method" - are uncannily altered by their encounter with questions of justice. In fact, as I hope to show, when deconstruction focuses on specific and concrete questions of justice, we will discover that deconstruction has always been something quite different from what most people thought it to be.

When I first began to write about deconstruction and law, I faced the task of translating deconstructive arguments in philosophy and literature to the concerns of law and justice. In the process, I proposed an understanding of deconstruction that enabled it to be employed in a critical theory of law. I fully recognized then that, in translating the insights of deconstructionists to the study of law, I was also working a transformation - for to translate is to iterate, and

iterability alters.¹ Not surprisingly, I was subsequently accused of misunderstanding both Derrida and deconstruction, and of emphasizing a logocentric version of deconstruction that misinterpreted Derrida's texts and subverted and undermined "true" or "proper" deconstructive practice.²

There is a certain irony to this accusation - the subversion of a putatively "orthodox" or properly performed deconstruction by a closet logocentrist. Yet it must be true, mustn't it, that there is a better and a worse way to engage in deconstructive argument? After all, deconstructive arguments are studied in departments of philosophy and comparative literature, and tests are given, and Ph.D. theses written, and degrees awarded, on the basis of this assumption. Aren't these tests graded as better or worse, and aren't these theses subjected to examination and sent back for revisions? How could one make sense of what deconstructionists do if there were not a better and a worse way to understand and perform deconstructive arguments? Surely it cannot be the case that "everything goes," where the determination of what is or is not a better use or understanding of deconstruction is concerned.

Nevertheless, I shall short-circuit this deconstructive quandary, which is potentially interminable. I plead guilty to the charge. If one is to adapt deconstruction to the critical study of law, the practice of deconstruction must, in fact, be altered, changed, modified, and, I would even say, improved. Certain features of Derrida's texts, for example, must be emphasized and others deemphasized and regarded as mistaken. Only in this way can deconstructive argument be made a useful tool of critical analysis. Only in this way can it escape the many criticisms of nihilism that have been leveled at it.

¹ See J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 Yale L.J. 743, 745 & n.8, 761 n.56 (1987) (comparing the account of legal deconstruction to a translation or alteration of it, and offering it as a dangerous supplement to Derridean deconstruction).

² See Pierre Schlag, *The Problem of the Subject*, 69 Texas L. Rev. 1627, 1695 (1991) ("This is not Derrida, and it is not deconstruction."); see also Pierre Schlag, "Le Hors de Texte, C'est Moi": *The Politics of Form and the Domestication of Deconstruction*, 11 Cardozo L. Rev. 1631, 1641-42 (1990).

How logocentric of me.

So, I freely confess, I am a traitor to deconstruction. Yet, as we know, "traitor" and "tradition" come from the same root: The traditionalist hands down, while the traitor hands over. In both cases there is a passing off, a changing. (Yet the ambiguities continue: one can pass off a baton, as in a relay race, or pass off counterfeit money or goods.) The traitor-traditionalist distinction, with all of its accompanying uncertainties, is surely one of the most interesting for a deconstructionist.³ There is an important sense in which I am continuing in the tradition of deconstructive argument even as I am insufficiently deconstructive by the standards of a purportedly "pure," "orthodox," "properly performed" deconstruction. If every traditionalist is also, in some sense, a traitor to what she preserves in the name of tradition - by altering it, freezing it in time, sucking the life out of it, and substituting the dry husk of unthinking imitation - might not every traitor also be, in some sense yet to be determined, a traditionalist of the first order?

As a traitor, however, I have an even greater satisfaction. As time has passed, Derrida himself has followed my perfidy. He has left the ranks of his apostles and joined the ranks of the apostates. His encounter with justice has brought him to many of the same conclusions about the meaning and use of deconstruction I have offered. So perhaps I was following him all along, in following the direction in which he later followed me. Perhaps I agreed with him all along, in agreeing with that with which he would later agree. Who is the traitor, and who the traditionalist now?

A key deconstructive idea is that iterability, or the capacity to be repeated in new contexts, results in change. Nevertheless, in examining how repetition is linked to change, we must always keep in mind two possible explanations, two different paths of explanation. The first claims that what we understand later really is different from the original and is consequently an improvement or a falling away. The second claims that this repeated thing has really always been the same; the new context has merely altered our understanding of it, with a consequent improvement or falling away of that understanding. Often it is very difficult to tell which claim we are making. It is often

³ For a discussion, see J.M. Balkin, Tradition, Betrayal, and the Politics of Deconstruction, 11 Cardozo L. Rev. 1613, 1619-20 (1990).

unclear whether we are traditionalists, who preserve the old in new guises and new understandings, or betrayers, who offer only an altered, imperfect substitute. After all, everyone is familiar with sectarian disputes between competing groups of believers - whether religious, political, or academic - who offer competing interpretations concerning the common object of their belief, branding their opponents as traitors while describing themselves as keepers of the faith.

It is this type of perfidy (which is at the same time a form of faithfulness), this alteration of deconstruction (which is at the same time not an alteration) that I would like to discuss here.

Of course, a deconstructionist must have texts to work with, texts to make her argument with. I take as my texts three writings by Jacques Derrida. The first is a lecture he gave in 1989 at a conference at the Cardozo Law School on "Deconstruction and the Possibility of Justice." This talk was later published under the title Force of Law: "The Mystical Foundation of Authority".⁴ In this address, he answered critics who accused deconstruction of nihilism or (perhaps worse) political quietism and complete irrelevance to questions of justice. Derrida replied that, far from failing to address the question of justice, deconstruction had addressed little else.⁵ As evidence he listed a series of recent articles he had written that, in his opinion, concerned questions of justice.⁶

Of course, from a deconstructionist's standpoint, what might be most interesting about this list are the articles that Derrida did not choose to mention. One might think that these articles were withheld because they were wholly irrelevant to questions of justice. After all, in several of the writings that Derrida does mention, it takes quite a

⁴ Jacques Derrida, Force of Law: The "Mystical Foundation of Authority," 11 Cardozo L. Rev. 919 (1990) (Mary Quaintance trans.). A slightly different version of this essay appears in Deconstruction and the Possibility of Justice 3 (Drucilla Cornell et al. eds., 1992).

⁵ Derrida, *supra* note 4, at 935.

⁶ Id. at 929 (listing various writings on Levinas, Hegel, Freud, Kafka, Nelson Mandela, and the Declaration of Independence).

stretch to see them as directly addressing the question of justice.⁷ A fortiori, the articles not mentioned must be even more divorced from these issues. Yet no deconstructionist worth her salt would accept such an obvious attempt at marginalization so readily; it would be like waving a red flag in front of a bull. Let us look, then, at the discarded, irrelevant parts of the Derridean corpus. Among them we find two substantial pieces on the controversy surrounding Paul de Man's wartime journalism.⁸

The basic story surrounding this scandal is by now well known.⁹ Paul de Man, Sterling Professor of Comparative Literature at Yale University, was a close friend of Jacques Derrida and one of the central figures in the development of literary deconstruction. He died in 1983, a beloved and respected teacher and scholar. In 1987, a young graduate student doing research for a thesis on de Man discovered articles de Man had written between 1940 and 1942 for the Belgian newspaper *Le Soir*. During the Nazi occupation of Belgium, *Le Soir* was seized by pro-German forces and used as a mouthpiece for pro-Nazi propaganda and antisemitic statements.¹⁰ De Man wrote for *Le Soir* during that period. He was still in his early twenties. Some of his articles were exclusively literary, while others were in various degrees concerned with politics. Moreover, as Derrida himself puts it, the "massive, immediate, and dominant effect" of de

⁷ See, for example, Jacques Derrida, *Glas* (1974), whose subject matter has never precisely been determined.

⁸ Jacques Derrida, *Biodegradables: Seven Diary Fragments*, 15 *Critical Inquiry* 812 (1989) (Peggy Kamuf trans.) hereinafter Derrida, *Biodegradables*; Jacques Derrida, *Like the Sound of the Sea Deep Within a Shell: Paul de Man's War*, 14 *Critical Inquiry* 590 (1988) (Peggy Kamuf trans.) hereinafter Derrida, *Paul de Man's War*.

⁹ For various accounts, see David Lehman, *Signs of the Times: Deconstruction and the Fall of Paul de Man* (1991); *Responses: On Paul de Man's Wartime Journalism* (Werner Hamacher et al. eds., 1989) hereinafter *Responses*.

¹⁰ See Werner Hamacher et al., *Paul de Man, a Chronology, 1919-49* in *Responses*, supra note 9, at xiii. Members of the Belgian public derisively referred to the captured institution as *Le Soir vole* ("The Stolen Evening"). Id.

Man's political articles conformed to the "official rhetoric ... of the occupation forces."¹¹ And one article in particular, *The Jews in Contemporary Literature*,¹² is overtly antisemitic.

The revelation of these writings created a furor in the academy over de Man's posthumous reputation, the relation of his past writings to his later academic work, and the possible relationship between de Man's wartime activities and the normative claims - or lack of normative claims - of deconstruction. Many silly and intemperate accusations were leveled on all sides of this dispute. In the midst of this controversy, Derrida wrote two substantial articles. In the first, *The Sound of the Deep Sea Within a Shell: Paul de Man's War*,¹³ he defends his old friend - and deconstruction itself - from what he regards as unjust accusation, and he tries to place de Man's life and works in their proper perspective. In the second, *Biodegradables: Six Literary Fragments*,¹⁴ he responds to six critics of the previous essay. Here he defends not only de Man and deconstruction, but also himself, from what he regards as unjust treatment and unfair criticism.

One can agree or disagree with Derrida's particular stance on these issues. Nevertheless, it is hard to argue that these articles do not raise, on every line of every page, issues of justice, responsibility, and fair treatment. Their major concerns are how one should judge de Man, deconstruction, and Derrida himself, and how various critics have fairly or unfairly treated them. The question of responsibility overhangs the entire discussion - responsibility for the Holocaust, responsibility for collaboration, responsibility for one's silence about collaboration, responsibility in reading the work of another person, and responsibility in judging another's life and works.

¹¹ Derrida, *Paul de Man's War*, supra note 8, at 607 (emphasis omitted). Derrida offers the same formula in Derrida, *Biodegradables*, supra note 8, at 822, as proof that he was not underplaying the malignancy of de Man's writings.

¹² Paul de Man, *Les Juifs dans la Litterature Actuelle*, *Le Soir*, Mar. 4, 1941, at 1.

¹³ Derrida, *Paul de Man's War*, supra note 8.

¹⁴ Derrida, *Biodegradables*, supra note 8.

Posed in the often byzantine setting of academic disputes and academic reputations, these articles concern the most concrete questions of justice and raise the most impassioned prose from Derrida. Indeed, the second article borders on the polemical. They stand in marked contrast to the relatively abstract pronouncements on justice and responsibility Derrida offers in his Cardozo Law School address, *Force of Law: The Mystical Foundation of Authority*.

Thus, it is all the more puzzling that Derrida did not think to list these essays in his catalogue of examples of deconstruction's encounter with justice. Derrida could hardly have forgotten them, for they had only recently been published when he gave his address at Cardozo. Nor could he have expected that his audience would not know about them, for they were published in a well-known literary journal; indeed the first article had attracted considerable controversy and led to a symposium of critiques in which the second appeared as a response.¹⁵ Nor can one object that these two articles do not discuss deconstruction or employ deconstructive techniques. In fact, both possess interesting and sustained discussions of deconstruction and its place in the academy, as well as many passages explicitly offering and rejecting possible connections between deconstruction and justice, or between deconstruction on the one hand and fascism or totalitarianism on the other.

Perhaps one might think that these articles are not worthy of mention precisely because they are so concerned with a particular event, and therefore lack universalizability. Yet, as Derrida himself reminds us in his Cardozo address, justice is always addressed to events and persons in all of their singularity.¹⁶ What better way, one might think, to discover what Derrida really thinks about justice than to study his remarks concerning an issue about which he feels the most deeply, which gets him, as the saying goes, "where he lives"? We often witness people speaking abstractly, in high sounding phrases, about what is just and what is good. Yet, one might believe,

¹⁵ See Symposium, On Jacques Derrida's "Paul de Man's War," 15 Critical Inquiry 765 (1989).

¹⁶ Derrida, *supra* note 4, at 949.

we only see what they really think about these matters when they are faced with a concrete question of justice that truly affects them. So I read these three texts together - the abstract disposition on justice with the more concrete discussions of the de Man controversy. The first is sedate, the others brimming with anger and anguish. The relationship of deconstruction to justice lies somewhere in the conversation between them.

Of course, there is a sense, too, in which even the more abstract Cardozo Law School address, which nowhere explicitly mentions de Man, is motivated by and concerns the de Man controversy. For by the late 1980s this scandal had raised anew accusations that deconstruction was the easy refuge of nihilists or those without values or conscience, that a doctrine that found complications of meaning in all texts was tailor-made for collaborationists with evil, unscrupulous opportunists, or simply weak-willed souls unable to commit to a just course of action when faced with obstacles or uncertainties. Thus, when Derrida rose to address the audience at the Cardozo Law School in the fall of 1989 - which was also the fall of the 1980s - it was all the more important to establish that deconstruction was not, nor had it ever been, nihilistic, opposed to justice, or even (God forbid) unconcerned with justice, but that it was, quite the contrary, fully committed to the critique of injustice and the creation of a more just world. Deconstruction, Derrida hoped to convince his audience, could properly be used for beneficial purposes of social and cultural critique, and indeed, it was perhaps most correctly used for such purposes.

Yet, in rising to respond to these critics, just as he had previously responded to the critics of de Man, Derrida offered examples of deconstructive argument that were not wholly consistent with all of his previous deconstructive writings. They are, however, consistent with the practice of deconstruction that I have advocated. This is Derrida's perfidy, his betrayal of deconstruction. Yet it is a betrayal that I heartily endorse.

In these essays, Derrida offers four different statements of the possible connection between deconstruction and justice. First, deconstruction can call into question the boundaries that determine who is a proper subject of justice -that is, to whom justice is owed.

Second, deconstruction demands "a responsibility without limits."¹⁷ Third, deconstruction requires one to address the Other in the language of the Other. Fourth, deconstruction is opposed to all intellectual forms of totalitarianism, and hence, by analogy, to political totalitarianism as well.

Like Derrida, I am also concerned with deconstruction's possible relationship to justice. In this essay, I offer an extended critique of Derrida's views in order to make two basic points about the relationship between justice and deconstruction. First, Derrida offers deconstructive arguments that cut both ways: Although one can use deconstructive arguments to further what Derrida believes is just, one can also deconstruct in a different way to reach conclusions he would probably find very unjust. One can also question his careful choice of targets of deconstruction: One could just as easily have chosen different targets and, by deconstructing them, reach conclusions that he would find abhorrent. Thus, in each case, what makes Derrida's deconstructive argument an argument for justice is not its use of deconstruction, but the selection of the particular text or concept to deconstruct and the way in which the particular deconstructive argument is wielded. I shall argue that Derrida's encounter with justice really shows that deconstructive argument is a species of rhetoric, which can be used for different purposes depending upon the moral and political commitments of the deconstructor.

Second, and equally important, Derrida's use of deconstructive argument to critique existing arrangements as unjust presumes belief in an idea of justice that may be indeterminate but is not reducible to any conventional notion of justice. Derrida's arguments simply make no sense unless he is relying on a transcendent idea of justice, which human law only imperfectly articulates. Moreover, I shall argue, he admits this, albeit only tentatively and haltingly, in his more recent writings on deconstruction.

Derrida's resistance to such a recognition is altogether understandable. A postulation of transcendent human values brings us a long way from the philosophical conception Derrida offered in

¹⁷ Id. at 953.

Of Grammatology.¹⁸ There he argued against the very existence of a "transcendental signified" and made his famous statement that "there is nothing outside of the text."¹⁹ Nevertheless, I believe that a transformation of deconstruction becomes inevitable when deconstructionists begin to confront real questions of justice and injustice. If deconstruction can have salutary effects for the study of legal theory, there are equally salutary effects that law can have for deconstruction. So, I argue, when we try to make sense of Derrida's arguments about law and justice and read them charitably to avoid confusing and self-contradictory interpretations, we arrive at an important variant of deconstructive practice, which relies on the existence of human values that transcend any given culture. For want of a better name, I shall call this type of deconstruction transcendental deconstruction. It is the form of deconstruction I have advocated in my own work.

A belief in transcendent values is often associated with the tradition of Platonism. However, the view I am concerned with is not the Platonism of the Republic.²⁰ It does not assert the existence of eternal and unchanging Ideas that exist in a Platonic Heaven. It does not postulate normative standards of determinate content. Rather, it is concerned with those indeterminate values or urges located in the human soul, which human beings articulate through positive morality and cultural conventions, and which nevertheless always escape this articulation.

Surprisingly enough, the origins of this nonplatonic transcendentalism also lie in Plato's work. Plato came to a similar view after he had written the Republic, in later dialogues like the

¹⁸ Jacques Derrida, *Of Grammatology* (Gayatri C. Spivak trans., Johns Hopkins Univ. Press 1976) (1967).

¹⁹ Id. at 158 (emphasis omitted).

²⁰ Plato, *Republic*, in *The Collected Dialogues of Plato* 575 (Edith Hamilton & Huntington Cairns eds., Bollingen Foundation 1961) hereinafter *Collected Dialogues* (Paul Shorey trans., 1930).

Statesman,²¹ Sophist,²² and particularly the Laws.²³ He abandoned his earlier dreams of political perfection for a more democratic, skeptical vision.²⁴ By the time of the Laws, Plato realized that our idea of justice is inchoate and indeterminate. It is a mere skeleton; it must be fleshed out in the world of culture. For this reason, we must construct a conception of justice using our human values and intuitions. T.K. Seung has called this approach "platonic constructivism"; he argues that it is a substantial modification of the more familiar Platonism we recall from the Republic.²⁵ But Seung's constructivism has a curious consequence: The articulation of our values in human culture, law, and convention makes these concrete articulations different from the inchoate values they articulate. It is this gap or discrepancy that deconstructive argument seizes upon as the basis for its critique. The essence of what I am calling transcendental deconstruction, then, is to note the interval between the human capacity for judgment and evaluation that inevitably and necessarily transcends the creations of culture, and the prescriptions and evaluations of that culture, which in turn articulate and exemplify human values like justice. It is in this sense that transcendental deconstruction depends, as Platonism itself does, on a conception of values that "go beyond" the positive norms of culture and convention. But these transcendent values do not come to us in a fully determinate form; they need culture to turn their inchoate sense into an articulated conception. And these transcendent values do not exist in an imaginary Platonic Heaven; they exist rather in the wellsprings of the human soul.

²¹ Plato, Statesman, in Collected Dialogues, supra note 20, at 1018 (J.B. Skemp trans., 1952).

²² Plato, Sophist, in Collected Dialogues, supra note 20, at 957 (Francis M. Cornford trans., 1935).

²³ Plato, Laws, in Collected Dialogues, supra note 20, at 1225 (A.E. Taylor trans., 1934).

²⁴ Here I draw on the excellent discussion in T.K. Seung, *Intuition and Construction: The Foundation of Normative Theory* 175-211 (1993).

²⁵ T.K. Seung, *Kant's Platonic Revolution* (forthcoming 1994).

The idea of values that "transcend" culture might suggest that when human beings evaluate they do so from a place outside culture. But it is difficult to make sense of this claim, because culture helps constitute us as individuals. Thus, standing outside of culture would be like standing outside of ourselves. We can only express our values through their articulations in culture. How, then, is it possible to speak of transcendent human values when the ways we express our values must always be immanent in culture? How can values be both immanent and transcendent?

To understand how values can be transcendent, we must recognize that value is properly a verb, not a noun. People do not "have" values as if they were objects that could be kept in their pockets. Rather, they possess an inexhaustible drive to evaluate - to name the beautiful and the ugly, the better and the worse. This feature of human evaluation is poorly captured by our standard metaphors of value. These are metaphors of determinate measurement: Values work like scales or rulers, and to evaluate is to measure. These metaphors have two important conceptual entailments: The first is that a value provides a fixed standard of measurement; the second is that there is a necessary separation between the value that measures and the thing measured. If a value is a standard of measure, it must be determinate just as a ruler is of a determinate length. Moreover, it must exist separately from the thing it measures. One cannot use a ruler to measure itself any more than one can use a balance to weigh itself. Hence, the metaphor of measurement leads us to assume that values can be transcendent only if they somehow exist as determinate standards apart from the culture that they measure. This leads to Plato's ontology, and, I submit, to Plato's error.

Instead we must consider a contrasting metaphor of value - that of an indeterminate urge or demand. Instead of viewing values as determinate standards of measurement, we should understand them as a sort of insatiable and inchoate drive to evaluate. Because they are inchoate they can never be made fully determinate; because they are insatiable they can never be fully satisfied. Our values are like an inexhaustible yearning for something that cannot clearly and fully be described; hence our values always demand more of us than we can ever satisfy, despite our best efforts.

Thus, we have two metaphorical accounts of value: one of determinate measurement, and one of indeterminate longing. Each is helpful in its own way, but neither can be usefully employed in all

contexts and circumstances. To understand the phenomenon of transcendence we must recognize the metaphor of measurement as a metaphor, and exchange it for a different one.

The metaphor of value as an insatiable urge or demand offers a more plausible account of how our values are transcendent and why our articulations of them are imperfect. Under the metaphor of measurement, our institutions fail to be just because they are imperfect representations of a determinate standard of justice; this standard is transcendent because it exists separate and apart from culture. Thus, virtue is a matter of copying, and the virtuous person is a good copyist. Under the contrasting metaphor, values are inchoate yearnings that we attempt to articulate through our cultural constructions. To be just we must construct examples of justice using the indeterminate urge for justice as our goad rather than as our guide. This means that the virtuous person is not a good copyist but a good architect. She attempts to satisfy her sense of justice by constructing just institutions. Nevertheless, she responds to an indefinite and indeterminate value. This has two consequences. First, there will be many different ways of constructing a just institution, depending upon the situation in which she finds herself and the resources she has available to her. Second, her constructed example of justice will never exhaust the insatiable longings of human value. Thus, human cultural creations will always fail to be perfectly just, but not because they are defective copies of a determinate standard. Their imperfection arises from the necessary inadequation that must exist between an indeterminate and inexhaustible urge and any concrete and determinate articulation of justice. This relationship of inadequacy between culture and value is what we mean by "transcendence." The goal of transcendental deconstruction is to rediscover this transcendence where it has been forgotten.

Some people have thought that deconstruction is aimless; that it has no goal or purpose. Others have argued that at best its goal is the mindless destruction and annihilation of all conceptual distinctions. Neither charge applies to the form of deconstructive practice I advocate here. Transcendental deconstruction has a goal; its goal is not destruction but rectification.²⁶ The deconstructor critiques for the purpose of betterment; she seeks out unjust or inappropriate

²⁶ I borrow this expression from T.K. Seung. Id.

conceptual hierarchies in order to assert a better ordering.²⁷ Hence, her argument is always premised on the possibility of an alternative to existing norms that is not simply different, but also more just, even if the results of this deconstruction are imperfect and subject to further deconstruction. Such a deconstruction assumes that it is possible to speak meaningfully of the more or the less just; it decidedly rejects the claim that nothing is more just than anything else, or that all things are equally just. Rather than effacing the distinction between the just and unjust, it attempts to reveal the mistaken identification of justice with an inadequate articulation of justice in human culture and law.

If this analysis is sound, deconstructive argument becomes something quite different from what most of its critics (and even some of its adherents) have imagined. Now deconstructive argument is premised on the assumption of transcendent yet only imperfectly realizable values of justice and truth. The practice of deconstructive argument may be skeptical about the perfection of any and every particular example of justice, but it is decidedly not nihilistic. Indeed, it is a deconstruction founded on faith - faith in human values which, although only articulable through culture, surpass and hence act as a perpetual admonition to culture. This is the type of deconstructive practice I have advocated, and the one that makes the most sense when applied to law and political theory.

Jacques Derrida, I shall argue, has gradually come around to a similar view, although he would not perhaps use the term transcendental to describe it. Yet it is an inevitable consequence of the connections he now wishes to draw between deconstruction and justice. Moreover, he has begun to insist that something like this is what he always had in mind by deconstruction.²⁸ Is this an adequate description of his project or a specious substitution? Is this tradition

²⁷ For a defense of this normative approach to deconstruction, see J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 Yale L.J. 105, 124-27 (1993).

²⁸ Here one must be sensitive to the possibility that my assessment of Derrida applies with equal force to me: Repetition of older arguments in new contexts may have produced changes in views that I claim always to have held.

or betrayal? That is for the reader to judge.

I. Deconstruction and the Subjects of Justice

The first connection between justice and deconstruction that Derrida hopes to demonstrate concerns the definition of who is a subject of justice, that is, who can be treated justly or unjustly. Throughout Western civilization, Derrida argues, the category of subjects of justice has been limited.²⁹ Deconstruction furthers justice, he insists, because it calls these limitations into question.³⁰

Derrida argues that Western civilization has traditionally considered justice and injustice to be concepts that apply only to persons, in particular to persons who possess the capability of language.³¹ These are persons whom one can speak to - and hence reason with. "One would not speak of injustice or violence toward an animal, even less toward a vegetable or a stone."³² For example, "an animal can be made to suffer, but we would never say, in a sense considered proper, that it is a wronged subject, the victim of a crime ... and this is true a fortiori, we think, for what we call vegetable or mineral or intermediate species like the sponge."³³ Indeed, Derrida continues, throughout human history "there have been, there still are many 'subjects' among mankind who are not yet recognized as subjects and who receive this animal treatment"³⁴ To treat a person as an animal - that is, one who is incapable of being addressed in language - is to consider that person's treatment not to be a question of justice or injustice. This argument reminds one of Chief Justice Taney's famous assertion in *Dred Scott v. Sandford*³⁵ that

²⁹ Derrida, *supra* note 4, at 951-53.

³⁰ *Id.* at 953-55.

³¹ *Id.* at 951.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ 60 U.S. (19 How.) 393 (1857).

blacks "had no rights which the white man was bound to respect."³⁶ Derrida even suggests that the primitive tradition of animal sacrifice confirmed and supported the notion of a separation between human subjects - who can speak and are the subjects and objects of just and unjust treatment - and "animals" who, by the logic of this opposition, are not capable of being treated unjustly.³⁷

The boundaries of justice, in other words, are determined by the boundaries of who is "human" as opposed to who is merely an "animal" - that is, one without language or, alternatively, without a recognized right to speak. Yet these boundaries and the justifications for these boundaries can be deconstructed, even to the point, as some animal rights activists would maintain, of calling into question the exclusion of animal life from questions of justice. At this point the distinction between "human" and "animal" would no longer serve to distinguish subjects of justice from nonsubjects; we would have to invent a new distinction.

Thus, Derrida argues, the opposition "subject of justice" versus "nonsubject of justice" is unstable. Because of its instability, it may continually be questioned, and the criteria that separate the subjects of justice from those nonsubjects - earlier identified by the distinction between "humans" and "animals" - must continually be revised. Hence, Derrida wants to insist, deconstruction is relevant to justice because we can deconstruct the boundaries of who is considered a "person" or, more generally, a proper subject of justice. By challenging these boundaries, we can move from a world in which the conception of a subject of justice is wrongfully limited to one in which it receives a just expansion.³⁸

³⁶ 60 U.S. (19 How.) at 407.

³⁷ Derrida, *supra* note 4, at 951.

³⁸ As Derrida puts it:

A deconstructionist approach to the boundaries that institute the human subject (preferably and paradigmatically the adult male, rather than the woman, child or animal) as the measure of the just and the unjust, does not necessarily lead to injustice, nor to the effacement of an opposition between just and unjust but may, in the name of a demand more insatiable

In this way, Derrida insists, the use of deconstruction might not lead to nihilism or injustice. Instead deconstruction would form part of a progressive project that sought increasingly to expand political rights to those other than white male European human beings by deconstructing the boundaries of who are and are not the proper subjects of justice. As he says, in a slightly different context, "nothing seems to me less outdated than the classical emancipatory ideal."³⁹

These egalitarian sentiments are surely to be applauded. Yet Derrida has not shown a necessary connection between deconstruction and justice. He has merely pointed out that one might deconstruct certain oppositions in a way that produces increasingly egalitarian conclusions. He has not shown that these are the only oppositions one might deconstruct. Nor has he shown that one can only deconstruct these oppositions in a way that produces increasingly egalitarian results.

Derrida might have chosen to deconstruct or problematize the distinction between justice and injustice, between liberty and slavery, or between tolerance and bigotry. He does not do so. But nothing in deconstructive theory - if such a thing exists - directs him or forbids him from doing so. Deconstructive argument does not cease to operate when the conclusions one might draw from it are inegalitarian, although it is hardly surprising that Jacques Derrida sees egalitarian consequences flowing from his use of deconstruction. Indeed, this possibility is admitted by his very claim that deconstruction "does not necessarily lead to injustice ... but may ... lead to a reinterpretation" that is more just.⁴⁰ Derrida, like every good deconstructor, picks his targets carefully.

Moreover, even given the targets of his deconstruction - the historically enforced oppositions between the subjects and

than justice, lead to a reinterpretation of the whole apparatus of boundaries within which a history and a culture have been able to confine their criteriology.

Id. at 953.

³⁹ Id. at 971.

⁴⁰ Cf. id. at 953 (emphasis added).

nonsubjects of justice - Derrida has not shown that the only way in which these oppositions might be deconstructed leads to increasingly just results. If deconstruction calls into question the boundaries of subjects of justice, it does not follow that the only way to question these boundaries is to advocate their expansion. They may well be unstable, as Derrida insists. Yet their instability might be evidence that they are about to implode, rather than expand. Furthermore, even if there must be an expansion, one can expand the boundary in two opposite directions - by expanding the scope of what is assigned to the "human," who is a subject of justice, or by expanding the scope of what is assigned to the "nonhuman," which is not a proper subject of justice. In this way, the instability of these boundaries might well be used, as it has in the past, to show that blacks, or Asians, or women are not fully human beings, or that the distinction between women and animals, for example, is so unstable that it cannot fully be maintained.

Indeed, one can understand the history of bigotry as the continuous deconstruction of an imagined unity of humankind. It is the perpetual claim that the unity of humankind is a pious fiction, a papered-over discontinuity and heterogeneity, and that the Other within this imagined unity must be located and understood in all of its difference and inferiority. The egalitarian claims to rediscover the true similarity of the subjects of justice by reclaiming those who were wrongly grouped with nonsubjects; the bigot claims to rediscover the true similarity of nonsubjects of justice by rejecting those who were wrongly grouped with the subjects of justice. Both deconstruct boundaries and categories, and the act of deconstruction does not decide between them.

One might also use deconstruction to show that the boundaries of who may possess certain civil and political rights are unstable. Thus, early American feminists argued that the expansion of political rights to black males required the expansion of political rights to women. However, a similar criticism applies here. The claim that the current limitations of political rights - like the franchise or the right to life - are unstable and that the justifications for these boundaries are self-deconstructing may argue in favor of further restricting the scope of these rights rather than expanding them. If the extension of antidiscrimination laws to disabled persons cannot be squared with the denial of such rights to homosexuals, then perhaps this result counsels in the direction of shrinking the rights of the disabled rather

than expanding the rights of homosexuals. The strongly egalitarian bias of the academy makes this an unthinkable position, but it is not made unthinkable by any feature of "deconstructive theory." It is made unthinkable by the preexisting moral commitments of those who make the deconstructive argument.

If one begins with an egalitarian ideology, one can easily be misled into thinking that the "emancipatory ideal" that Derrida endorses is the same as deconstruction. But this assumption is based on an implicit opposition or conceptual homology - namely, that deconstruction is to logocentrism as emancipation is to slavery, or as expansion of the subjects of justice is to contraction of the subjects of justice. Of course, one of the most important deconstructive techniques is the demonstration that the homology "A is to B as C is to D" is reversible; one deconstructs ideologies by subverting the conceptual homologies upon which they rest. My point is that this technique can be performed as easily with the present set of conceptual oppositions as with the opposition between speech and writing in *Of Grammatology*.

Furthermore, even if one accepted that deconstruction necessarily led to an increased domain of subjects of justice, Derrida's argument rests on the additional assumption that increasing the number of subjects of justice increases justice. But it does not. The second half of the nineteenth century saw two great expansions of the domain of subjects of justice in the United States. The first was the emancipation of the slaves and the bestowal of civil and political rights upon them through the Thirteenth, Fourteenth, and Fifteenth Amendments. The second came twenty years later in *Santa Clara County v. Southern Pacific Railroad*,⁴¹ in which the U.S. Supreme Court held that corporations were persons for purposes of the civil and political rights guaranteed by the Fourteenth Amendment. In Derrida's terms, corporations too became subjects of justice, and indeed, through the same constitutional amendment that granted civil rights to blacks. The result of this decision was that corporations had contract and property rights against other individuals that the courts were constitutionally bound to enforce, and they did so with a vengeance during America's Gilded Age, with results that today make

⁴¹ 116 U.S. 394 (1886).

most economic egalitarians shudder.⁴² The legacy of Santa Clara continues to this day: The Supreme Court has held that corporations as constitutional "persons" have First Amendment speech rights like those of private citizens.⁴³ This holding seems unexceptional but for the fact that corporations usually have considerably more money and therefore can exercise their speech rights more effectively than the average citizen, through donations to political campaigns, purchase of time and space on broadcast and print media, and so on. The recognition and protection of corporate civil and political rights has enabled corporations to convert huge concentrations of property rights into concentrations of political power and thereby exercise considerable control over the American political process. Not surprisingly, some scholars on the left find these results to be perverse

⁴² I want to emphasize here that the granting of "personhood" and even "citizenship" to corporations was originally designed to protect the property interests of individuals who owned shares in a corporation. To this extent, the expansion of corporate rights seems a perfectly justifiable protection of individual property rights - assuming always that the theorist in question believes that the basic structure of economic rights is justified. It therefore furthers, rather than detracts from, the "emancipatory ideal." However, one might protect these individual property rights in ways other than by creating a new legal subject with constitutional rights. The egalitarian critique, as I understand it, is that the choice of this strategy has had unexpected consequences that cannot all be explained as necessary to protect the (just) rights of shareholders. To some degree the fiction of the corporation as a person has taken on a life of its own and has been used to work injustices and denials of individual rights. See, e.g., Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 87-90 (1938) (Black, J., dissenting) (arguing that Santa Clara should be overruled); C. Edwin Baker, *Human Liberty and Freedom of Speech* 220-21 (1991). For an examination of some of the alternative ways the issue might have been conceptualized and the consequences of the Santa Clara decision, see Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. Va. L. Rev. 173 (1985).

⁴³ See *First Natl. Bank v. Bellotti*, 435 U.S. 765 (1978) (striking down limitations on corporate spending designed to influence voters).

and to represent a net loss of individual liberty.⁴⁴

In recent times, one of the most pressing questions before the American public has been the scope of the right to abortion. Antiabortion activists have been on the forefront of expanding the boundaries of personhood. One might almost believe that they were taking their cue from Derrida, for their arguments are nothing if not deconstructive: Effacing the distinction between fetus and child, they have argued that fetuses are "babies" and doctors who perform abortions are "baby killers." Insisting on the undecideability of any boundaries (such as viability) between the person and the nonperson, they have characterized the current law of the United States as the most violent act of mass murder since the Holocaust. If, as Derrida points out, justice and injustice have been reserved in Western culture to the possessors of language, and if this reservation is itself in need of destabilizing and deconstructing -in the case of animals, for example - the contemporary antiabortion advocate can hardly be faulted for seeing in this claim an argument for the protection of defenseless fetuses, who lack the power of speech and are routinely slaughtered by those who possess this power. Everything that Derrida says about the exclusion of animals from the domain of justice, they might argue, could be said on behalf of the human fetus: If a cat or a chimpanzee should be protected from torture or vivisection, how much more so should the human fetus who likewise lacks the power of speech, and who likewise is slaughtered for the

⁴⁴ See, e.g., Mark Tushnet, Corporations and Free Speech, in *The Politics of Law* 253 (David Kairys ed., 1982); cf. Owen M. Fiss, *Why the State?*, 100 Harv. L. Rev. 781, 787-91 (1987) (describing the media's control of public debate and business's control of the political process). Indeed, the U.S. Supreme Court has itself been somewhat equivocal on the question of whether the scope of this First Amendment right should be equal in all respects to the right enjoyed by natural persons. See *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). The question for Derrida, of course, is whether further deconstruction of the boundary that excludes corporations from full membership as "subjects of justice" would be a good thing or a bad thing.

benefit of those whom the state has already recognized as subjects of justice -women?

Needless to say, many women's groups and commentators on the left (including, one assumes - although one does not know this for certain - Derrida himself) would find such an argument abhorrent. But is the argument abhorrent because it is not deconstructive or rather because it is deconstructive - because nothing in "deconstruction" prevents such an argument? Is the reason that a feminist who employs deconstruction would not make such an argument because deconstruction forbids it or because it conflicts with her deeply held moral and political commitments - her sense of the just and the unjust? In other words, isn't she really using deconstructive argument to make sense of her existing commitments, to articulate her values?

In the examples of corporate speech, or the pros and cons of abortion, we witness what I call "ideological drift" at work.⁴⁵ An argument or principle that appears on its face to have determinate political consequences turns out to bear a very different political valence when it is inserted into new and unexpected contexts. Yet because, as deconstruction itself reminds us, one cannot fully control the contexts into which an argument or a claim can be inserted, one cannot fully control its political valence in future situations. The notion of ideological drift follows from the basic deconstructive point that iterability alters. We have merely applied this point to the practice of deconstructive argument itself. If the practices of deconstruction by human beings are themselves subject to the insights of deconstruction, this alteration seems inevitably to follow. The practice of deconstruction by human beings must also be subject to ideological drift. So is Derrida then hoisted on his own petard? If what is called "deconstruction" is a rhetorical practice, a series of arguments, a set of approaches that can be taught, repeated, iterated, used again and again in different contexts, places, and times, all this would seem to follow. Deconstruction, or more correctly deconstructive arguments made by human beings, must be iterable in ways that lead to both just and unjust results.

⁴⁵ See J.M. Balkin, *Ideological Drift and the Struggle Over Meaning*, 25 Conn. L. Rev. 869 (1993).

What, then, of this "if"? We are not prepared to answer this question. At least not yet.

II. A Responsibility Without Limits

A. The Infinite and the Indefinite

Let us continue. Derrida posits a second possible relation between deconstruction and justice - it is "the sense of a responsibility without limits."⁴⁶ This responsibility is "necessarily excessive, incalculable, before memory."⁴⁷ 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 is increased by eliminating her responsibility.

Nor do we necessarily increase justice by increasing the responsibility of all persons. Suppose that a defendant strikes a plaintiff because the plaintiff is homosexual and the defendant hates homosexuals. We can justly hold the defendant responsible for this brutality. Suppose, however, that the defendant argues as follows: His parents are also responsible because they abused him as a child. The bystanders on the street are responsible because they did not intervene on the plaintiff's behalf. The police are responsible because they did not prevent the injury from occurring. The state's mental health agencies are responsible because they did not offer the defendant free counseling to deal with his aggression and his hatred of homosexuals, and so on.

The difficulty is that to increase the responsibility of one person is often to decrease the responsibility of another. Here the defendant attempts to decrease his responsibility by shifting it to third

⁴⁶ Derrida, *supra* note 4, at 953.

⁴⁷ *Id.*

parties. There is no problem in increasing the responsibility of all persons as long as we insist that the defendant also remains fully responsible. Indeed, this may be a more adequate description of the situation. The difficulty arises anew, however, when we determine the appropriate remedy for an injustice. How are we to divide up the responsibility when the plaintiff demands compensation? The more persons who are held responsible, the less each will have to pay, all other things being equal. We might try to avoid this dilemma by allowing the plaintiff full recovery from each person held responsible, but surely this solution creates its own form of injustice.⁴⁸

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. That is what "just" means - neither too much nor too little, but just the right amount of responsibility for each person. The very notion of apportionment implies the possibility that the responsibility of some persons will be decreased, if not eliminated. Justice involves the recognition that people are simply not responsible for some of the things for which others would like to hold them responsible. Furthermore, the demand for an appropriate apportionment of responsibility presupposes that there is a notion of appropriateness - that not every assertion of responsibility is as valid as any other. If the deconstructive argument is to make sense, it must assume that one's responsibility goes as far as it should, but no further, whether or not this can be known for certain.

In this light, Derrida's essays on Paul de Man offer a useful counterweight to his more abstract formulation. In these essays,

⁴⁸ Increasing responsibility, moreover, always comes at a cost. The more things for which people are held responsible, the less time and money they have for their own pursuits. Responsibility to others comes at the price of one's freedom of action as well as one's security. An infinite protection of security for all will result in an infinite responsibility for all, which will paradoxically abolish the liberty of all, and with it the security of all. The demand for infinite responsibility is like the paradoxical predicament of the pantheist who finds she must remain motionless because she fears that any movement on her part will inadvertently destroy a bug or a microorganism. Whatever she does, she is responsible. Yet her failure to act makes her doubly responsible.

Derrida does not assert that either he, or de Man, have limitless responsibility. Rather, he attempts to put de Man's responsibility in its proper perspective. He attempts to offer a just apportionment of responsibility, blame, and innocence regarding de Man, himself, and his critics.

First, Derrida argues, de Man is not responsible for all of the many evils of Nazism or for the Holocaust. To compare him to Mengele, as one writer did, is unjust.⁴⁹ Second, it is unjust to read de Man's later writings as an admission of guilt or responsibility - or as an attempt to deny responsibility - for what he did during World War II.⁵⁰ Third, although de Man wrote a series of articles expressing the ideology of the occupation forces and one article which is blatantly antisemitic, it is unjust to judge his whole life based on that one episode in his youth.⁵¹ Fourth - and this is the most controversial point in his argument - Derrida suggests that de Man's articles are not as damning as one might be led to expect when they are read in the appropriate context. According to Derrida, the explicit antisemitism of the worst article is equivocal, and it is hardly as bad as many other articles in *Le Soir*.⁵²

In the same way, Derrida responds to the critics who attacked his discussion of de Man by arguing that his responsibility and that of the institution they call "Deconstruction" is less than they imply or contend. They are unjust to Derrida, a Jew who was a teenager during the Second World War: "I ... who have nothing whatever to do with everything that happened; I who, at the time, was rather on the side of the victims."⁵³ They are unjust as well to the practitioners of deconstruction, "which at the time was at year minus twenty-five of

⁴⁹ See Derrida, *Biodegradables*, supra note 8, at 821.

⁵⁰ Derrida, *Paul de Man's War*, supra note 8, at 640-51.

⁵¹ Id. at 650-51.

⁵² Id. at 621-32. In fact, Derrida asserts that, because de Man specifically distances himself from so-called "vulgar" antisemitism, one can even read his article as implicitly rebuking the more virulent examples of antisemitism in the pages of *Le Soir*. Id. at 625-26.

⁵³ Derrida, *Biodegradables*, supra note 8, at 820.

its calendar!"⁵⁴

These remarks suggest that Derrida cannot mean by "a responsibility without limits" a limitless responsibility. Otherwise, he, de Man, and indeed all of us are responsible without limits for the Holocaust and many other horrible crimes, both past and present. But this would not be just: The demand of justice is often the demand that we are not responsible, even though we have been unjustly accused.

Instead, we must offer an alternative account of "a responsibility without limits" that saves it from these difficulties. This account inevitably leads us to the transcendental conception of deconstruction. A limitless responsibility could be an infinite responsibility, or it could be a responsibility whose full contours cannot be defined in advance. This is the distinction between the infinite and the indefinite. We can say, both in the case of the infinite and the indefinite, that one cannot draw determinate and clear boundaries, so that in both cases we are, in a sense, "without limits." The meaning of "without limits," however, is different in each case. The infinite cannot be bounded because it is infinite. The indefinite has no clear boundaries because its scope is so heavily dependent on context, and not all possible future contexts can be prescribed in advance. The indefinite has boundaries, but we do not know precisely where they are. The infinite has no boundaries, and we know this for certain.

Thus, the indefinite is unlimited, but not in the way that the infinite is. It makes perfect sense to say that an individual's responsibility is "without limits" because it is always indefinite - that is, because the full contours of this responsibility can never be completely articulated - but it is nevertheless limited in another sense because it is not infinite. Paul de Man's responsibility for his wartime journalism is without limits because its scope cannot be fully demarcated: His actions will have had effects on individuals that he could not have foreseen. Moreover, his actions will continue to have effects about which modern day judges of his responsibility do not and cannot know. In this sense, Paul de Man indeed has a

⁵⁴ Id.

responsibility without limits. But it is not an infinite responsibility. He is not responsible for the Holocaust, or the Lockerbie plane bombing, or the French Revolution.

We can also apply the distinction between the infinite and the indefinite to the meanings of texts. People often associate deconstruction with the claim that the meaning of texts is indeterminate. Yet there are two ways to claim that meaning is indeterminate: One can say that a text's meaning is infinite - that is, that it means everything - or one can say that its meaning is indefinite. If the meaning of every text is infinite, then all texts mean the same thing, because all texts have every meaning. But if one says that the meaning of every text is indefinite, we mean that the contexts in which the text will take its meaning cannot be specified in advance, and therefore the text will always have an excess of meaning over that which we expect (or intend) it to have when it is let loose upon the world. The first view of texts is consistent with a nihilistic account of deconstruction; the second is consistent with the type of deconstruction I advocate.

The choice between these two approaches also corresponds to two different explanations of how one deconstructs a conceptual opposition. The strategy of the nihilistic view is one of total effacement - all conceptual distinctions are imaginary because the meanings of each side of the opposition are infinite. Therefore both sides mean the same thing. The strategy of transcendental deconstruction is one of nested opposition. A nested opposition is an opposition in which the two sides "contain" each other - that is, they possess a ground of commonality as well as difference.⁵⁵ In this case, the deconstruction argues that the two sides are alike in some contexts and different in others; the logocentric mistake has been to assert categorically that they were simply identical or simply different. Because the two sides form a nested opposition, their similarity and their difference rely on context, but because context cannot be fully determined in advance, the scope of their similarity and difference is indefinite. In this way the transcendental conception of deconstruction preserves the possibility of conceptual distinctions, while the

⁵⁵ For a fuller discussion, see J.M. Balkin, *Nested Oppositions*, 99 Yale L.J. 1669 (1990) (book review).

nihilistic version does not.⁵⁶

The distinction between transcendental deconstruction and its unworkable alternative rests upon the distinction between the indefinite and the infinite. However, since one can deconstruct any distinction, one should also be able to deconstruct the distinction between the indefinite and the infinite. Even here, however, we need to ask what conception of deconstruction we should use to critique the theory - the transcendental or the nihilistic. If we use a nihilistic conception, we would be effacing this distinction. We would say that there is no difference between the indefinite and the infinite in any circumstance or situation. So, for example, we would be saying that everything with indefinite boundaries is infinite in extension. It would follow that each day is infinite in length because the boundary between day and night is indefinite. Thus, the use of nihilistic deconstruction leads to an untenable position, just as it leads to the destruction of many other useful distinctions. But this is a reason to think that the nihilistic conception of deconstruction is seriously flawed.

⁵⁶ Note that even when deconstructive arguments are employed to efface a particular distinction, they do not necessarily efface the distinction in all contexts. Thus they should be distinguished from a strategy of total effacement. Take for example the distinction between writing and speech discussed in Derrida, *supra* note 18. Derrida argues that speech and writing are special cases of a more general form of "writing." He claims that people often assume that speech is closer to truth or true meaning than writing, but this assumption is not necessarily justified. Both possess the same features of signification, which are simply more obvious in the case of writing. Derrida's argument uses deconstruction for purposes of rectification; it argues that this new conception is a better - that is, truer - way of viewing things than the received wisdom. It is not a strategy of total effacement because his argument does not in fact efface the distinction between writing and speech in all contexts; it does so only with respect to the issue of semiotic function. Writing is still written, and speech is still spoken; hence even after the deconstruction we cannot say that writing and speech are identical in all contexts of judgment. This is a deconstructive argument of rectification; it shows not that speech and writing are identical, but that there is a nested opposition between the two concepts. See Balkin, *supra* note 55, at 1689-93.

Instead, we might deconstruct the distinction between the indefinite and the infinite using the technique of transcendental deconstruction. To deconstruct a conceptual opposition is to show that the conceptual opposition is a nested opposition - in other words, that the two concepts bear relations of mutual dependence as well as mutual differentiation.⁵⁷ For example, we might discover that they have elements in common, which become salient in some contexts, but that in other contexts we note very important differences between them, so that they are not the same in all respects. In fact, we would note that the meaning of each depends in part on our ability to distinguish it from the other in some contexts.

Thus, transcendental deconstruction, which relies on the indefiniteness rather than the effacement of all conceptual boundaries, would insist that although we can offer relatively clear examples of bounded but indefinite concepts - for example, between day and night - we cannot demarcate in advance every example of the indefinite from every example of the infinite. Some of the things that we currently think are indefinite may turn out, in a different context of judgment, to be infinite and vice versa. We cannot know for sure because this distinction, like all others, is context dependent. Nevertheless, the very fact that this distinction is so heavily dependent upon context means that we cannot say that the distinction is meaningless, or that the terms collapse into each other.⁵⁸

⁵⁷ Id. at 1676.

⁵⁸ I have argued that transcendental deconstruction is premised on the assumption of transcendent values, and that this assumption inevitably leads to a logic of indefinite rather than infinite meanings. We might be tempted to identify transcendent values with the infinite rather than the indefinite because people sometimes think of the transcendent as that which surpasses all others. However, the question of transcendent values really concerns the relationship between general normative concepts like justice or beauty and their particular instantiations in the real world. Our notion of justice is transcendent because no particular example of justice in the world is perfectly just; it is indefinite because it cannot be reduced to any determinate formula. These are two ways of describing the same phenomenon.

B. Deconstruction and Reconstruction

We have seen that, if Derrida's arguments about responsibility are to make sense, he must be committed to a transcendental conception of deconstruction, whether or not he specifically recognizes this fact. Moreover, the concept of an indefinite, rather than an infinite, responsibility better corresponds to the very important relationship of mutual differentiation and dependence that must always exist between law and justice. Laws apportion the comparative responsibility of parties. But laws can never perform this apportionment perfectly. They can never determine and assign completely the full responsibility of each and every person, living or dead, in exactly the right amount. First, laws must limit their concern to certain features of a situation and to certain effects that have already happened (or that can be proved in a court of law to have happened). Second, laws can extend their reach only to some parties, but not to all who might, in some larger sense, be responsible - for example, those who escape judgment because they are dead, out of the relevant jurisdiction, or bankrupt. Third, laws must speak in general terms that must be applied to many different factual contexts and therefore at best can fit each of these contexts like a mass-produced suit fits a body - perhaps well enough in some circumstances to be presentable, but certainly not perfect in all respects. Because responsibility is so deeply tied to context - both the contexts which have already emerged and those which in the fullness of time will emerge - human law must always, even in its best moments, be merely a heuristic, a catch-as-catch-can solution to the

Nevertheless, our idea of justice is not infinite; it does not lack boundaries, even if these are not fully determined. For example, the value of justice is not the same thing as the value of beauty. If general normative concepts really had no limits, they would all be identical because there would be no way to distinguish them from each other. So, although our transcendent notion of justice is not specific enough to match any determinate example of justice or any determinate formula of justice, it is specific enough to be distinguished from other normative concepts. That is why it is indefinite but not infinite.

problem of responsibility rather than a fully adequate solution. Thus, to speak of the indefiniteness of human responsibility, and to speak of its failure to be fully measured, apportioned, and captured by human laws and human conventions, are really two ways of saying the same thing.

At the same time, our notion of justice can only be articulated and enforced through human laws and conventions. We may have an idea of justice that always escapes law and convention, but the only tools we have to express and enforce our idea are human laws and human conventions. In this sense our conception of the just relies for its articulation and enforcement on the imperfect law from which it must always be distinguished.

In sum, law is never perfectly just, but justice needs law to be articulated and enforced. This argument is exemplary of a transcendental approach to deconstruction, the only approach that can rescue deconstruction from the nihilistic abyss of infinite meaning. It assumes that human values like justice transcend the positive norms of human culture, even as they depend upon these norms for their articulation and expression. Human values like justice are always indeterminate; they must be constructed and articulated through culture, law, and convention. Yet any articulation of human value never fully exhausts the scope of human evaluation. We may offer a theory of what is just, and this theory may assist our judgments of what is just, but it does not ever fully displace our sense of justice. We always retain the ability to understand that our conventions, laws, and theories of justice fall short of our value of justice. Thus, our indeterminate values continue to demand more from us than our articulations of them can ever give; our urge to evaluate serves as a perpetual reminder of the gap between our values and their articulations in law or convention.

Equally important, my argument assumes that it makes sense to speak of the more just and the less just in a given context, even though our sense of justice is always indeterminate and indefinite. It denies that every conceptual articulation of justice is as good as any other, or that every solution to the problem of justice is as good as any other. If I claim that a human law only imperfectly captures the responsibility of individuals, I must assume that there is another accounting of responsibility that would be more just, even if I cannot describe a perfectly just solution. If I do not assume this, then my argument has no critical import. If there is no more just solution, then

either the solution which I criticize is the best possible solution - in which case I have no reason to criticize it - or this solution is as good as any other solution I might offer as an alternative - in which case there is no reason to choose between them.

Thus, the transcendental conception of deconstruction is premised on the possibility of an alternative reconstruction that is superior to the given target of deconstruction. In this sense, deconstruction always depends on reconstruction, even though this reconstruction may be subject to further deconstructive critique. At the same time, theoretical (re)construction always depends on the tools of deconstruction. If we wish to construct a just account of moral or legal responsibility, we must be able to choose between competing alternatives and discard those that prove unsatisfactory. However, to critique the various possibilities, and discover their hidden incoherences, we need the critical tools of deconstruction.⁵⁹

A deconstructionist, Derrida included, can hardly avoid this analysis. Does he accept it? In his later writings, he seems to move toward it. Deconstruction, he argues, demands that we "constantly ... maintain an interrogation of the origin, grounds and limits of our conceptual ... apparatus surrounding justice."⁶⁰ This demand does not "neutralize an interest in justice" but "on the contrary ... hyperbolically raises the stakes of exacting justice."⁶¹

Deconstruction requires a "sensitivity to a sort of essential disproportion" between existing law or custom and justice.⁶² The deconstructive attitude "strives to denounce not only theoretical limits but also concrete injustices, with the most palpable effects, in the good conscience that dogmatically stops before any inherited determination of justice."⁶³ Hence, Derrida connects the notion of limitless responsibility with deconstruction's "engagement" by an

⁵⁹ For a fuller discussion of the relationship between deconstruction and reconstruction, see Balkin, *supra* note 27, at 124-27.

⁶⁰ Derrida, *supra* note 4, at 955.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

"infinite demand ... for justice."⁶⁴

Yet the claim of an essential disproportion between law and justice simply restates the point that there is an idea or value of justice that transcends any specific example of justice, whether embodied in law, custom, or convention. Indeed, as Derrida later notes, "the deconstruction of all presumption of a determinant certitude of a present justice itself operates on the basis of an infinite "idea of justice.' "⁶⁵ This is perhaps the closest Derrida comes to the transcendental conception. He hesitates at this point because he does not wish "to assimilate too quickly this "idea of justice' to a regulative idea (in the Kantian sense), to a messianic promise or to other horizons of the same type."⁶⁶ Nevertheless, Derrida's hesitation is unnecessary, for the deconstructive approach I advocate is not based on a fixed and determinate Idea of justice, but an indeterminate and indefinite human value. This value is the very sort of "demand" that Derrida identifies with justice: an insatiable urge that is never fully realized in the products of human law, culture, and convention.

III. Speaking in the Language of the Other

Derrida's third formulation of the relation between deconstruction and justice notes the etymological connections between justice and answering. To be just is to have responsibility, which is to respond to or to answer for something. Thus, Derrida speaks of justice as an "infinite demand."⁶⁷ However, not any answer

⁶⁴ Id.

⁶⁵ Id. at 965.

⁶⁶ Id. By a "regulative idea," Kant meant an idea that we must postulate or employ as a heuristic, in order to assist our use of reason. The self, the world, and God are examples of regulative ideas. See Immanuel Kant, *The Critique of Pure Reason* 549-60 (Norman K. Smith trans., London, MacMillan 1929) (1781).

⁶⁷ Derrida, *supra* note 4, at 955. In discussing Derrida's arguments concerning justice I shall follow his practice of speaking about the "demand" of justice, or about what justice "demands," to describe what is just or unjust. Nevertheless, I should note at the outset that this familiar locution has the twin rhetorical effects of

will do. Justice, Derrida insists, requires one to address oneself to the Other in the language of the Other: It requires us to forswear our own way of thinking, talking, and looking at things in order to understand the Other in all of her singularity and uniqueness.⁶⁸ This requirement is ultimately impossible to attain, and hence the infinite demand of justice can never fully be satisfied.

Because justice demands that we address ourselves in the language of the Other, the law can never be fully just. The problem for law, Derrida argues, is threefold. First, law must speak in general terms, and therefore it must simplify and falsify the situation at hand.⁶⁹ Legal understanding never allows us to understand situations or the persons affected in all of their uniqueness. We must understand them instead filtered through a set of legal categories, or classes of situations, that lump them together with many other equally heterogenous and unique circumstances. The enforcement of the law according to these categories is a form of simplification and falsification, and this simplification and falsification are sources of injustice.⁷⁰

Second, as James Boyd White has recently noted, the problem of justice is inherently a problem of translation.⁷¹ For judges or other parties to speak in the language of another, they must translate the Other's language into their own. But translations are always imperfect. They never fully convey the sense of the original. Hence the very necessity of translation renders it impossible fully to speak in the language of the Other.⁷²

anthropomorphizing justice and downplaying human subjectivity, as I describe more fully below. See *infra* text accompanying notes 136-37.

⁶⁸ See Derrida, *supra* note 4, at 949.

⁶⁹ See *id.*

⁷⁰ See *id.*

⁷¹ See James B. White, *Justice as Translation* 257-69 (1990).

⁷² See Derrida, *supra* note 4, at 949. This idea is related to a theme that Derrida borrows from Heidegger and Levinas - the Other, because it is an Other, always remains ultimately unreachable and

Third, the requirement that law be impartial demands that we not speak in the language of a particular party, but in a language that is neutral and fair.⁷³ To speak in the language of only one of the parties risks the danger of undue partiality toward that person, for the situation will be completely described in terms of her experience and her concerns. This result is unfair because it may give short shrift to the experience and concerns of other parties. Hence, law, which requires fairness to all parties, must proceed in the language of neither one party nor the other, but in a third language that attempts - even if it does not always succeed - to be fair to both sides. Legal justice strives for an impartiality that is also impersonal. Yet this solution creates its own set of problems, for the neutral language of a third party fails to speak in the language of either party, and hence it doubly falsifies the situation by denying or obscuring the uniqueness and singularity of each side.⁷⁴

Derrida's ethics of Otherness contains two separate imperatives. The first demands that we see a situation in all of its singularity. The second demands that we attempt to see things from the Other's point of view, using her vocabulary and her way of understanding the world. To deal justly with each of these two points, we must not conflate them, but rather deal with each separately - that is, respecting the singularity and difference of each.

A. Justice as the Recognition of Singularity

Derrida's demand that we see each situation in all its singularity is ambiguous. We could interpret it either as a claim of absolute difference among situations or only as one of relative difference. A claim of absolute difference means that we must see each situation as completely different from every other. A claim of relative difference means that we must see each situation as different from any other in some respects but not in others. Each situation is both different from and similar to every other situation; its uniqueness consists in the fact that this combination of similarity and difference

unfathomable.

⁷³ See *id.*

⁷⁴ See *id.*; White, *supra* note 71, at 262-63.

manifests itself in different ways for each situation to which it is compared. Thus, A and B are both similar to and different from C; but A and B are unique because they are similar to and different from C in different ways.

We may state this distinction in another way. Consider three situations A, B, and C. They are all different. But are two of them more alike than the third? There are two positions we can take. One argues that all of them are absolutely different; consequently, no situation is any more like another than any other situation. The alternative position would insist that we cannot answer this question until we know what context the questioner has in mind. Given a particular context of decision, it will often be possible to say that two situations are more like each other than either is to a third; but this judgment may shift radically if the context of judgment is sufficiently altered. If we are concerned only with the question of weight, an elephant and a truck are more alike than either is to an amoeba. Yet if the context of judgment is shifted to the question of animate versus inanimate, the elephant and the amoeba are more alike than either is to the truck. This alternative position asserts the relative similarity and difference of all situations.

Does Derrida mean to suggest a theory of absolute difference or a theory of relative difference? If justice is an "infinite demand," perhaps we must keep trying to view a situation as different from any other in every respect. That would presume a theory of infinite difference. Yet, if Derrida means that justice requires us to assert the absolute difference of every situation, his claim is incoherent. It will be impossible to decide any case, because no case can be compared to any other. Because each case is completely different from all others, no case is a better point of comparison than any other. We cannot apply any consistent principle to different cases; hence, our judgment is merely one of fiat, for no decision is any more principled or unprincipled than any other. Conversely, we might also say that all decisions are equally principled. Because there are no relative degrees of comparison, any judgment is as good an exemplar of our principles as any other.

If Derrida's claim is based on a notion of relative difference, however, it accurately describes the predicament of just

decisionmaking.⁷⁵ Each case is both similar to and different from every other, depending on how we look at it. The difficulty of just decisionmaking lies precisely in deciding what is the appropriate context of judgment. The question of principled consistency is the question of which cases our case is most like and which cases it is least like, given the appropriate context of judgment.

Consider the recent example of a seventeen-year-old high school student who was sentenced by a judge in Thomaston, Georgia to three years in prison for stealing an ice cream bar from the school cafeteria.⁷⁶ The judge defended his decision on the grounds that the case was a burglary, and the penalty for burglary was three years. He argued that the appropriate context of judgment involved the definition of burglary, the legislature's decision to fix the age of majority at seventeen, and his county's practice of uniform punishments for all violators of the same crime. His judgment was criticized on two grounds, each of which offered a competing context of judgment. First, what the student did was more like a schoolboy prank than a professional breaking and entering. Second, on the same day the student was sentenced to three years, the judge gave suspended sentences and fines to several people convicted of drug possession and drunk driving.⁷⁷

We can only criticize the judge's decision if we assume the relative difference of situations - that is, only if we argue that this situation is both different from and similar to others. In order to differentiate this case from an "ordinary" case of burglary, we must be able to say that this defendant was a student like other students, that his action was a prank like other schoolyard pranks. In order to argue that it is unfair that drug users and drunk drivers should receive

⁷⁵ This interpretation seems most consistent with his criticisms of Levinas. See, e.g., Drucilla Cornell, *The Philosophy of the Limit* 53-55, 68-72, 83-85 (1992); Jacques Derrida, *Writing and Difference* 126-28 (Alan Bass trans., Univ. of Chicago Press 1978) (1967); Guyora Binder, *Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie*, 98 Yale L.J. 1321, 1376 (1989).

⁷⁶ Christopher Sullivan, *Small Town Ponders Prison for Snickers Theft*, Austin Am. Statesman, Sept. 19, 1993, at A10.

⁷⁷ Id.

a lesser penalty, we must be able to assess comparative degrees of responsibility and harm between situations. Yet this means that we must already be able to see these situations as similar in some respects; this similarity is necessary for them to be comparable or commensurable according to some common metric. We cannot compare these situations if we assume that each is unique in the sense of absolutely different. We can only make such a judgment if we see each situation as relatively different. Thus, justice may require that we understand each situation in its uniqueness, but, ironically, this requires that we treat it like the situations that are most similar to it in the appropriate context of judgment. To recognize its uniqueness, we must also recognize its similarity to other situations.

The same criterion of relative difference applies when we seek a just understanding of persons who are different from us. It is important to try to understand and respect people who are different from us. To understand and respect their difference, however, we must first understand their similarity to us. We must try to see how their concerns and values are really similar to our concerns and our values, and thus, how the situation they find themselves in and their reactions to that situation make sense. At the same time, to grasp this similarity, to put ourselves in other people's shoes, we must recognize how our lives and theirs are different. That is why every attempt at understanding is a simultaneous assertion of commonality with and difference from the Other. If we unthinkingly assume that the Other is too much like us, we will never understand her actions when they diverge from our own; if we insist on our absolute difference from her, she will never be able to understand us.

The competing interpretations of absolute and relative difference offer two different accounts of the predicament of judging. The theory of absolute difference suggests that just judging is impossible because no situation is really like any other. All principled decisionmaking is completely indeterminate because we have no way of comparing situations when each is absolutely different. On the other hand, the theory of relative difference argues that doing justice is difficult because there are so many ways to see situations as similar as well as different. The problem is not that no two situations are ever similar; it is that there are too many ways in which situations are similar to each other, and we must try to parse out the right ways to assess this similarity. In other words, the secret of judging lies in determining the appropriate context of judgment. However, we can

never fully determine the present context, and we can never fully know of the presence or absence of other events that might significantly alter the context of our judgment when we decide a case. Therefore we are always uncertain - at least to some degree - about the justice of our decision.

Note that the dependence of justice on context is much like the dependence of meaning on context. The indeterminacy of meaning and the uncertainty of judgment are both based on the indefiniteness of context. This view is consistent with the transcendental approach to deconstruction. In contrast, an approach that asserts the infinite difference of each situation is just the flip side of an approach that asserts that meaning is infinite. The former asserts the absolute difference of all situations and all people, while the latter asserts the absolute identity of all meanings. Both approaches lead to normative nihilism and a failure of understanding. As before, Derrida's arguments only make sense if his is a transcendental account of deconstruction.

B. Justice as Understanding the Other's Point of View

Derrida's ethics of Otherness has a second component: It employs a different sense of individuality and uniqueness. Under this view, justice requires one to speak in the language of the Other by trying to see things from the Other's point of view.⁷⁸ This conception of justice seems most attractive when we are the injurer or the stronger party in a relationship, or when we are in the position of a judge who is attempting to arbitrate between competing claims. For example, suppose that we are the State, the stronger party, the oppressor, or the injurer, or suppose that we are contemplating an action that might put us in such a position. It seems only just that we should try to understand how we have injured or oppressed the Other (or might be in a position to injure or oppress). We can only do this if we try to see the problem from the Other's perspective and understand her pain and her predicament in all of its uniqueness. The duty we owe to the Other is the duty to see how our actions may affect or have affected the Other; to fulfill this duty we must put away our own preconceptions and vocabulary and try to see things from her

⁷⁸ See Derrida, *supra* note 4, at 949.

point of view. Similarly, if we are a judge in a case attempting to arbitrate between the parties, the ethics of Otherness demands that we try to understand how our decision will affect the two parties, and this will require us to see the matter from their perspective.

Suppose, however, that we are not the injurer, but the victim; not the State, but the individual; not the strong, but the weak; not the oppressor, but the oppressed. Does justice require that we speak in the language of the person we believe is injuring or oppressing us? Must a rape victim attempt to understand her violation from the rapist's point of view? Does justice demand that she attempt to speak to the rapist in his own language - one which has treated her as less than human? Must a concentration camp survivor address her former captor in the language of his worldview of Aryan supremacy? We might wonder whether this is what justice really requires, especially if the injustice we complain of is precisely that the Other failed to recognize us as a person, refused to speak in our language, and declined to consider our uniqueness and authenticity.

When we move from Derrida's grand pronouncements on the ethics of the Other to the place "where he lives," to his writings on Paul de Man, we see this pleasant formula properly deconstructed. Derrida both adopts and rejects the formula in different contexts. For example, Derrida applies the formula when he demands that his critics read both him and de Man fairly. His first rule of just interpretation is "respect for the other, that is, for his right to difference, in his relation to others but also in his relation to himself."⁷⁹ To judge de Man fairly, one must speak to de Man in his own language and read him in the proper context.

Thus, Derrida insists that we evaluate de Man through the ethics of the Other. But what is the proper attitude to take toward de Man's critics? Derrida argues that he faces a serious problem: These critics cannot or will not read what he and de Man say; he describes them through the neologism *ne pveulent pas lire* - they can't/won't read.⁸⁰ These critics have failed the call of justice; they have not been

⁷⁹ Derrida, *Paul de Man's War*, supra note 8, at 644.

⁸⁰ Derrida, *Biodegradables*, supra note 8, at 823. Derrida combines the "p" in *pouvoir* (can) and the "v" in *vouloir* (want) to create the expression "*je ne pveux pas lire* (I can/will not read)." Id. at 828; see also id. at 827, 843.

open to the Other - de Man and Derrida.⁸¹ What does justice demand of Derrida in defense of de Man? Here Derrida's practice deconstructs his theory: The essay Biodegradables cannot be described as anything other than a polemic. Derrida is perfectly aware of this but considers it unavoidable:

I have never in my life taken the initiative of a polemic. Three or four times, and always in response, and always because I was invited to do so, I have simply tried to confront some manipulations that were too serious to ignore....

Of those who might regret the harshness or the high-handedness of certain of my remarks, right here, I ask - isn't it only fair? - to reread one more time the critical responses. Then they will have a better measure of the aggression - its violence and its mediocrity - that has me as its victim It is not possible for me to respond on that level. And it is my duty not to accept it. One does not always decide by oneself on a high-handed tone.⁸²

Justice, it seems, does not always demand that one speak in the language of the Other, especially when the Other is not playing by the same rules.⁸³ Jesus might have advised his followers to turn the

⁸¹ Indeed, so egregious is their practice of reading that at one point Derrida wonders whether they can even be considered to be morally responsible for their actions. Id. at 823. Because the category of ne pveut pas lire "displaces the category of responsibility," Derrida insists that he is not passing judgment on his critics: "Moreover, I bear these five no ill will; I have nothing against them; I would even like (if only in order to avoid this spectacle) to help them free themselves from this frightened, painful, and truly excessive hatred." Id. However, given the tone of the rest of the article, one might be pardoned if one were tempted to take these protestations of good will at less than face value.

⁸² Id. at 872.

⁸³ Indeed, Derrida insists, one does not even have to respond at all to accusations that are fundamentally unfair or disrespectful:

other cheek and to love their enemies, but this approach is not necessarily what justice requires or a particularly good strategy for achieving a just result. Not all encounters with an Other will involve willing participants in an open dialogue. Nevertheless, justice demands that the oppressor answer for her wrong, whether or not she admits her fault. Even if she makes no answer to her victim, she must answer for her crime. Justice demands satisfaction, even (and especially) if the miscreant is unwilling to provide satisfaction. The answer that an oppressive Other must provide to an oppressed Other - for example, a prison sentence or a money judgment - is not necessarily addressed to the victim in her language. It is not necessarily even understood by the injurer as an answer to the victim, or as an attempt to understand the victim in all of her singularity. Sometimes justice makes its demand precisely when people will not understand each other, when they will not treat others as equals.

Thus, perhaps unsurprisingly, justice demands that we deal with people and things not in a self-abnegating manner, but in the manner appropriate to the situation before us. Centuries ago, Confucius argued that the virtuous man is one who knows both how to love people to the extent they are deserving of love, and to hate

Is it necessary to respond to every interpellation, to everyone no matter who, to every question, and especially to every public attack? The answer is "yes," it seems, when time and energy permit, to the extent to which the response keeps open, in spite of everything, a space of discussion. Without such a space no democracy and no community deserving of the name would survive. But the answer is "no" if the said interpellations fail to respect certain elementary rules, if they so lack decency or interest that the response risks shoring them up with a guarantee, confirming in some way a perversion of the said democratic discussion. Yet, in that case, it would be necessary that the nonresponse be appropriately interpreted as a sign of respect for certain principles and not as contempt for the questioner.

Id. at 837.

people to the extent that they are deserving of hate.⁸⁴ Justice demands that we speak in the language of the Other to the extent that it is appropriate to do so because this would further justice, but it equally demands that we not do so when it would increase injustice.

We may connect this point to our earlier criticism of the notion of a "responsibility without limits." Derrida has argued that the ethics of Otherness imposes upon us a responsibility to speak in the language of the Other. However, because justice is a responsibility without limits, we might ask as before whether this responsibility to the Other is an infinite responsibility or merely an indefinite one.

Thus, there are two different interpretations of the ethics of Otherness. The first imposes an infinite duty; the second imposes only an indefinite duty. The first corresponds to a nihilistic conception of deconstruction; the second to the transcendental conception. The requirement of an infinite duty means that we must in every case use all the available means at our disposal to speak in the language of the Other; the requirement of an indefinite duty means we must make some attempt to speak in the language of the Other, and that the boundaries of our duty are uncertain and contextually driven. In the first case, the demand of justice is never satisfied because this demand is infinite; in the second case, we can never be certain that the demand of justice is satisfied because the duty it imposes is indefinite.

All of the difficulties with the ethics of Otherness arise from the assumption that our responsibility to speak in the language of the Other is infinite. We can restate the difficulty by relating it to a similar problem in understanding the views of another. This is the problem of hermeneutic charity. When we try to understand what another person means, we usually do so by trying to envision how what they are saying makes sense. As Hans-Georg Gadamer has argued, we must make an "anticipation of completion" that what another is saying is coherent and has a claim to truth.⁸⁵ A stance of openness and interpretive charity is actually essential to the process

⁸⁴ Confucius, *The Analects* 4:3 (D.C. Lau trans., Chinese Univ. Press 1983) (1979).

⁸⁵ Hans-Georg Gadamer, *Truth and Method* 261-62 (Garrett Barden & John Cumming eds. & Sheed & Ward Ltd. trans., Seabury Press 1975) (1960).

of understanding. If we do not take this stance, we cannot be sure that our discovery of incoherence or falsity in another's position is due to a defect in their argument or our inability to understand it fully.⁸⁶

In other words, when attempting to understand another person, especially a person with a different world view from our own, we must be open to the possibility that the truth is more on their side than ours, that what they are saying is really true and valid - indeed, more true and valid than our own beliefs. Thus, we must be open to the possibility that our encounter with the Other will change our own views about what is true and good.⁸⁷ Understanding, then, is a kind of vulnerability or openness to the truth that the Other may have to express.⁸⁸ It always requires the possibility that our beliefs will be changed through our encounter with the Other. Indeed, Gadamer argues, if we do not come to our encounter with this hermeneutic openness, we can never achieve real understanding; at most we achieve a halfway measure, in which we withhold ourselves from true understanding because we withhold ourselves from the necessary hermeneutic vulnerability.⁸⁹

The duty of hermeneutic charity in Gadamer's theory of interpretation strongly resembles Derrida's version of the ethics of Otherness. Given the common influence of Heidegger on both thinkers, this commonality should not be surprising. Yet Gadamer's duty of interpretive charity and openness to the object of interpretation raises a serious difficulty. If this duty is endless, it is hard to distinguish this duty from a duty to reach an agreement with the person we are trying to understand. We do not know, in other words, at what point we should cease our efforts to see the truth in the views of the other party and simply recognize that they are wrong or that their argument is incoherent. If we go too far, we risk the danger of what I call hermeneutic cooptation.⁹⁰ By repeatedly blaming the

⁸⁶ See id. at 263.

⁸⁷ Cf. id. at 262.

⁸⁸ See id. at 262.

⁸⁹ Id. at 270.

⁹⁰ See Balkin, *supra* note 27, at 163.

incoherence or wrongness of the argument of another solely on our insufficient failure to understand it, we place all the responsibility for intellectual change upon ourselves. There is the danger that our drive to understand the truth in the other person's views will lead us to be coopted by those views and brought into agreement with things we should not agree with, because they are false, misleading, or unjust.⁹¹

There is a further difficulty. If the Other's views treat us as objects or as persons who deserve no respect, the requirement of continual hermeneutic charity will require us to adopt ways of thinking and talking that are unjust to ourselves. That is why we hesitate to think that justice requires that a political prisoner strive to speak in the language of her former torturers, or that a Holocaust survivor attempt to understand her own situation in the language of Aryan supremacy. To require this sort of understanding is to require these people to injure themselves psychically through the duty of understanding. For want of a better name, let us call this the requirement of hermeneutic masochism. True justice toward another should never involve hermeneutic cooptation, and it should never require hermeneutic masochism.

An infinite responsibility to speak in the language of the Other creates the perpetual danger of hermeneutic cooptation and hermeneutic masochism. It leads to the ridiculous spectacle of the rape victim being asked to understand that, in the eyes of her attacker, she was really just an object for subordination and conquest. It leads to the conclusion that blacks should be more understanding when white police officers automatically assume that they are likely to be criminals.⁹² An infinite responsibility to speak in the language of the Other can easily lead to perpetual justification of the Other, no matter how unreasonable their position. This is not what justice requires.

The postulation of an infinite duty is untenable. Yet we might still make sense of the ethics of Otherness by viewing the duty to understand as indefinite rather than infinite. We have some duty to

⁹¹ Id. at 160-61, 167-69.

⁹² See Patricia J. Williams, *The Alchemy of Race and Rights* 46, 58-79 (1991).

speak in the language of the Other, but our duty is not infinite. Instead, justice demands that we make just the right amount of effort to understand the Other. Beyond that point, it is not only appropriate but necessary for us to recognize that the Other's views are incoherent or unjustified, and that our own position is more reasonable. We have a duty to be open to and absorb that part of the Other's point of view which furthers justice while disagreeing with the rest.

But if we have this responsibility, how will we know when to cease our efforts at understanding? How will we know when we have done all that justice requires? We cannot know the full contours of our responsibility in advance of our encounter with the Other. Each situation will be different, and our responsibility in each situation will depend heavily on the context of the encounter. Hence our responsibility to the Other, while not infinite, is nevertheless indefinite.

There is a further reason why our duty to the Other must be indefinite. It has to do with the symmetrical nature of Otherness.⁹³ We are always an Other to the person who is an Other to us. The ethics of Otherness seems most appealing when we sympathize with the Other because the Other is the oppressed, the victim, or a potential object of injustice. However, we cannot state as a general rule that only the oppressor needs to speak in the language of the oppressed, or the injurer in the language of the victim. An additional problem of indefiniteness arises because these categories are not always clearly defined. In different contexts, and from different perspectives, different people appear to be strong or weak, injurer or victim, oppressor or oppressed, judge or judged.

First, the roles of the two parties may shift radically depending on how one describes the situation. Consider two neighbors who make conflicting uses of their property. Suppose that Neighbor One needs to operate machinery to run her business while Neighbor Two needs peace and quiet for her health. The second neighbor regards the first neighbor as an injurer; Neighbor One should try to understand how important it is for Neighbor Two to have peace and quiet. But Neighbor One has a symmetrical complaint. If she has to stop operating her machine, she will go out of business. Neighbor Two's demand is unreasonable under the circumstances, and justice requires

⁹³ See Cornell, *supra* note 75, at 54; Derrida, *supra* note 75, at 128.

that Neighbor Two understand the significant costs her request will impose on Neighbor One.⁹⁴ In this situation each party is an Other to the other, and each is an Other to the judge who must decide the case. Thus there are at least four different potential duties to respond. Both neighbors must make some effort to understand the position of the Other, but the roles of oppressor and oppressed, victim and injurer, are not determined in advance. Similarly, the judge must attempt to understand the situation of each neighbor from each neighbor's perspective, but the extent of this duty depends on which neighbor is acting unjustly toward the other, and this is the very question that the judge must decide.

Thus, the scope of the duty owed to speak in the language of the Other depends on our definition of the roles of the parties - as victim or injurer, strong or weak - but this definition will in turn be affected by the scope of the duty to speak in the language of the Other. For example, the more we try to see things from Neighbor One's perspective, the clearer it may become that Neighbor Two is being unreasonable, oppressive, and playing the role of the potential injurer. Yet the opposite conclusion might follow if we attempt to see the situation from Neighbor Two's perspective. The scope of our duty to speak in the language of the Other does not exist before we decide what their respective roles are, but the roles each plays cannot fully be determined before we fix the scope of the duty; each feature of the situation provides the proper context in which the other feature is to be judged. Because of the mutual dependence and differentiation of these contexts, the scope of the duty toward the Other is indefinite. It is neither infinite nor nonexistent, but dependent on facts and circumstances that are never fully clear, and whose precise contours we cannot fully determine in advance. Thus, the duty to speak in the language of the Other becomes a duty without limits, but it is by no means an infinite duty as Derrida suggests.

The difficulty that produces indefiniteness may be subdivided into two problems: Let us call them the problem of certainty and the problem of proportion or degree. The problem of certainty arises when we cannot be sure whether a person is in fact an oppressor or an

⁹⁴ This example draws on the familiar Coasean point that both parties are causal factors in their conflicting use. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1, 2 (1960).

oppressed person. Justice may require us to decide this question, rather than use it as a basis for determining just action. Suppose a criminal defendant is accused of rape. If he really raped the victim, he is an oppressor. Justice demands that he recognize how he has harmed his victim and answer for his crime. If he is innocent, however, he will be oppressed if the State fails to do justice to him. The State must therefore ensure that it hears his story and understands the situation from his point of view; it must make sure that it does not convict him based on false evidence or unreasoning stereotypes. At the same time, it must not unthinkingly accept every piece of exculpatory evidence and every exculpatory account the defendant might offer, for that might create an equal and opposite injustice. In a criminal case we cannot determine in advance whether a person is guilty or innocent; that is precisely the purpose of a criminal trial. Given this situation, does justice demand that we speak to the defendant in his language or that he speak to us in our own? Our uncertainty in this regard leads to the indefiniteness of the duty.

The problem of degree arises because a person may at one and the same time be an injurer or oppressor to some degree and a victim or an oppressed person to another degree. Suppose that we are quite sure that a criminal defendant is guilty of rape. He nevertheless deserves to be treated with some respect; for example, the State should not be permitted to torture him to extract a confession, and it must give him an opportunity to defend himself in court. His crime may be less bad than other crimes of the same sort; if so, justice requires that he be given a chance to produce exculpatory evidence, and the State has a duty to consider it and lessen his sentence to the appropriate extent. If the State fails to protect the defendant's rights, he may be in the position of an oppressed party, despite his horrible crime. Thus, the State has a duty to speak in his language with respect to some features of the situation, but not with respect to others. These complications also produce an indefinite duty.

The case of Paul de Man is a perfect example of the indefiniteness of our duty toward the Other. The entire debate surrounding de Man concerns what role he should be assigned. Is de Man a victim of unjust accusation or a person who unjustly accused others (Jews)? Was he a collaborator, an ambitious man without a moral compass who sought to forget his sordid past, or was he an immature youth who made an early mistake yet matured into a respected scholar? The question of his status is inextricable from the

question of what it means to be fair to him. Moreover, even if de Man willingly wrote antisemitic literature, justice requires that he be condemned only to the extent that he is responsible, but not to the extent that he is not responsible. In order to be fair to de Man, we must try to understand what he did and wrote, and this endeavor may require us to understand how he understood his actions and his writings. Nevertheless, we do not have to accept everything he said or did at face value or interpret every one of his writings or actions so as to exculpate him, just as we should not deliberately interpret his life in its worst possible light. Our duty of fairness is indefinite, but not infinite in either direction - toward exculpation or inculpation. We can be unjust either by refusing to speak in the language of the Other or by exclusively adopting that tongue.

Note that we cannot avoid these difficulties by insisting that all parties, whether victim or injurer, oppressor or oppressed, have an equal and infinite duty to speak in the language of the Other. An equal and infinite duty on all sides leads to either incoherence or injustice. It means that the rapist and the rape victim have equal duties to understand each other in terms of each other's conception of each other, and this requirement permits neither a determinable decision nor a just one. Justice demands that each "speak in the language of the Other" to the proper amount, to the proper degree, and in the proper circumstances. This duty is without limits not because it is infinite but because it is indefinite - because the question of duty to the Other is bound up with the very description of the situation which the duty concerns.

An indefinite duty, like an indefinite responsibility, is "without limits" because its contours are context bound and because this context cannot be fully determined in advance. What would an indefinite duty toward the Other mean? It would be a duty that can never fully be satisfied. However, it cannot be satisfied because we are uncertain about its scope, not because the demand is infinite.⁹⁵

⁹⁵ We should not confuse the question whether our responsibility to the Other is infinite or indefinite with still another reason why the demand of justice may remain unsatisfied in a particular case: the impossibility of a commensurable remedy. Often subsequent reparations for an injury never seem adequate to compensate for a previous loss. But this impossibility is not because either the loss or the responsibility for the loss is infinite, in the sense of having a

Previously we identified the concept of an infinite responsibility with normative nihilism. The notion of an infinite duty to speak in the language of the Other - which is a total abandonment of ourselves to the language of the Other - also leads to a kind of nihilism. Hoping to efface the distinction between self and Other, we succeed only in effacing the self and its language, just as the effacement of all distinctions leads to the destruction of meaning. This endeavor leads to a "nihilism of the self." The preservation of the self is the preservation of its Otherness from the Other, which is also the preservation of its partial similarity to the Other, and a source of the indefiniteness of its duty toward the Other. When we understand deconstruction to require an indefinite obligation, we preserve the self and make sense of the demand of justice; but when we understand deconstruction to require an infinite demand, it must lead to effacement or nihilism.

IV. Deconstruction as an "Antitotalitarian" Form of Analysis

limitless magnitude. Rather, the problem is one of incommensurability between the loss and any remedy we could offer. This incommensurability arises from the fact that our lives change in response to the events that happen to us. Our situation after an injury cannot be made fully commensurable with the situation before because both we and the world around us have changed as a result and can never be the same again. The past, precisely because it is past, can never fully be redeemed. The nature and direction of our lives have been irrevocably altered by previous actions and events; we become different people because of what has happened to us.

Thus, if the defendant accidentally breaks the plaintiff's leg, she may be deeply sorry for what she has done. Yet her action has affected the lives of others in a way that cannot fully be repaired, no matter what good deeds she later performs, and no matter how much assistance she offers to the victim and the victim's family. In such circumstances, the reason why the injurer's responsibility can never be fully satisfied is not because it is infinite in magnitude. The problem is that any remedy we could offer will be of the wrong kind, because we cannot relive the past. Thus, the fact that we live our lives in unidirectional time by itself can make subsequent remedies for finite harms incommensurable and hence essentially and perpetually inadequate.

Derrida's final suggestion connects deconstruction to an opposition to totalitarianism in thought. Derrida insists that what he has always practiced under the name of deconstruction "has always seemed to me favorable, indeed destined (it is no doubt my principal motivation) to the analysis of ... totalitarianism in all its forms, which cannot always be reduced to names of regimes."⁹⁶ He finds examples of totalitarian thinking in criticisms of Paul de Man; since these critics are so concerned with denouncing political totalitarianism, he argues, they should avoid reproducing the logic of totalitarianism in their judgments and readings.⁹⁷ In fact, deconstructive analysis, which they attack, is the best way to avoid totalitarian logic: "Deconstructions have always represented ... the at least necessary condition for identifying and combating the totalitarian risk" in discourse.⁹⁸

What is a "totalitarian" logic of discourse or a "totalitarian" gesture in discourse? Derrida seems to identify it with various forms of oversimplification, falsification, or rushing to judgment. His examples describe features that he finds objectionable in various critical readings of de Man's work:

purification, purge, totalization, reappropriation, homogenization, rapid objectification, good conscience, stereotyping and nonreading, immediate politicization or depoliticization (the two always go together), immediate historicization or dehistoricization (it is always the same thing), immediate ideologizing moralization (immorality itself) of all the texts and all the problems, expedited trial, condemnations, or acquittals, summary executions or sublimations. This is what must be deconstructed.⁹⁹

All of these sins of reading and understanding share an inattention - whether willful or innocent - to problems of context.

⁹⁶ Derrida, Paul de Man's War, supra note 8, at 648.

⁹⁷ Id. at 645.

⁹⁸ Id. at 647.

⁹⁹ Id. at 646.

They oversimplify by failing to spend the time or effort to see the multifaceted and complicated textures of meaning that attend any text or any event.¹⁰⁰ The totalitarian gesture, then, is oversimplification and inattention to complexity and context; the antitotalitarian gesture, which is just, is a corresponding attention to these features of texts.

Of course, a judgment whether one is being insufficiently sensitive to context is itself a contextual judgment. For example, in some contexts, dismissing another's arguments, making categorical distinctions, and even rushing to judgment may not be an entirely bad practice.¹⁰¹ Derrida denies that "we have access to a complete formalization of this totalitarian logic" or can be absolutely exterior to it.¹⁰² There is no "systematic set of themes, concepts, philosophemes, forms of utterance, axioms, evaluations, hierarchies which, forming a closed and identifiable coherence of what we call totalitarianism, fascism, nazism, racism, antisemitism, never appear outside these formations and especially never on the opposite side."¹⁰³ Indeed, there is no "systematic coherence proper to each of them, since one must not confuse them too quickly with each other."¹⁰⁴ Conversely, there is no discursive act which is completely antitotalitarian, for there is no "property so closed and so pure that one may not find any element of these systems in discourses that are commonly opposed to them."¹⁰⁵

Derrida's identification of deconstructive argument with antitotalitarianism is really a special case of his critique of logocentrism. The problem of logocentrism is the problem of categorical judgment. Categorical judgments are judgments that employ categories; whenever we predicate a property of an object, we place it in a category. We say that it is this way rather than that, that

¹⁰⁰ Id. at 645.

¹⁰¹ For example, Derrida himself thinks it important to condemn Nazism and political totalitarianism in all of their forms. See id.

¹⁰² Id.

¹⁰³ Id.

¹⁰⁴ Id.

¹⁰⁵ Id.

it goes into this box rather than another. In fact, categorical judgments are necessary to our thought; they are the basis of all judgments of similarity and difference. Of course the term categorical has another meaning as well - insensitivity to context. Categorical obligations are unconditional; to state something categorically is to assert it without regard to (at least some types of) context. Thus, categorical judgments, because they are categorical, are to some degree acontextual. They must lump some things together as similar and exclude others as different, without attending to the similarities across, or the differences within, the boundaries that they establish. Hence every categorical judgment is a sort of falsification or oversimplification of the situation. Of course that is precisely why categories are useful. In a world of infinite diversity, change, and differentiation, categories gather things together and treat them as similar so that the human mind can understand the world before it. One might think of categories, then, as heuristics that aid understanding through partial simplification.¹⁰⁶

What is most remarkable about categorical judgment, then, is that it is simultaneously useful, adequate, and empowering in some contexts and deficient, inadequate, and misleading in others. We cannot do without categorical judgments of some type, yet if we do not pay sufficient attention to the context in which we make them, they may lead us away from what is true and what is just. Deconstruction helps us to recognize the discrepancy between the categorical judgments we make and the context our judgment overlooks. A perfectly just treatment of a situation would require us to understand the situation in all of its contextual richness.¹⁰⁷

¹⁰⁶ Although this sort of argument is generally associated with conceptual relativism, we should note that it is perfectly consistent with a realist ontology. One might believe that linguistic categories lump together objects that are really similar in some respects, although different in others, and that the grounds of this similarity and difference are not simply a matter of human convention.

¹⁰⁷ Thus, Derrida insists, "one must analyze as far as possible this process of formalization and its program so as to uncover the statements, the philosophical, ideological, or political behaviors that derive from it and wherever they may be found." Derrida, Paul de Man's War, supra note 8, at 646.

Nevertheless, we must make categorical judgments of some type to articulate the very context we seek to uncover. Context itself must be describable in terms that are unavoidably categorical. Hence the process of deconstructive analysis, while "urgent," is also "interminable."¹⁰⁸ Deconstruction becomes "the tireless analysis (both theoretical and practical) of ... adherences"¹⁰⁹ to the totalitarian discourses that remain lodged even in one's own ways of thinking and which one is trying to combat.

Indeed, in articulating his point, Derrida falls prey to the very danger he warns against. Derrida labels all the various forms of oversimplification and acontextual judgment as "totalitarian."¹¹⁰ But this comparison is itself a gross overstatement and highly misleading. To be sure, totalitarian regimes may make use of simplistic slogans and lump various persons together into categories of undesirables, but it hardly follows that every oversimplification deserves the name "totalitarian," especially given the powerful connotations that usually accompany this word. In Derrida's terms this comparison is in itself an oversimplification, a "totalitarian" move that provides Derrida's attack on de Man's critics with much more rhetorical force than it really deserves. It would be more appropriate - and more just - to argue that these critics do not read de Man in the proper context and with the proper degree of charity; but this accusation, even if true, in no way justifies the claim that, in misreading de Man, they are reproducing the logic of totalitarian discourse.

In fact, when we strip away its more obfuscating elements, Derrida's identification of deconstruction with antitotalitarianism is really better expressed in terms of deconstruction's continual allegiance to transcendent human values, which law, language, and convention never fully serve and always partially obscure. We deconstruct categorical judgments because they take us further away from truth; we deconstruct legal categories because they deviate from

¹⁰⁸ Id.

¹⁰⁹ Id. at 648.

¹¹⁰ See id. at 645 ("Such a formalizing, saturating totalization seems to me to be precisely the essential character of this logic whose project, at least, and whose ethico-political consequence can be terrifying.").

what is just. Nevertheless, a deconstruction in the service of justice is always premised on the possibility of reconstruction - that is, on the hope of some categorical scheme that would better articulate the appropriate context of judgment. If we do not believe that there is a better description, there is no point in deconstructing in the first place. We are simply substituting one description for another, without any assertion that one is better than another.

Does this practice in fact presuppose a transcendent norm of justice? We might deconstruct only in order to show that a categorical judgment fails to live up to the norms of our particular culture or legal system. In that case the ultimate ground of our deconstruction is to obtain increasing fidelity to positive norms. However, such a practice places the positive norms beyond criticism because they are the basis of deconstructive critique. Yet one can easily imagine cases in which this very refusal to critique positive norms would itself be totalitarian.

However, to say that positive norms are inadequate - and hence in order to deconstruct them - we must refer to values that lie beyond the norms we are critiquing and that serve as the source of our criticism, even if we believe that the values we wish to uphold are to some extent realized in our culture. Suppose that we denied that we need concern ourselves with transcendent values: Suppose we assert that we are only interested in engaging in an "immanent" critique. In other words, we say that we are using one aspect of our cultural norms to critique other aspects, and therefore we need make no reference to anything beyond the positive norms of our culture. For example, we might use the commitment to equality expressed in the Civil Rights Act of 1964 ¹¹¹ to criticize the lack of civil rights for homosexuals in the United States. The question remains, however, why we saw a particular aspect of our cultural practices as a worthy basis for our critique and another aspect as unworthy. Since both are equally aspects of our culture, culture by itself cannot serve as a norm to decide between them.

We might say that one is a more central feature of our cultural norms than the other, but this leads to two different interpretations. If something is central because it is more prevalent, we refer only to a positive norm. Yet mere prevalence does not guarantee the worth of

¹¹¹ Pub. L. No. 88-352, 78 Stat. 241 (codified as amended principally at 42 U.S.C. 2000a to 2000h-6 (1988)).

a cultural practice, unless our only goal is to reinforce positive norms for their own sake. For example, racial inequality may be central to a regime of Jim Crow or apartheid, but this fact does not make it a worthy basis for a critique of egalitarian norms that might exist elsewhere in the culture. Indeed, by reinforcing the most prevalent practices of a culture, we may reinforce its most deeply unfair elements. On the other hand, by "central" we could mean "more valuable" or "more just." In that case our judgment must also refer to a transcendent conception of value or justice that informs our notion of centrality. Thus, whenever we speak of the proper continuation of positive norms or about deciding between alternative interpretations of positive norms, we must eventually make use of transcendent norms of justice. Although we may find these norms partially realized in portions of our own culture, these inadequate articulations do not exhaust their meaning for us.

V. Deconstruction as a Normative Chasm

I want to conclude this essay by juxtaposing two different claims. I began this essay by noting that the normative import of any particular deconstructive argument depends largely upon what the deconstructor chooses to deconstruct, and the values and commitments that she brings to her act of deconstruction. As we have seen,¹¹² Derrida tends to pick targets for deconstruction that correspond to the injustices he perceives. He deconstructs inegalitarian conceptions, but not egalitarian ones; he deconstructs the cultural practice of apartheid and Western practices that support it, but not arguments against apartheid; he deconstructs unfair accusations of Paul de Man, but not those assessments which he believes to be fair. At the same time, I have argued for a transcendental version of deconstruction: When we employ deconstruction to discuss questions of justice, we always refer to the discrepancy between human law, culture, and convention, and the human values which they articulate.

When we put these two claims together, we arrive at a curious problem. If deconstruction makes reference to transcendent values, why should the results of deconstructive argument turn on the target

¹¹² See supra notes 9, 15, 31-40 and accompanying text.

of our deconstruction? How is it possible that deconstructive arguments can be wielded for contrary purposes? Why isn't deconstructive argument always a force for good?

In the three essays I have discussed, Derrida does not deal adequately with the many difficult questions concerning the ethics of deconstructive argument. He is preoccupied with showing that deconstruction is not necessarily nihilistic.¹¹³ Nevertheless, he never offers much of an argument for why deconstructive argument cannot lead to contradictory normative positions or even be used to promote injustice. In *Biodegradables*, he does little more than scoff at the notion that one can use deconstruction to promote both good and evil political regimes; he demands proof that deconstruction could ever be used for a bad purpose.¹¹⁴ This burden is easily met, however: As the first part of this essay shows, it takes very little effort to produce numerous examples of deconstructive arguments that point in opposite directions.¹¹⁵ In his Cardozo Law School address, Derrida tries a different tack. He seems to suggest that any example of deconstruction that leads to injustice is not really deconstructive, just as no example of law is ever fully just. In his view, both deconstruction and justice are impossible. Thus, deconstruction itself

¹¹³ For example, he insists that deconstruction does not "correspond (though certain people have an interest in spreading this confusion) to a quasi-nihilistic abdication before the ethico-politico-juridical question of justice and before the opposition between just and unjust." Derrida, *supra* note 4, at 953. But this failure of correspondence may mean either that deconstruction - properly employed and understood - need not lead to injustice, or that it cannot do so. Even if people do not use deconstructive arguments to efface the distinction between the just and the unjust, they might still use deconstructive arguments to argue for what is unjust through sophistical means.

¹¹⁴ See, e.g., Derrida, *Biodegradables*, *supra* note 8, at 827 (rejecting the claim of a critic that deconstruction can be used for either "fascist" or "liberal" purposes and demanding "some proof, please, some arguments, some examples, at least one example!").

¹¹⁵ See *supra* text accompanying notes 40-45; see also Balkin, *supra* note 3, at 1613-25 (offering competing readings of a U.S. Supreme Court opinion on parental rights).

can never be unjust; in fact, Derrida asserts, "Deconstruction is justice."¹¹⁶ In these passages, Derrida simply offers a mystical equation between justice and deconstruction; he strings together provocative metaphysical formulas but does not begin to offer a convincing argument for them.

Nevertheless, it is possible to make sense of deconstruction's proper relationship to justice, and, in the process, to offer a more charitable interpretation of Derrida's rather obscure discussion. To solve this quandary, let us distinguish between deconstructive arguments made by human beings, which we might call the rhetorical practice of deconstruction, and the relationship of mutual dependence and differentiation that exists between human values and human language, convention, and culture. In this relationship, human conventions articulate human values but never fully capture them. Let us call this relationship of simultaneous inadequacy and dependence the normative chasm between inchoate human values and their cultural articulations.¹¹⁷

What is the relationship of the rhetorical practice of deconstructive argument to this normative chasm? When people make deconstructive arguments about justice, they make use of this chasm in two ways. First, their arguments implicitly rely on values which, to some indefinite degree, transcend human conventions. Second, their critiques partially describe the discrepancy between law, convention, and culture and the human values of justice and truth. Yet deconstructive arguments that make use of this normative chasm are not themselves identical to this chasm, nor do they ever articulate it completely. Indeed, because human values are inchoate and indeterminate and human conventions are indefinite in their reach and scope, the relationship between the two is doubly problematic. It may

¹¹⁶ Derrida, *supra* note 4, at 945.

¹¹⁷ Perhaps unsurprisingly, Plato was among the first philosophers to stress this relationship; it is a principal motivation for his theory of Forms. Cf. Seung, *supra* note 24, at 209-10. Nevertheless, one does not have to accept the entire ontological baggage of the Forms to acknowledge Plato's genius in recognizing this fundamental inadequacy between our indeterminate values and their articulations in the world of culture.

even be misleading to think of this normative gap as a single, homogenous thing that any mind could ever grasp or describe as a totality. Thus, there are two things that human law, language, and convention fail adequately to capture: The first are the human values on the other side of the normative chasm; the second is the chasm itself.

The human practice of deconstructive argument always involves a limited use of the normative gap between value and articulation. It is limited in two senses. First, a deconstructive argument must always begin somewhere, at a certain place or with a certain target. Each deconstructive argument shows the instability of the distinctions with which it starts, and the mutual dependence and differentiation of the conceptual oppositions it targets. Yet these deconstructive arguments themselves must rely on distinctions and conceptual oppositions, otherwise they could not be expressed in language and understood by others. Furthermore, no deconstructive argument destabilizes all of the conceptual structures in language or culture at once; for every distinction it contests, it leaves unexamined thousands more. Thus, every deconstructive argument fails ultimately to offer an adequate account of the normative chasm; instead it examines and articulates only a little part of this phenomenon, using conceptual tools that are already symptoms and effects of this chasm.

Second, each deconstructive argument must come to an end. It generally ends with a conclusion that a particular distinction or set of distinctions is effaced, undecidable, or more complicated than one had first imagined. It ends when the deconstructor believes that she has reached an appropriate degree of enlightenment from the process of deconstructive argument.¹¹⁸ For example, Derrida ends his essay on de Man by showing that de Man's situation is more complicated than his critics thought. So deconstruction as practiced by human beings always arrives at a conclusion in two senses of the word - both an end and a result of reasoning. Yet the decision to stop and assess the conclusions of one's argument, to state them as conclusions - in both senses of that word - leaves unspoken the many further steps that could be taken. These additional steps could lead to a partial or even a complete transformation of the conclusions just arrived at. Thus, from another perspective, the conclusion of a deconstructive

¹¹⁸ See Balkin, *supra* note 1, at 766.

argument is a conclusion in neither sense of the word: for it does not end the possible lines of deconstructive argument, nor does it lead to a fixed and determinate result.

We thus obtain the curious result that the discrepancy between value and articulation that makes each human practice of deconstruction possible is itself indescribable through the finite rhetorical practice of deconstruction. One might try to imagine a God's-eye point of view from which all the mutual differentiations and dependences, all the uncanny reversals and undoings of human conceptual structures, could be understood and appreciated. But such a view is not possible for any human intelligence. Thus, the rhetorical practice of deconstructive argument is always inadequate to express the predicament of human culture that makes this sort of argument possible.

It is possible that, when Derrida speaks of "Deconstruction" in his more mystical pronouncements, he has in mind something like this normative chasm, this essential inadequation between transcendent human values and human culture. If so, then no human practice of deconstructive argument is "Deconstruction," because no argument ever fully describes the relationship between value and articulation. Indeed, such a complete description would be impossible. It would not follow, however, that "Deconstruction" itself was impossible, only a fully adequate account of it. So Derrida's equation between Deconstruction and justice is flawed. Justice is "impossible" only in the sense that one never finds a fully and categorically just act in this world. Yet "Deconstruction" is not impossible, even though one never finds a fully deconstructive argument. The relationship of mutual dependence and differentiation that exists between culture and value is not impossible; it is the case. Moreover, it is simply not true, as Derrida asserts, that Deconstruction is justice. This assertion is a confusion of the normative chasm between culture and value with a particular inchoate and indefinite human value. Derrida's mystical formula simply obscures a valuable insight.¹¹⁹

¹¹⁹ In other words, if Derrida were correct that Deconstruction is justice because both are impossible of attainment, then Deconstruction would not only be justice, but also beauty, wisdom, and temperance, as none of these virtues is perfectly realized in this world. A more appropriate view would be Derrida's assertion that

This account of Deconstruction also explains two other puzzling Derridean statements. The first is Derrida's insistence that Deconstruction is not a method or a technique.¹²⁰ The second is his assertion that Deconstruction itself, like justice, is not deconstructible.¹²¹

Derrida's repeated denial that deconstruction is a method or a practice -and therefore, unlike these denials, not repeatable - has struck many as strange and possibly a clever way of dodging criticism: if deconstruction is not a method, then only a certain elect -presumably Jacques Derrida and his followers - can tell whether a given argument is truly deconstructive or not. They can thus disown all examples that put their practices in a bad light. Whether or not Derrida has sought to shield himself from criticism through obfuscation, there is another, more charitable way of accounting for his statements. Derrida's insistence on separating deconstruction from "method" is consistent with a view of Deconstruction as a normative chasm that cannot adequately be captured by any human rhetorical

"deconstruction takes place in the interval that separates the undeconstructibility of justice from the deconstructibility of droit (authority, legitimacy, and so on)." Derrida, *supra* note 4, at 945 (first emphasis added). In other words, Deconstruction is the gap itself, rather than one side or another of this gap.

If by Deconstruction Derrida means this normative gap, Deconstruction would not even be an activity of human beings. Instead Deconstruction would simply be the case that there is a fundamental inadequation. Thus, elsewhere Derrida suggests that "deconstruction takes place, it is an event that does not await the deliberation, consciousness, or organization of a subject, or even of modernity. It deconstructs it-self." Letter from Jacques Derrida to a Japanese Friend 4, reprinted in Derrida and Différance 1-5 (David Wood & Robert Bernasconi eds., 1988) hereinafter Letter from Derrida. This "it," Derrida insists, "is not ... an impersonal thing that is opposed to some egological subjectivity." Id. It is not the result of a subject applying a force to an object. It would perhaps be better to say simply that "Deconstruction happens," or "There is Deconstruction".

¹²⁰ See Letter from Derrida, *supra* note 119, at 3.

¹²¹ Derrida, *supra* note 4, at 945.

practice of deconstructive argument. This chasm is not part of any conventional practice of deconstruction; rather, it is what these conventions imperfectly articulate. The human practices of deconstructive argument are conventional, repeatable, transmissible, and hence deconstructible. In contrast, Deconstruction - which is the case that there is an indescribable inadequacy between human values and their articulations - is not a convention, and hence it is not deconstructible.¹²²

Nevertheless, it follows that deconstructive arguments are surely part of a practice or convention of deconstructive rhetoric. This claim has two consequences. First, the practice of deconstructive argument is as deconstructible as any other set of conventional understandings and practices. This resolves the question left unanswered earlier in this essay. We noted that if deconstruction argument were a repeatable rhetorical practice, expressible through repeatable linguistic signs and conventions, it would be subject to "ideological drift": The insertion of deconstructive arguments into new and different contexts would result in arguments with widely varying political and moral valences. This would mean both (1) that deconstructive arguments could be used for a variety of different political purposes, depending on the context in which they were offered; and (2) that any normative uses of deconstruction would themselves be subject to further deconstructive critique.

These conclusions are fully warranted. Deconstructive argument, like all other forms of rhetoric, is a communal practice existing in various human institutions. It can be - and is - learned and taught, copied and parodied, understood and misunderstood. It can be - and is - the subject of countless Ph.D. theses and books. It is repeatable and transmissible, like all other features of human life existing in and articulated through human language and human social conventions. It is therefore subject to the vagaries of iterability and

¹²² A similar argument would apply to justice. Only human culture, law, and convention are deconstructible because, and to the extent that, they depend upon but vary from inchoate human values. A human value like justice would not be deconstructible, although any particular articulation of it would be, just as the normative gap - Deconstruction itself - would not be deconstructible, although any particular articulation of it would be.

ideological drift. It is deconstructible.¹²³

Furthermore, because deconstructive argument is a practice of rhetoric, it is hardly surprising that it can be used for good or for ill. Like all rhetoric, deconstructive argument is a form of persuasive advocacy. As Aristotle pointed out, the advocate always takes large portions of her audience's beliefs for granted and does not try to contest them.¹²⁴ Instead, she focuses on specific questions and makes use of beliefs and attitudes that she and her audience hold in common.¹²⁵ Some of these beliefs may be only partially correct; others may even be the result of unthinking acceptance of community norms. Nevertheless, the advocate refrains from attacking them because they actually assist her in making her argument.

In this regard the human practice of deconstructive argument is much the same as other forms of persuasive rhetoric. It begins

¹²³ It might seem strange for me to note the obvious - that people learn to deconstruct in departments of comparative literature, that theses on deconstruction that repeatedly apply deconstructive arguments are produced in great numbers, that these theses are criticized or applauded as good and bad examples, that people can apply the varieties of deconstructive arguments they find in certain texts to later problems, and that other members of the relevant interpretive community of deconstructive scholars agree that these later applications are also deconstructive. I emphasize these features - the repeatability and the communal nature of deconstructive practice - precisely because Jacques Derrida has always been so uncomfortable with such statements, leading as they do to the conclusion that there is, after all, a deconstructive method, that can be taught, practiced, and repeatedly applied in new situations. At the same time, Derrida has been quick to point out that certain arguments are misstatements of deconstruction, that others are poorly performed versions of deconstruction, and that particular deconstructive readings are themselves subject to further deconstruction. My theory of Deconstruction as a normative chasm shows how one might consistently hold these positions; nevertheless it commits Derrida - and other deconstructionists - to something like a transcendental account of deconstruction.

¹²⁴ See Aristotle, *The "Art" of Rhetoric*, Book I, 1.12 (John H. Freese trans., Loeb Classical Library 1982).

¹²⁵ See id.

somewhere and ends somewhere. It takes certain features of culture and convention for granted and uses them to deconstruct others. Thus, people can use deconstructive argument for different purposes because they can begin their critiques with different texts or different features of the same text. Because the normative chasm between value and articulation applies to all aspects of human culture and convention, there will always be some discrepancy or instability to deconstruct in every conceptual structure and in every normative position. Thus, depending upon where one starts and where one ends, one can put into question different distinctions and conceptual oppositions that support or justify different interpretations or different actions.

If deconstructive argument is a form of rhetorical practice, then the ethical status of deconstruction is very much like the question of the relationship of rhetoric to ethics. The latter question has been the focus of a great historical debate. Quintilian, the great Roman theorist of rhetoric, claimed that good oratory is a good person speaking well.¹²⁶ This statement might be read to suggest that well-done oratory must also serve a just objective and, conversely, that arguments motivated by an unjust purpose or a bad character will always manifest poor rhetorical style.¹²⁷ Although this position has had its adherents throughout history,¹²⁸ many people consider it wishful thinking.¹²⁹ A more common position on the ethics of

¹²⁶ 4 Quintilian, *Institutio Oratoria*, Book XII, 1.1 (H.E. Butler trans., Loeb Classical Library 1961).

¹²⁷ See id., 1.3.-13.

¹²⁸ A recent example is Richard Weisberg, *Poethics* 5-15 (1992), which argues that unjust judicial opinions usually display rhetorical flaws.

¹²⁹ Quintilian himself recognized that "common opinion is practically unanimous in rejecting this view." Quintilian, *supra* note 126, 1.14. His claim is all the more puzzling given that he was involved in the training of lawyers, who are taught to argue both sides of a case with equal ability. However, Quintilian's position was motivated by a much more plausible one: He believed that the proper use of rhetoric could only be guaranteed by a rigorous moral education that produced a good character; hence he felt that rhetorical

rhetoric is that of Plato, who compared rhetoric to cosmetics, flattery, and the baking of pastries.¹³⁰ Plato argued that rhetoric misleads people by giving certain positions an artificial appeal, just as a pastry chef gives food an artificial appeal that is undeserved given its lack of nutritional value.¹³¹ Thus, far from always serving just ends, rhetoric was a device inherently designed to falsify and obfuscate.

Aristotle struck a middle position between these two extremes. He emphasized that rhetoric is a useful and important feature of public life.¹³² But its publicity means that it can be used for many different purposes.¹³³ It is surely wrong to employ rhetoric for evil ends; nevertheless, it is worthwhile to be able to argue both sides of a case precisely so that one can better respond to the unjust use of rhetoric when one encounters it.¹³⁴ Although one can use rhetoric for good or for ill, the same can be said of many useful things, like strength, health, wealth, and strategic expertise.¹³⁵ Rhetoric's ability to be employed for both good and wicked purposes should lead us to recognize the responsibility that each of us has for the arguments that he or she makes. Each of us - Derrida and de Man included - may become skillful at persuasion. Yet with this skill

and moral education must occur together. See id., 2.1-.2.

¹³⁰ Plato, *Gorgias*, in *Collected Dialogues*, supra note 20, at 229 (W.D. Woodhead trans., 1953).

¹³¹ Id. at 245-57.

¹³² Cf. Aristotle, supra note 124, Book I, 1.10 (offering arguments for the utility of rhetoric).

¹³³ As George Kennedy reminds us, "Aristotle was the first person to recognize clearly that rhetoric as an art of communication was morally neutral, that it could be used either for good or ill." George A. Kennedy, *Introduction to Aristotle On Rhetoric* ix (George A. Kennedy trans., Oxford Univ. Press 1991).

¹³⁴ Aristotle, supra note 124, Book I, 1.12.

¹³⁵ See id., 1.13.

comes responsibility. Like all other kinds of rhetoric, we must use the practice of deconstruction responsibly, because the practice itself will not guarantee the purity of our motives or the goodness of our actions.

Conclusion

The encounter between deconstruction and justice has changed both parties; yet, of the two, deconstruction appears to be the more transformed. If deconstructive practice is to be of any use to the question of justice, it must become a transcendental deconstruction. It must exchange the logic of the infinite for that of the indefinite. It must act in the service of human values that go beyond culture, convention, and law. It must recognize the chasm that differentiates human value from articulated conceptions of it, and it must identify Deconstruction with that chasm. Finally, one must understand deconstructive practice as a rhetorical practice that employs Deconstruction but is not identical to it. Because deconstructive practice is a practice, it is repeatable, teachable, and alterable like any other human convention. Because it is rhetorical, it can be used for good or for ill.

There is one more transformation yet to come. Understanding the subject of justice must lead us to reunderstand the subject. Derrida speaks repeatedly of the "infinite demand" of justice. But his metaphor obscures a central point: Justice does not demand anything, for justice is not a person that could demand. Justice is a human value. It is a value lodged in the hearts of human beings. It is people who demand justice, and who demand it of one another.

Derrida's placement of justice in the role of the grammatical subject - the subject who demands justice - obscures the fact that the real subject of justice is, and always has been, not a concept, not a grammatical subject, but a person. This subject of justice is someone who can experience justice and injustice, who can feel wronged or vindicated, harmed or helped, who can understand that she or someone else has been treated justly or unjustly.

There is something uncannily appropriate in Derrida's way of expressing himself, replacing the individual subject with a grand abstraction. Deconstruction first came to public attention in the wake

of structuralism, an intellectual movement that effaced the human subject and sought to explain it as an effect or byproduct of language and culture. These attempts to dissolve the human subject were in turn part of a larger tendency in French thought toward antihumanism.¹³⁶ Derrida broke with structuralism in several respects, but not in this one. He adopted the largely antihumanist assumptions then reigning in French intellectual life, as well as the unfortunate tendency in Continental philosophy to make grammatical subjects out of philosophical predicates.

In fact, there has always been the temptation in Derrida's work to do without the individual human subject, to speak of Deconstruction, but not of deconstructors; of signs, but not those who signify; of meanings, but not those who mean; of justice, but not of people who value the just. Especially in his early works, one sometimes finds the suggestion that there are simply signs pointing to each other, without the necessary support of any human intelligence.¹³⁷

Nevertheless, this raises a serious difficulty. How can there be signs without subjects to understand them? After all, as Charles Sanders Pierce defined it, a sign is something that stands for something else to somebody in some relation or context.¹³⁸ Without the "somebody" to make or understand the sign, signification becomes impossible, and Derrida's philosophical project falls apart. Thus, although antihumanism and semiotics are often identified with each other, in fact they are mutually incompatible.

One way out of this difficulty is to postulate a Transcendental Subject who does all of the work of meaning and understanding all signs. This is the Hegelian solution; it projects human intelligence

¹³⁶ On French antihumanism, see Kate Soper, *Humanism and Anti-Humanism* (1986).

¹³⁷ See, e.g., Derrida, *supra* note 75, at 25 ("The meaning of meaning ... is infinite implication, the indefinite referral of signifier to signifier.").

¹³⁸ 2 *Collected Papers of Charles Sanders Pierce* 228 (Charles Hartshorne & Paul Weiss eds., 1960).

onto a single great Mind. The second solution, which Derrida has occasionally toyed with over the years, is semiotic materialism.¹³⁹ It argues that signs are material traces or are formed from the juxtapositions of material elements. Thus, a sign does not need to be understood by anyone in order to exist as a sign; its semiotic character is ensured by its relationship to other signs without the mediation of a consciousness. Moreover, instead of explaining signs in terms of consciousness, as Pierce did, we explain consciousness in terms of signs. So the self becomes an "effect" or "determination" of a system of differentiated signs.¹⁴⁰ Neither of these solutions is completely satisfactory. A third and better solution is simply to abandon antihumanism and to reemphasize the importance of individual subjects in the creation of a culture that in turn creates them.

Deconstruction's confrontation with questions of justice presses this third alternative upon us; confronting the question of justice raises the problem of the subject with renewed urgency. Derrida wants to speak of responsibility and choice; he wants to say that de Man's critics are unfair and that de Man was a good and generous person. He wants to assert that each of us has an infinite responsibility to the Other. Yet, in order to speak in this way, he needs subjects who are response-able - who can make choices and can be praised or blamed, rewarded or held responsible for them. His arguments about justice become incoherent unless he assumes the existence of individuals who are more than the products of cultural writing, and who can bear a responsibility to others, whether this responsibility is infinite or indefinite.

Thus, the antihumanist vocabulary that has for so long been associated with deconstruction must be abandoned when deconstruction confronts questions of justice in the real world. Once again, it is interesting to look at the treatment of the subject in

¹³⁹ Cf. Richard Harland, *Superstructuralism: The Philosophy of Structuralism and Post-Structuralism* 146-54 (1987); T.K. Seung, *Structuralism and Hermeneutics* 256-57 (1982).

¹⁴⁰ See Jacques Derrida, *Speech and Phenomena* 147 (David B. Allison trans., Northwestern Univ. Press 1973) (1967-1968). Of course, the words "effect" and "determination" must be put in quotes because the very notions of "cause" and "effect" become inadequate in Derrida's approach. Id.

Derrida's essays about Paul de Man. In these essays, Derrida jettisons the antihumanist rhetoric of his earlier writings. He speaks of individual actions, individual meanings, and individual responsibilities.¹⁴¹ Indeed, when Derrida discusses the ethical responsibilities of de Man and his critics in these writings, one could easily be forgiven for mistaking his discourse with familiar liberal notions of autonomy and free will.

The subject who emerges from deconstruction's encounter with justice may not be in all respects the relatively autonomous subject of traditional political theory; nevertheless, she is a person who can choose and hence bear the responsibility for her choices.¹⁴² Deconstruction's encounter with justice shows how urgently the concept of a socially constructed subject needs revision. The challenge is to integrate deconstructive insights about language and meaning with the reality of individual subjects and the claims of individual responsibility. The transcendental conception of deconstruction can prove helpful in this endeavor. It argues that human beings articulate their values through culture and conventions. But this articulation is by no means uniformly limiting. To the contrary, the articulation of human values through language and culture simultaneously empowers individuals. Although the cultural articulation of human values fails fully to capture these values, at the same time it opens up possibilities for action and hence for responsibility. It creates degrees of moral and practical freedom.¹⁴³ Thus, contrary to antihumanist assumptions, culture and language do not efface human autonomy but are the conditions of its very possibility.

In one sense, it was inevitable that deconstructionists would have to rethink deconstruction's relationship to the subject the moment they became concerned with questions of justice. The notion

¹⁴¹ See, e.g., Derrida, *Biodegradables*, supra note 8, at 825-28.

¹⁴² Drucilla Cornell reaches a similar conclusion in her study of the ethics of deconstruction. See Cornell, supra note 75, at 149; cf. Binder, supra note 75, at 1383 ("There can be no right of self-determination if there is no self.").

¹⁴³ These arguments are further elaborated in J.M. Balkin, *Cultural Software*, 15 Cardozo L. Rev. (forthcoming 1994).

of responsibility toward others presupposes people who can be responsible. The idea of an indefinite demand presupposes people to whom this demand can be addressed. The attempt to deconstruct systems of law or legal doctrines presupposes concern about the people unjustly affected by them. Finally, the transcendental conception of deconstruction inevitably leads us back to the individual subject. For this conception locates justice not as a determinate, unchanging Idea in Heaven but as a value or urge within the human soul; hence the importance of paying attention to the person possessing that soul.

* Charles Tilford McCormick Professor of Law, University of Texas.
- Ed. My thanks to Guyora Binder, David Gray Carlson, Sandy Levinson, Jay Mootz, and Tom Seung for their comments on previous drafts of this essay.