

CARING FOR DECONSTRUCTION

Katherine C. Sheehan[†]

Come on, would anyone ever have talked or heard talk of deconstruction for more than ten minutes if it came down to such derisory dogmas or such stupid monoliths as these? One shows considerable contempt for many colleagues or students if one believes they are silly enough or credulous enough to interest themselves in such simple and pitiful discourses.

Jacques Derrida, *Biodegradables: Seven Diary Fragments*¹

I. INTRODUCTION

Displaying an uncharacteristic lack of grace, Robin West states in her recent book, *Caring for Justice*,² that “for feminist reformers concerned with doing something with law to end patriarchy, as a tool of analysis deconstruction has all the usefulness of an unhinged steering wheel in avoiding a collision with a wall.”³ West is wrong about deconstruction, but she is wrong in an interesting way, and it is interesting that she goes so far out of her way to be wrong about deconstruction. In an oeuvre otherwise marked by attentive and careful readings of texts by all sorts of authors, from Franz Kafka to Richard Posner⁴ and the United States Supreme Court,⁵ and from Pauline Reage⁶ to Northrop Frye,⁷ West’s offerings on deconstruction have

[†] Associate Professor, Southwestern University School of Law. A shorter version of this paper was presented at the Annual Meeting of the Working Group on Law, Culture, and the Humanities, March 10-12, 2000. I would like to thank Robin West, Eric Blumenson, and George Wright for their helpful comments, and Mark Cammack, Craig Christensen, Isabelle Gunning, Anne Lombard, and Henry Sheehan for their help and encouragement.

1. 15 CRITICAL INQUIRY 812, 827 (Peggy Kamuf trans., 1989).

2. ROBIN WEST, *CARING FOR JUSTICE* (1997).

3. *Id.* at 204. The remark follows and imitates Catharine MacKinnon’s assertion that “legal doctrine has ‘all the indeterminacy of a bridge abutment hit at sixty miles per hour.’” *Id.* ((mis)quoting CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 123 (1989)). MacKinnon’s remark referred not to legal doctrine but to the world outside the self, the existence of which Descartes, but no woman, could doubt: “Epistemologically speaking, women know *the male world* is out there because it hits them in the face. No matter . . . what they think or do, they cannot get out of it. It has all the indeterminacy of a bridge abutment hit at sixty miles per hour.” CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 123 (1989) (emphasis added).

4. West exploded onto the law and literature scene in 1985 when she accused Richard Posner of having failed to heed the lessons to be learned from Franz Kafka in Robin West, *Authority, Autonomy and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985) [hereinafter West, *Kafka and Posner*], reprinted in ROBIN WEST, *NARRATIVE, AUTHORITY, AND LAW* 27-78 (1993). Judge Posner graciously, if uncomprehendingly, responded in Richard A. Posner, *The Ethical Significance of Free Choice: A Reply to Professor West*, 99 HARV. L. REV. 1440 (1986), which was immediately followed by Robin West, *Submission, Choice, and Ethics: A Rejoinder to Judge Posner*, 99 HARV. L. REV. 1449 (1986), reprinted in WEST, *supra*, at 79.

5. See chapter nine, entitled Narrative, Responsibility, and Death, of WEST, *supra* note 4, at 419 (discussing judicial use of the narrative voice in writing opinions); Robin West, *Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43 (1990) (analyzing the Supreme Court’s work of the 1990 Term).

6. To be precise, West reads PAULINE REAGE, *THE STORY OF O* (1965) through other readings of that

amounted to little more than careless potshots.

Like many outspoken critics of deconstruction, post-structuralism or postmodernism⁸, Robin West does not always make clear what she is disparaging. She uses a number of terms—postmodernism, critical legal studies, critical social theory, deconstruction⁹—more or less interchangeably,¹⁰ as if they all referred to the same cluster of concepts, methods, or thinkers and could all be tarred with the same broad “postmodern” brush. Judith Butler wonders whether the confusion displayed by postmodernism’s foes is strategic:

A number of positions are ascribed to postmodernism, as if it were the kind of thing that could be the bearer of a set of positions: discourse is all there is . . . ; the subject is dead, I can never say “I”

work. See chapter four, entitled Women’s Hedonic Lives, of WEST, *supra* note 4, at 179 (discussing MARIA MARCUS, A TASTE FOR PAIN: ON MASOCHISM AND FEMALE SEXUALITY (1981) and JESSICA BENJAMIN, *The Bonds of Love: Rational Violence and Erotic Domination*, in THE FUTURE OF DIFFERENCE 41 (Hester Eisenstein & Alice Jardine eds., 1980)).

7. See chapter eight, entitled Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory, of WEST, *supra* note 4, at 345 (analyzing jurisprudential theory using categories developed in NORTHROP FRYE, ANATOMY OF CRITICISM: FOUR ESSAYS (1957)).

8. As will become clear, the position defended in this Article against West’s criticism is drawn from the work of Jacques Derrida. This Article does not undertake to answer the question whether such a thing as “postmodernism” exists as anything other than a target of criticism or, if it does, whether Derrida’s work is a part of that thing. According to Derrida, “*postmodernism or poststructuralism . . . are catch-all notions into which the most poorly informed public (and, most often, the mass-circulation press) stuffs nearly everything it does not like or understand, starting with ‘deconstruction.’ I do not consider myself either a poststructuralist or a postmodernist.*” Jacques Derrida, *Marx & Sons*, in GHOSTLY DEMARCATIIONS: A SYMPOSIUM ON JACQUES DERRIDA’S SPECTERS OF MARX 213, 228-29 (Michael Sprinker ed. & G.M. Goshgarian trans., 1999). Derrida and deconstruction, however, are commonly included within the scope of what is called “postmodernism” by both hostile and friendly surveyors of contemporary legal theory. See, e.g., GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY’S END 116-22 (1995) (including a discussion of deconstruction as a “postmodern legal movement”); Stephen M. Feldman, *The Politics of Postmodern Jurisprudence*, 95 MICH. L. REV. 166 (1996) (discussing Derrida as a “postmodern interpretivist”); Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505, 2514 (describing Derrida, along with Roland Barthes, Jean Baudrillard, Jacques Lacan, and Jean-Francois Lyotard as principal representatives of post-structuralism, one of the “two major strains” of postmodernism). *But see* Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 262-79, 313-14 & n.276 (1992) (arguing that Derrida is not postmodern). Schanck considers Patterson’s failure to include Derrida in his discussion of postmodern legal thought “questionable.” Schanck, *supra*, at 2508 n.5.

9. At some points, West seems to use “deconstruction” as another name for what postmodernists are doing when they are doing postmodernism. See, e.g., WEST, *supra* note 2, at 16-17 (describing a luxury car commercial making use the Shaker hymn *Simple Gifts* and images of the Statue of Liberty as “postmodern” and calling it a “deconstruction of the representations of simplicity and compassion that had once been, but are no longer, essentially embedded within the Shaker hymnal [sic] and the national symbol.”). With respect to deconstruction in the legal academy, Jacques Derrida has remarked that the word deconstruction “gives rise to so many misunderstandings that one wouldn’t want to add to them by reducing all the styles of Critical Legal Studies to one or by making them examples or extensions of Deconstruction with a capital “D.” Jacques Derrida, *Force of Law: The “Mystical Foundation of Authority,”* 11 CARDOZO L. REV. 919, 933 (Mary Quintaince trans., 1990).

10. Chapter 5 of *Caring for Justice*, for example, now entitled *Feminism, Postmodernism, and Law*, was originally published in the 1989 volume of the Chicago Legal Forum under the title *Feminism, Critical Social Theory and Law*. See WEST, *supra* note 2, at ix. West’s criticism of postmodernism in Chapter 5 of *Caring for Justice* has been thoroughly critiqued in a paper presented to the 2000 Conference on Law, Culture, and the Humanities by Matthew Byron Romain under the working title “Essentialism or Bust” (Mar. 11, 2000) (unpublished manuscript, on file with author).

again; there is no reality, only representations. These characterizations are variously imputed to postmodernism or poststructuralism, which are conflated with each other and sometimes conflated with deconstruction

. . . Lyotard's work is, for instance, seriously at odds with that of Derrida, who does not affirm the notion of "the postmodern," and with others for whom Lyotard is made to stand. Is he paradigmatic? Do all these theories have the same structure (a comforting notion to the critic who would dispense with them all at once)? . . . For if Lyotard uses the term, and if he can be conveniently grouped with a set of writers, and if some problematic quotation can be found in his work, then can that quotation serve as an "example" of postmodernism, symptomatic of the whole?¹¹

West is by no means alone, even among authors writing more or less as feminists, in dismissing postmodern or poststructuralist contributions without displaying her usual careful attention. Martha C. Nussbaum, for example, in the course of a recent essay taking Judith Butler and other unidentified feminist theorists to task for doubting that large-scale social change could be achieved without subversion of the dominant structures of power, undertook to rewrite a passage by Butler that had been declared by the journal *Philosophy and Literature* to be the winner of its 1998 "Bad Writing Contest."¹² Nussbaum's "correction" of the passage in question, however, not only truncated and oversimplified Butler's thesis, a problem evident from an examination of the grammatical structures of the two passages,¹³ but also got Butler's point wrong in substance.¹⁴

11. Judith Butler, *Contingent Foundations: Feminism and the Question of "Postmodernism,"* in *FEMINISTS THEORIZE THE POLITICAL* 3, 4-5 (Judith Butler & Joan W. Scott eds., 1992). Chantal Mouffe has further noted that, "if by 'postmodernism' one wants to designate only the very specific form that such a critique takes in authors such as Lyotard and Baudrillard, there is absolutely no justification for putting in that category people like Derrida, Lacan, or Foucault." Chantal Mouffe, *Feminism, Citizenship and Radical Democratic Politics*, in *FEMINISTS THEORIZE THE POLITICAL*, *supra*, at 369, 370. If instead one wants to refer to thinkers who have, for example, critiqued essentialism or taken issue with the category of the subject, the category should include thinkers not ordinarily considered "postmodern": Wittgenstein, Dewey, and Freud, for example. *See id.*

12. *See* Martha C. Nussbaum, *The Professor of Parody: The Hip Defeatism of Judith Butler*, *THE NEW REPUBLIC*, Feb. 22, 1999, at 37. Butler's winning entry and the names and texts of the runners up can be found online at *Winners of the Fourth Bad Writing Contest* (visited Oct. 10, 1999) <<http://www.cybereditions.com/aldaily/bwc.htm>>.

13. Text appearing as a given in a subordinate clause in Butler's passage became the point of the passage in Nussbaum's rewrite. *See* Nussbaum, *supra* note 12, at 37.

14. Nussbaum's version erroneously assigns to Althusserian theory a position Butler's passage offered as a contrast to that theory. *See id.* Surely Nussbaum would not have become Ernst Freund Professor of Law & Ethics at The University of Chicago if this effort were typical of her scholarship. In rushing her comments into print, Nussbaum seems to have succumbed to what Derrida calls the "temptation of the media," the "compulsion to misuse the privilege of public declaration in a social space that extends far beyond the normal circuits of intellectual discussion." Jacques Derrida, *Honoris Causa: This is also extremely funny*, in *POINTS . . . : INTERVIEWS, 1974-1994*, at 399, 401 (Susan Weber ed. & Peggy Kamuf trans., 1995) (1992).

Vivian Curran has also remarked on the lack of intellectual rigor displayed by ordinarily careful scholars when they take on deconstruction:

Those who oppose it in the legal field are among the most brilliant of thinkers. Their readiness to condemn deconstruction without engaging in a debate on its merits is just the sort of "point of rupture" which signals to a deconstructionist that more is at stake than what appears on the surface. . . . In my opinion, the anti-deconstructionist analysis, i.e., the notable absence of attempts to demonstrate logical fallacies in deconstructionist analyses, stems from a wish to deny the sobering conclusion that . . . our jurisprudential system cannot reliably ensure our future safety. The anti-deconstructionist charge that deconstruction is a philosophy of despair is a normative statement, neither establishing its own truth nor justifying the conclusion that deconstruction is invalid.¹⁵

The peculiar passion with which postmodernism generally is attacked also provoked Jane Flax to speculate about the emotional investment of postmodernism's foes. Flax argued that postmodernism enhances intellectual and political anxiety:

Postmodernism calls into question the belief (or hope) that there is some form of innocent knowledge to be had. This hope recurs throughout the history of Western philosophy (including much of feminist theory). . . .

By innocent knowledge I mean the discovery of some sort of truth which can tell us how to act in the world in ways that benefit or are for the (at least ultimate) good of all. Those whose actions are grounded in or informed by such truth will also have their innocence guaranteed. They can only do good, not harm to others.¹⁶

Flax evidently found even this source of anxiety insufficient fully to account for extreme feminist reactions to postmodernism:

I am trying to make sense of part of the emotional vehemence with

This temptation of the media encourages these intellectuals to renounce the academic discipline normally required 'inside' the university, and to try instead to exert pressure through the press and through public opinion, in order to acquire an influence or a semblance of authority that has no relation to their own work.

Id. at 402.

15. Vivian Grosswald Curran, *Deconstruction, Structuralism, Antisemitism and the Law*, 36 B.C. L. REV. 1, 27-28 (1994).

16. Jane Flax, *The End of Innocence*, in FEMINISTS THEORIZE THE POLITICAL, *supra* note 11, at 445, 447.

which some feminists reject [postmodern] writings, sometimes with only minimal knowledge of them. The intensity of the emotional response is puzzling, especially among people who generally respond to ideas in a much more complex and nuanced manner.¹⁷

Noting that postmodern critiques of the concepts of “woman” and “gender” had emerged at about the same time as the recognition that these categories depended for their coherence on the exclusion of “the experiences of women of color, . . . women outside the overdeveloped world, poor women and lesbians,”¹⁸ the emotional quality of the reaction led Flax to speculate:

Since the projects of postmodernism and women of color overlap here, I wonder whether there is a racial subtext at work that requires more attention. Since directly attacking women of color or voicing our resentment of them (in public) would be politically unthinkable, is it easier and more acceptable for white women to express our discomfort with difference discourses and the politics of knowledge claims by categorically rejecting postmodernism and branding it politically incorrect?¹⁹

It is not entirely clear why West, Nussbaum, and other disapproving feminists bother to concern themselves with postmodernism or deconstruction at all, much less to attack them with the vehemence sometimes displayed. The fashion these days is to consider deconstruction, at least, a thing of the past,²⁰ a literary fad that enjoyed some currency in the eighties but quickly revealed its inadequacy and was soon displaced by the new historicism, culture studies, queer studies, or some other trend.²¹ Indeed, judging from the citations in *Caring for Justice*, West has based her understanding of postmodern thought entirely on the work of Michel Foucault,²² who died in 1984, and on the first wave of work by the Conference on Critical Legal Studies.²³ Yet West’s

17. *Id.* at 463 n.22.

18. *Id.* at 459.

19. *Id.*

20. See JEFFREY T. NEALON, *DOUBLE READING: POSTMODERNISM AFTER DECONSTRUCTION* 22 (1993) (“There is still plenty of discourse being produced concerning deconstruction, but deconstruction’s heyday has clearly passed.”); Glen Scott Allen, *Baptismal Eulogies: Reconstructing Deconstruction from the Ashes*, 3 *POSTMODERN CULTURE* ¶ 4-8 (January 1993) <<http://www.iath.virginia.edu/pmc/text-only/issue.193/review-7.193>> (collecting statements by friends and foes of deconstruction noting its passing from U.S. departments of literature). West herself has dismissed deconstruction in this way. See Robin West, *Progressive and Conservative Constitutionalism*, 88 *MICH. L. REV.* 641, 642 (1990) (describing progressive constitutionalism as taking the place of “critical and deconstructive scholarship”). But see Schank, *supra* note 8, at 2507 (describing postmodernism as “dominant” in legal theory).

21. See, e.g., Richard Rorty, *Remarks on Deconstruction and Pragmatism*, in *DECONSTRUCTION AND PRAGMATISM* 13, 15 (Chantal Mouffe ed., 1996) (describing deconstruction as a “school of literary criticism which was briefly (before the advent of ‘cultural studies’) dominant in the US”).

22. See WEST, *supra* note 2, at 259-76.

23. When West does get specific about her postmodern targets she tends to identify them as the critical legal studies scholars who, while they have not ceased to publish, made their biggest impact in the mid- to

objections to what she calls postmodernism seem to become more pressing as time goes by—not only is *Caring for Justice* more dismissive than West's earlier work, but the portions of *Caring for Justice* most hostile toward postmodernism are the portions written specially for that book as opposed to those chapters and sections reprinted from earlier publications.²⁴

West's identification of deconstruction with the early work of the critical legal scholars is unfortunate because, until fairly recently, Derrida's potentially important contributions to feminist legal theory have been thoroughly obscured by the peculiar reception his work received when first introduced into the United States. Perhaps as a tribute to the fecundity of the ideas drifting across the Atlantic from France in the late sixties and seventies, the most fleeting exposure to this thought inspired American scholars, especially in law, to produce work of powerful insight and critical acuity.²⁵ That this work was inspired by Derrida, however, does not make it deconstruction, any more than a poem inspired by sight of the Seine is on that basis in French.²⁶ As Rodolphe Gasché said: "Undoubtedly deconstructive

late-1980s. See, e.g., WEST, *supra* note 2, at 10 ("In chapter 5, I examine some of the premises of the modern critical legal studies movement, particularly as that movement has come to be defined by the postmodern sensibilities of many of its practitioners."); 260 n.4 (citing, in support of the critical legal scholars' position on power, no work published after 1987; the citation in West's note to THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (D. Kairys ed., 1992) is a typographical error; that excellent book was published in 1982, with revised editions in 1990 and 1998.).

24. See, e.g., WEST, *supra* note 2, at 6, 16-17, 204, 259-92. West treats postmodernism with more disdain in the introduction to *Caring for Justice*, and in the passages added to *The Literary Lawyer*, 27 PACIFIC L.J. 1187 (1996) to update it for *Caring for Justice*, see WEST, *supra* note 2, at 204, than she did in her earlier works collected in *Narrative, Authority, and Law* or even in older portions of *Caring for Justice*. The anti-deconstruction crack cited above to page 204 is found in a portion of Chapter 3, *Law, Literature, and Feminism* added to *The Literary Lawyer* for publication in *Caring for Justice*; the original of this chapter did not specifically consider the intersection between feminism and the various schools of law and literature. Even earlier in her career, West herself called for a feminist critique that would "deconstruct the [legal] images that authoritatively diminish women, sometimes down to nothing." Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 67 (1988) (emphasis added).

25. See, e.g., Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Gerald Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1161 n.6 (1985).

[T]here has been no attempt made to remain faithful to anything like a 'deconstructive method' or 'Derrida's philosophy,' whatever such things would be. My utilization of elements of Derridean analysis departs from the focus of his work in that I attempt to relate the insights from Derrida's study to political and ideological issues. My intention is to use the deconstructive approach in order to describe the process by which the status quo of social life is reified, or, in the terms of another tradition, how 'false consciousness' is constructed.

Id.; see also RICHARD BEARDSWORTH, *DERRIDA AND THE POLITICAL* 3 (1996) ("[A]t its intellectual best, the literary reception of Derrida's thought overplayed its rhetorical side and, at its institutional worst, made it into a practice of literary criticism, the political orientation of which was easily advertised, but poorly elaborated."); RODOLPHE GASCHÉ, *THE TAIN OF THE MIRROR: DERRIDA AND THE PHILOSOPHY OF REFLECTION* 255-56 (1986).

So-called deconstructive criticism, which, however important, is but an offspring of New Criticism, . . . has done little more than apply what it takes to be a method for reading literary texts to the unproblematized horizon of its discipline. As a result, the genuine impact that Derrida's philosophy could have on literary criticism has not been, or at best has hardly been, noticed.

Id.

26. According to Rodolphe Gasché, Paul de Man, the leading "deconstructionist" critic at Yale, was well aware of the fundamental differences between his critical practices and Derrida's work. See Rodolphe Gasché, *In-Difference to Philosophy: De Man on Kant, Hegel, and Nietzsche*, in *READING DEMAN READING* (Wlad Godzich & Lindsay Waters eds., 1987). For various perspectives on the history of deconstruction in

criticism has greatly profited from Derrida's thought, both thematically and methodologically. But to quarry from Derrida's writings is not automatically to become deconstructive in the eminent sense.²⁷

One of Derrida and deconstruction's most prolific self-appointed spokesmen in law has been J.M. Balkin.²⁸ In a series of articles, Balkin has undertaken to explain deconstruction to readers of law journals, to make clear its utility for legal scholars, and to defend it from its critics.²⁹ Although superficially faithful to the letter of deconstruction, Balkin's accounts entirely miss the spirit of Derrida's work,³⁰ and in the process obscure those implications of Derrida's thought of most interest to the work of feminist legal scholars.

Derrida himself has delivered an ambivalent evaluation of the so-called deconstructive efforts in Critical Legal Studies:

However unfamiliar they may be to me, I know that these efforts in Critical Legal Studies have their history, their context, and their proper idiom, and that in relation to such a philosophico-deconstructive questioning they are often (shall we say for the sake of brevity) uneven, timid, approximating or schematic, not to mention belated, although their specialization and the acuity of their technical competence puts them, on the other hand, very much in advance of whatever state deconstruction finds itself in a more literary or philosophical field.³¹

the American academy, see, for example, BEARDSWORTH, *supra* note 25, at 1-4; BARBARA JOHNSON, *THE WAKE OF DECONSTRUCTION* (1994); DAVID LEHMAN, *SIGNS OF THE TIMES: DECONSTRUCTION AND THE FALL OF PAUL DE MAN* (1991); NEALON, *supra* note 20, at 22-71.

27. GASCHÉ, *supra* note 25, at 2.

28. As an example of Balkin's influence, the explanation of deconstruction found in GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END* (1995) appears to be drawn almost entirely from Balkin's work. See MINDA, *supra* note 8, at 116-24.

29. See J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987) [hereinafter Balkin, *Deconstructive Practice*]; J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275 (1989) [hereinafter Balkin, *Footnote*]; J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613 (1990) [hereinafter Balkin, *Politics*]; J.M. Balkin, *Transcendental Deconstruction, Transcendent Justice*, 92 U. MICH. L. REV. 1131 (1994) [hereinafter Balkin, *Transcendental Deconstruction*]; J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE L.J. 105 (1993) [hereinafter Balkin, *Understanding*]; J.M. Balkin, *Nested Oppositions*, 99 YALE L.J. 1669 (1990) (reviewing JOHN M. ELLIS, *AGAINST DECONSTRUCTION*, (1989)) [hereinafter Balkin, *Nested Oppositions*].

30. See Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627, 1695 (1991) ("[T]his is not Derrida, and it is not deconstruction.")

31. Derrida, *supra* note 9, at 933. A notable exception among legal scholars to the generally superficial treatment of deconstruction is the work of Drucilla Cornell. In numerous articles, most of them reprinted in her several books, Cornell has explored the implications of Derrida's work (as well as that of other philosophers) for a feminist transformation of legal theory and law, carefully situating Derrida with respect to his philosophical forebearers and contemporaries and incisively critiquing his thought. See DRUCILLA CORNELL, *BEYOND ACCOMMODATION: ETHICAL FEMINISM, DECONSTRUCTION, AND THE LAW* (1991) [hereinafter CORNELL, *BEYOND ACCOMMODATION*]; DRUCILLA CORNELL, *THE PHILOSOPHY OF THE LIMIT* (1992) [hereinafter CORNELL, *PHILOSOPHY*]; DRUCILLA CORNELL, *TRANSFORMATIONS: RECOLLECTIVE IMAGINATION AND SEXUAL DIFFERENCE* (1993).

West's persistent misunderstanding of deconstruction is particularly unfortunate because her recent work on the need to incorporate an ethic of care into judging bears striking similarities to Derrida's recent writing on responsibility and justice. Both share a concern with the intersection of general rules and singular circumstances, and both exhibit an asymmetric, non-reciprocal structure presenting both stimulating opportunities and puzzling problems for progressive legal theory.

This Article will begin to tear down the wall that prevents West from appreciating Derrida's work. Part II will examine West's objections to postmodernism as set forth in the introduction to *Caring for Justice*, where West answers questions she expects postmodernists to raise against her idea of justice tempered with essentially female caring. Part II will conclude that West's response to postmodernism is neither well-founded nor particularly just. Part III will then look at West's jurisprudential project in light of Derrida's work on language and meaning, identifying areas where West's failure to acknowledge the implications of her own work has entangled her thought in contradiction and difficulty. To a surprising extent, the theoretical weaknesses of West's feminist essentialism resemble misunderstandings of Derrida's work at large among "deconstructionists" in the United States. Part IV of this Article will attempt to correct some of these misunderstandings, in particular identifying features of J.M. Balkin's explanatory work on deconstruction that have obscured its value for feminists, while highlighting other aspects of Balkin's work that demonstrate deconstruction's liberatory potential. With some of the obstructions identified as such, if not entirely cleared away, Part V will compare West's work on justice and care with Derrida's work on responsibility, ethics, and justice, exploring both the striking parallels and the fundamental differences between these ideas. Finally, once it is shown that Derrida and West share basic attitudes toward justice, it can also be seen that their approaches face similar problems. The Article therefore concludes in Part VI where, but for all the confusion, it might have begun, suggesting that West's passion for a caring justice demands that she care for deconstruction as well.

Before beginning—or, more accurately, continuing—this project, a few preliminary words about approach are in order. Despite its "anything goes" reputation, Derridean deconstruction is, perhaps above all, careful and respectful attention to particular texts. The "moves" or terms that have come to be identified with the deconstructive method were each originally found to be an infrastructure³² or a quasi-transcendental structure³³ shaping a singular text being read by Derrida. A project exploring the objections of "feminists" to "postmodernism" would be entirely alien to deconstruction, which could

32. See GASCHÉ, *supra* note 25, at 7 (using the word "infrastructure" in connection with Derrida's work).

33. See BEARDSWORTH, *supra* note 25, at 19 (using the phrase "quasi-transcendental structure" in connection with Derrida's work).

only proceed by reading singular texts with or against each other. As much as possible, therefore, the focus of this Article will be restricted to particular works by particular authors, primarily Robin West, J.M. Balkin, and Jacques Derrida.

II. POSTMODERNISM IS BAD FOR CHILDREN AND OTHER LIVING THINGS: WEST'S OBJECTIONS TO POSTMODERNISM

West's dispute with what she calls postmodernism derives from her commitment to "difference" feminism or feminist essentialism. West contends that women share important qualities with each other related to women's responsibility in all known cultures and ages for bearing and raising children.³⁴ Whether West believes these qualities are innate,³⁵ learned,³⁶ or the result of patriarchal coercion³⁷ is never made clear, although the difference is one that would seem to matter.³⁸ Because the law has historically been dominated by men to the near exclusion of women, the law neither protects nor values qualities characteristic of women. A major part of West's project, therefore, "is to tell true stories of women's lives."³⁹ "Most important, we need to tell stories, and give voice to the stories of others."⁴⁰ "[F]eminist legal theorists need to show through stories the value of intimacy—not just to women, but to the community—and the damage done—again, not just to women, but to the community—by the law's refusal to reflect that value."⁴¹ Telling these stories, according to West, will both open up mental space for new understandings of women's lives⁴² and help men and the law appreciate them.⁴³

West perceives postmodernism to be a threat to her project for two reasons: First, she understands postmodernists to deny that any self, female or otherwise, exists in a form stable enough to have her true story told;⁴⁴ and second, West attributes to postmodernists the contention that, because, like everything else, women are inessential, they can neither have essential

34. See WEST, *supra* note 2, at 10-21.

35. See *id.* at 13-14 (conceding the possibility that male violence against women might be rooted in biology, but arguing that law should nevertheless prohibit such violence).

36. See *id.* at 18 (noting that it would be "extremely odd" if the facts that we are all borne by women, that most of us are raised by women, and that the majority of women the world over give birth, were to "have no effect, and lend to women's perspectives no unifying and distinguishing threads.").

37. See *id.* at 123 (attempting to distinguish female altruism rooted in care from female altruism rooted in fear).

38. See CORNELL, BEYOND ACCOMMODATION, *supra* note 31, at 25-26 (noting a tension in West's work as to the role of biology in the formation of female identity, and outlining the problems this tension causes for West's theory).

39. West, *supra* note 24, at 64.

40. WEST, *supra* note 2, at 275.

41. *Id.* at 65.

42. See *id.* at 215 (borrowing the notion of mental space from MILNER BALL, THE WORD AND THE LAW (1993)).

43. See WEST, *supra* note 4, at 179-85.

44. See WEST, *supra* note 2, at 5-6.

qualities nor share them with other women.⁴⁵

A. *Taking Care of the Self*

West contends that the law's neglect of the caring connections between people "is reflected in and amplified by—and partly explained by"⁴⁶ current ideas about the self. The law, like liberal and economic legal theory, presupposes a self antithetical to connection and caring, "an individual who prides himself on his autonomy and on his self-chosen life projects, including, of course, his voluntary, willful decisions to interact, on a limited basis and toward self-defined ends, with others."⁴⁷ However, West warns, it is not liberal legalism or law and economics but postmodernism that poses "the greatest contemporary ideological threat to any conception of selfhood that asserts either the moral importance of the self's connections with others, or the seriousness of the harms those connections sometimes occasion."⁴⁸

West does not explain what it can mean for an ideology to threaten a conception of the self. The notion that actual selves are endangered by postmodernism seems far-fetched, but West's urgency and passion express more than a fear that her idea of the self might simply be shown to be theoretically inadequate or even politically regressive. West's tone is more appropriate for the conclusion that postmodernists beat their children or, perhaps worse, cannot remember or do not care which children are theirs. If this analogy seems exaggerated, it is no more so than West's—she begins the introduction to *Caring for Justice* by invoking the fear of losing one's children⁴⁹ and by the end has equated "the parent's foundational and utterly healthy fear of losing her children"⁵⁰ with the "inhuman" postmodern disconnection of text and meaning.⁵¹

The reason why the postmodern self is such a moral threat, according to West,

is simply this: both economic and liberal legalism . . . rest on a contingent, tentative, empirically grounded, and therefore *changeable* conception of the individual. The radically individuated and unconnected individual at the heart of their jurisprudential perspective is radically individuated because that is how these theorists see him as being: they are asserting a descriptive and empirical—and hence falsifiable—claim, not a metaphysical or transcendent one. Should that

45. *See id.* at 11.

46. *Id.* at 4.

47. *Id.*

48. *Id.* at 5.

49. *See id.* at 1. The first line of the introduction is "Children and their parents, different as they are, share one powerful emotion: they are terrified at the prospect of losing each other." *Id.*

50. *Id.* at 17.

51. *Id.*

tentative description of human nature turn out to be wrong, there is nothing in either the logic or the politics of economic or liberal legalism that forecloses either from shifting ground.⁵²

The notion that the bizarre description of the individual presupposed by Richard Posner's jurisprudence⁵³ might have been the product of empirical observation does not encourage one to hope that further observation will soon produce a better account. After all, nearly a century of psychological research following Freud's investigations into the unconscious has rendered any account of economic man sagely weighing costs and benefits as he busily pursues his chosen projects a cartoonish oversimplification, at best. Surely no such individual is observable in the world without the assistance of strong ideological lenses, and the task of persuading investigators to change these lenses is an ideological, not an evidentiary, one. West nevertheless considers the liberal concept of the self to be a work-in-progress, capable of correction.

The same cannot be said, however, of the purportedly fractured, unstable, disconnected and inessential self, or lack of self, at the heart of the new postmodern legal scholarship. . . . [A]ll its connections as well as all other attributes it may be thought to possess, are accidental, contingent, or random, and furthermore, they are so *essentially*. This is not an empirical, descriptive, tentative claim about our modern nature, it is a transcendental claim about the nature of nature. . . . [T]he postmodern self so dear to the heart of postmodern theorists is . . . as changing, unstable, and unpredictable as the wind. . . . To repeat, that inessential self is . . . not a hypothetical description, subject to modification or amendment as new evidence presents itself. It is a metaphysically transcendent truth.⁵⁴

It is very difficult to see what sort of idea West is describing here.⁵⁵ At

52. *Id.* at 5.

53. See West, *Kafka and Posner*, *supra* note 4; see also Jennifer Gerarda Brown, *Posner, Prisoners, and Pragmatism*, 66 TUL. L. REV. 1117 (1992) (pointing out that Posner's purportedly empirical observations about the lives and motivations of prisoners rest on little or no empirical bases); Mark M. Hager, *The Emperor's Clothes Are Not Efficient: Posner's Jurisprudence of Class*, 41 AM. U. L. REV. 7 (1991) (examining, *inter alia* Posner's view of the connections between rich and poor); Ian Shapiro, *Richard Posner's Praxis*, 48 OHIO ST. L.J. 999 (1987) (criticizing Posner's views as both empirically and economically unsound).

54. WEST, *supra* note 2, at 6.

55. It would be helpful if West would attribute this particular conception of the self to some postmodern scholar whose work could then be consulted for clarification—although the idea is said to be “at the heart” of postmodern legal theory, no author is cited. See *id.* at 5. Postmodernism generally displays more interest in the “subject” than the “self.” “The ‘self’ implies a center, a potentially autonomous individual; the ‘subject’ is a place in language, a signifier that is already alienated in an intersubjective network.” Jane Gallop & Carolyn Burke, *Psychoanalysis and Feminism in France*, in *THE FUTURE OF DIFFERENCE* 106, 106 (Hester Eisenstein & Alice Jardine eds., 1980). The question of whether a stable self exists is of less interest to postmodernism than the question of how such a self could be known or described given the contingent nature of reference and meaning in language.

times West seems to regard this postmodern self, like the liberal self, as a description of an empirical entity—a claim about “the nature of nature,”⁵⁶ albeit one that the postmodernists dogmatically refuse to allow to be contested or corrected by contrary evidence. Confusingly, West depicts the postmodern self as “unstable, and unpredictable as the wind,” implying that, like the weather, the postmodern self has a real existence in the world, if one that is sometimes hard to keep track of. West’s declaration that the postmodern self is essentially inessential is the sort of glib verbal manipulation feminists have always had to endure in arguments with the patriarchy. It seems unlikely that a postmodern theorist would agree with West’s ponderous conclusion that the postmodern self “is a metaphysically transcendent truth,” and, while such a proposition might be established through rigorous argument, West offers none in its support. This treatment stands in marked contrast to the careful consideration West ordinarily gives other writers, whether or not she agrees with their work.

Plainly, essentially inessential selves, whose connections are all “accidental, contingent or random,”⁵⁷ can have no essences in common. West, however, believes it is important to connect her justice of care with gender differences.⁵⁸ West denounces as “anti-scientific” what she calls “the seductive postmodern claim that gender roles and attributes bear only an incidental, contingent, or socially constructed connection to sex, and that what we should therefore do is shake things up and ‘play’ with the disconnections so as all the better to shatter the stereotypical pedestal.”⁵⁹

Whereas creationists view us as divinely created in our modern complexity, with no relation to nature or to our naturalist ancestors down the evolutionary ladder, so postmodern feminists and fellow travelers view us as “societally” created, or constructed, in our modern complexity, with no relation—no metanarrative connection—to a presocial natural history, or indeed to any internal or external natural world. The creationist views us as divinely created and the postmodernist views us as socially constructed, but both deny that we are the product of a natural, evolutionary history of which our social history is but a part. They both accordingly adamantly deny the relevance of our nature—biological as well as otherwise—to our ideals and mores.⁶⁰

56. WEST, *supra* note 2, at 5-6.

57. *Id.* at 6.

58. See, e.g., *id.* at 19-20 (acknowledging Joan Tronto’s point that one could advocate an ethic of care without associating it with gender differences but arguing that the importance of care derives in part from the importance of women’s experiences “that inform it,” and that connecting the ethic of care with women helps to explain why it has hitherto been undervalued in our culture).

59. *Id.* at 16.

60. *Id.* at 16. It would be helpful to the reader if West would identify any postmodern feminist or “fellow traveler” adamantly holding this position. Whatever the accuracy of West’s description of creationist beliefs, the position she attributes to unnamed postmodernists here might have issued from *The Postmodern*

West here attributes to postmodernism the position that investigating human nature will not improve the lot of the oppressed. Granted, a fairly unremarkable postmodern position on this question might be that the outcome of any investigation into human nature undertaken by modern Western science would be so overdetermined by the logic of scientific discourse—a metanarrative, one might say, which would define the object to be studied, the questions to be asked, the evidence to be considered, and the potential findings to be recognized—that the result could have no beneficial impact on oppression. Either (1) the dominant scientific discourse would prevent the articulation of any radically new or different understanding of human nature, instead producing results that merely reinforce current concepts and all the cultural inequities dependent on or justified by these concepts; or (2) if the dominant discourse did not rule out radically new or different understandings of human nature, its failure to do so would have to be the result of an alteration in the discourse so dramatic as to have a greater impact on oppression than any findings it might make possible.⁶¹

Because West does not inquire into the details of various postmodern positions before rejecting them all, she does not make clear why she believes postmodernism can offer no insight into how the lot of the oppressed has proved so resistant to change. West's analogy between creationists and postmodernists is therefore misperceived, or even misdirected. West views postmodernists as sharing with creationists a belief that nature has nothing to tell us about ourselves. It would be more accurate to say that some postmodernists view some scientists as sharing with creationists an inability, based on unquestioned beliefs about the world, to draw certain conclusions about nature. Ironically, up to a point this postmodern position is also West's: West is not engaged in the scientific investigation of human nature or natural gender differences, but rather she is engaged in the attempt to intervene in the discourse that determines which questions should be investigated and why.

B. Taking Meaning Apart

West also expresses concern that postmodernism's "dismantling of the connections between sex and gender both rests on, and resembles, the postmodern dismantling of the connection between word and meaning, or

Generator, (visited Jan. 2, 1999) <<http://www.cs.monash.edu.au/cgi-bin/postmodern>>, a computer program written by Andrew C. Bulhak using the Dada Engine, a system for generating random text from recursive grammars. It is hard to imagine any theorist, postmodern or otherwise, either asserting or denying that we have "a metanarrative connection to a presocial natural history."

61. For a cogent critique of postmodern pragmatist relativism in science and other areas, see Christopher Norris, *Right You Are (If You Think So): Stanley Fish and the Rhetoric of Assent*, in *WHAT'S WRONG WITH POSTMODERNISM* 77 (1990) (reviewing STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* (1989)).

signifier and signified.”⁶²

The dismantling of the connection between text and meaning and between author and text reflects among much else the ugly truth that the meaning of words, texts, songs, or documents, whether or not up for grabs in postmodern society, is certainly up for sale. Put differently, the postmodern dismantling of the connections of meaning upon which we must rely to communicate, reflects in part simply the advances of the forces of commodification: we have alienated meaning from texts because we have so thoroughly commodified both texts and meanings, and we have done so smugly aware that by so doing we have dislodged meaning from text and text from author.⁶³

It is not clear whether West blames postmodernists for actually divorcing words from meanings that otherwise would have remained fixed to them or merely for recognizing that the separation has already happened. West's example of the pernicious effect of the disconnection and commodification of words and meanings makes her meaning no clearer: She describes a television advertising campaign that connects the Shaker hymn *Simple Gifts* and images of the Statue of Liberty welcoming immigrants to America with the importation of luxury cars.

West expects us to “rage against this dismantling of the meaning of the Shaker hymn, to say nothing of the symbolic meaning of the Statue of Liberty,”⁶⁴ and to do so because, “[l]ike the parent's foundational and utterly healthy fear of losing her children, our outrage at these assaults on meaning is premised on an understanding of the importance of connections to our inner lives: in this case, the connection between text and meaning.”⁶⁵ Even accepting that the commercial is outrageous and somehow on a par with the loss of one's children, West has not explained how postmodern theory—in this case, poststructuralist or deconstructive theory—might be responsible, either for the commercial or for the conditions that make it possible. At worst, postmodern theory might help to explain how the perpetrators of the offending commercial are able to exploit the meanings of words and images in the manner described.

Indeed, West is far too pessimistic in believing that the commercial she describes demonstrates that meaning has been detached from either the hymn or the statue. She treats the ad as if it must be read to celebrate imported

62. WEST, *supra* note 2, at 16-17. West's reference to “signifier and signified” here indicates that she may have in mind the discovery, made by Saussure and elaborated upon by other structuralists (and not, strictly speaking, by postmodernists), that the relations between signifier, signified, and referent in any language are arbitrary. See FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS 67 (Wade Baskin trans., 1959).

63. WEST, *supra* note 2, at 17.

64. *Id.* at 16.

65. *Id.*

luxury cars as the fulfillment of the dream of all who sought their liberty in America, perhaps because this is the meaning presumably intended by the corporate “author” who paid for the ad.⁶⁶ However, as West, herself a practiced and critical reader of literature, must surely realize, this text cries out to be read in other, more complicated and interesting ways: as a critique of the commercial trivialization of the American dream or, perhaps, as a comment on the degree to which America’s “golden door” ever was or still remains open to the “wretched refuse” of other lands. These alternative meanings are made possible, not by the disconnection, but by the strong connection—perhaps initially contingent and arbitrary but now indestructible—between image and meaning, as well as by the inability of any author to restrict a text to his or her (or, in the case of the commercial, its) intended meaning.⁶⁷

Here, then, is another version of the creationist analogy: West believes, or wants to believe, that she lives in a world in which words can and should remain connected to their meanings, so she closes her ears to postmodern theorists who persist in bedeviling her with “seductive” arguments to the contrary. Like the creationists, West evidently believes there is nothing to be lost by cutting off inquiry into things she does not want to believe.

III. DECONSTRUCTING ROBIN WEST

It is particularly ironic that West chose to attack postmodernism as a threat to her essentialist position in connection with her call for a justice of care. Although West considers her essentialism to be a critical part of her jurisprudential theory, there is no reason why this should be so. West’s call for the mitigation of justice with particularized care does not depend on showing that women share essential qualities with each other.⁶⁸ Indeed, West’s essentialism, premised on the notion that individuals share essential qualities by virtue of their gender, is inconsistent with her demand that justice respect each litigant in his or her particularity. West’s refusal to attend to postmodernism because of its threat to her essentialist position, moreover, undermines the strength of her case for a justice of care by preventing her from recognizing and dealing with important obstacles that such a notion of justice must overcome, obstacles with which Derrida’s work has long been concerned.

66. *See id.*

67. Much of Paul de Man’s work concerned the resistance that rhetoric is always able to raise against the intended, consensual, or “true” meaning of a text. *See, e.g.*, PAUL DE MAN, *THE RESISTANCE TO THEORY* (1986).

68. *See* CORNELL, *BEYOND ACCOMMODATION*, *supra* note 31, at 62-63 (arguing that West’s essentialism is not only unnecessary but also harmful to her feminist theory in that it seems to rule out the possibility that men would or could ever cease to oppress women).

A. Language and Meaning

Derrida's earliest work concerned the phenomenology of Edmund Husserl. In 1962, Derrida published a translation and introduction to Husserl's *The Origin of Geometry*.⁶⁹ As described by Christina Howells, this work was "an exceptionally close reading of a text he knows inside out having undertaken its translation, in which, under the guise of exposition, he unravels and unpicks all the stitchings and patchings that have gone towards making an apparently seamless surface from a tangled web of philosophical conflicts."⁷⁰ Very briefly, Husserl's phenomenology was an effort to strip consciousness of all personal, empirical, and contingent influences in order to reveal universal structures and ideal essences. Derrida's work on Husserl⁷¹ demonstrated that consciousness is only accessible through linguistic representation—there can be no pure unmediated presence of the self to itself—and that this conclusion is compelled by the logic of Husserl's own arguments. While West's phenomenological method is substantially different from Husserl's, her effort to bring women's true experiences to the attention of the law is subject to the same critique Derrida levels against Husserl.⁷²

The fact that knowledge is always mediated through language means that it cannot be stripped of accidental, contingent, and empirical aspects, for language itself is contaminated with—indeed, constituted by—these features. As Ferdinand de Saussure demonstrated long ago, language is a system of signifiers without positive terms, only differences among the signifiers.⁷³ Thus, neither the letter "M" nor the sound associated with it has any meaning apart from its recognizable difference from "B," "N," and other signifiers. Meaning does not inhere in any signifier ("MAN" bears no resemblance to or natural connection with the concepts speakers of English associate with this word), nor can the meaning of any signifier or signified concept be divined by studying it without reference to all others. The connection between any one signifier and its signified concept is arbitrary, as is the relationship between signified concepts and their referents, if any, in the "real" world—not, as is so often misunderstood by deconstruction's critics and adherents alike, "up for grabs,"⁷⁴ but unmotivated by any feature inherent in either the signifier or the signified:

69. EDMUND HUSSERL, *L'ORIGINE DE LA GEOMETRIE* (Jacques Derrida trans. intro., 1962) [THE ORIGIN OF GEOMETRY].

70. CHRISTINA HOWELLS, *DERRIDA: DECONSTRUCTION FROM PHENOMENOLOGY TO ETHICS* 12 (1999). Howells provides an extraordinarily lucid summary of Derrida's work on Husserl. See *id.* at 6-28.

71. In addition to his introduction to *The Origin of Geometry*, Derrida's work on Husserl includes JACQUES DERRIDA, *SPEECH AND PHENOMENON* (David Allison trans., 1973) (1967) and JACQUES DERRIDA, *'Genesis and Structure' and Phenomenology*, in *WRITING AND DIFFERENCE* 154-68 (Alan Bass trans., 1978) (1967).

72. On the susceptibility of West's work to Derrida's deconstruction of Husserl, see CORNELL, *BEYOND ACCOMMODATION*, *supra* note 31, at 21-36.

73. See JACQUES DERRIDA, *Linguistics and Grammatology*, in *OF GRAMMATOLOGY* 27, 31 (Gayatri Chakravorty Spivak trans., 1997) (1967) (discussing SAUSSURE, *supra* note 62, at 67).

74. WEST, *supra* note 2, at 17.

The instituted trace is “unmotivated” but not capricious. Like the word “arbitrary” according to Saussure, it “should not imply that the choice of the signifier is left entirely to the speaker.” Simply, it has no “natural attachment” to the signified within reality. For us, the rupture of that “natural attachment” puts in question the idea of naturalness rather than that of attachment.⁷⁵

Indeed, far from being detached from meaning, each signifier must already be meaningful—that is, it must already have a place in the system of differences—before it can signify at all. Even if it were possible to conceive wholly novel pre-linguistic essences, these could only be understood by others through the use of language already generally recognized as meaningful. To be recognized as meaningful, a signifier must be “iterable,” that is, capable of repetition. Each new utterance must be understood as in some sense “the same” as a signifier to which significance has already, by convention, been attached. The idea of iterability goes beyond the unremarkable notion that the meaning of an utterance may change when it is repeated or reread in a new context.⁷⁶ Iterability prevents a signifier from ever having an undivided meaning fully present to the speaker, even if it is uttered only once:

The iterability of an element divides its own identity a priori, even without taking into account the fact that this identity can only *determine* or delimit itself through differential relations to other elements and that it hence bears the mark of this difference. It is because this iterability is differential, within each individual “element” as well as between the “elements,” because it splits each element while constituting it.⁷⁷

As a consequence of the structure of iteration:

[T]he intention animating the utterance will never be through and through present to itself and to its content. The iteration structuring it a priori introduces into it a dehiscence and a cleft [*brisure*] which are

75. DERRIDA, *supra* note 73, at 46 (quoting SAUSSURE, *supra* note 62, at 68-69).

76. The idea of iterability is often oversimplified. J.M. Balkin, for example, confuses iterability, the possibility of repetition, with repetition itself:

[I]terability, 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 think 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.

Balkin, *Transcendental Deconstruction*, *supra* note 29, at 1133.

77. JACQUES DERRIDA, LIMITED INC 53 (Samuel Weber & Jeffrey Mehlman trans., 1977) (1972).

essential. . . . Above all, this essential absence of intending the actuality of utterance, this structural unconsciousness, if you like, prohibits any saturation of the context.⁷⁸

Thus, no user of language can ever fully control the meaning of any utterance. Not only do words take on new meanings in new contexts, but they are always already associated with meanings that may or may not be known or intended by the speaker. Freud, moreover, has amply demonstrated that unintended meaning is by no means random but rather is often the product of significant associations made by the unconscious.

B. Her Master's Voice

Iterability has important consequences for West's effort to bring women's lives to the attention of the law. As Drucilla Cornell has pointed out, West's aim to "reveal Woman for what she truly is"⁷⁹ depends for its success on "language as a pure medium that transposes sense by bringing it to conceptual form."⁸⁰ The requirement of iterability prevents language from being a transparent medium able to "communicate" or transport⁸¹ pre-linguistic concepts or feelings from inside to outside. West cannot express a feeling or a meaning new to men, law, and the dominant discourse by using entirely new language untainted by its role in repressing that meaning. West can and has contributed to the proliferation of meaning by using language in new ways in new combinations, but she cannot escape the patriarchal structure of language itself.

Despite the fact that West's project of telling women's true stories is plainly a discursive one, West impatiently dismisses postmodern work on discourse, particularly that of Michel Foucault,⁸² as excessively concerned with "speechifying."⁸³ Instead, West hopes to recover the voices and stories of women who have been silenced by patriarchal discourse over the centuries. "We need archaeologies of the discourses patriarchy has silenced, of the selves it has not allowed to be, of the subjectivities it has denied, of what it has forbidden, and what it has destroyed."⁸⁴ However, when West calls for "archaeologies of the discourses patriarchy has silenced," she demands what Foucault, in *Madness and Civilization*, attempted to provide. Although Foucault may not have been particularly interested in women,⁸⁵ he was, at

78. *Id.* at 18.

79. CORNELL, *BEYOND ACCOMMODATION*, *supra* note 31, at 29.

80. *Id.*

81. See DERRIDA, *supra* note 77, at 1-3 (investigating the various meanings of "communicate").

82. See WEST, *supra* note 2, at 264-76.

83. *Id.* at 274.

84. *Id.* at 262 (footnote omitted).

85. Catharine MacKinnon remarks that, for Foucault, "Women are simply beneath significant notice." MACKINNON, *supra* note 3, at 288 n.80; see also Linda R. Hirshman, *Was There Sex Before Calvin Klein?*, 53 WASH. & LEE L. REV. 929, 935 (1996).

least at some points in his intellectual career,⁸⁶ intently interested in silence⁸⁷ and in the difficult task of permitting the silenced to speak. “The language of psychiatry, which is a monologue of reason about madness, has been established only on the basis of such a silence. I have not tried to write the history of that language, but rather the archaeology of that silence.”⁸⁸ Instead, West calls for a study of the production of women’s silence,⁸⁹ referring to such problems as market censorship of women writers; the exclusion of women from professional, literary, and academic life; and society’s refusal to hear the voices of women who do speak.⁹⁰

West oversimplifies the problem of silence and thus necessarily undervalues the contribution postmodern work might make to feminism.⁹¹ To be sure, like every other topic of importance to women, the question of how women’s voices have been muzzled by prejudice and adversity has received too little attention from mainstream scholars.⁹² It is not, however, a

[Foucault] wrote his whole story of the modern construction of sexuality without women. Or, where women appear, it is without any of the will that characterizes his other players. In Foucault’s world of sex, men act and women are acted upon. And accordingly, because the actors are roughly equal, Foucault and the other social constructionists miss the threatening, scary, preemptive, and chilling centrality for women of the one universal characteristic Foucault does recognize: the will to power, or as we feminists put it, to dominance.

Id. However, the fact that Foucault, like Freud, gave little attention to women does not mean that his ideas cannot productively be applied to our concerns. See, e.g., Wendy Brown, *In the ‘Folds of Our Own Discourse’: The Pleasures and Freedoms of Silence*, 3 U. CHI. L. SCH. ROUNDTABLE 185 (1996) (drawing on the work of Foucault to examine women’s silence). Feminist theorists who restrict their reading to thinkers interested in women will not find much to read.

86. [Foucault] persistently revises and reworks a set of themes which emerges and re-emerges throughout his writings, without there ever being clear or unambiguous breaks. . . . He does not elaborate a general theoretical perspective or pretend that his concepts are exact or precise. . . . One particularly important consequence is that there is no ‘real Foucault’ who can be summoned. Rather, we argue that it is a useful strategy to insist that there are many ‘Foucaults’ who coexist and interact with one another.

ALAN HUNT & GARY WICKHAM, *FOUCAULT AND LAW: TOWARDS A SOCIOLOGY OF LAW AS GOVERNANCE* 3 (1994).

87. West’s single footnote acknowledging this point (and thanking a graduate student for bringing it to her attention) fails to explain why Foucault’s work on silence is of no use to feminism. See WEST, *supra* note 2, at 322 n.45.

88. MICHEL FOUCAULT, *MADNESS AND CIVILIZATION* xi (Richard Howard trans., 1965).

89. See WEST, *supra* note 2, at 265-66.

90. See *id.*; see also *id.* at 111-12 (attributing the “relative silence of women in the literary and visual arts” to the harmful consequences of bearing a disproportionate share of household labor).

91. Some feminists have, in fact, found Foucault’s insights very productive. See, e.g., JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990); ZILLAH EISENSTEIN, *THE FEMALE BODY AND THE LAW* (1988); JANA SAWICKI, *DISCIPLINING FOUCAULT: FEMINISM, POWER, AND THE BODY* (1991); Marie Ashe, *Mind’s Opportunity: Birthing a Poststructuralist Feminist Jurisprudence*, in *LEGAL STUDIES AS CULTURAL STUDIES: A READER IN (POST) MODERN CRITICAL THEORY* 85 (Jerry Leonard ed., 1995); Sandra Lee Bartky, *Foucault, Femininity, and the Modernization of Patriarchal Power*, in *FEMININITY AND DOMINATION: STUDIES IN THE PHENOMENOLOGY OF OPPRESSION* 63 (1990). West’s attack here on the value of Foucault for feminism has been called “insightful if somewhat overdrawn.” Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1479 n.174 (1992).

92. Feminist poet Adrienne Rich shares West’s concern with the historical silencing of women and her suspicion that postmodern theorizing can lose sight of women’s pain. See, e.g., ADRIENNE RICH, *Divisions of Labor*, in *TIME’S POWER: POEMS 1985-1988*, at 45 (1989) (“an old magazine polishes up its act/with deconstructions of the prose of Malcolm X/The women in the back rows of politics/are still licking thread to slip into the needle’s/eye, trading bones for plastic, splitting pods/for necklaces to sell to the cruise-ships”). Rich is also aware, however, of the difficulty of reading and breaking silence. “Rich has been concerned

particularly difficult theoretical question: Given the social, economic, political, physical, and psychological burdens women have been forced to bear over the centuries, it takes no great feminist insight to understand why women have produced only “one out of twelve” of the world’s modern literary classics.⁹³ Non-feminists may still need to be told that women’s comparative lack of lasting creative output is attributable more to our lack of time than to a lack of talent,⁹⁴ but this is no longer the cutting edge of feminist theory.

A far more interesting and difficult theoretical question is how the silencing of women has shaped language to render it unfit to express women’s point of view, and how this language might nevertheless be used to reclaim the history of the women whose silencing has shaped it. This task is analogous to Foucault’s effort to write a history of madness: Women, like madness, have been defined as reason’s other, yet the language in which our history must be written, if it is to be written at all, is the language of reason—the language of men. Derrida has aptly described the madness of this project:

Foucault wanted to write a history of madness *itself*, that is madness speaking on the basis of its own experience and under its own authority, and not a history of madness described from within the language of reason, the language of psychiatry *on* madness . . . on madness already crushed beneath psychiatry, dominated, beaten to the ground, interned, that is to say, madness made into an object and exiled as the other of a language and a historical meaning which have been confused with logos itself.⁹⁵

West at one time recognized that her own project was equally mad:

The goal of reconstructive feminist jurisprudence is to render feminist reform rational. We must change the fact that, from a mainstream point of view, arguments for feminist legal reform efforts are (or appear to be) invariably irrational. The moral questions feminist reforms pose are always incommensurable with dominant moral and legal categories.

throughout her career with the ethical imperative of breaking personal and cultural silences, and with the epistemological difficulties of doing so.” Jane Hoogestraat, “Unnamable by Choice”: *Multivalent Silences in Adrienne Rich’s Time’s Power*, in *VIOLENCE, SILENCE, AND ANGER: WOMEN’S WRITING AS TRANSGRESSION* 25, 28 (Deirdre Lashgari ed., 1995). The value of poetry for Rich lies in part in its greater openness to the unconscious and, therefore, its greater potential for expressing the repressed feminine. See ADRIENNE RICH, *ADRIENNE RICH’S POETRY* 113 (Barbara Charlesworth Gelpi & Albert Gelpi eds., 1975) [hereinafter RICH, *ADRIENNE RICH’S POETRY*].

93. RICH, *ADRIENNE RICH’S POETRY*, *supra* note 92, at 266 (quoting TILLIE OLSEN, *One Out of Twelve: Writers Who are Women in Our Century*, in *SILENCES* 41, 41 (1978)).

94. The same must be said for other economically and socially disadvantaged classes of people; an inventory of great classics in any art would be unlikely to include more than a handful produced by persons who had to work for a living.

95. JACQUES DERRIDA, *Cogito and the History of Madness*, in *WRITING AND DIFFERENCE*, *supra* note 71, at 31, 34.

Let me put it this way: given present moral categories, women's issues are crazy issues.⁹⁶

The problems encountered in writing women's stories into the law have been examined by a number of French feminists, some of them influenced in important ways by the work of Jacques Derrida, and all of them generally regarded as postmodern. Luce Irigaray,⁹⁷ for example, wonders how woman is to gain access to a symbolic order to which she is "other":

Given that, once again, the "reasonable" words—to which in any case she has access only through mimicry—are powerless to translate all that pulses, clamors, and hangs hazily in the cryptic passages of hysterical suffering-latency. Then. . . Turn everything upside down, inside out, back to front. *Rack it with radical convulsions*, carry back, reimport, those crises that her "body" suffers in her impotence to say what disturbs her. Insist also on those *blanks* in discourse which recall the places of her exclusion and which, by their *silent plasticity*, ensure the cohesion, the articulation, the coherent expansion of established forms. Reinscribe them hither and thither *as divergencies*, otherwise and elsewhere than they are expected, in *ellipses* and *eclipses* that deconstruct the logical grid of the reader-writer, drive him out of his mind, trouble his vision to the point of incurable diplopia at least.⁹⁸

Hélène Cixous also has argued that women's sexuality cannot be expressed in current symbolic systems because the only position available from which to write within those systems is that of the male. Even male sexuality cannot be expressed within this system because it too has been forced into the limiting framework of binary oppositions (active/passive, masculine/feminine) that alienates men from their own bodies and forces them into relationships with the feared other.

Nevertheless, both Irigaray and Cixous call for the inscription of the female in what Cixous calls *l'écriture féminine*. "Woman must write herself: it

96. West, *supra* note 24, at 68.

97. Oddly, West concludes her chapter of *Caring for Justice* by warning feminists away from postmodernism with several extended quotations from Irigaray offered as a description of an aspect of women's internality threatened by the destructivity of patriarchal power. See WEST, *supra* note 2, at 289-90. According to West:

[Irigaray] contends that patriarchal society destroys, excludes, negates, and renders fantastic women's internal, prelingual, and even presymbolic sense of ourselves as witness to the truth that the violence done upon the world by discursive categorization—this breaking into subjects, objects, principles, rights, and wrongs—is false, is wrong, and is not all.

Id. As is her practice, West cites two entire books by Irigaray as the source of this contention so it is difficult to comment on its accuracy. See *id.* at 324 n.83. However, Irigaray's work is generally concerned with language, psychoanalysis, and the possibility of a feminine discourse, and not with the effects of patriarchal violence.

98. LUCE IRIGARAY, *SPECULUM OF THE OTHER WOMAN* 142 (Gillian C. Gill trans., 1985) (1974) (ellipses in original).

is the essential act by which she can mark 'her shattering entry into history which has always been based on her suppression.'"⁹⁹ Doing so, however, may be possible only in poetry, which is closer to the unconscious and celebrates rather than represses multiplicity and mobility of meaning. These theorists would applaud West's project, that of filling the air with women's stories—when women write themselves, their bodies, their joys and sorrows, they will alter the structure of language and bring about liberating change. But they would regard West's largely unexamined use of patriarchy-soaked language to do so, repeating women's stories without heeding the degree to which language makes them mere reflections of symbolically male stories, as doomed to reconfirm the dominant discourse.

1. Just Like Men, Only Different

Indeed, West's writing reveals the obstacles language places in the way of her project in a number of ways. For example, in discussing the law's failure to adequately address and redress women's distinctive harms, West argues at length that injuries suffered by women are not adequately described by legal terms derived from the experience of men. The harm suffered by a woman who has been raped, for example, is not fully captured by claims that "rape is a crime of violence, not sex,"¹⁰⁰ or that "the real harm done by rape is the threat to women's autonomy, or that the real harm done is the residue of fear that the threat of rape leaves in all women, both survivors and others."¹⁰¹ West notes that "these accounts omit . . . those aspects of the experience of rape which are, in a word, gendered: the aspects of the experience of rape which simply have no correlate in (most) men's lives."¹⁰² West therefore undertakes to categorize and describe the gendered harms experienced by women. Despite her determination to break free of male descriptive categories, however, West explains women's harms in terms of the damage done to a distinctively male notion of the self. West describes the obstacles abuse and fear place in the way of a woman's ability to enjoy life according to the "liberal idea of a healthy, assertive individualism"¹⁰³ which assumes that "we desire what pleases us, and we act on the basis of our desires: this is largely what it means in this culture to be a self-possessed individual."¹⁰⁴ Thus:

The girl or woman in whom these hedonic connections are severed because of repeated or long-term sexual assault, is not going to be capable of a robust, autonomous individualism. . . . [S]he becomes

99. H  l  ne Cixous, *The Laugh of the Medusa*, 1 SIGNS 880, 885 (Keith Cohen & Paula Cohen trans., 1976).

100. WEST, *supra* note 2, at 101.

101. *Id.* (footnote omitted).

102. *Id.*

103. *Id.* at 103.

104. *Id.*

incapable of the quintessentially individualistic act of positioning, asserting, or *thrusting* herself into the world, thereby changing the world with a felt presence.¹⁰⁵

In the case of the gendered harm of unwanted pregnancy, West again describes the injury in terms of interference with the ability to act

on the basis of a freely willed moral commitment, in the Kantian, deontic, and duty-bound spirit of ethical liberalism. This specific conjunction of the *moral* act with the *free* act—and the identification of that conjunction with a definition of individualism—is precisely what an unwanted pregnancy threatens.¹⁰⁶

Thus, in her effort to provide a truer description of women's harms than can be achieved by analogizing them to men's harms, West finds herself forced to describe these harms in terms of their impact on the liberal individual, at best a gender-neutral ideal and, by most accounts, culturally male. The task of telling women's true stories is more complicated than West is willing to admit.

2. *Raging Italics*

The resistance offered by language—particularly legal language—to the task of telling women's stories is evident in various other aspects of West's style. The most obvious sign of West's frustration with the inflexibility of language may be her excessive use of italics for emphasis. Choosing a page more or less at random, one finds West writing:

Indeed, "justice," as it is generally understood, and "care," as it is widely practiced, are each *necessary conditions of the other*. The pursuit of justice, when successful, *must* also be caring, and the activity of caring, when successful, must be mindful of the demands of justice. Put negatively, the zealous pursuit of justice, if neglectful of the ethic of care, will fail not just as a matter of overall virtue, but more specifically, it will fail *as a matter of justice*.¹⁰⁷

One cannot read West's work without imagining her shaking the reader by the shoulders in her effort to communicate passion she cannot make her words express. West is aware of the difficulties encountered by feminists attempting to write feminist legal scholarship and has written perceptively about them in

105. *Id.* at 104 (emphasis in original).

106. *Id.* at 106 (footnote omitted).

107. *Id.* at 24.

her 1989 essay *Love, Rage, and Legal Theory*.¹⁰⁸ There she argued, “that feminist legal scholarship distinctively shows that we have unwittingly internalized as well as quite consciously rebelled against, the dominant legal culture’s condemnation of the emotional root of our work.” She urged:

[W]e should trust our rage a little more, and our internalized repression of that rage a whole lot less. We should refuse to honor mainstream demands of objectivity and detachment that disable us from feminist methods of narrative expression that we know have worked for women in the past, and that we know to have worked in large part because they move us to an enraged response to our injuries instead of a belittling self-contempt.¹⁰⁹

West has not, however, found herself able to take her own advice. Only in her italics does West reveal the rage she says lies behind her work. Despite the evident fact that much of the impetus for West’s work in feminism derives from her own personal experience of consciousness raising,¹¹⁰ West seldom writes in a narrative style at all and reserves the first person singular “I” for observations about the text (“I will argue” or “I will try to show”) and the occasional “I think” or “I believe.”

3. *Pronoun Trouble*

West ordinarily writes in the third person, describing the objective and intellectual world from a vantage point somewhere outside it. The state of the world or the ideas of others can be summed up in a sentence or two and pronounced right or wrong, true or false, healthy or harmful. For example, “[t]his inattentiveness to silence is not only a massive injustice, but it also distorts understanding”;¹¹¹ “it is simply not true—it is emphatically not true— . . . that oppressive ‘power’ in any of its manifestations is the necessary consequence of inequality and hierarchy.”¹¹²

When she is not using the third person, West most often writes in the first person plural. Her use of this voice is seldom the editorial “we”¹¹³ but tends to be an ambiguous and, sometimes, coercive “we.” Sometimes, “we” seems to refer to West and the rest of the omnipotent legal subjects presumed to be reading her work: “How might we develop a moral sensibility with which to criticize law that is itself independent of the influence of law?”¹¹⁴ “We must

108. Robin West, *Love, Rage, and Legal Theory*, 1 YALE J.L. & FEMINISM 101 (1989).

109. *Id.* at 109.

110. *See, e.g.*, WEST, *supra* note 4, at 217-32; WEST, *supra* note 2, at 284-86.

111. WEST, *supra* note 2, at 272.

112. *Id.* at 277.

113. *But see, e.g.*, WEST, *supra* note 2, at 59 (“We can see the tension between the relational constraint and the economic constraint . . .”).

114. WEST, *supra* note 4, at 6.

change the fact that, from a mainstream point of view, arguments for feminist legal reform efforts are (or appear to be) invariably irrational.”¹¹⁵ However, omniscient and omnipotent legal subjects ordinarily efface themselves entirely from their texts, leaving the impression that truth itself is speaking.¹¹⁶ West’s “we” may indicate some anxiety about whether, as a woman writing feminism, she really counts as a legal subject.

Sometimes we cannot tell who West means by “we.” For example, West writes:

[I]f it is true, as relational feminists claim, that the act of caring for others to whom we are connected in some way is central to our moral lives, then our capacity for care should be at the center of our understanding of our public and legal, as well as private and personal, virtues, and specifically that it should be central to the meaning of legal justice.¹¹⁷

To be consistent with West’s view of the differences between men and women, the “we” in the second line of the quotation above should mean “we women.” However, “we women” are not in a position to make “our understanding” of virtue “central to the meaning of legal justice”—“we” would have to include the omnipotent legal subject (or at least some men) to have a prayer of achieving that miracle.

Most often, West’s “we” plainly means “we who agree with West.” “We” are required by this pronoun to share with West a variety of opinions, beliefs, and experiences that might otherwise appear eccentric or unique to West, if only because they are so rarely acknowledged in law. Because the language West must use is unable to do justice to her arguments, it is perhaps understandable that she falls back on a vaguely coercive “we” to treat her points as established. Thus, “we” feel rage at a television commercial;¹¹⁸ “we need to resist the false comparison between legal and patriarchal power”;¹¹⁹ “what would best serve us is a balance between objective and subjective conceptions of harm.”¹²⁰

In *Love, Rage and Legal Theory*, West considered her own unwillingness, as well as that of other feminist legal scholars, to write first-person accounts of her own experiences.¹²¹ She commented on the regularity with which such accounts, when they appeared at all, were confined to prefatory material, brackets, or footnotes.¹²² That article, however, was written in the same voice

115. West, *supra* note 24, at 68.

116. For a description of the classic legal subject, see Schlag, *supra* note 30, at 1634.

117. WEST, *supra* note 2, at 9.

118. *See id.* at 17.

119. *Id.* at 263.

120. *Id.* at 177 (emphasis omitted).

121. *See* West, *supra* note 108.

122. *See id.* at 107-08.

as *Caring for Justice*, alternating between the omniscient third person (“While love informs a feminist sense of morality, and hence of ideal conceptions of law, rage informs the feminist sense of justice.”)¹²³ and the inescapable first-person plural (“We are enraged, and we are moved to act, by our identification with the gendered injuries that distinctively destroy women's selfhood and security.”).¹²⁴ Thus, even when confessing her own weakness or anxiety, West writes from a position of epistemological or numerical strength inconsistent with the importance she assigns to first-person accounts.

The closest West comes to engaging in first-person autobiography is in chapter four, *Women's Hedonic Lives*, of *Narrative, Authority, and Law*,¹²⁵ where she tells stories of the lives of individual women including, West tells the reader, her own.¹²⁶ To tell these stories, West quotes extensively from other women's first-person accounts of abuse and exploitation.¹²⁷ Where such accounts are not employed, however, West does not supply her own story. Instead, she weaves dizzily in and out of the first, second, and third person:

The battered woman is a giving self for another within an abusive marriage, to precisely the extent to which it is too frightening and dangerous to even contemplate being for oneself. . . . The other must live, and that is why you are. If you are going to be at all, you are going to be for him.¹²⁸

And:

One way (there are others) that a young girl can respond to the “rising panic” she feels on a date is by defining herself as giving. A straightforward, sensible, protective reaction to someone who is indifferent to your subjectivity, and at the same time must have you as an object, is to hide your subjective self and objectify and then give

123. *Id.* at 102.

124. *Id.*

125. See WEST, *supra* note 4, at 179-249.

126. See *id.* at 196.

[T]he descriptions that follow are exemplary of the types of fear that have at some point in my life determined my self-definition. Toward that end, I will discuss the effect of domestic violence, promiscuous and threatening heterosexuality, and the fear of rape and street hassling on a woman's self definition. The list . . . excludes, because I have not myself lived through it and do not fully understand it, how stranger rape itself (instead of the fear of it) and incest affects a woman's self-perception.

Id.

Anne Coughlin has noted that West does not make entirely clear which parts of her story are autobiographical. See Anne M. Coughlin, *Regulating the Self: Autobiographical Performances in Outsider Scholarship*, 81 VA. L. REV. 1229, 1324-25 (1995).

127. See, e.g., WEST, *supra* note 4, at 196-200, where West conveys the experience of domestic abuse through extensive quotation from DEL MARTIN, *BATTERED WIVES* (1976); ERIN PIZZEY, *SCREAM QUIETLY OR THE NEIGHBORS WILL HEAR* (1977); and WOMEN AGAINST VIOLENCE AGAINST WOMEN (Dusty Rhodes & Sandra McNeill eds., 1985).

128. WEST, *supra* note 4, at 197-98.

your sexual self for his pleasure and your safety.¹²⁹

And:

[Street hassling] feels frightening and infantilizing. It always made me feel—still makes me feel—like a helpless and guilty child. . . . One way that (some) women and girls respond to the jolt of fear, the rising panic, that street hassling engenders is by defining themselves as “giving”; by hiding, suppressing, their subjective selves and then giving away for visual consumption their sexual appearance. . . . This quasi-consensual bargain feels horrible. Your body, objectified and separated from your subjective being, becomes dead weight.¹³⁰

Even when she promises to tell her own story, West encounters great difficulty in actually telling it as her own story.

Ironically, it appears to be other women’s first-person narratives that have convinced West that she shares essential qualities and experiences with women in general. In one of the few explicitly personal accounts in her work West reports the shock of recognizing her own fears and hopes in the work of Carol Gilligan, and her own victimization and injury in the work of Andrea Dworkin.¹³¹ Her inability to provide similarly personal accounts of her own experience, despite the importance she attaches to such accounts, prevents West’s readers from feeling that same shock. The reader is not moved by general statements about how women, or “we” think and feel, no matter how eloquent or italicized.

C. Purity of Essence

As Saussure demonstrated, language is a system of differences without positive terms in which no signifier is essentially meaningful. Determining the significance of any signifier or signified is a process of differentiating it from all other elements in the system and excluding all other possible meanings. Derrida’s work demonstrates the profound philosophical implications of this fact, implications that pose both a serious problem and a splendid opportunity for West’s work on justice. To the extent that West is committed to spelling out a true description of women’s essential qualities, the fact that these qualities, like the concept “woman,” are defined through a process of linguistic exclusion rather than one of natural discovery places practical, logical, and political obstacles in her path. On the other hand, because even the most univocally patriarchal language can only appear to be so through the

129. *Id.* at 201.

130. *Id.* at 206-07.

131. *See West, supra* note 24, at 55-56.

repression of competing meanings, these silenced significances both shape oppressive language and remain ready to return to disrupt the authorized meaning at any time.

1. Speech and Writing

American practitioners of deconstruction often overemphasize Derrida's complex analyses of the possibility of language and meaning and the relationship of speech and writing at the expense of Derrida's more general philosophical and political interests. However, Derrida's deconstruction of the distinction between speech and writing, and of the priority given the former over the latter by Saussure,¹³² has particular relevance to West's work. The difficulties into which Saussure was led by his effort to preserve the integrity of speech resemble those that plague West's struggle to preserve an essential male/female difference.

According to Derrida, Saussure intended to found linguistics as a science by identifying as its object a phenomenologically limited unit of study: the spoken word. Defining his new science, Saussure stated: "The linguistic object is not defined by the combination of the written word and the spoken word: the spoken form alone constitutes the object."¹³³ Saussure considered the spoken word, which he called the sign, to be a natural unity of the sound-image, or signifier, and the concept, or signified. Language is thus a system of spoken words or signs; writing is a separate and second system of graphic signs which "exists for the sole purpose of representing the first."¹³⁴ Thus, while the spoken word is the sign of a thought, the written word is merely the sign of that sign.

Derrida demonstrates that Saussure's distinction of speech from writing, and his exclusion of the latter from consideration as the object of the science of linguistics that he intended to found, led Saussure into contradictions within the terms of his own thought. For example, Saussure showed that the relationship between any signifier and its signified is arbitrary, that is, instituted rather than natural. "To say therefore that there is a natural subordination of writing to speech—that writing is a secondary representation of a primary unity of sound and meaning—whilst propounding at the same time that all signs are arbitrary is contradictory."¹³⁵

Saussure also understood that language is made up not of positive terms but of a system of differences among terms. This insight, too, contradicts the constituting premise of Saussure's science, for it indicates that the sign or spoken word could not be a phenomenologically limited unit of study, but instead is a secondary effect of the entire system of differences, with no

132. See DERRIDA, *supra* note 73.

133. *Id.* at 31 (quoting SAUSSURE, *supra* note 62, at 23-24).

134. *Id.* at 30 (quoting SAUSSURE, *supra* note 62, at 23) (emphasis Derrida's).

135. BEARDSWORTH, *supra* note 25, at 11.

greater claim to natural existence or integrity than the written word. Saussure knew that signification was a product of difference and, indeed, defined the concept of language by differentiating it from writing, but then purported to find language/speech as a natural object present in the world—that is, with an inherent meaning not constituted by difference. The illusion of natural unity of the linguistic object was thus violently created by expelling difference into its opposite, writing.

Having made the decision to define language as a coherent concept by excluding writing from the field of study, Saussure then expelled into the disfavored category those qualities he did not want complicating language as an object of scientific study: Writing is exterior, artificial, and representational; language/speech is internal, real, and present.¹³⁶ Derrida demonstrated that the qualities banished from speech/language into writing in the interest of science were precisely those that made not only language but also science possible. Writing “is not only an auxiliary means in the service of science . . . but first, as Husserl in particular pointed out in *The Origin of Geometry*, the condition of the possibility of ideal objects and therefore of scientific objectivity.”¹³⁷

Saussure implicitly acknowledged the violence and instability of the exclusion of writing from language in the odd hostility he displayed toward the continuing influence of writing on language. Saussure complained: “Some Parisians already pronounce the *t* in *sept femmes* ‘seven women’. . . . Such phonic deformations belong to language *but do not stem from its natural functioning*. They are due to an *external* influence. Linguistics should put them into a *special compartment* for observation: they are *teratological* cases.”¹³⁸

Derrida comments:

Where is the evil? one will perhaps ask. . . . Why wish to punish writing for a monstrous crime, to the point of wanting to reserve for it, even within scientific treatments, a “special compartment” that holds it at a distance? For it is indeed within a sort of intralinguistic leper colony that Saussure wants to contain and concentrate the problem of deformations through writing.¹³⁹

Derrida attributes the violence of Saussure’s reaction to the violence of the distinction organizing linguistics and the instability of the resulting concepts. “It seems then as if Saussure wishes at the same time to demonstrate the corruption of speech by writing, to denounce the harm that the latter does to

136. See DERRIDA, *supra* note 73, at 30-35.

137. *Id.* at 27.

138. *Id.* at 42 (quoting SAUSSURE, *supra* note 62, at 31-32) (emphasis Derrida’s).

139. *Id.* at 41-42.

the former, and to underline the inalterable and natural independence of language."¹⁴⁰ Linguistics resembles metaphysics generally in the way it constitutes opposing concepts—here, language/speech and writing—“expelling into one term of the opposition the very possibility of the condition of such oppositions.”¹⁴¹ As Richard Beardsworth explains, Derrida is interested in writing because:

Writing offers privileged access to the reinscription of the empirico-transcendental difference since the sign is *the* determining instance of this opposition for metaphysics. The very possibility of the sign is predicated on an opposition between that which is conveyed (the signified, the *logos*, the non-worldly) and the conveyor (the signifier, the worldly).¹⁴²

Derrida's deconstruction of Saussure's science of linguistics is a deconstruction of metaphysics and Western thought as well. The structure thus illuminated has implications far beyond the question of language and writing.

2. *Men and Women*

For example, a similar structure can be observed in the constitution of the opposition human/male and female. The category male is constituted through the creation of the category female, to which is assigned the trait of “difference” that made possible the distinction between the two categories and, therefore, the existence of the category human (male).¹⁴³ The male (or, simply, “man”) can then be taken as the proper object of the human sciences¹⁴⁴ and conclusions derived from that science applied to humans generally, any lack of fit between the results of such research and female humans being regarded as accidental. The vehemence with which the purity of the category male has historically been protected by the dominant discourse at least equals Saussure's protection of his concept of language from contamination by writing.

West, in her effort to focus feminist inquiry on a naturally-occurring

140. *Id.* at 41.

141. BEARDSWORTH, *supra* note 25, at 8.

142. *Id.* at 7.

143. *Cf.* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 21-22 (1990) (describing how society disregards the comparative nature of difference and instead views it as a part of the nature of persons excluded on that basis).

144. *See, e.g.*, Dorothy E. Smith, *Women's Perspective as a Radical Critique of Sociology*, in FEMINISM AND SCIENCE 17, 17 (Evelyn Fox Keller & Helen E. Longino eds., 1996) (comparing the traditional sociological view of women to the television soap opera view of men); *see also* David B. Ottoway, *A Safety Device with a Fatal Flaw; Designed to Cushion Body, Air Bags Putting Short People at Risk*, WASH. POST, Oct. 27, 1996, at A1 (arguing that automobile airbags are designed to protect persons 5'9" and taller). *Cf.* GERDA LERNER, THE CREATION OF FEMINIST CONSCIOUSNESS: FROM THE MIDDLE AGES TO EIGHTEEN-SEVENTY 247-48 (1993) (reporting that the first 3800 years of the 4000-year recorded Western history concerns the affairs of men but not women).

category “woman,” is engaged in a conceptual project analogous to Saussure’s and encounters similar difficulties. West’s feminist essentialism is paradoxical in several respects: As noted above, West emphasizes the importance of individual women and their stories, but her semi-coercive writing implies that having had her own consciousness raised has given West access to the interiority of all women qua women. West tries to justify her essentialism in *Caring for Justice* and elsewhere in her work but never succeeds in doing so adequately. In a defense against anticipated objections in the introduction to *Caring for Justice*, for example, West confuses sameness with difference. West refers to the work of Carol Gilligan for the proposition that women are different from men, then challenges “those who assert the ‘no difference’ hypothesis”¹⁴⁵ to assume the burden of proof. The critical problem with West’s essentialism, however, is that it posits sameness among women, not that it argues for difference between women and men. By highlighting gender as the difference that matters, West renders differences among women (as well as among men) invisible or, at best, secondary.¹⁴⁶

Moreover, West makes the highly problematic assumption that the category “woman” subordinated by patriarchy is co-extensive with a category “woman” existing in nature and forming a part of individuals’ identities apart from their experience of sexism, just as she assumes that the notion of “race” defining racism is also a natural category independent of individuals’ experience of racism:

The complexity of the intersection of race and sex, raises, in my view, the most challenging set of problems facing feminism, and for this reason: it is surely *true* that race and racism pose nearly intractable problems of social justice It is also true, as scores of black feminists have now shown, that black women are injured and subordinated in this culture in ways that simply *are not shared* by white women or black men.¹⁴⁷

When West answers this objection to the sameness imposed by her essentialism, she simply denies that it is a problem:

145. WEST, *supra* note 2, at 18.

146. For one very problematic example of West’s essentialism undermining her arguments, see West, *supra* note 108, at 103-04, where West asserts:

Underlying this disjunction between the feelings that motivate feminist and mainstream legal scholarship is an even more fundamental cleavage between the existential situation—the position in the world—of the feminist legal scholar and the masculine legal scholar. It is the lived reality of physical, emotional and psychic *intersubjectivity* with others which underlies the two emotions—love and rage—that motivate the feminist sense of morality and justice respectively and hence of feminist legal theory.

Id. In this passage, West assumes, among many other things, that women, and only women, experience lives of intersubjectivity and, therefore, love and rage, and that only injustice against members of one’s gender (and not, for example, ethnic group or even species) can provoke the rage West associates with the feminist sense of justice.

147. WEST, *supra* note 2, at 14.

The problem . . . is *racism*, and specifically white racism, not essentialism. . . . *None* of the many difficulties inherent in the monumental task of addressing the multiple and intersectional nature of the subordination of black women suggest the anti-essentialist conclusion or premise which these difficulties often invoke. It doesn't follow from the complexity, multiplicity, or intersectionality of many women's subordination that any *one* of the intersecting axes on which men or women might be subordinated doesn't *exist*.¹⁴⁸

As a category of nature, however, race certainly does not exist; to the extent that it has any physical basis at all, race is a socially constructed set of meanings imposed on any of a number of superficial physical traits with no scientific significance or integrity. Like the problems of sexism, the problems of racism exist and must be addressed independent of whether the members of each subordinated group share some essential traits.

West's descriptions of the differences between men and women are riddled with contradictions. Women, for example, "are actually or potentially materially connected to other human life. Men aren't."¹⁴⁹ West does not contend, however, that women are connected only to each other. Men (or, at least, males) are often the people to whom women are materially connected, whether pre-natally, while nursing, or during intercourse. To say, then, that women are connected to other life while men are not is to assign to one side of a conceptual opposition a quality necessarily shared by both concepts.

Similarly, West finds women to be dependent while men are autonomous. Men, however, are certainly dependent when they are children (children, oddly, are never quite separated out as a category).¹⁵⁰ West clearly recognizes the degree to which women provide needed care for men throughout their lives and can point to only incidental examples of women's natural dependence (for instance, women need protection while they are actually giving birth). As West remarks in another context, a day spent watching people will drive the point home: Men surround themselves with women to care for them—secretaries, cooks, waitresses, maids, baby-sitters, and, of course, girlfriends and wives. Women do not, or, when they do, they surround themselves with other women. Women are most often found taking care not only of themselves but also of others dependent on them.

West also displays an odd vehemence, strikingly similar to Saussure's, when her project of investigating women's true nature is threatened. For

148. *Id.* at 15.

149. West, *supra* note 24, at 14; *see also id.* at 21 ("[W]omen are ultimately more 'connected'—psychically, emotionally, and morally—to other human beings because women, as children were raised by women and women raise children because women, uniquely, are physically and materially 'connected' to those human beings when the human beings are fetuses and then infants.").

150. Indeed, West's failure to place children on one side or the other of the male/female divide is quite interesting, given the great weight she gives both to women's true nature and to the importance of children.

claiming that gender roles bear a contingent or socially constructed connection to sex, postmodern theorists are condemned to join the creationists in their “anti-Darwinian, anti-naturalist and anti-scientific”¹⁵¹ world view. The postmodern “dismantling of the connections between sex and gender,”¹⁵² like the “destruction of meaning and language,”¹⁵³ is decried as “at bottom inhuman.”¹⁵⁴

West’s effort to study the true nature of women may be even more contradictory than Saussure’s project because the concept “woman” has long consisted in that which was excluded from the concept “man.” “Woman” in the dominant discourse is not a coherent concept at all; instead, it is a tangle of elements excluded from the concept “man” so that man could appear coherent, ideal and whole—difference, gender, passion, nature, weakness, dependence. Not only the concepts “man” and “woman,” but also the language in which West must work to study them are marked by thousands of years of repression of whatever was assigned to woman.¹⁵⁵

Drucilla Cornell has pointed out that West’s understanding of men and women as naturally different seems to rule out the possibility of ending the oppression of women by men:

The fundamental theoretical problem with the American feminist version of object relations theory, including as it is implicit in West, is that it collapses psychic structure into social relations. . . . Because West accepts the story of masculine separation from the mother as the foundation for male identity, she cannot provide an explanation of why men could get beyond this identity. Moreover, there would be no reason they would want to.¹⁵⁶

West’s recognition that essential differences between men and women make an end to patriarchal violence unlikely may be what drives West to posit an equally untenable distinction between patriarchal and legal power:

151. WEST, *supra* note 2, at 16.

152. *Id.* at 16-17.

153. *Id.* at 17.

154. *Id.*

155. Repression of the female is so much a part of Western culture and the Western psyche that some psychoanalytic feminists have been led to wonder whether the unconscious is inherently feminine. See LUCE IRIGARAY, *THIS SEX WHICH IS NOT ONE* 123 (Catherine Porter trans., 1985) (1977).

[T]he first question we have to ask is whether there is something in the unconscious as it is currently designated that might belong to the repressed feminine. . . . Whether the feminine does not, in part, consist . . . of what is designated as the unconscious. Thus, many of the characteristics attributed to the unconscious may evoke an economy of desire that would be, perhaps, “feminine.”

Id.

156. CORNELL, *BEYOND ACCOMMODATION*, *supra* note 31, at 52. The object relations theory referred to by Cornell is that of Nancy Chodorow, *see id.* at 50-51, on whose work West relies heavily. *See, e.g.*, WEST, *supra* note 2, at 129-30, 284. West acknowledges that finding a biological basis for male violence might be seen to make enforcement of laws against that violence more necessary, *see id.* at 13, but she does not explain how persons motivated to enforce those laws would come to have the power to do so.

For it is distinctively *because* of this central *difference* between law and patriarchy that law becomes a tool with which patriarchal power can be resisted. Put another way, it is because of the difference between legal and patriarchal power that law, with all its positivity—its socially constructed rights and its ideological, imaginative, and institutional inventions—is a potent weapon against the destructivity and negativity of patriarchy.¹⁵⁷

Like Saussure's distinction between speech and writing, West distinguishes legal and patriarchal power, not as theoretical constructs (that is, she offers no definition of either, and does not pretend to be positing them as tools of analysis), but as real weapons capable of being used against each other in the world. To maintain this distinction, she must reject Michel Foucault's work on the productive aspects of power. She plainly finds Foucault's description of power disturbing (enough to italicize it in its entirety):

*We must cease once and for all to describe the effects of power in negative terms: it "excludes," it "represses," it "censors," it "abstracts," it "masks," it "conceals." In fact, power produces; it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production.*¹⁵⁸

West asks:

Is Foucault's suggestion, though—that we should quit talking about power in negative terms—something feminist legal scholars should heed? Is its underlying assumption—that modern power is creative and productive rather than negative and censorial—as true of modern *patriarchal* power as it seems to be of *legal* power?"¹⁵⁹

The answer, according to West, is no—the law and the patriarchy must be seen as exercising distinct and opposed types of power. Legal power is

157. WEST, *supra* note 2, at 263 (footnote omitted).

158. *Id.*, at 260 (quoting MICHEL FOUCAULT, DISCIPLINE AND PUNISH 194 (A. Sheridan trans., 1979) (1975)) (emphasis West's).

159. *Id.* at 260-61. Ironically, while West concedes that Foucault's insights on the productive nature of power are important to an understanding of the legal power of the state, contesting only their applicability to the private exercise of patriarchal power, many others have criticized Foucault for concentrating on private exercises of power to the exclusion of the legal power of the state. See EISENSTEIN, *supra* note 91, at 16-20 (noting that "Foucault's method keeps us from seeing, or recognizing, what we might want to do with the state"); HUNT & WICKHAM, *supra* note 86, at 17-20 (commenting that Foucault's focus on the interaction of "micro-powers" impedes the development of a political strategy for dealing with sites of concentrated power such as the state); Lucie E. White, *Seeking "... The Faces of Otherness ...": A Response to Professors Sarat, Felstiner, and Cahn*, 77 CORNELL L. REV. 1499, 1505 (1992) (warning that we cannot get "stuck" in Foucault's theory of power because of its weakness in explaining the role of institutional power and its role in perpetuating domination).

“constructive, positive, creative, and inventive,”¹⁶⁰ while patriarchal power is characterized by its “destructive, negating, censorial violence.”¹⁶¹ West’s refusal to consider the positive effects of patriarchal power is puzzling in light of the importance of these effects in her own work. Examples of patriarchal power’s constructions abound in West’s writing. The “giving self,” for example, movingly described by West in chapter four of *Narrative, Authority, and Law*,¹⁶² who “consents to transactions, changes, or situations in the world so as to . . . maximize the pleasure and satiate the desires of others”¹⁶³ in response to “a fully justified fear of acquisitive and violent male sexuality”¹⁶⁴ is a product of patriarchal power’s positive effects. Indeed, the world described by West in which domestic violence, despite its prevalence, remains invisible, in which “[w]ay too many people, including the women who sustain them, think that a slap on the face is normal, ordinary, unexceptional, or deserved,”¹⁶⁵ is a positive effect of patriarchal power.

West’s belief in the continuing invisibility of patriarchal violence, despite the pervasive reality of “[t]he danger, the violence, and the fear with which women live,”¹⁶⁶ is also symptomatic of contradictions in her essentialist theory. West argues that this violence is

not a part of men’s world, externally or internally. . . . [W]omen’s definitional fear is not a part of their external world: the danger and the threat that causes it are largely, to them, invisible. Left and liberal men do not see women shake with fear. They do not see . . . women sexually harassed at work. They do not see women battered in the home. They do not see women being raped, by strangers, dates, or husbands. They do not see women violated, abused, and afraid. . . . It is not surprising that the claim that women’s lives are ruled by fear is heard by these men as wildly implausible. They see no evidence in their own lives to support it.¹⁶⁷

Of course, it cannot be that violence against women is in fact invisible to men because men are the perpetrators of the violence. Nor is there any basis

160. WEST, *supra* note 2, at 263.

161. *Id.*

162. See WEST, *supra* note 4, at 179-249.

163. *Id.* at 192.

164. See WEST, *supra* note 4, at 193.

165. WEST, *supra* note 2, at 208-09.

166. WEST, *supra* note 4, at 193.

167. *Id.* at 194. West also seems to assume that the fear and violence are visible to all women. However, although most women may fear violence against themselves at various times, women appear to be just as likely as men to doubt a story of “date rape,” see, e.g., KATIE ROIPHE, *THE MORNING AFTER: SEX, FEAR, AND FEMINISM ON CAMPUS* (1993) (questioning the phenomenon of date rape), or to dismiss as a shrew the wife who provokes her husband to hit her. See, e.g., Andrea Dworkin, *Living in Terror, Pain: Being a Battered Wife*, in *VIOLENCE AGAINST WOMEN: THE BLOODY FOOTPRINTS 237-39* (Pauline B. Bart & Eileen Geil Moran eds., 1993) (documenting the lack of support a battered woman can expect from friends, family, and neighbors—male and female alike).

for supposing that men can be divided into violent men on the one hand and “left and liberal men”¹⁶⁸ on the other. The logic of West’s essentialism, however, drives her to posit these unsupported divisions.

IV. DECONSTRUCTION FOR FUN AND PROFIT: DERRIDA IN THE U.S.

A. Turning Back Flips

West’s essentialism, by elevating the female over the male in importance while leaving gender categories basically undisturbed, bears a striking resemblance to the operation of deconstruction as (mis)understood by many of its American practitioners. J.M. Balkin, for example, presents deconstruction as a method of analyzing texts that can be used to critique legal doctrine, to reveal disguised ideological premises,¹⁶⁹ and to provide fresh interpretations of legal texts.¹⁷⁰ Balkin considers deconstruction to be a technique,¹⁷¹ a tool for locating and inverting hierarchical conceptual oppositions—what Balkin calls “nested oppositions”¹⁷²—structuring a given text or argument.¹⁷³

Although Balkin himself seems to enjoy deconstructing things, his account of deconstruction never makes clear what other advantage this new tool might have over traditional legal argument. The value of deconstructive reversal of conceptual hierarchies, for example, is simply that it enables us to see our legal doctrines from a new point of view:

168. *Id.* at 193.

169. See Balkin, *Deconstructive Practice*, *supra* note 29, at 746 (“[M]y goal in this Article is to offer ways of bringing the concerns and methods of deconstructionists to the study of legal issues.”). *But see* Jacques Derrida, *Biodegradables: Seven Diary Fragments*, 15 *CRITICAL INQUIRY* 812, 827 (Peggy Kamuf trans., 1989). (“I have explained a hundred times why deconstruction was not essentially a ‘method . . .’”). Balkin acknowledges that Derrida and others refuse to call deconstruction a method of analysis. See Balkin, *Transcendental Deconstruction*, *supra* note 29, at 1131. The problem of how to refer to deconstruction is endemic among those who wish to write carefully about it. See, e.g., BEARDSWORTH, *supra* note 25, at 4-6 (discussing why he has chosen to refer to deconstruction as a “method”); GASCHÉ, *supra* note 25, at 121-24 (reviewing the philosophical origins of deconstruction and of methods in general to open a chapter entitled *Deconstructive Methodology*); Balkin, *Deconstructive Practice*, *supra* note 29, at 746 & n.9.

Beardsworth explains:

Derrida is careful to avoid this term [method] because it carries connotations of a procedural form of judgment. A thinker with a method has already decided *how* to proceed, is unable to give him or herself up to the matter of thought in hand, is a functionary of the criteria which structure his or her conceptual gestures. For Derrida . . . this is irresponsibility itself.

BEARDSWORTH, *supra* note 25, at 4. Implicit in the Derridean unwillingness to refer to deconstruction as a method, therefore, is a concern to avoid the sort of normative pre-judgment Balkin advocates as “transcendental deconstruction” or “rational deconstruction.”

170. See Balkin, *Deconstructive Practice*, *supra* note 29, at 744; see also Balkin, *Transcendental Deconstruction*, *supra* note 29, at 1138 (“[D]econstructive argument is a species of rhetoric, which can be used for different purposes depending upon the moral and political commitments of the deconstructor.”).

171. See Balkin, *Nested Oppositions*, *supra* note 29, at 1671 (“Properly understood and properly used, deconstruction offers theorists a set of techniques and arguments involving the concepts of similarity and difference.”); see also *id.* at 1674, 1705. *But see* Derrida, *supra* note 69, at 827 (“I have explained a hundred times why deconstruction was not essentially a ‘technique’”).

172. See Balkin, *Nested Oppositions*, *supra* note 29.

173. See Balkin, *Deconstructive Practice*, *supra* note 29, at 746 (“Described in its simplest form, the deconstructionist project involves the identification of hierarchical oppositions, followed by a temporary reversal of the hierarchy.”).

The deconstruction of legal concepts, or of the social vision that informs them, is not nihilistic. Deconstruction is not a call for us to forget about moral certainty, but to remember aspects of human life that were pushed into the background by the necessities of the dominant legal conception we call into question. . . . By recalling the elements of human life relegated to the margin in a given social theory, deconstructive readings challenge us to remake the dominant conceptions of our society.¹⁷⁴

This is more or less unobjectionable, but why go to the trouble of deconstructing a text to reach conclusions so easily demonstrated through more traditional methods—particularly when the mere hint that an argument is intended to be deconstructive is enough to insure that many readers will discount it no matter how brilliant the wordplay.¹⁷⁵ Indeed, Balkin's account of deconstruction often renders it indistinguishable from standard legal reasoning and leads one to wonder how anyone could possibly object to it.¹⁷⁶ In *Nested Oppositions*, for example, Balkin states that, "to deconstruct a conceptual opposition is to . . . observe simultaneously the similarity and difference, the dependence and differentiation, involved in a relation between concepts. Deconstructive argument is simply the means by which this reinterpretation is achieved."¹⁷⁷

According to Balkin, the tool of deconstruction can 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. . . . [D]econstructive argument is a species of rhetoric, which can be used for different purposes depending upon the moral and political

174. Balkin, *Deconstructive Practice*, *supra* note 29, at 763. Cf. Iris Marion Young, *The Ideal of Community and the Politics of Difference*, in *FEMINISM/POSTMODERNISM* 300, 306-07 (Linda J. Nicholson ed., 1990).

[A]sserting the value of community over individualism, the feminine over the masculine, the aesthetic over the instrumental, the relational over the competitive, does have some critical force with respect to the dominant ideology and social relations. The oppositions themselves, however, arise from and belong to bourgeois culture, and for that reason merely reversing their valuation does not constitute a genuine alternative to capitalist patriarchy.

Id.

175. See, e.g., Arthur Austin, *Primer on Deconstruction's "Rhapsody of Word-Plays,"* 71 N.C. L. REV. 201 (1992).

176. For example, Balkin's "deconstruction" of the opinions of Justices Scalia and Brennan in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), plays upon the etymological relationship between "tradition" and "betrayal" to reach the unremarkable conclusion that each Justice betrays some traditional value to serve another. See, e.g., Balkin, *Politics*, *supra* note 29, at 1613-25.

177. Balkin, *Nested Oppositions*, *supra* note 29, at 1676. Lest anyone think deconstruction might be something new, Balkin at one point offers David Hume's 1739 criticism of Descartes as an example of deconstructive argument. See Balkin, *Deconstructive Practice*, *supra* note 29, at 753 n.27 (quoting DAVID HUME, *A TREATISE OF HUMAN NATURE* 6 (L. Selby-Bigge 2d ed. 1888)).

commitments of the deconstructor.¹⁷⁸

Balkin thus understands deconstruction to serve bigotry as well as tolerance,¹⁷⁹ oppression as well as freedom.¹⁸⁰

Deconstruction, therefore, does not alleviate the need for the existence of a set of political commitments that preexist the deconstructive act. These commitments may change as one deconstructs, and the deconstructor may change with them—but they must already be present for the deconstruction even to get off the ground. Thus, deconstruction turns out to be instrumental, rather than a source of ethical or political value.¹⁸¹

From a feminist point of view, however, new tools, no matter how handy and sharp, are no better than old ones; the problem with existing law is not its lack of effective tools but its failure to use the tools available to benefit women. Balkin's account of deconstruction presents it as a rigorously neutral instrument, as easily used against the oppressed as for them and therefore likely to do more harm to women than good.

Derrida has specifically rejected the mechanical, reverse-the-hierarchy form of deconstruction advocated by Balkin:

Deconstruction cannot limit itself or proceed immediately to a neutralization: it must, by means of a double gesture, a double science, a double writing, practice an *overturning* of the classical opposition *and* a general *displacement* of the system. It is only on this condition that deconstruction will provide itself the means with which to *intervene* in the field of oppositions that it criticizes, which is also a field of non-discursive forces.¹⁸²

Derrida warns that a deconstruction satisfied with simply reversing hierarchical oppositions is irresponsible:

To remain content with reversal is of course to operate within the immanence of the system to be destroyed. But to sit back . . . and take an attitude of neutralizing indifference with respect to the classical oppositions would be to give free rein to the existing forces that effectively and historically dominate the field. It would be, for not

178. Balkin, *Transcendental Deconstruction*, *supra* note 29, at 1137-38.

179. *See id.* at 1145. *But see* Derrida, *supra* note 69, at 827 (objecting to the statement that deconstruction can be used equally well for fascist or liberal purposes).

180. *See* Balkin, *Deconstructive Practice*, *supra* note 29, at 786 & n.114.

181. Balkin, *Politics*, *supra* note 29, at 1628.

182. JACQUES DERRIDA, *Signature Event Context*, in *MARGINS OF PHILOSOPHY* 307, 329 (Alan Bass trans., 1982); *see also* Derrida, *supra* note 77, at 21.

having seized the means to *intervene*, to confirm the established equilibrium.¹⁸³

As described above, conceptual oppositions are instituted through the banishment of certain shared qualities into the disfavored concept. In the second, generally omitted, phase of deconstruction, as described by Rodolphe Gasché, these qualities are recalled from exile:

[T]he hitherto repressed traits of concepts, or traits held in reserve, are restored to their generality, to their power of generalization, and to their generative force. With this liberation of the traits held in reserve by the concepts within philosophy, new “concepts” erupt into the territory of philosophy. These concepts refer to something that could never be comprehended, that could never have been an “object” within the discourse of philosophy.¹⁸⁴

Gasché, following Derrida, calls these new concepts “infrastructures”:¹⁸⁵

Whereas the first gesture [of deconstruction] plays entirely within the closure of metaphysics, the second attempts a breakthrough toward a certain outside of philosophy. . . . Compared to the conceptual hierarchies, reversed or not, the infrastructures produced during the second phase of deconstruction are unheard-of concepts within the limits of philosophy.¹⁸⁶

183. JACQUES DERRIDA, *DISSEMINATION* 6 (Barbara Johnson trans., 1981); see also GASCHÉ, *supra* note 25, at 163-76:

The phase of reversal of the hierarchy of predicates or concepts is only the first step; the second step consists of what is called a reinscription, displacement, or reconstruction. This second phase is necessary because the first operates solely within the conceptuality of the system to be deconstructed. Without such a second movement, the reversal would be “nothing more than a clamorous declaration of the antithesis.”

Id. at 171-72 (quoting JACQUES DERRIDA, *SPURS: NIETZSCHE’S STYLES* 95 (B. Harlow trans., 1979)); see also NEALON, *supra* note 20, at 22-49 (examining the general failure of American deconstruction to proceed beyond an initial reversal of oppositions).

184. GASCHÉ, *supra* note 25, at 172.

185. *Id.*

186. *Id.* at 173. Balkin sometimes describes his version of deconstruction as proceeding in two steps, but they are very different from the double gesture called for by Derrida. In *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, Balkin advocates a practice of “rational deconstruction” followed by “rational reconstruction.” Balkin, *Understanding*, *supra* note 29, at 124. Neither step resembles the openness and responsibility required by Derridean deconstruction:

In order to tell what is anomalous and what is central to our story, we need the tools of rational deconstruction. Through rational deconstruction we decide that two parts of the existing corpus cannot live together in a coherent scheme of principles and policies and that we must choose between them. Rational reconstruction thus makes use of rational deconstruction not only in determining which consistent sets of principles and policies could serve as a rational reconstruction, but also in deciding which parts of the legal corpus must be explained by the rational reconstruction and which parts can be jettisoned as mistaken.

Id. at 127.

It is in this second, neglected gesture that deconstruction's potential for feminism can be seen. Even the most militant feminists do not seriously believe that patriarchy can or should be replaced with an equally oppressive matriarchy, so a simplistic focus on reversing hierarchies presents itself as a game women have no time to play.¹⁸⁷ But a mode of thought that seeks to break the bonds of our either/or thinking, releasing repressed and constrained content to flow where it will, may offer more potential.

Balkin's failure to follow through on his "deconstructions" accounts for his belief that deconstruction is a neutral tool that can cut both ways. For example, Balkin remarks that, although "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."¹⁸⁸ However, the only other possible configuration of this field that Balkin allows is the contraction of the same boundaries:

[T]heir 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.¹⁸⁹

Balkin continues:

Indeed, one can understand the history of bigotry as the continuous deconstruction of an imagined unity of humankind. . . . The egalitarian claims to rediscovery 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.¹⁹⁰

187. See, e.g., WEST, *supra* note 2, at 262-63 (dismissing deconstruction as a "hip philosophical . . . excuse for men to blind themselves to the violence of patriarchy. . . . Why talk about something as banal as violence" she imagines them saying, "when there are so many 'social constructs' to deconstruct?") *But see* Young, *supra* note 174, at 306-07 (critiquing the interpretive practice of inverting the valuation of hierarchically opposed terms without questioning the oppositions themselves).

188. Balkin, *Transcendental Deconstruction*, *supra* note 29, at 1145.

189. *Id.*

190. *Id.*

Thus, although Balkin refers to deconstruction and questioning of boundaries and categories, his “deconstruction” questions neither. Instead, he implicitly restricts the universe of possible outcomes to the expansion or implosion of existing boundaries or categories, leaving no room for rethinking the question of whether there can be any boundary between the categories human and non-human, or for the still more radical rethinking of the concepts of boundary and category. Not only does he fail to move on to the second gesture of deconstruction—displacement of the system of conceptual oppositions—but he also totalizes the field of what can be thought to exclude the possible restructuring of the system. West, too, limits the potential reach of her thought by working within traditional gender oppositions.

A. *The Sound of Silence*

To return once more to Derrida’s work on language and meaning, one of the reasons no text can have a single, unitary meaning is that signification is a process of exclusion, and every signifier and every concept bears the traces of all the others from which it must be differentiated to have any meaning at all. Determining *the* meaning of an utterance means excluding a host of other possible meanings. A text, therefore, is structured by the meanings excluded to make it intelligible. Just as the qualities banished from the favored member of a hierarchical opposition keep returning to contaminate and disrupt the hierarchy, the excluded, or more accurately, repressed meanings can never be eliminated from the text completely and are always capable of returning to unsettle the coherence of the authorized meaning—no voice is ever truly silenced.

Thus, when West observes that the law provides no account of women’s lives, joys, or suffering,¹⁹¹ her statement is not entirely accurate; the lives, joys, and sufferings of women (and workers and servants and slaves) have made the law possible, and the text of the law bears the traces of all it has repressed to make its univocal, authorized meaning appear. Among the ghosts, palimpsest images and traces hidden by the surface of the law are those of women.

Deconstruction seeks out the meanings excluded to make authorized meanings possible. As such, it opens possibilities for transformation of existing structures of meaning, freeing texts to mean more than one might have thought. For feminists, therefore, deconstruction offers the exciting possibility of liberating from old legal texts the suppressed, silenced meanings that had to be excluded (but could not be eliminated) to enable these texts to appear to speak with a unitary patriarchal voice. In addition, feminist lawyers

191. See WEST, *supra* note 2, at 97-138 (attempting to provide the description of women’s harms missing from the law); WEST, *supra* note 4, at 179-89 (calling for descriptions of women’s hedonic lives because they are unknown to the law).

seeking to create or to give effect to new liberties are often thwarted by the effect of centuries of patriarchal precedent. Deconstructing those old texts can not only identify sources of this intransigence but also reveal the women, there from the beginning but silenced in favor of tradition, and enable them to demand to know why they should not be heard.

Although, as explained at length above, J.M. Balkin's descriptions of deconstruction obscure its potential for turning precedent inside-out to liberate the persons on whose backs the law was written, his work actually includes an excellent example of such an emancipatory deconstruction. In his article *The Footnote*, Balkin traces the themes of exclusion and inclusion, purity and contamination, inside and outside, and footnote and text through a reading of *Carolene Products* and its famous footnote four.¹⁹² By approaching the text of *Carolene Products* open to whatever meaning it might hold out to him, aware that what has been excluded and marginalized in favor of the authorized meaning can still speak, Balkin presents richer insights into the origin and tensions of judicial review than could possibly be attained through traditional legal argument. In commenting on his deconstruction of the case, Balkin notes that themes of inclusion and exclusion are characteristic not only of *Carolene Products* but of writing and of law as a form of writing. Both involve the formation of concepts—the creation of meaning—through a process of inclusion and exclusion of alternate meanings.¹⁹³ Yet, “the marginalization and exclusion necessary for intellectual conception is never complete. Traces of banished and deemphasized alternatives lurk within the dominant conception, supporting it and at the same time calling its dominance into question.”¹⁹⁴ Considering the question of why figurative and literary features of a legal text should play any role in the discussion of the law, Balkin returns to the same theme:

Yet the more we profess our lack of interest in the metaphorical, figurative, and syntactic features of the text, (as yet another form of impurity to be excluded from legal analysis) the more assuredly they return to trouble the logic of the opinion. Once again, our ability to exclude and marginalize these elements is never complete; our attempt at purifying legal discourse of its literary aspects (leaving only reliable logic and fact) is always impure.¹⁹⁵

192. See Balkin, *Footnote*, *supra* note 29, at 284-85; see also *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938) (explaining that the Court, in according deferential scrutiny to state legislation prohibiting the introduction of filled milk, has no need to consider whether statutes restricting the political processes or directed at “discrete and insular minorities” might receive stricter scrutiny).

193. See Balkin, *Footnote*, *supra* note 29, at 304; cf. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) (describing any legal decision as simultaneously jurisgenerative, as one party's view is made part of the law, and jurispatic, as another party's view is written out of the law).

194. Balkin, *Footnote*, *supra* note 29, at 304.

195. *Id.* at 313.

Defending his use of the literary aspects of *Carolene Products* in his analysis, Balkin first states that making use of the “economy” or “lucky condensation of features” in the text “must be understood as a shortcut to understanding the structures and tensions of logic in modern constitutional jurisprudence.”¹⁹⁶ At the same time, however, there is another reason to attend to the surface features of the text:

Disregarding the contingent or surface features of legal language features is symptomatic of the very issue of marginalization, exclusion, and false preservation of purity that we have noted before. We believe that we preserve the real, pure meaning of the text we call *Carolene Products* by excluding superficial, contingent features of the text. We believe that we thus purify it, claiming that the same ideas could have been stated another way, unlike a poem, which resists paraphrase. Yet in so doing, we deliberately place blinders on the ways in which textuality (metaphor, expression, and so forth) affect our ways of thinking about legal problems.¹⁹⁷

Balkin concludes:

The opinion, which concerns the need for economic regulation, itself demonstrates the unregulatability of the economy of a text. For what is orthodox legal analysis but an attempt to regulate this economy—to delimit a certain set of features about a text that are appropriate for the reader to consider?¹⁹⁸

Deconstruction, by seeking out the meanings repressed by authorized readings, is a way of giving voice to the silenced who make the law possible. As all feminists know, the voices that are silenced so that legal texts may speak with authority are not chosen at random; a method of analysis centered on the marginalized will find itself attending to women and workers and servants and slaves. Thus, West’s objection that postmodernism fails to concern itself with “archaeologies of the voices patriarchy has silenced”¹⁹⁹ may be a just criticism of some offshoots of deconstruction in America but overlooks one of the truly exciting aspects of Derridean deconstruction for women, its dedication to—indeed, obsession with—the voices and meanings trivialized, marginalized, and discounted by dominant discourse.

196. *Id.* at 314.

197. *Id.* at 315.

198. *Id.* at 319-20.

199. WEST, *supra* note 2, at 265.

V. A KINDER, GENTLER DECONSTRUCTION:
WEST AND DERRIDA ON JUSTICE, LAW, AND CARE

A. *Justice and Care*

In *Caring for Justice*, Robin West issues a compelling call for the law to recognize, protect, and incorporate moral values associated with nurturant caring. She argues that:

[I]f it is true, as relational feminists claim, that the act of caring for others to whom we are connected in some way is central to our moral lives, then our capacity for care should be at the center of our understanding of our public and legal, as well as private and personal, virtues, and specifically that it should be central to the meaning of legal justice.²⁰⁰

Historically, according to West, “our capacity to care has not been regarded as necessary to our capacity to do justice,”²⁰¹ leading to deformation of both public and private values: “Our justice is not just when it is not caring, and care is not caring when it is not just.”²⁰²

Similarly, in *Force of Law: The “Mystical Foundation of Authority,”* his first explicit discussion of justice,²⁰³ Derrida examined the relationship between law (*droit*) and justice. What Derrida means by “law” (*droit*), “the generality of a rule, a norm or a universal imperative,”²⁰⁴ is what West and others concerned with the care/justice dichotomy mean by “justice.”²⁰⁵ What Derrida means by “justice,” on the other hand, resembles what West calls “care” or “caring justice” in that it focuses on particularity. As Derrida remarks, “justice always addresses itself to singularity, to the singularity of the other.”²⁰⁶

West’s concern in *Caring for Justice* is to integrate into the judicial role an

200. *Id.* at 9.

201. *Id.*

202. *Id.*

203. As Derrida repeatedly states, his work has concerned justice from the beginning. See, e.g., JACQUES DERRIDA, DECONSTRUCTION IN A NUTSHELL: A CONVERSATION WITH JACQUES DERRIDA 16 (John D. Caputo ed., 1997) (“It is true that, although the problem of justice has been on my mind in previous texts all the time, it is only in recent years that I have addressed this problem thematically.”); Derrida, *supra* note 9, at 935 (“Deconstruction, while seeming not to ‘address’ the problem of justice, has done nothing but address it.”); see also BEARDSWORTH, *supra* note 25, at xv (basing the argument for the political consequences of deconstruction on works predating *Force of Law: The “Mystical Foundation of Authority”*); SIMON CRITCHLEY, THE ETHICS OF DECONSTRUCTION (1992) (founding an examination of the political possibilities of deconstruction on Derrida’s earlier works).

204. Derrida, *supra* note 9, at 949.

205. This point has been recognized by Nel Noddings. See NEL NODDINGS, PHILOSOPHY OF EDUCATION 193 (1995); see also Julian Edgoose, *An Ethics of Hesitant Learning: The Caring Justice of Levinas and Derrida*, 97 PHIL. OF EDUC. (last modified June 3, 1999) <http://www.ed.uiuc.edu/EPS/PES-Yearbook/97_docs/edgoose.html> (exploring the connection between the notion of caring advanced by Noddings and the caring justice of Derrida and Levinas).

206. Derrida, *supra* note 9, at 955.

obligation to particularize the litigants before the court when applying general rules of law:

The judge has a special obligation to the very particular litigants before her, as the parent has a special obligation to her children. He or she must listen to the injured patient, the ruined farmer, or the despondent mother to understand the particularizing details of *their* predicament, not simply universalize each case, each injury, and each contract so as to fit it within a more general rule.²⁰⁷

Derrida, too, asks:

How are we to reconcile the act of justice that must always concern singularity, individuals, irreplaceable groups and lives, the other or myself *as* other, in a unique situation, with rule, norm, value or the imperative of justice which necessarily have a general form, even if this generality prescribes a singular application in each case?²⁰⁸

West identifies the judge's act of applying a general rule to particular facts as a moment of ethical responsibility. She argues, for example, that in deciding whether to force a surrogate mother to relinquish to the would-be adoptive parents the child she has borne, a judge must not avoid the difficult decision by treating the case as just another contract action. Instead, the judge is required "to attend, empathically, to the wrenching pain of litigants before her who unquestionably have diametrically conflicting needs."²⁰⁹

To refuse to do this work, and to instead reach the Draconian conclusion that the birth mother must be forced to give up the baby because of the apparent similarity between the plight of such a person and any commercial contractor who discovers that the cost of performance is higher than initially presupposed, is a failure of a relational ethic of care: it is a refusal to grant the uniqueness of *this* litigant, and the moral duty of relational recognition she imposes upon *this* court and *this* judge.²¹⁰

West also disputes, on ethical grounds, the view of normative economists on how particular cases should be decided:

Economists urge courts to think not of the plight of particular litigants

207. WEST, *supra* note 2, at 58.

208. Derrida, *supra* note 9, at 949.

209. WEST, *supra* note 2, at 56.

210. *Id.* at 57.

before them but of the incentives for (or against) prudent market behavior that will result from particular decisions, and to treat those incentives as dispositive. . . . But . . . there is a difference between “doing” justice and “doing” sound economic social policy.²¹¹

Again, Derrida would agree:

Every time . . . that we placidly apply a good rule to a particular case, to a correctly subsumed example, according to a determinant judgment, we can be sure that law (*droit*) may find itself accounted for, but certainly not justice. Law (*droit*) is not justice. Law is the element of calculation, and it is just that there be law, but justice is incalculable.²¹²

The moment at which justice must be done, for Derrida, “is always full of anxiety, but who pretends to be just by economizing on anxiety?”²¹³

Derrida compares his concept of justice to that of Emmanuel Levinas, for whom justice is “the relation to others,”²¹⁴ in which “the extent of the right of the other” is ‘a practically infinite right.’²¹⁵ For Levinas, “equity is not equality, calculated proportion, equitable distribution or distributive justice but rather absolute dissymmetry.”²¹⁶ Derrida’s justice, therefore, is a “responsibility without limits.”²¹⁷ It is

an infinite “idea of justice,” infinite because it is irreducible, irreducible because owed to the other, owed to the other, before any contract, because it has come, the other’s coming as the singularity that is always other. This “idea of justice” seems to me to be irreducible in its affirmative character, in its demand of gift without exchange, without circulation, without recognition or gratitude, without economic circularity, without calculation and without rules, without reason and without rationality.²¹⁸

Distinguishing law from justice, Derrida explains:

[L]aw (*droit*) is essentially deconstructible, whether because it is

211. *Id.* at 59.

212. Derrida, *supra* note 9, at 947.

213. *Id.* at 955.

214. *Id.* at 959 (quoting EMMANUEL LEVINAS, TOTALITY AND INFINITY: AN ESSAY ON EXTERIORITY 89 (Alphonso Lingis trans., 1969) (1961)); see also DERRIDA, *supra* note 203, at 17 (“Levinas says somewhere that the definition of justice—which is very minimal but which I love, which I think is really rigorous—is that justice is the relation to the other.”).

215. Derrida, *supra* note 9, at 959 (quoting EMMANUEL LEVINAS, DU SACRE AU SAINT, CINQ NOUVELLES LECTURES TALMUDIQUES 17-18 (1977)).

216. *Id.*, at 959.

217. *Id.* at 953.

218. *Id.* at 965.

founded, constructed on interpretable and transformable textual strata (and that is the history of law (*droit*), its possible and necessary transformation, sometimes its amelioration), or because its ultimate foundation is by definition unfounded. . . . Justice in itself, if such a thing exists, outside or beyond law, is not deconstructible. No more than deconstruction itself, if such a thing exists. Deconstruction is justice.²¹⁹

Like justice, Derrida argues, deconstruction corresponds to a “sense of a responsibility without limits, and so necessarily incalculable, before memory.”²²⁰ This is a difficult and, as Derrida admits, dangerous²²¹ idea of justice but one rich with possibilities for a progressive transformation of law.

Neither Derrida nor West explains how legal justice is to be reconciled with care. West presents the task as a matter of finding the right proportion—for each decision there is an appropriate blend of justice and care that will result in caring justice. West gives a number of examples of arguments and decisions that fail to seek that balance. For example, John Rawls’ conception of justice as that to which each member of society would freely consent, “so long as we further define ‘each member’ as a disembodied, rational, contracting agent ready to give rational consent where it best serves his or her self-interest, but in ignorance of . . . what those interests might be,”²²² fails “to take seriously the nature of our nurturant practices, and hence fail[s] to take seriously the particularistic values those practices reflect.”²²³ However, acceptance of the “cultural defense” in a criminal case “to excuse or mitigate the punishment of a criminal defendant who has committed a homicide, at least in part because he was raised in a culture of permissive misogynist violence”²²⁴ improperly elevates nurturant care for the litigant over consistency and justice to the victim.²²⁵ West presents these examples as self-evidently unjust and/or uncaring. She does not explain how one is to know when the balance between justice and care has been properly struck, but neither does she indicate that a proper balance cannot be found.

Derrida offers no solution to the problem of reconciling “justice (infinite, incalculable, rebellious to rule and foreign to symmetry, heterogeneous and heterotropic) and the exercise of justice as law or right, legitimacy or legality, stabilizable and statutory, calculable, a system of regulated and coded

219. *Id.* at 943-45.

220. *Id.* at 953.

221. *See id.* at 971 (“Left to itself, the incalculable and giving (*donatrice*) idea of justice is always very close to the bad, even to the worst for it can always be reappropriated by the most perverse calculation.”).

222. WEST, *supra* note 2, at 63 (citing JOHN RAWLS, A THEORY OF JUSTICE 12, 15, 72 (1971)).

223. *Id.* at 64.

224. *Id.* at 78.

225. *See id.*

prescriptions.”²²⁶ Instead, he demonstrates that the problem is structurally impossible to solve:

Everything would still be simple if this distinction between justice and *droit* were a true distinction, an opposition whose functioning was logically regulated and permitted mastery. But it turns out that *droit* claims to exercise itself in the name of justice and that justice is requires to establish itself in the name of a law that must be “enforced.”²²⁷

But if law takes the form of a rule of universal applicability, it cannot be just to apply it mechanically to the particular case:

We would not say of a being without freedom, or at least of one without freedom in a given act, that its decision is just or unjust. But this freedom or this decision of the just, if it is one, must follow a law or a prescription, a rule. . . . But if the act simply consists of applying a rule, of enacting a program or effecting a calculation, we might say that it is legal, that it conforms to law, . . . but we would be wrong to say that the decision was just. . . .

. . . .

. . . In short, for a decision to be just and responsible, it must in its proper moment if there is one, be both regulated and without regulation: it must conserve the law and also destroy it or suspend it enough to have to reinvent it in each case, rejustify it, at least reinvent it in the reaffirmation and the new and free confirmation of its principle. Each case is other, each decision is different and requires an absolutely unique interpretation, which no existing, coded rule can or ought to guarantee absolutely.²²⁸

For Derrida, then, justice is an aporia.²²⁹ “An aporia is a non-road. From this point of view, justice would be the experience that we are not able to experience.”²³⁰ But, “there is no justice without this experience, however, impossible it may be, of aporia. Justice is an experience of the impossible.”²³¹

It would seem that the promising confluence of Derrida’s thinking with West’s has here gone horribly wrong—far from assisting in West’s project of providing a theoretical basis on which justice could be constructed, Derrida

226. Derrida, *supra* note 9, at 959.

227. *Id.* at 959-61.

228. *Id.* at 961.

229. For an extended discussion of the philosophical history of the term “aporia” and of Derrida’s use of this term, see BEARDSWORTH, *supra* note 25, at 31-34.

230. Derrida, *supra* note 9, at 947.

231. *Id.*

seems to have “deconstructed” justice of any kind out of the question. The difficulties identified by Derrida’s work, however, are shared equally by West’s. Once again, the work of J.M. Balkin is useful in highlighting these problems.

B. Reading with Care

In his article *Transcendental Deconstruction, Transcendent Justice*, Balkin examines the relationship of deconstruction and justice. Although he considers Derrida’s meditations on this relationship in *Force of Law: The “Mystical Foundation of Authority,”* Balkin begins his examination by rejecting the idea, put forward by Derrida in that article, that his work has been about justice all along.²³² Balkin remarks that “it takes quite a stretch to see [the works Derrida lists] as directly addressing the question of justice.”²³³ Instead, Balkin turns to Derrida’s two essays on Paul de Man’s wartime writing. Derrida was among the first to write extensively about articles written by the late Paul de Man for a collaborationist newspaper during the Nazi occupation of Belgium in 1940 through 1942. De Man’s wartime journalism was unknown or unrecalled outside Belgium until it was rediscovered in the late 1980s by a graduate student studying de Man. The first of Derrida’s two works on this topic, *Like the Sound of the Sea Deep within a Shell: Paul de Man’s War*,²³⁴ is an extended and sometimes anguished reading of the pieces in question; the second, *Biodegradables: Seven Diary Fragments*,²³⁵ responds to six other articles, five of which generally condemn de Man, Derrida, and deconstruction as more or less equally complicit in the horrors of the Nazi regime.²³⁶

Balkin states that the “major concerns” of Derrida’s two articles on de Man’s wartime writing are “how one should judge de Man, deconstruction, and Derrida himself.”²³⁷ In the first of these articles, however, Derrida specifically disclaimed any intention of judging Paul de Man:

232. See *id.* at 929 (listing a number of Derrida’s prior works as particularly concerned with ethics and politics).

233. Balkin, *Transcendental Deconstruction*, *supra* note 29, at 1134. In a footnote to this proposition, Balkin writes, “See, for example, JACQUES DERRIDA, *GLAS* (1974), whose subject matter has never precisely been determined.” *Glas* is a difficult work, setting forth parallel readings of the work of G.W.F. Hegel and Jean Genet. Despite its difficulty, however, a number of thinkers working at the intersection of philosophy and justice have found *Glas* to be important to their work. See, e.g., BEARDSWORTH, *supra* note 25, at xv, 46-97 (relying on a reading of *Glas* to situate Derrida’s thinking with respect to Kant and Hegel); CORNELL, *PHILOSOPHY*, *supra* note 31, at 62-90 (basing a rich discussion of deconstruction, ethics and the figure of woman, in part, on *Glas*); CRITCHLEY, *supra* note 203, at 1-50 (finding *Glas* to be both a “tour de force of Hegel scholarship” and a helpful commentary on Genet’s work).

234. Jacques Derrida, *Like the Sound of the Sea Deep Within a Shell: Paul de Man’s War*, 14 *CRITICAL INQUIRY* 590 (Peggy Kamuf trans., 1988).

235. Derrida, *supra* note 69.

236. As Balkin notes, “Many silly and intemperate accusations were leveled on all sides of this dispute.” Balkin, *Transcendental Deconstruction*, *supra* note 29, at 1135.

237. *Id.*

Through the indelible wound, one must still analyze and seek to understand. . . . [I]n analyzing, judging, evaluating this or that discourse, this or that effect of these old fragments, I refused to extend these gestures to a general judgment, with no possibility of appeal, of Paul de Man, of the totality of what he was, thought, wrote, taught, and so forth.²³⁸

The latter of the two articles is among Derrida's most polemical writings. Nevertheless, its main message, repeated over and over, is not that de Man's critics have made the wrong judgments, but that they have not read either the writings in question or Derrida's reading of them:

I am not going to request that people reread what I wrote or, one more time, that they reread de Man. . . . What is more, I never said that *it was necessary at all costs to read* de Man or anybody else, but, and this is quite a different thing, that *if* at least one claims to speak about all this, it is a good idea to read, even better to reread, preferably everything one can.²³⁹

It is somewhat irresponsible of Balkin to turn to Derrida's works on de Man for an illustration of Derrida's thinking on justice. Derrida's investigations of Western thought invariably take the form of careful readings of works by thinkers who have played important roles in shaping that thought and, to a great extent, his writings derive their weight from the weight of the works being read. The pieces on de Man, therefore, are not well chosen to display the depth of Derrida's thought; the first is a painful reaction to de Man's unfortunate exercise in collaborationist journalism, while the second responds to a series of diatribes of no lasting value (hence the title of Derrida's response, a reference to the sort of paper on which Derrida hopes these works are written).

Nevertheless, the articles on de Man do indeed concern justice and injustice in precisely the sense that emerges from *Force of Law: The "Mystical Foundation of Authority"* and all of Derrida's work. The injustice of which Derrida complains in the de Man articles is the failure to read and judge with care—the irresponsible rush to judge the meaning of de Man's texts and of his life without respecting the singularity of these events and the multiple interpretations to which they are susceptible and without acknowledging the violent and necessarily provisional nature of any decision one must finally make. Derrida writes:

Can one speak of responsibility or assume a responsibility without

238. Derrida, *supra* note 234, at 631.

239. Derrida, *supra* note 69, at 838.

difficulty and without anguish? I don't believe so. To speak of it calmly and as if there were some obvious, commonsense facts available on this subject, *as if one knew* what were and ought to be the "ethical categories," is irresponsibility itself—moral, political, philosophical, intellectual irresponsibility in general.²⁴⁰

Derrida's concern here is not with de Man's responsibility but with his own and that of those who wish to judge de Man. Balkin, however, reads Derrida as arguing that "de Man is not responsible for all of the many evils of Nazism or for the Holocaust."²⁴¹ To show that Derrida does not really think that justice demands infinite responsibility, Balkin quotes Derrida:

Five of the six 'responses' that I reread last night are written, as one used to say, with a pen dipped in venom. Less against the de Man of 1940-42, perhaps, than against me (I . . . who have *nothing whatever to do* with everything that happened; I who, at the time, was rather on the side of the victims . . .). Less against me, in truth, than against 'Deconstruction' (which at the time was at year minus twenty-five of its calendar!).²⁴²

Balkin infers from these remarks 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.²⁴³

Balkin confuses responsibility with blame. Levinas and Derrida are not concerned with blame, with assigning responsibility to the other. Neither de Man nor Derrida nor Balkin is to blame for the Holocaust. Justice, however, according to Levinas and Derrida, makes it my responsibility to ask whether I could be more attentive to the singularity of others, and whether by acceding

240. *Id.* at 846. In this reply to six responses to his earlier article, after asking over and over how his critics could have failed to read the earlier piece to which they were responding, Derrida provides a Table of Concordances listing the pages in the earlier article on which he had already said what his critics accused him of failing to say, and a Table of Concordances listing the pages on which he had already responded to the arguments his critics were now making.

241. Balkin, *Transcendental Deconstruction*, *supra* note 29, at 1150.

242. Derrida, *supra* note 69, at 820, *quoted in part in* Balkin, *Transcendental Deconstruction*, *supra* note 29, at 1151. Derrida, whose mother was Jewish, was ten years old in 1940. In 1942, he was expelled from his school in Algeria when it was determined that the school had too many Jewish students. *See* GEOFFREY BENNINGTON & JACQUES DERRIDA, *JACQUES DERRIDA* 325-26 (Geoffrey Bennington trans., 1993) (1991).

243. Balkin, *Transcendental Deconstruction*, *supra* note 29, at 1151.

to general rules or propositions about Jews or Germans—or women—I might be helping to make a world in which the Holocaust is possible. If I were sitting in judgment on Derrida, justice would require me to read his work with at least the care Derrida devoted to de Man's articles in *Like the Sound of the Sea Deep within a Shell: Paul de Man's War* and, when I could hesitate to judge no longer, to take responsibility for my necessarily violent, incomplete, and unjust judgment.²⁴⁴

For Balkin, however, the imposition of responsibility on others appears to be what justice is about. He argues:

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.²⁴⁵

Despite Derrida's repeated statements that justice is incalculable, Balkin contends:

The demand for an increase of justice is not necessarily the demand for increased responsibility. It is rather the demand for an *appropriate apportionment* or responsibility. That is what "just" means—neither too much nor too little, but just the right amount of responsibility for each person. . . . 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.²⁴⁶

Balkin's version of justice, reminiscent of Goldilocks and the Three Bears,²⁴⁷ is alien to deconstruction. Judging, for Levinas and Derrida (and, sometimes, for West) is a matter of ethics.²⁴⁸ Ethics is my responsibility, my asymmetrical relationship to the other; it is not dependent on the other's reciprocation. As Simon Critchley explains, for Levinas, "[e]thics is not a spectator sport; rather, it is my experience of a claim or demand that I both cannot fully meet and cannot avoid. . . . I cannot even demand that the other

244. See Derrida, *supra* note 9, at 969.

245. Balkin, *Transcendental Deconstruction*, *supra* note 29, at 1149.

246. *Id.* at 1150.

247. Or, perhaps, Aristotelian. See ARISTOTLE, ETHICS, BOOK V.

248. Simon Critchley points out that Derrida's adoption of Levinas' definition of justice is somewhat problematic in this respect. Derrida cites in the context of law and judging a definition of ethical justice that Levinas offered in the context of my face-to-face relationship to the other. However, in a later work, Levinas distinguished justice from this ethical relation, and argued that the question of justice only arises when a third party comes on the scene, presenting me with competing ethical claims. See SIMON CRITCHLEY, ETHICS—POLITICS—SUBJECTIVITY: ESSAYS ON DERRIDA, LEVINAS AND CONTEMPORARY FRENCH THOUGHT 99-199 (1999).

respond responsibly to my response, 'that is his affair'" ²⁴⁹

C. *The Importance of Being Doubtful*

The judge who wishes to do justice in Derrida's world must have a high tolerance for doubt.²⁵⁰ Doubt is inherent in Derrida's view of the meaning—doubt can never be eliminated because the relationship between singularity and universality, between the event and the rule, is aporetic, not simply uncertain. No amount of reading will fully exhaust all the possible meanings of a text; some must always be excluded to render the text intelligible, and the decision which meanings to exclude—when to stop reading—is always a violent one. Richard Beardsworth explains:

[N]o law can be general enough not to be violent, not to engender exceptions or instances of counter-violence which, as the precipitate of the disjuncture between the universal law and its particular application or reality, are appropriately thought of as "singular." The undecidable relation between the general and the singular translates in other terms the iterability of law.²⁵¹

The impossibility of a decision without violence, and therefore of a just decision, does not excuse the judge from deciding:

[J]ustice, however, unrepresentable it may be, doesn't wait. It is that which must not wait. To be direct, simple and brief, let us say this: a just decision is always required immediately, "right away." It cannot furnish itself with infinite information and the unlimited knowledge of conditions, rules or hypothetical imperatives that could justify it. And even if it did have all that at its disposal, even if it did give itself the time, all the time and all the necessary facts about the matter, the moment of *decision, as such*, always remains a finite moment of urgency and precipitation, since it must not be the consequence or the effect of this theoretical or historical knowledge, of this reflection or this deliberation, since it always marks the interruption of the juridico- or ethico- or politico-cognitive deliberation that precedes it, that must precede it. The instant of decision is a madness, says Kierkegaard.²⁵²

A decision, however,

249. *Id.* at 66 (quoting EMMANUEL LEVINAS, *ETHIQUE ET INFINI* 92 (1982)).

250. On the need for a greater tolerance for doubt in law, see Katherine C. Sheehan, *Toward a Jurisprudence of Doubt*, 7 *UCLA WOMEN'S L.J.* 201 (1997).

251. BEARDSWORTH, *supra* note 25, at 25.

252. Derrida, *supra* note 9, at 967.

that didn't go through the ordeal of the undecidable would not be a free decision, it would only be the programmable application or unfolding of a calculable process. It might be legal; it would not be just. But in the moment of suspense of the undecidable, it is not just either, for only a decision is just²⁵³

The point is not, therefore, to avoid decisions. Rather, as Beardsworth explains:

[T]here are different kinds of decisions—those that recognize their legislative and executive force and those which hide it under some claim to naturality *qua* “theory” or “objective science.” The point is thus secondly that the acknowledgment of the prescriptive force of one's statements may make one more ready to transform the field that is posited by the nature of one's decisions This is the argument of a “lesser violence” in a general economy of violence.²⁵⁴

Thus, not only is doubt inherent in the application of the general law to particular events, but a judgment that fails to recognize this doubt, that instead purports to reach justice by way of calculation, cannot be just.

Balkin's treatment of *Force of Law: The “Mystical Foundation of Authority”* avoids all mention of aporia or doubt, smoothly concealing these fissures beneath a totalized surface. Balkin concedes that in his effort to “adapt deconstruction to the critical study of law” he has transformed deconstruction:²⁵⁵

Certain features of Derrida's texts, for example, must be emphasized and others de-emphasized 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.²⁵⁶

Balkin describes his project of identifying features of Derrida's texts to be “regarded as mistaken” as “hermeneutic charity,” a term he borrows from Hans-Georg Gadamer.²⁵⁷ Throughout *Transcendental Deconstruction*, *Transcendent Justice*, Balkin tries “to make sense of Derrida's arguments about law and justice and read them charitably to avoid confusing and self-contradictory interpretations.”²⁵⁸ In connection with his discussion of

253. *Id.* at 963.

254. BEARDSWORTH, *supra* note 25, at 12.

255. Balkin, *Transcendental Deconstruction*, *supra* note 29, at 1132.

256. *Id.*

257. *Id.* at 1165 (quoting HANS-GEORG GADAMER, *TRUTH AND METHOD* 261-62 (Garrett Barden & John Cumming eds. & Sheed & Ward Ltd. trans., Seabury Press 1975) (1960)).

258. *Id.* at 1138; *see also id.* at 1154 (“[I]f Derrida's arguments about responsibility are to make sense,

Derrida's statement that justice demands that we speak in the language of the other, Balkin explains:

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. A stance of openness and interpretive charity is actually essential to the process 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.²⁵⁹

It should be evident that a method of interpretation capable of accepting only those meanings fitting neatly into existing understanding is inherently conservative and hostile to radical reconceptualization. Indeed, Balkin's requirement that Derrida be read to "make sense," to avoid contradiction and incoherence, prevents Balkin from understanding Derrida to be saying anything new or different from what Balkin already knows. Elsewhere, Balkin says this quite plainly:

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.²⁶⁰

Thus, when Derrida says that deconstruction is "[t]he sense of a responsibility without limits,"²⁶¹ one that is "necessarily excessive, incalculable, before memory,"²⁶² Balkin charitably concludes that "Derrida cannot mean by 'a responsibility without limits' a limitless responsibility,"²⁶³ because "[i]f deconstructive argument is to make sense, it must assume that

he must be committed to a transcendental conception of deconstruction, whether or not he specifically recognizes this fact."); Balkin, *Nested Oppositions*, *supra* note 29, at 1671 (contending that Balkin's own version of deconstruction is "the interpretation that is most charitable to Derrida's often obscure texts and that makes the most sense of the type of arguments found within them").

259. Balkin, *Transcendental Deconstruction*, *supra* note 29, at 1165 (quoting HANS-GEORG GADAMER, *TRUTH AND METHOD* 261-62 (Garrett Barden & John Cumming eds. & Sheed & Ward Ltd. trans., Seabury Press 1975) (1960)).

260. *Id.* at 1161.

261. *Id.* at 1149 (quoting Derrida, *supra* note 9, at 953).

262. *Id.*

263. *Id.* at 1151.

one's responsibility goes as far as it should, but no further. . . ."²⁶⁴ When Derrida says, "'Deconstruction is justice,'"²⁶⁵ Balkin charitably rejects Derrida's "mystical equation,"²⁶⁶ finding no "convincing argument"²⁶⁷ for it, and undertakes instead 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."²⁶⁸ Balkin concludes this particular exercise by announcing that "it is simply not true, as Derrida asserts, that Deconstruction is justice."²⁶⁹

Derrida's work questions the possibility and limits of philosophical thought.

The philosophical meaning of such an intellectual enterprise is certainly not easy to grasp. Its difficulty stems not simply from philosophy's notorious transgression of commonplace representation, but from an attempt, made in full respect of all the classical requirements of philosophical argumentation and development, to question the laws of possibility of that transgression itself, without, however, aiming to do away with it.²⁷⁰

To subject such an attempt to a facile requirement that it "make sense" is to prevent it from happening at all.

Balkin's employment of "hermeneutic charity" to "make sense" of Derrida is what Derrida would call a totalizing or totalitarian gesture. In connection with Derrida's assertion in *Force of Law: The "Mystical Foundation of Authority"* that deconstruction opposes totalitarianism, Balkin asks: "What is a 'totalitarian' logic of discourse or a 'totalitarian' gesture in discourse?"²⁷¹ For an answer he looks to Derrida's response to de Man's critics:

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.²⁷²

264. *Id.* at 1150.

265. *Id.* at 1177 (quoting Derrida, *supra* note 9, at 945).

266. *Id.* at 1177.

267. *Id.*

268. *Id.*

269. *Id.* at 1179.

270. GASCHÉ, *supra* note 25, at 2.

271. Balkin, *Transcendental Deconstruction*, *supra* note 29, at 1171-72.

272. *Id.* at 1172 (quoting Derrida, *supra* note 234, at 646).

Balkin comments, “[t]he totalitarian gesture, then, is oversimplification and inattention to complexity and context,”²⁷³ a statement that is itself an oversimplification of magnificent proportions. The totalitarian gesture against which Derrida warns is the unacknowledged—and therefore irresponsible—imposition of limits on the possible meanings of a text (or a life)—precisely what Balkin calls charity.

VI. CONCLUSION

Judgment, the application of law to decide a singular case, must also be the imposition of limits on the possible meanings of a text or a life. Robin West has argued that “adjudication is not interpretation,”²⁷⁴ and that such a view of law both overlooks the imperative, violence-based aspects of judgment and, by restricting the possible “meanings” of law to those already embedded in its traditional text, provides no basis for radical critique or change.²⁷⁵ West’s point is a powerful one, but West herself underestimates both the imperative aspects of interpretation—the degree to which “the” meaning of a text is the product of a violent decision—and the transformative possibilities remaining in the text in the form of that which has been repressed. Law, the common law in particular, does not proceed by way of yes/no, thumbs up/thumbs down determinations, which might extinguish the voices of the vanquished for good; rather, it consists in volumes and volumes of text, determined to explain itself, to present each exercise of power as meaningful, to account to the losers for their losses. Traditionally, however, it does so by presenting its decisions as inevitable, required by the neutral application of universally valid principles to correctly categorized facts, leaving no ends loose or obligations unmet.

West’s justice of care recognizes that universal principles may be unjust in the individual case and calls upon the judge to take responsibility for particularizing each dispute, empathizing with each litigant.²⁷⁶ West does not, however, acknowledge the degree to which such an assumption of empathy must itself be an act of violence. Clearly basing her model of the caring judge on the caring mother, West envisions a wiser, more powerful, hierarchically superior judge able to understand the needs of each litigant and to meet these needs so far as it is in the law’s power to do so. But to understand fully any other’s position is to appropriate that other’s position as one’s own, as West does when she posits an essence of woman qua woman, and to deny that other his or her singularity, to decree that certain differences don’t count. And to place the law in the hands of a subject who believes she can read the heart of

273. *Id.*

274. WEST, *supra* note 4, at 89-176.

275. *See id.*

276. *See* WEST, *supra* note 2, at 89.

the other is to entrust the law to a legal subject who cannot be trusted. West's caring justice may be possible, but it is not just.

Derrida's asymmetrical relationship between judge and litigant is structured differently. First, Derrida's judge is not superior to the litigant. The judge is under an obligation to the litigant that can never be met, to do justice to the litigant in all his or her singularity. Derrida's judge can never be just because any application of the general law violently denies the litigant's singularity. The judge's ability to do justice, then, is not dependent on the judge's superior wisdom or compassion because no amount of wisdom will enable the judge to cross the aporia between the universal and the singular. However, the severity of the judge's failure to be just depends on the judge's humility, on her willingness to place herself in a position inferior to the litigant, to open herself and the law to welcome the unknown.²⁷⁷

Second, because Derrida's judge must always acknowledge that justice has been left undone, and must always repress in any decision traces and meanings capable of returning to subvert that decision in the future, the present decision is always founded on the promise of a justice to come.²⁷⁸ This justice to come or promise of democracy²⁷⁹ is not understood as an event expected to occur in a future version of the present and merely to be awaited now, but as a sort of messianism, an obligation to do now what is required to welcome the promise of the future.²⁸⁰ In his recent work on these topics, Derrida has explored the relationship between justice or ethics—the infinite responsibility to the other—and politics,²⁸¹ the need to make decisions in the here and now. This work points in a number of new and fruitful directions and may reward careful reading, not only by Robin West and feminists hoping to introduce caring into judgment, but by anyone thinking about the possibility of justice for the marginalized and silenced.

277. In recent work, Derrida has focused his discussions of ethics on the concepts of hospitality and welcome. See, e.g., *Politics and Friendship: A Discussion with Jacques Derrida*, (visited Apr. 18, 2000) <<http://www.susx.ac.uk/Units/frenchthought/derrida.htm>>, an interview with Derrida conducted by Geoffrey Bennington at the Centre for Modern French Thought, University of Sussex, December 1, 1997.

278. See, e.g., Derrida, *supra* note 9, at 969-71.

279. See, e.g., JACQUES DERRIDA, SPECTERS OF MARX: THE STATE OF THE DEBT, THE WORK OF MOURNING, & THE NEW INTERNATIONAL 65 (Peggy Kamuf trans., 1994) (1993).

280. See *Politics and Friendship: A Discussion with Jacques Derrida*, *supra* note 277.

281. See, e.g., JACQUES DERRIDA, POLITICS OF FRIENDSHIP (George Collins trans., 1997) (1994).