

Desire and Language in Derrida's *Force of Law*

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Abstract: In this article the author proposes a reading of *Force of Law* from two angles: boundless desire and the 'law' of language. The author contends that an analysis from these perspectives casts new light on the notion of the 'mystical', as well as repetition, singularity and good/evil as they appear in Derrida's text. In exploring the 'notion' of desire, the article focuses specifically on Derrida's analysis of Freud's *Beyond the Pleasure Principle* in *To Speculate – On Freud* where the death drive is explored. The author shows the importance of this essay for an understanding of the relation between justice and law. The mystical and justice, the author contends, is to be understood with reference to the death drive, and repetition or law enforcement as its return. Law enforcement could also be viewed in terms of the 'notion' of iterability in Derrida's texts on language. These perspectives furthermore allow for an understanding of singularity in terms of unconditionality and of justice as beyond good and evil.

1. Introduction

In *Force of Law: The Mystical Foundation of Authority* Derrida refers to a number of his earlier texts in order to show that his thinking has always been concerned with justice.¹ One of the texts that he refers to in this regard is a text which appears to have little to do with justice, and even less so with law: *To Speculate – On "Freud"*.² The latter essay involves a detailed reading of Freud's *Beyond the Pleasure Principle*³ and more specifically reflects on the way in which Freud explores the idea of a death drive. In Derrida's other texts on psychoanalysis this is a 'theme' which he comes back to consistently.⁴ The idea of a death drive is not however something which is of relevance only for psychoanalysis. Legal scholarship cannot ignore the idea of a death drive, seeing that, as Derrida indicates, all organisms, organisations and institutions find their 'origin' in this drive. Derrida's essay on Freud's *Beyond the Pleasure*

¹ I have relied on the following two publications of the English translation(s) (both by Mary Quaintance) of this text: Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority"*, in: *Deconstruction and the Possibility of Justice*, eds. Drucilla Cornell, Michel Rosenfeld and David Gray Carlson, 1992, 3-67 (hereafter referred to as 'Force of Law (1)'), and Jacques Derrida, *Acts of Religion*, 2002, 230-298 (hereafter referred to as 'Force of Law (2)'). The first of these texts corresponds in all substantial respects with the French and English versions that appeared in the *Cardozo Law Review* 11 (1989-1990), 920-1045 as well as with the German translation; see Jacques Derrida, *Gesetzeskraft: Der "mystische Grund der Autorität"*, 1991. The second text is an extended version, based on the 1994 French version. The reference to two texts in what follows is made necessary by the differences between them. The text that will be relied on primarily is the extended version, *Force of Law* (2).

² Jacques Derrida, *The Post Card: From Socrates to Freud and Beyond*, 1987. For the references to this text, see *Force of Law* (2), 235, *Force of Law* (1), 7.

³ See Sigmund Freud *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, vol XVIII, 2001, 7.

⁴ The reader is requested to pardon the frequent use that will be made of quotation marks in this article when referring to certain concepts. As those who know Derrida's texts will already be aware, this is not done for arbitrary reasons, as should also appear from the further discussion.

Principle has thus far received little attention in legal scholarship.⁵ This is unfortunate and has led to many misunderstandings in relation to *Force of Law*. The same can be said concerning Derrida's explorations of what could be termed the 'law' of language. It is the topic of numerous texts of Derrida, and in *Force of Law* he links the 'problem of language' explicitly to 'the question of justice'.⁶

This article will seek to address the confoundedness, especially in legal scholarship, which has accompanied *Force of Law* since its first publication.⁷ This, it is submitted, has often been a result of attempting to read *Force of Law* as an isolated essay with insufficient regard for Derrida's broader oeuvre.⁸ As a consequence, a number of important issues in *Force of Law* have remained at least partly unexplored. These include the idea of the 'mystical' foundation of law, as well as the 'notions' of iterability, singularity, undecidability, and the problem of good and evil. Derrida's reading of Freud's *Beyond the Pleasure Principle* is particularly helpful in clarifying these issues, more specifically the mystical and iterability. The mystical, it will be contended, must be understood with reference to what could also be referred to as boundless desire. The role of such desire in law as well as that of iterability is shown by Derrida's contemplations on the death drive as well as the fort/da game which Freud analyses in *Beyond the Pleasure Principle*. The analysis of the law of language also assists in understanding the 'notion' of iterability. Thinking about the notions of the mystical and iterability in the way described in detail below, furthermore makes it easier to understand what Derrida means with singularity as well as to determine the relationship between justice and good and evil. Both for reasons of space and for structural reasons this cannot be an exhaustive reading of *Force of Law*.⁹ The present article will nonetheless seek to and will hopefully succeed at least partly in providing some markers that could be helpful in further explorations of this remarkable text of Derrida.

2. Derrida on desire and language¹⁰

a) Fort/da

The most well-known part of Freud's *Beyond the Pleasure Principle* is the second chapter where he recounts his observation of the 'game' of his grandson Ernst (at the time one and a half years of age) with a wooden spool with a piece of string tied around it during a family vacation.¹¹ Ernst had the 'disturbing habit', Freud comments, of throwing small objects away from him into a corner, under the bed, and

⁵ The exception is provided by Drucilla Cornell, *The Doubly-Prized World: Myth, Allegory and the Feminine*, *Cornell Law Review* 75 (1990) 644; and Drucilla Cornell, *Law and the Postmodern Mind: Rethinking the Beyond of the Real*, *Cardozo Law Review* 16 (1995) 729. In the non-legal context, this essay has received more attention; see e.g. Christopher Norris, *Derrida*, 1987, 206-213; Marian Hobson, *Jacques Derrida: Opening Lines*, 1998, 164-182; Gregory L. Ulmer, Review: The Post-Age, *Diacritics* 11:3 (1981), 39; Andrea Loselle, Freud/Derrida as Fort/Da and the Repetitive Eponym, *MLN* 97:5 (1982), 1180; Samuel Weber, *Institution and Interpretation*, 2001, 85-131.

⁶ See *Force of Law* (2), 245, *Force of Law* (1), 17.

⁷ This can of course not be said with regard to all commentaries that have appeared on *Force of Law*.

⁸ This has unfortunately not stopped many legal scholars from criticising or dismissing that which they often have no at most a very superficial understanding of.

⁹ See Jacques Derrida and Maurizio Ferraris, *A Taste for the Secret*, 2001, 31-32 on the excess within Derrida's texts.

¹⁰ This section may be difficult for the reader to follow at first. Although what is discussed in section 2 should logically follow after the introduction, it could also be (re)read after having first read section 3, which should also make the relevance of the explorations in section 2 clear.

¹¹ Freud (note 3), 14; Derrida (note 2), 307

so on. It was not easy work for the parents, Freud notes, to collect these toys again.¹² In dispersing his toys like this Ernst uttered the sound “o-o-o-o”, accompanied by an expression of interest and satisfaction’, as Freud describes it, and which Freud and Sophie¹³ understood as the German word *fort* (gone, far away).¹⁴ Freud will eventually interpret this disturbing habit as a ‘game’ and as part of the whole or complete fort/da game. Ernst had another game (the well-known and ‘complete’ one) of throwing a spool over the railing of his little veiled bed while uttering loudly the sound ‘o-o-o-o’ and pulling it from out of the bed back towards him, uttering joyfully the sound ‘*da*’ (there). Freud observes that the greatest pleasure for Ernst lay in the return of the spool.¹⁵ Ernst also had another game, making himself disappear when playing with his own mirror-image. This he did by watching his reflection in the mirror and then crouching so that he could no longer see himself in the mirror which did not reach to the ground.¹⁶ Upon the return of Sophie, after ‘several hours’ of absence and a ‘long period of solitude’, as Freud notes, she was met by the words ‘Baby [*Bebi*] o-o-o-o’ from Ernst.¹⁷ For Freud this is also part of the fort/da game. Freud’s interpretation of the fort/da game is that Ernst seeks to compensate himself for a great cultural achievement - his own renunciation of instinctual satisfaction – of allowing his mother to leave the house without protestation. The question this however raises is why Ernst would repeat what seems to have been an unpleasant experience for him. It could possibly be argued, Freud contends, that as the pleasure lay in the return, the departure had to be enacted as a necessary preliminary to this return and that the re-enactment of the joyful return was the true aim of the game.¹⁸ This would not however explain the fact that the distancing (the mother’s departure being disagreeable) was performed more often than the return (the agreeable part), and as a game in itself, as Freud himself notes.¹⁹ Freud’s first attempted solution of this ‘mystery’ is to speculate that even though Ernst repeats an unpleasant experience - the absence of his mother - this is done in order to master her absence. What was first of all a passive experience is thus turned into a game in which Ernst plays an active part even though the game repeats an unpleasant experience. Freud attributes Ernst’s actions to an instinct for mastery, acting independently of whether or not the memory in itself was pleasurable.²⁰ Freud’s second attempt at a solution is to view the pleasure principle as fulfilling a negative function. Distancing his toys would in other words be pleasurable for Ernst. He would thereby be taking revenge on his mother for going away, implicitly saying to her: ‘All right, then, go away! I don’t need you. I’m sending you away myself’.²¹ Freud clearly prefers the solution which links Ernst’s actions to an instinct of mastery independent of the pleasure principle, but nevertheless concludes ‘that no certain decision [on a beyond of the pleasure

¹² Derrida (note 2), 309

¹³ Sophie was Ernst’s mother and Freud’s (favourite) daughter, referred to by Derrida (note 2), 306 as the ‘mute daughter’, the significance of which should appear from the discussion below, where we will similarly refer to the death drive’s silence.

¹⁴ Freud (note 3), 14-15; Derrida (note 2), 310

¹⁵ Freud (note 3), 15; Derrida (note 2), 313, 318

¹⁶ Freud (note 3), 15 n 1; Derrida (note 2) 318-9

¹⁷ Freud (note 3), 15 n 1

¹⁸ Ibid 15-16

¹⁹ Freud (note 3), 16; Derrida (note 2), 324

²⁰ Freud (note 3), 16; Derrida (note 2), 325; Derrida notes the strangeness of this interpretation, seeing that it is based on the idea that ‘mastery’ amounts to a beyond of the pleasure principle, something which does not correspond with some of Freud’s other texts where the pleasure principle is equated with mastery; see Derrida (note 2), 325. See further section 3(d) below.

²¹ Freud (note 3), 16; Derrida (note 2), 326

principle] can be reached from the analysis of a single case like this', thereby effectively confirming the domination of the pleasure principle.²²

b) The death drive

The above game will be an important part of our reflections, especially in the discussion below of law-preserving violence/power as it appears in *Force of Law*. For the present discussion it is important to first take note of the broader context within which the game is recounted by Freud. Based on the observation that his patients tend to repeat unpleasant experiences, both in dreams and in the analytic situation by repeating childhood events through transference, which appear to reflect a mysterious masochistic trend in the ego, Freud questions the common assumption that the pleasure principle (PP)²³ dominates in the psyche.²⁴ Freud for this reason reflects on the origins of life. He notes that it was through external disturbing forces that inorganic states were transformed into living entities.²⁵ The tension which in this way arose in the organism which had until then been inanimate must have tried to cancel itself out. In this way the first instinct came into effect, namely to return to the inorganic state. This instinct has not remained restricted to the first life forms, Freud contends. All organisms primarily still seek to return to the inorganic state in the form of detours of longer or shorter duration.²⁶ This latter function is performed by the conservative drives in the ego which seek to make the organism die its own death, in other words, of natural causes, and keep the organism away from anything that might prevent this from happening.²⁷ They in other words serve to ensure that the organism does not go directly towards death.²⁸ The conservative (ego) drives in the organism are nevertheless merely secondary processes which ultimately serve the primary psychical process or what could be termed a death drive.²⁹

To be noted is that Freud does not adopt or accept the notion of a death drive as a thesis for psychoanalysis. He sends it away again or casts doubt on its 'existence' each time after having considered its possibility.³⁰ Particularly insofar as the description above is concerned, Freud casts doubt on the 'existence' of a death drive because of his view that the sexual instincts (the 'true life instincts') stand in opposition to the conservative (ego) drives/instincts.³¹ Whereas the sexual instincts are directed towards an object, the conservative instincts serve the self-preservation of the individual.³² The sexual instincts cannot in other words be said to be linked to the death drive, Freud contends, seeing that they make the task of ceasing to live more difficult. Only the conservative instincts would thus be linked to a compulsion to repeat.³³ Freud later nevertheless acknowledges that even the ego or conservative

²² Freud (note 3), 16; Derrida (note 2), 294, 295, 324

²³ Derrida uses the abbreviation PP to refer to the pleasure principle as well to Freud as grandfather (Pépé); see Derrida (note 2), 287 n 18, and 298; and Jacques Derrida *Glas*, 1986, 176b. Derrida (note 2), 275 points out that the 'pleasure principle' is an interesting translation of what Freud calls the *Lustprinzip*; *Lust* of course refers also to erotic enjoyment [*jouissance*] and desire. This dimension is lost in the English translation.

²⁴ Freud (note 3), 13-14, 36

²⁵ Ibid 36, 38

²⁶ Ibid 38-39

²⁷ Ibid 39

²⁸ Ibid

²⁹ Ibid 34, 39

³⁰ See e.g. *ibid* 59.

³¹ Ibid 39-41; the ego instincts, Freud notes later on (at 51), were at first thought to function 'only as a repressive, censoring agency, capable of erecting protective structures and reactive formations'.

³² Ibid 50-51

³³ Ibid 44, 57

instincts (or at least a part thereof) have a libidinal nature as can be seen from narcissism where the libido is withdrawn from the object and directed on to the subject's own ego.³⁴ From studying the libidinal development of children in its earliest stages it also becomes clear that the ego is the 'true and original reservoir of the libido'.³⁵ It therefore appears that the libido is extended from the ego on to objects, the ego itself being one of the primary sexual objects.³⁶ In order not to have to agree with Jung's (libidinal) monism, and in order to account for sadism (the sexual injury of a love-object, in spite of the life instincts aiming at the preservation of life) as well as masochism, Freud however rejects the idea that all instincts are libidinal in nature and insists on retaining an opposition between life instincts and death instincts.³⁷ This was despite his dissatisfaction with the latter hypothesis. Notwithstanding his difficulty in solving the relation between the instinctual processes of repetition and the dominance of the pleasure principle, and his inability to provide proof of the existence of a death drive, Freud expresses his personal preference for the notion of a death drive in order to explain psychological processes.³⁸ Derrida could be said to succeed in solving Freud's dilemma of explaining the relation between the ego and sexual drives/instincts as well as the life and death drives/instincts.³⁹ Briefly stated, according to Derrida there is no opposition between life (instincts) and death (instincts). There is instead a *differential* relation between the primary and the secondary processes that Freud describes. There is therefore also no opposition between the sexual instincts and the conservative or ego instincts as Freud at some point asserts, but later substitutes with an opposition between life and death instincts.⁴⁰ Instead, the conservative and sexual instincts are in a *differential* relation with the death drive or absolute pleasure, also referred to by Derrida as 'final orgasm'.⁴¹ As Freud furthermore indicated, the mental apparatus, already during the primary process, restricts itself independent of but actually in service of the pleasure principle and its delegate, the reality principle.⁴² At this stage no account is taken of the development of unpleasure.⁴³ Insofar as the secondary process is concerned, it is ruled by the pleasure principle, but as a satellite of the death drive. The secondary process is in other words a supplementary process of binding.⁴⁴ The process can be depicted as follows (the line between the two, indicative of the zone of *différance*):

Pleasure Principle (PP) + Reality Principle (PR)
primary process (pp)

³⁴ Ibid 51-52; see also Sigmund Freud, *The Standard Edition of the Complete Psychological Works of Sigmund Freud* vol XVI, 2001, 415-416 (The Libido Theory and Narcissism).

³⁵ Freud (note 3), 51

³⁶ Ibid 51-52

³⁷ Ibid 52-55, 61; and Sigmund Freud *The Standard Edition of the Complete Psychological Works of Sigmund Freud* vol XXI 118-119 (Civilization and its Discontents); Derrida (note 2), 366-8.

³⁸ Freud (note 3), 59-60; Derrida (note 2), 385

³⁹ It should perhaps be pointed out that Derrida's reading of the Freudian death drive is very different from that of scholars such as Lacan, Žižek and Douzinas; see e.g. Jacques Lacan, *The Ethics of Psychoanalysis*, 1992, 253-268; Slavoj Žižek, A Plea for a Return to Différance (with a Minor Pro Domo Sua, *Critical Inquiry* 32:2 (2006), 226-249 at 245; and Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism*, 2007, 47.

⁴⁰ Freud (note 3), 61

⁴¹ Derrida, (note 2), 361-376, 396-405, 408; see also Freud (note 3), 10 and Freud (note 34), 355-356 on the difficulty in educating the sexual instincts.

⁴² Freud (note 3), 32, 34-35, 62

⁴³ Ibid 62

⁴⁴ Derrida (note 2), 394-395

Death is therefore always already a part of life, although life hides this from itself.⁴⁵ This is not a place in the psyche, but a non-place which is 'decreed by a sworn pledge'.⁴⁶ We are therefore already dead in accordance with this life-death 'stricture', or stated differently, 'We do not await death, we only desire it as a past we have not yet lived, that we have forgotten'.⁴⁷ The relation between the drives or instincts in Freud thus becomes the movement of *différance* in Derrida's text.

c) The law of language

Derrida's reading of Freud is tied to his earlier explorations of the 'law' of language. The importance of Derrida's earlier thinking on the relation between speech and writing is often referred to simply as illustration of deconstruction at work. The exploration of the relation between speech and writing holds also a greater significance for legal thinking. Derrida's analysis in this regard, which can only very briefly be summarised here, is essential to understand the life-death stricture and therefore also the relation between law and justice.⁴⁸ It is because of the illusion of and desire for self-presence (or proximity to the mind and of the mind to things) that speech has been privileged in the metaphysical tradition since Plato. This is because speech seemingly has a sense of immediacy which is absent in the materiality of writing. The words/signifiers used in speech seem to disappear the moment they are uttered. Speech thus seems to be able to ensure the pure expression of a signified (meaning) and of thought, perfect understanding, and direct access to truth. Writing on the other hand has been viewed in the metaphysical tradition as a mere secondary representation of and as external to speech which is already a full presence. Writing in this sense is a deviation from nature, leading to forgetfulness, and bearing the risk of misinterpretation as it can continue to function and can be read by anyone at a time when the author is no longer present so as to correct misunderstandings. Writing has in other words become a synonym for the betrayal of life, for dead or empty repetition, as well as for the corruption of self-present meaning, thinking and truth.⁴⁹ Those philosophers who have condemned writing have however in the same breath indicated its necessity and its 'originary' character, usually in a non-thematic way.⁵⁰ The relation with the description above of the death drive should be clear: the repression of writing in favour of speech/presence can in psychoanalytic terms be explained as the 'symptom' of a fear of the threat of what is already lodged inside speech/presence and which, as we will see just now, writing is already a supplement for - the desire for absolute pleasure, for death.⁵¹

Derrida proceeds to show that what is usually said critically of writing can also be said of speech (as well as of silent reflection).⁵² As speech entails the use of signifiers in the same way as writing, the pure presence to a subject of thoughts or ideas cannot be at the origin of speech/writing. If not self-presence, what then makes language possible?

⁴⁵ See also Freud (note 3), 63.

⁴⁶ See Jacques Derrida and Anne Dufourmantelle, *Of Hospitality*, 2000, 119.

⁴⁷ Derrida (note 23), 79b, 84b

⁴⁸ See in general Jacques Derrida, *Of Grammatology*, 1974; Jacques Derrida, *Limited Inc.*, 1988; Jacques Derrida, *Dissemination*, 2004; Jacques Derrida, *Speech and Phenomena*, 1973.

⁴⁹ See e.g. Derrida (note 48), *Dissemination*, 136-137.

⁵⁰ See e.g. Derrida (note 48), *Of Grammatology*, 52-53, 142-143, 245-246; Derrida (note 48), *Dissemination*, 156-157.

⁵¹ See Derrida (note 48), *Of Grammatology*, 56; Derrida's approach should nonetheless not be confused with psychoanalysis as it precedes psychoanalysis (at 159-161); see also Jacques Derrida, *Writing and Difference*, 2001, 246-250.

⁵² See Derrida (note 48), *Speech and Phenomena*, 70-87.

This 'law' is already shown in the above description of writing. For a sign to be able to function, it has to be distinguishable from other signs and repeatable in different contexts at another time even if the author or the first reader(s) is no longer present, and more specifically, when they are dead.⁵³ Repetition, as essential feature of writing and speech, always involves a kind of mechanization.⁵⁴ Language, we could also say, is already worked through by the machine (the sign, repetition), becoming independent from its origin.⁵⁵ The functioning of signs⁵⁶ is therefore not dependent on the self-presence of a speaking subject, but on their iterability.⁵⁷ Iterability refers to the ability of signs to function in or be grafted onto other contexts and also to function in the event of the death of their 'producer', risking thereby - not as a chance but as a structural necessity - the loss of self-presence, of meaning, of readability, of property. 'All graphemes', Derrida notes, 'are of a testamentary essence'.⁵⁸ The condition of possibility or law of language described here is clearly very similar to the life-death stricture of *différance* described above. This similarity appears also in Derrida's response to a question in relation to the experience of language:

It is a matter of life in the sense that life is not separable from an experience of death....[T]he life of language is also the life of specters...a spectrality proper to the body of language. Language, the word - in a way, the life of the word - is in essence spectral. It is a little like the date: it repeats itself, as itself, and is every time other. There is a sort of spectral virtualization in the being of the word, in the very being of grammar. And it is therefore within language already, right on the tongue, that the experience of life-death makes itself felt.⁵⁹

Our relation to ourselves and to others is thus not one of self presence. The desire for presence inevitably has to pass through and is made possible by technics or the machine, whether in the form of language, the psyche or of some other kind.⁶⁰ The psyche as we saw is structured by the death drive or unbounded pleasure and language similarly entails a structure of dispossession. These two structures are furthermore closely related, as the desire for self-destruction 'is' also the pre-origin of

⁵³ Derrida (note 48), *Limited Inc*, 8, 48

⁵⁴ Jacques Derrida: An Interview with, Word Processing, *Oxford Literary Review* 21 (2000), 3 at 4.

⁵⁵ Jacques Derrida, Archive Fever in South Africa, in: *Refiguring the Archive*, eds. Carolyn Hamilton et al, 2002, 38 at 54.

⁵⁶ The notion of the sign and therefore necessarily of the signifier and signified is put in question by Derrida (note 48), *Of Grammatology*, 19 read with n 9 and replaced with the notion of the 'mark'. See also Derrida and Ferraris (note 9), 76 where Derrida refers to the mark as not anthropological and as prelinguistic.

⁵⁷ Derrida (note 48), *Limited Inc*, 12; see also Sascha Bischof, *Gerechtigkeit - Verantwortung - Gastfreundschaft: Ethik-Ansätze nach Jacques Derrida*, 2004, 123-155 for an excellent analysis. This law of language can also be referred to as the arche-trace (Derrida (note 48), *Of Grammatology*, 46-47, 61-65, 70, arche-writing (at 56, 60) or *différance* (at 62) which refer to an absolute past (at 66, 70). In response to the remarks of Giorgio Agamben, *Language and Death*, 1991, 38-40, concerning Derrida and the overcoming of metaphysics with reference to what Agamben refers to as the *gramma*, it needs to be pointed out that the *grammè* (or *arche-writing*) in Derrida's thinking should not be confused with writing in the narrow sense.

⁵⁸ Derrida (note 48), *Of Grammatology*, 69, also at 184: 'Imagination is at bottom the relationship with death'.

⁵⁹ Jacques Derrida, *Sovereignties in Question: The Poetics of Paul Celan*, 2005, 103-104; see also Derrida (note 48), *Of Grammatology*, 141: 'The specular dispossession which at the same time institutes and deconstitutes me is also a law of language. It operates as a power of death in the heart of living speech: a power all the more redoubtable because it opens as much as it threatens the possibility of the spoken word.'

⁶⁰ See Jacques Derrida and Elisabeth Roudinesco, *For What Tomorrow...A Dialogue*, 2004, 47-61 for a lucid exposition of Derrida's relation with the machine, and for helpful commentaries on this aspect of Derrida's texts, see Michael Naas, *Comme si, comme ça: Phantasms of Self, State, and a Sovereign God*, *Mosaic* 40:2 (2007) 1; and Patricia Ticineto Clough, *The Technical Substrates of Unconscious Memory: Rereading Derrida's Freud in the Age of Teletechnology*, *Sociological Theory*, 18:3 (2000), 383.

language.⁶¹ Unbounded desire or the death drive therefore necessarily plays in on the structure of language (co-structures it). The functioning of the psyche can at the same time be described with reference to a writing machine or even tele-technology, provided one is aware of that which exceeds calculation in the machine.⁶² The implications of this for the legal system (another kind of technics/machine)⁶³ are what Derrida explores in *Force of Law*.

3. Re-reading Force of Law⁶⁴

a) The mystical foundation of authority

i) Part I

Legal scholars have thus far often read the phrase ‘the mystical foundation of authority’ from the title of *Force of Law* as if Derrida merely contends that the law is based on violence and therefore is ultimately without foundation or justification. Considering this phrase in light of the above exploration of the death drive and of language, allows for another perspective. In *Force of Law*, Derrida explores this phrase with reference to the writings of Montaigne and Pascal, and later also of Benjamin.⁶⁵ The passage from Montaigne reads as follows:

Lawes are now maintained in credit, not because they are just, but because they are lawes. It is the mystical foundation of their authority; they have none other ... Whosoever obeyeth them because they are just, obeyes them not justly the way as he ought.⁶⁶

Derrida, in his analysis of this phrase, emphasises the fact that the founding of a state takes place through a performative force which is neither just nor unjust and which cannot be guaranteed, contradicted or invalidated by justice or by any previously founding law or pre-existing foundation.⁶⁷ Law is not simply in the service of force and thus exterior to some dominant power, but it stands in an internal, more complex relation to force, power or violence, Derrida contends.⁶⁸ Since the origin of authority, the foundation or positing of law, rests only upon itself, it is a violence/power without ground.⁶⁹ This is also the case where a new constitution is adopted on the basis of an earlier one, as in the case of the last such founding act, the same groundless violence will appear.⁷⁰ Where international law appears to guarantee the legitimacy of the founding of a state, the same also applies, as the rules of international law are also a

⁶¹ See Jacques Derrida, *Monolingualism of the Other; or, The Prosthesis of Origin*, 1998, 21-22 where Derrida notes that ‘an immanent structure of promise or desire...informs all speech’. This promise is a threatening promise, promising the impossible; see at 67-68, 73.

⁶² See Derrida (note 51), 246-291; Derrida and Roudinesco (note 60), 58.

⁶³ See Jacques Derrida and Bernard Stiegler, *Echographies of Television*, 2002, 62-64 in relation to law as technology. Viewing law as such does of course not mean that law is totally instrumentalizable as we will see below.

⁶⁴ The discussion of this section will proceed on the assumption that the reader has some acquaintance with *Force of Law*.

⁶⁵ *Force of Law* (2), 238-241; *Force of Law* (1), 10-13

⁶⁶ As quoted and translated in *Force of Law* (2), 239-240; see also *Force of Law* (1), 12

⁶⁷ *Force of Law* (2), 241, *Force of Law* (1), 13; see also Gunnar Folke Schuppert, *Staatswissenschaft*, 2003, 747-749.

⁶⁸ *Force of Law* (2), 241, *Force of Law* (1), 13

⁶⁹ *Force of Law* (2), 242, *Force of Law* (1), 14

⁷⁰ Ibid

violence/power without ground.⁷¹ This does not however mean that law is completely without ‘foundation’. The positing of law, Derrida contends with reference to its status as neither legal nor illegal, exceeds the opposition between founded and unfounded, foundationalism and anti-foundationalism.⁷² In this brief analysis we can already see the same questions of ‘origin’ lurking as in Freud’s *Beyond the Pleasure Principle*.

One of the first clear signs of an overlap of *Force of Law* with *To Speculate – On Freud* and with the discussion of the law of language above appears when Derrida notes that in the ‘violent structure of the founding act’ of law or of a state, there is ‘a silence walled up’ and that this silence is ‘walled up, walled in because...[it] is not exterior to language’.⁷³ He continues by saying that this is what he means by the mystical foundation of authority.⁷⁴ When Derrida refers to justice in terms of an experience of aporia or of the impossible, he again alludes to the notion of the mystical.⁷⁵ The mystical foundation of authority is therefore clearly a reference to justice,⁷⁶ which has to be understood in relation to the ‘notion’ of boundless desire referred to above in the discussion of the death instinct.⁷⁷ Another reference to the relation between justice and the death drive can be seen in Derrida’s reference to the suspension of law as an ‘anguishing moment of suspense’.⁷⁸ The following passage’s correlation with the *differantial* stricture of life-death as described above in the context of Derrida’s reading of Freud’s *Beyond the Pleasure Principle*, requires no further comment:

Everything would still be simple if this distinction between justice and law were a true distinction, an opposition the functioning of which was logically regulated and masterable. But it turns out that law claims to exercise itself in the name of justice and that justice demands for itself that it be established in the name of a law that must be put to work [*mis en oeuvre*] (constituted and applied) by force “enforced”. Deconstruction always finds itself and moves itself between these two poles.⁷⁹

As was explained above, two ‘laws’ or ‘desires’ can be said to be at stake in life death, this unity being inhibited at the origin.⁸⁰ The one: the organism dying its own death, thereby emphasising the proper and the *oikos*; and the other, hidden from the self: returning to the inorganic state. These laws or desires are evident in *Force of Law* in the distinction that Derrida draws between justice and law (the consequence of the conservative drives) and can also be recognised in his analysis of hospitality where he distinguishes between absolute hospitality or just hospitality on the one hand, and hospitality in a restricted sense on the other.⁸¹

⁷¹ Ibid

⁷² Ibid

⁷³ Ibid; see also Derrida (note 2), 353 where he refers to repressed memory traces as an ‘encysted threat’.

⁷⁴ *Force of Law* (2), 242, *Force of Law* (1), 14

⁷⁵ *Force of Law* (2), 244, *Force of Law* (1), 16; see also Jacques Derrida, *Ein Zeuge von jeher. Maurice Blanchot: Der Augenblick meines Todes*, 2003, 14-15, 19; and Jacques Derrida, *Demeure: Fiction and Testimony*, 2000, 47 on death as the impossible which has always already come.

⁷⁶ See also *Force of Law* (2), 248, *Force of Law* (1), 19-20 where the mystical is associated with the demand for infinite justice.

⁷⁷ When he speaks of justice as an experience of the impossible, Derrida refers to a *desire* for justice; see *Force of Law* (2), 244, 254, *Force of Law* (1), 16, 25; see further section 3(b) below on the ‘notion’ of boundless desire.

⁷⁸ *Force of Law* (2), 249, *Force of Law* (1), 20; see also Jacques Derrida, *Préjugés: Vor dem Gesetz*, 2005, 21-23.

⁷⁹ *Force of Law* (2), 250-251, *Force of Law* (1), 22

⁸⁰ See also Jacques Derrida, *Points...Interviews, 1974-1994*, 1995, 7.

⁸¹ See Derrida (note 48), *Dissemination*, 134 on the polis constituting itself; and Derrida and Dufourmantelle (note 46), 25, 27 on hospitality.

In the founding of law, Derrida notes somewhat later on in words which cannot but remind us of his reflections in *To Speculate – On Freud*, the ‘problem of justice will have been posed and violently resolved, that is to say buried, dissimulated, repressed’.⁸² This repression can also be described as an expulsion or rejection of that which the body politic does not tolerate, that which threatens it or that it feels to be a threat.⁸³ It is for the same reasons that Derrida invokes the unconscious, or at least something unconscious,⁸⁴ in discussing the third aporia, describing the instant of a just decision as ‘a madness; a madness because such a decision is both hyper-active and suffered [*sur-active et subie*], it preserves something passive, even unconscious, as if the deciding one was free only by letting himself be affected by his own decision and as if it came to him from the other’.⁸⁵ In Derrida’s description of justice we can also clearly see allusions to the repressed memory traces of the inorganic state or absolute *jouissance* in his reading of *Beyond the Pleasure Principle*:

[T]his ‘idea of justice’ seems indestructible 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 theoretical rationality, in the sense of regulating mastery. And so, one can recognize in it, even accuse in it a madness, and perhaps another kind of mysticism [*une autre sorte de mystique*].⁸⁶

Justice thus entails incalculable disproportion and a loss or an expropriation of the proper, of property, of economy, of rights, the suspension of law in other words.⁸⁷ The ‘desire’ for justice or the mystical limit appears and is repressed at the origin of every institution and as we will see later, comes to the fore again in its conservation.⁸⁸ With reference to what Derrida says in *Glas* concerning the first moment of natural religion in Hegel’s *Phenomenology of Spirit*, the founding of law or of a state can be said to be a monument put forth to guard, to monumentalise the trace of death.⁸⁹ The people in the moment of revolution, devoid of self, without any body proper, without property, propriety, truth, without sense, in consuming self-destruction, preserves itself in losing itself in appearing through this founding.⁹⁰ This clearly ties in with Derrida’s statement in *To Speculate – On Freud* that ‘[e]very being-together...begins by *binding-itself*, by a binding-itself in a differential relation to itself’.⁹¹ As should be clear, this also corresponds with what was said above regarding the binding which takes place already in the primary process in the service of the pleasure principle.⁹² The same hidden memory or ‘mystical limit’ that we saw operates in the case of ‘living’ organisms, is thus also to be found at the origin of law or of a state. As we will see below, through repetition, those who write legal judgments and those who take political decisions on the authority of constitutions are inevitably affected by the same

⁸² *Force of Law* (2), 252, *Force of Law* (1), 23

⁸³ Jacques Derrida, *Who’s Afraid of Philosophy? Right to Philosophy I*, 2002, 5

⁸⁴ The unconscious is a problematic concept for Derrida as it still implies a privilege of presence; see Derrida (note 51), 289.

⁸⁵ See *Force of Law* (2), 255 (in part newly added), *Force of Law* (1), 26.

⁸⁶ *Force of Law* (2), 254, *Force of Law* (1), 25

⁸⁷ See *Force of Law* (2), 248, *Force of Law* (1), 20; Derrida (note 23) 50a-53a on Hegel and Jewish law; and Jacques Derrida, *Specters of Marx: The State of Debt, the Work of Mourning, & the New International*, 1994, 65.

⁸⁸ *Force of Law* (2), 242, 252, *Force of Law* (1), 14, 23

⁸⁹ See Derrida (note 23), 240a.

⁹⁰ *Ibid* 239a, 240a, 241a; see further Derrida (note 63), 136 where he refers to the national, political, collective ‘unconscious’, with the necessary caveats.

⁹¹ Derrida (note 2), 402

⁹² *Ibid* 396

erased memory traces.⁹³ In *To Speculate – On Freud* Derrida already pointed out that what is said regarding the self applies to every living organism, every corpus, every movement, every organization and therefore also to state law.⁹⁴ At the ‘origin’ of law, at the origin of a constitution, in a similar way as the institution of psychoanalysis, we could say, lies an erased or suppressed trace of justice⁹⁵ or of a return to the inorganic state.⁹⁶ A constitution may in other words appear to speak only of law or a restricted economy, but if one reads it with a ‘responsibility toward memory’, it speaks also of justice, of absolute hospitality.⁹⁷ Derrida more specifically calls for this when he speaks of justice in terms of a ‘responsibility without limits, and so necessarily excessive, incalculable, before memory’.⁹⁸

ii) Part II

In the second part of *Force of Law*, when Derrida continues with his analysis of the mystical, the correlation with his analysis of the Freudian death drive can also clearly be seen. In spite of other differences between them that will be referred to below, Derrida expresses his agreement with Benjamin’s contention that law is inherently violent and that the state seeks to have a monopoly on violence.⁹⁹ The state fears fundamental, founding violence most of all as this kind of violence could ultimately present itself as having the right to found a new law.¹⁰⁰ The violence that founds law is not alien to law, Derrida notes, following Benjamin, but that in law which suspends law; an instance of non-law in law.¹⁰¹ This is of course related to Benjamin’s interpretation of the right to strike which is a right that modern legal systems grant to workers which can be relied on in a general strike, Benjamin contends, to abolish law and to found a new law. Derrida extends this idea by contending that by means of modern technology something similar to a general strike can be brought about without having to mobilise great numbers of people.¹⁰² With reference to Derrida’s other texts, it could be said that this right to law or the right to found new law is not restricted to the right to strike, but to be implied also in other fundamental rights guaranteed in a constitution such as the right to equality, which potentially comes

⁹³ See in this respect also Derrida (note 87), 139: ‘everyone reads, acts, writes with his or her ghosts’.

⁹⁴ Derrida (note 2), 328, 347, 356

⁹⁵ See *Force of Law* (2), 252, *Force of Law* (1), 23-24 where Derrida notes that in the founding of law or in its institution the ‘problem of justice will have been posed and violently resolved, that is to say buried, dissimulated, repressed. Here the best paradigm is the founding [foundation] of the nation-states or the institutive act of a constitution that establishes what one calls in French *l’état de droit*.’

⁹⁶ See Derrida (note 2), 353; *Force of Law* (2), 252, *Force of Law* (1), 23-24; and Jacques Derrida, Faith and Knowledge: the Two Sources of ‘Religion’ at the Limits of Reason Alone, in: *Religion*, eds. Jacques Derrida and Gianni Vattimo, 1 at 51 where he notes that the death drive ‘is silently at work in every community, every *auto-immunity*, constituting it as such in its iterability, its heritage, its spectral tradition. Community as common auto-immunity: no community <is possible> that would not cultivate its own auto-immunity, a principle of sacrificial self-destruction ruining the principle of self-protection (that of maintaining its self-integrity intact), and this in view of some sort of invisible and spectral sur-vival.’ See also Derrida (note 51), 255 where he points out that the effects of *différance* are not to be restricted to the psychoanalysis of the individual, but extend to the history of culture.

⁹⁷ See *Force of Law* (2), 248, *Force of Law* (1), 20; and Derrida (note 96), 64: ‘There is no opposition, fundamentally, between “social bond” and “social unravelling”. A certain interruptive unravelling is the condition of the “social bond”, the very respiration of all “community”.’

⁹⁸ *Force of Law* (2), 247, *Force of Law* (1), 19

⁹⁹ *Force of Law* (2), 266-267, *Force of Law* (1), 33; see also Schuppert (note 67), 55-153.

¹⁰⁰ *Force of Law* (2), 268, *Force of Law* (1), 34-35

¹⁰¹ *Force of Law* (2), 268-270, 275, *Force of Law* (1), 35-36, 41-42

¹⁰² *Force of Law* (2), 271, *Force of Law* (1), 37-38

into play in every interpretive reading.¹⁰³ The founding of law or of a state is terrifying, Derrida notes, inter alia because these moments of founding are in themselves and in their violence uninterpretable or indecipherable (an ungraspable revolutionary instant).¹⁰⁴ He then explicitly links this with the notion of ‘mystique’.¹⁰⁵ This is to be understood with reference to the way in which the violence that is used in order to found a new state is justified in revolution: by relying on the future anterior. The in-progress or to-come founding of a new law is said to now already justify the illegal violence that is currently taking place.¹⁰⁶ The mystical is in other words that instance of non-law in law which suspends established law in order to found another law.¹⁰⁷ This moment, Derrida says -

always takes place and never takes place in a presence. It is the moment in which the foundation of law remains suspended in the void or over the abyss, suspended by a pure performative act that would not have to answer to or before anyone. The supposed subject of this pure performative would no longer be before the law [*devant la loi*], or rather he would be before a law [*loi*] still undetermined, before the law as before a law nonexisting, a law still ahead, still having to and yet to come [*une loi encore devant et devant venire*].¹⁰⁸

This is a difficult passage and creates the impression that Derrida is saying that the law, in the sense of the legal system, always remains to come, in a similar way in which he would in other texts for example refer to democracy to come.¹⁰⁹ We cannot engage here in a lengthy analysis of Derrida’s reading of Kafka’s *Before the Law*, which Derrida also refers to here, but it is important to note that the law that Derrida refers to in his essay *Before the Law* is not to be equated with the legal system, but rather with desire or what in *Force of Law* would be referred to as justice and which as Derrida notes, ‘remains to come, it remains by coming [*la justice reste à venire*], it has to come [*elle a à venire*] it is to come, the to-come [*elle est à-venir*], it deploys the very dimension of events irreducibly to come’.¹¹⁰ What is at stake in the above (indented) passage, as the context makes clear, is the suspension of law in order to found a new law. Nevertheless, this founding of a new law is ‘based’ on what Derrida refers to as an ‘anterior law’ and which is given the figure of the general strike (and also of war) in Benjamin’s text.¹¹¹ Benjamin expresses a similar idea through the notion of divine violence or divine justice which is without means that look to an end, which Derrida also refers to in terms of the mystical foundation of authority.¹¹² What Derrida admires about this thinking of Benjamin, he says, is its acknowledgment that there can be no justice and no responsibility without an exposure to all risks, beyond certitude and good conscience.¹¹³ Derrida however distances himself from the

¹⁰³ See Jacques Derrida, *Rogues: Two Essays on Reason*, 2005, 52.

¹⁰⁴ *Force of Law (2)*, 269, 274, *Force of Law (1)*, 35, 40-41; see also section 3(a)(i) above where Hegel’s *Phenomenology of Spirit* was invoked.

¹⁰⁵ *Force of Law (2)*, 269, *Force of Law (1)*, 35

¹⁰⁶ *Ibid*

¹⁰⁷ *Force of Law (2)*, 269-270, *Force of Law (1)*, 35-36

¹⁰⁸ *Force of Law (2)*, 269-270, *Force of Law (1)*, 36

¹⁰⁹ See, in general, Derrida (note 103); and Jacques Derrida, *Politics of Friendship*, 1997.

¹¹⁰ *Force of Law (2)*, 256, *Force of Law (1)*, 27; see Jacques Derrida, *Acts of Literature*, 1992, 181, for the text, *Before the Law*.

¹¹¹ *Force of Law (2)*, 274-275, *Force of Law (1)*, 40-41; see also Jacques Derrida, *The Laws of Reflection: Nelson Mandela*, in *Admiration*, in: *For Nelson Mandela*, eds. Jacques Derrida and Mustapha Tlili, 1987, 13 at 34 where Derrida refers to a law beyond legality.

¹¹² *Force of Law (2)*, 285, *Force of Law (1)*, 50

¹¹³ *Force of Law (2)*, 287, *Force of Law (1)*, 51-52

(bloodless) divine violence which Benjamin ascribes to justice, its complete separation from law, and the notion of the divine as sovereign.¹¹⁴ The stricture of *différance* which Derrida insists on should be clear from this objection and from Derrida's description of the relation between law and justice. For Derrida, justice is as for Benjamin an 'anterior law' and not of the order of knowledge; justice for Derrida is indissociable from law and yet without sovereignty.¹¹⁵

b) Repetition and law-enforcing violence

The notion of the mystical as well as that of repetition could be clarified further when we consider Derrida's interpretation of Ernst's game, as recounted in Freud's *Beyond the Pleasure Principle*. Derrida's reading is that Ernst is effectively dispersing himself or perhaps even being dispersed in these games.¹¹⁶ In the second game, as we saw, he throws the spool (representing Sophie) into his veiled bed. The bed, Derrida contends, is *fort*, and throwing the spool into the veil, expresses Ernst's desire for absolute pleasure or pleasure without end.¹¹⁷ This is not to be understood as an oedipal desire or even a desire to return to the mother's womb, but the absolute desire of a return to the inorganic state, or an immense orgiastic jouissance, Sophie here representing death.¹¹⁸ Sophie, in other words, is already a substitute for that which is ultimately desired. This desire is described as follows by Derrida:

We do not await death, we only desire it as a past we have not yet lived, that we have forgotten, but with a forgetfulness that has not come to cover over an experience, with a memory more ample, more capable, older than any perception.¹¹⁹

The same desire is also expressed in Freud's text, hiding the fact from himself that he is Ernst's grandfather, by writing on Ernst's game, and recalling Sophie, his favourite daughter who died in January 1920, of influenza, at the time of his writing of *Beyond the Pleasure Principle*.¹²⁰ Freud, in *Beyond the Pleasure Principle*, appears to send away the pleasure principle like Ernst does with the spool, but each time brings it back to himself.¹²¹ Ernst is in other words not the inventor of these games as Freud at one point contends.¹²² The game(s) as described by Freud instead show that absolute desire which precedes Ernst as a subject is the 'origin' thereof. It is in a sense the game that repeats itself, using Ernst as one figure among others, in which he is picked up and hurled.¹²³ The return of the toys, the spool, and Ernst in each the three games, comes in order to disrupt the pleasure principle, or as Derrida puts it, 'to mine the PP as its proper stranger, to hollow it into an abyss from the vantage of an origin more

¹¹⁴ *Force of Law (2)*, 285-298, *Force of Law (1)*, 51-63

¹¹⁵ See also Derrida (note 103), 150.

¹¹⁶ Derrida (note 2), 310, 370

¹¹⁷ *Ibid* 315-317, 397; as Derrida points out at 316-317, the veil ties in with his earlier exploration of the hymen in the Double Session, published in *Dissemination* (note 48).

¹¹⁸ See Derrida (note 2), 316; Derrida (note 23), 134b, 172b; Derrida (note 75), *Demeure*, 68.

¹¹⁹ Derrida (note 23), 79b; see also *Force of Law (1)*, 64, *Force of Law (2)*, 259 on this memory.

¹²⁰ See Derrida (note 2), 301.

¹²¹ *Ibid* 302, 320; the structure of the first part of *Force of Law*, undoubtedly not by accident, shows remarkable similarities with the structure of Freud's *Beyond the Pleasure Principle*. This is done *inter alia* through Derrida's exploration of the notion of direct 'address', which is approached and withdrawn from repeatedly by the taking of detours.

¹²² Freud (note 3), 14; compare at 15. The implication here is that Freud can also not simply be said to be the father or inventor of psychoanalysis; see further below.

¹²³ See similarly, Derrida (note 48), *Dissemination*, 322, 366.

original than it and independent of it, older than it within it'.¹²⁴ The answer to Freud's question on the repetition of 'unpleasant' experiences, and here in particular the repetition that is at stake in Ernst's games, is in other words not to be found only in the dominance of the pleasure principle, but also in the return through repetition of the conservative drives of the death drive, that is, through *différance*. This return involves the binding of absolute pleasure. At this point, as Freud points out, no account is taken of unpleasure.¹²⁵ The pleasure principle or the master (which can be taken to also stand for Ernst and Freud), 'is not the master, subject or author of this speculation. It is only charged with this mission, an emissary, a facteur, one might almost say a courtier.'¹²⁶ This life-death stricture is not however restricted to Freud and Ernst, and by extension to human beings. One could say that all organisms, organisations and institutions (as well as their functioning) are a consequence of absolute pleasure limiting itself.¹²⁷ Derrida's analysis of Ernst's game(s), as we can see from the above, shows that Freud's *Beyond the Pleasure Principle* and consequently also psychoanalysis as an institution has an erasure of desire at its 'origin' which disrupts what appears to be a teleological auto-institution.¹²⁸ As was contended in the preceding subsection, the same could be said in relation to legal systems.

In considering repetition or law-conserving violence we also need to remind ourselves of the 'notion' of iterability that was explored briefly above in relation to language. In the second part of *Force of Law*, Derrida seeks to complicate the Benjaminian distinction between law-making, law-enacting or law-founding violence/power (*rechtsetzende Gewalt*) on the one hand and law-preserving violence/power (*rechtserhaltende Gewalt*) on the other.¹²⁹ Benjamin himself later acknowledges in his discussion of the death penalty and of the police, that this distinction is not a rigid one.¹³⁰ Law-founding violence/power, Derrida notes, is already enveloped by the need for its conservation, in other words, because of the need for repetition.¹³¹ In the first part of *Force of Law*, he had already pointed out that law always implies its enforceability, and that the latter is therefore not something secondary to law.¹³² Law founding entails the positing of what is believed should be conserved; it therefore entails the promise of its own repetition in future, the sharing of a heritage and a

¹²⁴ Derrida (note 2), 317-318

¹²⁵ Freud (note 3), 62

¹²⁶ Derrida (note 2), 400

¹²⁷ Ibid

¹²⁸ Ibid 273-4, 321, 353

¹²⁹ *Force of Law* (2), 264-265, 272, *Force of Law* (1), 31, 38; It appears as if Benjamin regards decisions of the judiciary (specifically imposing the death penalty) as well as of the police as law-preserving violence/power. Law-founding violence/power refers to the founding of a state/law. A question that could be raised here is whether the founding of law refers also to parliamentary legislation. Benjamin regards parliament as *representing* law-founding violence. What is said here concerning law and its conservation can therefore, also with reference to Derrida's discussion in the first part of *Force of Law* regarding the enforceability of law, be extended to parliamentary legislation.

¹³⁰ *Force of Law* (2), 276-281, *Force of Law* (1), 42-46

¹³¹ *Force of Law* (2), 272, 274-275, *Force of Law* (1), 38, 41

¹³² *Force of Law* (2), 233, *Force of Law* (1), 5-6; According to Agamben *State of Exception*, 2005, 37-39, the expression 'force of law' (with reference to Derrida's essay) refers not to the law, but to decrees of the executive, particularly in a state of exception, which would not formally qualify as law but which would nevertheless have the force of law. The issue of executive decrees in such circumstances would lead to the non-application of law. Derrida does not use the expression in the strict legalistic sense in which Agamben seeks to use it. Derrida's reliance on it is tied to the English idiomatic expression 'to enforce the law' which cannot be directly translated into French, as well as the German word 'Gewalt', which can be translated as power, violence and force. Derrida furthermore uses this expression in light of his discussion of the Benjaminian distinction referred to above which he will show deconstructs itself. As we will see below, all law-enforcement according to Derrida destroys law, and not only executive action in the case of a state of exception.

tradition.¹³³ There can thus be no purity in the founding of law.¹³⁴ The same applies to conservation: the conservation of law cannot be strictly distinguished from the founding of law as it re-founds and conserves.¹³⁵ Whereas Benjamin however seeks to return to a pure origin, a presence without representation, Derrida seeks to draw the consequences of this structure of contamination.¹³⁶

This structure is shown implicitly in Benjamin's analysis of the police, who as Benjamin points out, is supposed to only conserve law, but also finds, enacts or produces law. Because of this mixing of functions and also because they are everywhere, the power or violence of the police is described by Benjamin/Derrida as phantom-like or spectral.¹³⁷ In spite of the institution of democracy and the principle of separation of powers, the police make regulations themselves and in doing this, set new goals which are not provided for in law.¹³⁸ This is to be compared, Benjamin says, with the position in an absolute monarchy where the police represent a ruler in whom legislative and executive powers are united. The police in modern states also act in situations where no legal basis exists for doing so. The police therefore, strictly speaking, completely or absolutely (literally, 'throughout') [*durchaus*] act outside the law.¹³⁹ Derrida, in a passage added to the second version of *Force of Law*, elaborates on this with reference specifically to modern technology and the consequent ubiquity of the police, their ability and authority to intrude in every sphere.¹⁴⁰ This constitutes an internal degeneration of the democratic principle: police power is intended to protect democracy, but is essentially uncontrollable in its technological autonomy.¹⁴¹ Law and democracy through the need for police powers thus destroy themselves. The police, we could also say, deprive law of its strength and its authority, its force, 'dooming it to a sort of self-persecuting disidentification'.¹⁴² The concept of law must therefore be understood as being 'double', because if it was only force and authority itself,¹⁴³ it would not have been possible for it to lose force and authority.¹⁴⁴ The ghostly double or spectral duplicity that Derrida invokes here refers to his analysis in *Of Spirit: Heidegger and the Question*, where in a reading of Heidegger he shows

¹³³ *Force of Law* (2), 272, *Force of Law* (1), 38; Elsewhere in *Acts of Religion* (note 1) 185 Derrida asks rhetorically whether this promise is not in itself, in its structure, 'a relation to the future which involves forgetting, indeed a sort of essential indifference to the past, to that in the present which is not present, but also an ingathering, that is, a memory of the future'. The 'indifference to the past' that Derrida refers to here should clearly not be understood as a reference to the past present, but as the moment which never became a presence: the non-presence of law's suspension which threatens law from within with its own destruction.

¹³⁴ *Force of Law* (2), 272, 277-278, *Force of Law* (1), 38, 43-44

¹³⁵ *Ibid*

¹³⁶ See also Hent de Vries, Anti-Babel: The 'Mystical Postulate' in Benjamin, de Certeau and Derrida, *MLN* 107:3 (1992), 441.

¹³⁷ *Force of Law* (2), 279, *Force of Law* (1), 44-45; Walter Benjamin, *Selected Writings*, vol I, 1996, 236 at 243: 'Unlike law...a consideration of the police institution encounters nothing essential at all. Its power is formless, like its nowhere-tangible, all-pervasive, ghostly presence in the life of civilized states.'

¹³⁸ See also *Force of Law* (2), 295, *Force of Law* (1), 59 on the police force that becomes the true legislative power; and see Schuppert (note 67), 563-565 on the dominant or at least very important role of the executive in the enactment of legislation by parliaments in constitutional democracies.

¹³⁹ Walter Benjamin, *Gesammelte Schriften* 2, no. 1, 1977, 179 at 189.

¹⁴⁰ *Force of Law* (2), 279-280; see also Schuppert (note 67), 578-581 on the extension of state powers through the notion of a state function of ensuring inner security.

¹⁴¹ The 'theme' of democracy destroying itself, or autoimmunity, is something that will be taken up again more extensively in Derrida (note 103).

¹⁴² Jacques Derrida, *Of Spirit: Heidegger and the Question*, 1989, 61-62; the footnote reference to *Of Spirit* in the first version of *Force of Law* was removed in the second version.

¹⁴³ See *Force of Law* (2), 233, *Force of Law* (1), 5: 'law is always an authorized force'.

¹⁴⁴ See Derrida (note 142), 62; see also Derrida (note 48), *Of Grammatology*, 39-40 for a similar argument concerning speech and writing.

that the concept of spirit is double, both preserving and destroying itself, in a *differential* relation with its 'self' and its 'other', we could add.¹⁴⁵ Spirit, in the latter respect, is closely associated with fire, not of the hearth, but of burning itself, setting fire to itself, conflagrating itself.¹⁴⁶ When Derrida refers to the *Fort-Dasein* of the police he therefore points not only to his analysis of Ernst's game in Freud's *Beyond the Pleasure Principle*, but also to the fact that even though the police destroy law, the polis nevertheless has to rely on the police for the conservation of law.¹⁴⁷ Derrida's statement, following Benjamin, that '[t]here is something decayed or rotten in law, which condemns it or ruins it in advance', must be understood in the above context.¹⁴⁸ The correlation with the role of the conservative drives in Freud's model described above, as seeking to make the organism die its own death, but at the same time and primarily being satellites of the death drive, should be obvious.¹⁴⁹

Derrida can be agreed with when he contends that the same can be said in relation to the consequences of all law enforcement whether or not it belongs to the institution of the police.¹⁵⁰ This can be understood as a reference to the broad discretionary or interpretive powers granted to officials in modern legal systems which is usually justified with reference to the inability of parliaments to regulate everything in detail, the unpredictability of future situations, and the need for flexibility in the taking of decisions.¹⁵¹ This nevertheless means that those who enforce the law (and ultimately the constitution) make what purport to be legal rules or decisions but which are not authorised by 'law', or are authorised only insofar as the authorisation 'perverts' law. They in other words found, create or produce 'law' and therefore also violence which can only be said to be authorised by law insofar as it can at the same time be said that law authorises its own abolition.¹⁵² Administrative law (as well as criminal procedure), which through the laying down of requirements of legality or grounds of review, *inter alia* seeks to ensure that officials act within their powers or according to certain procedures, can from this perspective be seen as a modern response to this 'degeneration' of law. Administrative-law cases however show that the purpose(s) of a law, as well as the scope of the powers and duties laid down, are hardly ever easily determinable. Judges furthermore often defer in varying degrees to the substantive and procedural decisions taken by administrators which leave further scope for the creation of 'law' by the administration. More recently, privatisation, deregulation, and attempts at achieving the ends of government through state contracts, public procurement, public-private partnerships, self-regulation, and public participation, have given a new dimension to this 'degradation' of law.¹⁵³

¹⁴⁵ *Force of Law* (2), 279-280, *Force of Law* (1), 45.

¹⁴⁶ Derrida (note 142), 83-98

¹⁴⁷ *Force of Law* (2), 280, *Force of Law* (1), 45

¹⁴⁸ *Force of Law* (2), 273, *Force of Law* (1), 39

¹⁴⁹ See also Giovanna Borradori, *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida*, 2003, 99 where Derrida draws a comparison between repression in the psychoanalytical and the political sense - in the latter instance through the police, the military and the economy - which 'ends up producing, reproducing, and regenerating the very thing it seeks to disarm'.

¹⁵⁰ *Force of Law* (2), 278, *Force of Law* (1), 44-45

¹⁵¹ See e.g. Schuppert (note 67), 562.

¹⁵² It should be clear that this argument would not be affected should a specific constitution expressly (or by implication) authorise the delegation of discretionary powers. According to this analysis it would mean that the constitution effectively authorizes its own degeneration/abolition.

¹⁵³ For an excellent overview of this trend in administrative law, see Schuppert (note 67), 440-627, and for two recent books in the Commonwealth that deal with these themes, specifically that of deference, see *Inside and Outside Canadian Administrative Law*, eds. Grant Huscroft and Michael Taggart, 2006; and *Acta Juridica*, ed. Hugh Corder, 2006.

The above brief analysis is of course not meant as criticism of the grant of discretionary powers in modern legal systems or of constitutional and administrative law in general or to suggest that there should be a return to some 'pure' state of law. Modern states can hardly function without these institutions. Derrida can also not be read as saying that administrative and constitutional law, also in their other attempts to structure discretion or to ensure 'good' decision-making, do not place more or less effective limits on the exercise of discretionary powers. His analysis would also not deny that limits are often imposed in constitutional democracies as to the permissible extent of parliamentary delegation of powers.¹⁵⁴ Derrida, reading Benjamin, seeks to show and to draw consequences from the fact that the state cannot any longer, or perhaps never could, achieve its purposes through the legal order itself; a supplement is always required. This supplement, however, as we saw above, necessarily leads to the abolition or degeneration of law because of the indeterminacy that is involved in interpretation and enforcement.¹⁵⁵ Because of the co-implication of law founding/making and law enforcement, the (legal) validity of both is undermined. The abyss of this destruction points to an 'origin' of law which precedes the idea of origin as auto-institution. This destruction would in other words not have been possible if it was not already inscribed within the origin of law. Any 'conception' of law must consequently also make provision for its perversion, its auto-deconstruction or autoimmunity through repetition, not only as an accident, but as its condition of possibility, its pre-origin; iterability in other words.¹⁵⁶

Returning now to Ernst's game and its relation to law-conserving violence, as we saw, Freud ultimately decides that the pleasure principle is at the origin of this game. Derrida, on the other hand, contends that Ernst's game, but also Freud's *Beyond the Pleasure Principle* (and, with reference to *Force of Law*, also law), are set in motion as well through a return of absolute desire, of self-destruction. Pure presence is never possible as life is always haunted by the desire for destruction, for absolute pleasure. The founding of law, one could also say, following Benjamin, is made possible by that which threatens its ruin.¹⁵⁷ In the conservation of law and therefore in every act of interpretation, there is also a return of the mystical, of justice, of what Benjamin would refer to as the general political strike. This is the case even though there is a performative violence at the heart of every interpretive reading and even though interpretation is never neutral and never non-violent as it depends on the established order that it interprets.¹⁵⁸ We could compare with the above the tendency in contemporary constitutional thinking to contemplate the order of law and its interpretation simply in terms of a discourse of self-legitimation.¹⁵⁹ Derrida's contention in *Force of Law* and other texts is that this is a result of the privilege that has been accorded to presence in Western philosophy which has in turn led to a privileging of that which is related to it, that is, the self, the home, property, and the nation. As indicated above, the desire for presence has to pass through language as well as through law which are not continuations of presence, but disruptive of presence, of the self, the home, property, and the nation.

c) Singularity

¹⁵⁴ See in this respect Schuppert (note 67), 553-557.

¹⁵⁵ See also Schuppert (note 67), 559-565 on the independence of the administration in enforcing legislation and the important role of the executive in the enactment of legislation.

¹⁵⁶ *Force of Law* (2), 290, *Force of Law* (1), 55

¹⁵⁷ *Force of Law* (2), 278, *Force of Law* (1), 44

¹⁵⁸ *Force of Law* (2), 270-271, *Force of Law* (1), 36-37

¹⁵⁹ See Schuppert (note 67), 743-791 for a discussion of some of these approaches.

In seeking to spell out the implications of *Force of Law*, great importance has been attached to the notion of singularity in Derrida's thinking by (legal) scholars in especially the English-speaking world, more specifically by those sympathetic to his thinking.¹⁶⁰ In most of these readings singularity and the other have been placed in opposition to law's generality. Whereas in some of these versions every party in a court case who loses as well as convicted criminals (the excluded other of the system) have been regarded as (singular) others, in other versions (usually by also invoking Levinas) all those who are marginalised or in a position of suffering have been regarded as the (singular) other. In these and related approaches, law has often on the basis of *Force of Law* been denounced for its generality and (representational) violence and therefore its inability to do justice. This denouncement has then usually been followed by calls for a model of decision-making which would concern itself with the singular other(s) (that is, the parties) in a court case rather than law, an approach which has sometimes been referred to as an ethics of difference. In similar vein, *Force of Law* has been read as emphasising contingency, openness or responsiveness and the need for decision-makers to take personal responsibility for their decisions, rather than hiding behind or seeking to justify their decisions solely with reference to the law. In some versions the emphasis on singularity has furthermore been accompanied by a call for an attempt at reconciliation of the different interests in a legal dispute and in light of the impossibility thereof, an acknowledgement of sacrifice. Reliance has inter alia been placed on the following passages in support of such readings:

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

To address oneself to the other in the language of the other is both the condition of all possible justice, it seems, but, in all rigor, it appears not only impossible (since I cannot speak the language of the other except to the extent that I appropriate it and assimilate it according to the law [*loi*] of an implicit third) but even excluded by justice as law, inasmuch as justice as law seems to imply an element of universality, the appeal to a third party who suspends the unilaterality or singularity of the idioms.¹⁶¹

These passages make one understand why the interpretations mentioned above where law is opposed to singularity, the latter being equated with justice, have been so popular in readings of *Force of Law*. The multiple use of the word 'seems' in these passages as well as the question mark at the end of the first passage should however call on us to take care.¹⁶² To understand what is involved in Derrida's use of the notion of singularity we should also not stop reading here. Especially towards the end

¹⁶⁰ This is not the place for a detailed review of every publication where this kind of reading of Derrida has been adopted, something which has, at least partly, been undertaken elsewhere. For purposes of the present article, where the focus is on *Force of Law* and not a detailed review of secondary literature, it will therefore suffice to give a broad description of these approaches.

¹⁶¹ *Force of Law* (2), 245, *Force of Law* (1), 17

¹⁶² See also *Force of Law* (2), 235, *Force of Law* (1), 7 where Derrida, in another context, points out that he does not use the word 'seem' by accident.

of the second part of *Force of Law* it becomes clear that Derrida is, in the above passages, invoking a Benjaminian distinction between singularity on the one hand and generality or representation on the other.¹⁶³ This corresponds with Benjamin's view that the originary destination of language was appellation, nomination, the giving or the appeal or presence of the name, that is, that language is originally not a means to an end.¹⁶⁴ Benjamin's thinking about singularity is clearly tied to a thinking which privileges presence, as opposed to representation.¹⁶⁵ At the same time, as Derrida points out, Benjamin acknowledges that the language of communication and representation cannot be clearly distinguished from that of expression.¹⁶⁶ Benjamin also acknowledges, as we saw above, that the founding of law cannot be clearly distinguished from its conservation. It should be clear with reference to what Derrida has termed a general strategy of deconstruction that the above quoted passages cannot be read or invoked as the 'final outcome' of a strategy of deconstruction, but are instead testimony to the first 'phases' of such a strategy.¹⁶⁷ Derrida is contending in these passages of *Force of Law* that there is a seeming tension between the requirement of justice of relating to someone as other in a purely idiomatic way (for example through the proper name), in other words without the intervention of language viewed as a means to an end, and the other requirement of justice – generality or universality as characteristics of law and language. As in other contexts (for example, the event, the date, the invention, a performative speech act), Derrida is concerned here with showing that there can be no pure event, pure idiom, pure invention, pure performative, as there is always already, from the first moment, representation, repetition, mechanization, and technology.¹⁶⁸

This seemingly paradoxical situation requires another strategic 'phase' namely the inscription of the opposition within a new 'concept', 'thereby disorganizing the entire inherited order and invading the entire field'.¹⁶⁹ We saw above how this re-inscription takes place in *Force of Law* with reference to the 'concept' of justice, which is no longer a concept in the traditional sense as it exceeds economy.¹⁷⁰ Derrida speaks in this regard of justice in the sense of 'a responsibility without limits, and so necessarily excessive, incalculable, before memory', an experience of inadequation or an incalculable disproportion, as a gift without exchange, and with reference to Levinas as absolute dissymmetry.¹⁷¹ It is necessary to determine the implications of this re-inscription for singularity. What Derrida's analysis of law and justice shows (and the above quoted passages already indicate this) is that the technicality or generality of law is not a negative accident, something that happens by accident to law, but that it is part of its structure. This structure, as we saw above with reference to law-founding and law-preserving violence, furthermore points to that which makes law possible – (unconditional) justice. When we take account of some of Derrida's other texts on the

¹⁶³ See *Force of Law* (2), 295, *Force of Law* (1), 59; the same happens in Derrida (note 109), 22, and Derrida (note 87), 65.

¹⁶⁴ *Force of Law* (2), 259, 297, *Force of Law* (1), 61, 64

¹⁶⁵ *Force of Law* (2), 259-260, *Force of Law* (1), 64-65

¹⁶⁶ *Force of Law* (2), 297, *Force of Law* (1), 61

¹⁶⁷ See Jacques Derrida, *Positions*, 2004, 38. To point to such a strategy in Derrida's texts is of course not to be confused with an approach that would turn deconstruction into a method or technique as proposed for example by J.M. Balkin, Deconstructive practice and legal theory, *Yale Law Journal* 96 (1987), 743; J.M. Balkin, Transcendental deconstruction, transcendent justice, *Michigan Law Review* 92 (1994), 1131.

¹⁶⁸ See also Derrida (note 48), *Of Grammatology*, 163 on presence and representation in Rousseau; and *Force of Law* (2), 252 (newly added passage) where Derrida refers to the mechanics or the technology introduced by the necessary iterability of judgments.

¹⁶⁹ Derrida (note 167), 38

¹⁷⁰ On the 'notion' of a general economy, see Derrida (note 51) 317-350; and Derrida (note 2), 389.

¹⁷¹ See *Force of Law* (2), 247-251, *Force of Law* (1), 19-22.

concept or notion of singularity we can see that singularity is, similar to law, but almost imperceptibly, deconstructed in *Force of Law*, in a movement away from presence towards a thinking of singularity in terms of the unconditional.¹⁷² The relation between justice/the unconditional and singularity for example comes to the fore in Derrida's discussion of unlimited hospitality which he refers to as the 'unique and singular and absolutely only great Law of hospitality' requiring an unconditional welcome.¹⁷³ This thinking of singularity is of course still related to law, but requires a new relation between justice, law and singularity. This relation does not consist in opposing a specific party or even all the parties in a court case to the law, but in something – a *differential* relation we could say - beyond this opposition. Derrida makes this clear also when he discusses the three examples of the impossible experience of aporia in *Force of Law* and when he says that a judge cannot, if he wants to do justice, simply apply a rule to a case; there has to be a suspension or destruction of law, and a reinvention in each case. This is because '[e]ach case is other, each decision is different and requires an absolutely unique interpretation which no existing, coded rule can or ought to guarantee absolutely'.¹⁷⁴

It may still be contended that there are many passages in *Force of Law* where Derrida refers to the other and that this indicates the importance for deconstruction of singularity. There can be little doubt as to the importance of singularity for deconstruction/justice. The question is how to understand these references to the other. In discussing the second aporia, Derrida for example notes that the infinite idea of justice is 'irreducible, irreducible because owed to the other, owed to the other, before any contract, because it has *come*, it is a *coming* [*parce qu'elle est venue*], the coming of the other as always other singularity'.¹⁷⁵ This passage, and others that may be referred to, should similarly not be read out of context.¹⁷⁶ A rigorous reading of this passage in *Force of Law* would note that it is immediately followed in the same paragraph by a reflection on justice in terms of the gift without exchange and the desire for justice. The passage in question where the coming of the other is invoked can perhaps be understood better when we take account of Derrida's reflections elsewhere on the concept of the event, which is often used to describe the coming of the other.¹⁷⁷ When Derrida speaks of the third aporia (urgency) in *Force of Law*, he for example invokes the notion of justice that remains to come. He continues as follows:

“Perhaps” - one must [*il faut*] always say *perhaps* for justice. There is an *avenir* for justice and there is no justice except to the degree that some event is possible which, as event, exceeds calculation, rules, programs, anticipations and so forth. Justice, as

¹⁷² See especially Derrida and Ferraris (note 9), 12-13, 61; Derrida (note 103), 150-151; Derrida (note 87), 31; Derrida (note 63), 77-81; Derrida and Roudinesco (note 60), 51-53), read with *Force of Law* (2), 297, *Force of Law* (1), 61-62

¹⁷³ Derrida and Dufourmantelle (note 46), 77, 81; see also *Deconstruction in a Nutshell*, ed. John Caputo, 1997, 22 where Derrida in response to a question from Caputo, points out that attention to singularity is not opposed to universality.

¹⁷⁴ *Force of Law* (2), 251, *Force of Law* (1), 23

¹⁷⁵ *Force of Law* (2), 254, *Force of Law* (1), 25

¹⁷⁶ For an excellent discussion of Derrida's Violence and Metaphysics: An Essay on the Thought of Emmanuel Levinas, in Derrida (note 51), see Michael Naas, *Taking on the Tradition: Jacques Derrida and the Legacies of Deconstruction*, 2003, 93-114, pointing out that the unforeseeable other can be encountered only by means of 'the concept'. The concept in turn must be understood in terms of its autodeconstruction; see Derrida (note 1), *Acts of Religion*, 362-364.

¹⁷⁷ See e.g. Derrida and Roudinesco (note 60), 58.

the experience of absolute alterity, is unrepresentable, but it is the chance of the event and the condition of history.¹⁷⁸

Derrida's other texts on the concept of the event shows that the event has a similar structure as was described above in respect of singularity.¹⁷⁹ The incalculability of justice (as of other concepts such as friendship, democracy, and the gift) is what allows for a new thinking of the event, and of the future.¹⁸⁰ It is in other words only when we are 'prepared' by way of a deconstructed concept of justice, hospitality, friendship, democracy and the gift to encounter that which comes with a certain defenselessness or exposure, without mastery and without sovereignty, without horizon of expectation, that the future has a chance.¹⁸¹ This is to be compared with a situation where the future is approached from the perspective of determinate concepts (also of justice) which have been constructed from a thinking of presence and which through their totalizing horizon closes us off from that which comes. Responsibility, Derrida says elsewhere, requires that the other take the decision in me.¹⁸² Derrida's thinking about the event, which is clearly related to the death drive, the desire for absolute pleasure or what he would later call autoimmunity, goes beyond humanism as it involves an openness to whatever or whoever comes. As should be clear, this openness and exposure still involves singularity, but without being tied to presence.¹⁸³

It should also be evident that the above structure does not leave us with relativism, in other words with no criterion to choose between the interests of the different parties to a dispute, with a reconciliation of interests as the only option. At the same time it does not provide us with a criterion of judging, at least not in the traditional sense. The discussion of the notion of undecidability below will make this clear. It also does not mean that a court should simply always decide in favour of those who can be regarded as 'suffering others'. Much more is required if a judge is to be responsible in this hyperbolic sense. As we saw above, every act of conservation and therefore every act of interpretation invokes the possibility of a general strike. In other words, the pre-origin of law, which entails incalculable disproportion and a loss or an expropriation of the proper, of property, of economy, of rights, lies at the 'origin' of every interpretation. Justice therefore requires that a judge should give him/herself and the law up to the impossible decision, while taking account of law and rules.¹⁸⁴ Derrida uses the latter description of decision-making in the context of speaking about the second aporia of undecidability. As he makes clear there, undecidability is not merely about an oscillation or tension between two different interpretations of the same rule or between the universality of law and the singularity of a unique

¹⁷⁸ *Force of Law (1)*, 27, *Force of Law (2)*, 257

¹⁷⁹ See e.g. Derrida and Roudinesco (note 60), 51-53

¹⁸⁰ See also Derrida (note 87), 23-29 where he explores the notion of justice through Heidegger's *Der Spruch des Anaximander* and where Derrida contends that justice necessarily supposes disassociation, being out of joint, a disjointure which alone would be able to do justice to the other as other. A detailed exploration of this text insofar as it relates to justice will be undertaken elsewhere.

¹⁸¹ Derrida's notion of the future must of course not be understood in terms of a future presence but with reference to the Freudian notion of belatedness (*Nachträglichkeit*) or the return of the repressed which disrupts the idea of a distinction between the past and the future; see Jacques Derrida, *Archive Fever: A Freudian Impression*, 1995, 80.

¹⁸² Derrida and Roudinesco (note 60), 53; Derrida (note 109), 68-69; *Force of Law (2)*, 255 (newly added passage)

¹⁸³ See *Force of Law (2)*, 297, *Force of Law (1)*, 61-62; Derrida (note 63), 77-81; Derrida and Roudinesco (note 60), 51; Jacques Derrida, *The Truth in Painting*, 1987, 47; Derrida (note 103) 52, 53.

¹⁸⁴ *Force of Law (2)*, 252, *Force of Law (1)*, 24

situation.¹⁸⁵ The question this raises is whether undecidability is another name for justice. This appears to be the case from the heading of this section - 'Second Aporia: The Haunting of the Undecidable' - and when Derrida speaks of the 'moment of suspense of the undecidable', in other words, that which happens in the impossible experience of aporia or justice.¹⁸⁶ This understanding of the undecidable seems to be confirmed by the following passage:

Once the test and ordeal of the undecidable has passed (if that is possible, but this possibility is not pure, it is never like an other possibility: the memory of the undecidability must keep a living trace that forever marks a decision as such), the decision has again followed a rule, a given, invented or reinvented, and reaffirmed rule: it is no longer *presently* just, *fully* just.¹⁸⁷

The above passage nonetheless also refers to the contamination between justice and law and it seems to imply that the notion of undecidability is not unaffected by this contamination. In the second part of the essay Derrida confirms this contamination when he elaborates on Benjamin's notion of undecidability.¹⁸⁸ Benjamin refers to divine justice beyond law and the state as decidable (referring in this way inter alia to the destruction of law by divine justice), yet as without decidable knowledge. In other words, divine violence does not lend itself to human determination or knowledge or decidable certainty.¹⁸⁹ Law and the state, although it is itself paralyzed by undecidability (conserving violence having to repress counter-violence) is the place of decidable knowledge. It is in other words subject to human determination. Derrida does not oppose these forms of violence or power like Benjamin at some point does, but instead emphasises the need to participate in both.¹⁹⁰ This is because there is no pure moment of undecidable justice, but always a *differential* relation between (undecidable) justice and (decidable) law, a relation which needs to be negotiated in singular instances. While justice does not therefore simply demand a concern for suffering or marginalised others, this structure of law and justice should, depending on whether the decision-maker indeed gives him- or herself over to the impossible decision (undecidable justice), in most instances lead to an invention of law which favours those who are 'marginalised'. The qualification 'most' is added, because as the discussion below will show, justice is not to be confused with the desires of those who have nationalist, ethnic, racist, linguistic, xenophobic, religious fundamentalist and other similar aspirations, even though those who propagate these views often believe themselves to be 'marginalised'. The latter are desires for presence, whereas justice as we know, stands in a *differential* relation to the desire for presence.

d) The death drive and good/evil

The relation between justice and what Derrida refers to in *Force of Law* as the bad and the worst often raises concern in legal debates.¹⁹¹ Similarly, the notion of the diabolical that Derrida repeatedly invokes in the context of the death drive could

¹⁸⁵ Ibid

¹⁸⁶ *Force of Law* (2), 252-253, *Force of Law* (1), 24-25

¹⁸⁷ *Force of Law* (2), 253 (part of which is newly added); *Force of Law* (1), 24; see also Derrida (note 48), *Limited Inc*, 116; and Derrida and Roudinesco (note 60), 53, 58 on the undecidable.

¹⁸⁸ *Force of Law* (2), 289-292, *Force of Law* (1), 54-56

¹⁸⁹ The undecidable, Derrida *Force of Law* (2), 259, *Force of Law* (1), 64 also points out, is often associated with the demonic or what is demonically ambiguous.

¹⁹⁰ See also Derrida (note 23), 209a on the undecidable concept which is no longer strictly speaking a concept.

¹⁹¹ See e.g. *Force of Law* (2), 257, *Force of Law* (1), 28

easily be understood in such a way that the death drive is viewed as something that should be avoided as if it was an evil to be equated with fascism. This is not the case.¹⁹² As the above discussion should already have made clear, the death drive concerns a return to the inorganic state of an organism or an organisation, a desire for self-destruction. It therefore entails a turn against the self. This is no doubt something dangerous; yet justice requires that it is not something to be simply avoided, but indeed to be affirmed, which at the same time does not mean that it should be embraced.¹⁹³ In Derrida's texts, the death drive finds expression also in the 'notions' of absolute hospitality, forgiveness, the gift, and autoimmunity, all of which involve a turn against the interests of the self, the state, or the law. Derrida's use of the terms 'the worst', 'evil', and 'monstrosity' should as always be viewed within the context that they appear.¹⁹⁴ At times these terms are used to refer to the future anterior (the future that comes (from the) back or from behind) which could be viewed as another term for what in the present context we have referred to as the 'return to the inorganic'.¹⁹⁵ When used as such, this usually goes hand in hand with a call for justice or a hyper-politics or hyper-ethics of the impossible where the subject or the state will no longer be in control.¹⁹⁶ At other times, Derrida uses terms such as 'evil' and 'the worst' to refer to and as an evaluation of the calculation which necessarily follows from justice as its condition of possibility. References to evil or the worst then serve as a reference to the holocaust¹⁹⁷ or to conservative politics,¹⁹⁸ used as a call for political engagement,¹⁹⁹ or relied on to say that without risking evil no chance will be given to justice.²⁰⁰ Derrida's statement in *Force of Law* must therefore be understood in context:

Abandoned 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. It is always possible, and this is part of the madness of which we were speaking. An absolute assurance against this risk can only saturate or suture the opening of the call to justice, a call that is always wounded. But incalculable justice commands calculation.²⁰¹

Derrida is clearly not saying here that this 'idea' of justice is in itself bad or the worst. This would of course not have been 'wrong' to say from the perspective of the self as this idea of justice requires absolute or just hospitality and thus self-destruction.²⁰²

¹⁹² For a number of insightful comments of Derrida which should dispel these kinds of illusions see the Post-scriptum to *Force of Law* (2), 295-297, *Force of Law* (1), 59-61 where he draws a clear distinction between Nazism on the one hand and justice which is heterogeneous to the order of right/law, on the other.

¹⁹³ See Jacques Derrida, *Die Tragiense, die Onmoontlike en die Demokrasie: 'n Onderhoud met Jacques Derrida, Fragmente* 3 (1999) 35 at 58.

¹⁹⁴ My thanks to Stewart Motha for his assistance in finding some of these references

¹⁹⁵ See inter alia Derrida (note 87), 99, 116 (threat of the worst); Derrida (note 96), 41, 47, 65 (radical evil); Derrida (note 23) 52a (evil); Derrida (note 51), 370 (monstrosity); Derrida (note 48), *Of Grammatology*, 5 (monstrosity); Derrida (note 109), 152 (read with Derrida, (note 193), 57-59.

¹⁹⁶ See e.g. *Force of Law* (2), 253 (newly added passage on the subject).

¹⁹⁷ See *Force of Law* (2), 298, *Force of Law* (1), 63 where the worst is explicitly equated with the final solution.

¹⁹⁸ Derrida and Roudinesco (note 60), 59

¹⁹⁹ *Force of Law* (2) 257, *Force of Law* (1), 28

²⁰⁰ Derrida (note 87), 29 (also at 27): 'To be "out of joint," whether it be present Being or present time, can do harm and do evil, it is no doubt the very possibility of evil. But without the opening of this possibility, there remains, perhaps beyond good and evil, only the necessity of the worst. A necessity that would not (even) be a fated one.' Justice or a-temporaneity is in other words the condition of possibility of both good and evil.

²⁰¹ *Force of Law* (1), 28, *Force of Law* (2), 257

²⁰² Derrida and Dufourmantelle (note 46), 25

Nevertheless Derrida is here pointing out that justice needs law and that there are different (better and worse) ways of calculating law. He is calling for an engagement in juridico-political battles.²⁰³ A brief analysis of Derrida's discussion of the relation between the death drive and sadism, referred to above, might clarify things further. Sadism belongs to the ego drives and the sexual drives.²⁰⁴ This is also the case with masochism, which Freud describes as a component drive complementary to sadism and which turns back towards one's own proper ego.²⁰⁵ Sadism is connected to the violent exercise of power, to domination; it is a drive for power.²⁰⁶ What sadism shows, Derrida contends, is that the pleasure principle is also a drive for power. The drive for power and sadism must thus not be confused with the death drive or the repetition compulsion.²⁰⁷ Like all the drives, the drive for power (and thus also sadism) derives from the need to restore to an earlier state of things.²⁰⁸ The drive for power (and sadism) is consequently firstly a satellite of death; the death drive and the repetition compulsion necessarily overflow power.²⁰⁹

4. Conclusion

The above analysis has sought to show the importance of the Freudian death drive and of Derrida's reflections on the law of language for an understanding of *Force of Law*. The life-death stricture that Derrida describes in *To Speculate – On Freud* and which is repeated (differently) in *Force of Law* puts in question self-government and autonomy as the dominant features of democratic constitutionalism. By pointing to the 'mystical' or erased memory trace of a death drive or unbounded desire in institutions such as a legal order, it calls on us to recognise a pre-origin which is not subject to mastery and which disrupts the idea of an institution as possession. The death drive read with Derrida's exploration of the law of language furthermore puts in question the idea of law as calculation prevalent in constitutional democracies. Calculation here refers not only to the use of strict legalistic methods of constitutional interpretation, but also procedural and value oriented approaches with reference to open-ended concepts such as human dignity or the common good. It was contended above that in every repetition or act of self-conserving violence, the law opens itself to unconditional justice. In calculating, a decision-maker is therefore by virtue of the structural functioning of desire necessarily also exposed to the impossible or to unconditional justice, that is, a loss of property, of rights, of economy, of meaning, of reason, of sovereignty, of citizenship. Only in this exposure is there a chance for decision, for responsibility, which would not simply involve a return of the law to itself. Unconditional justice 'is' beyond good and evil, and it calls for negotiation in singular instances to prevent this desire from being nothing at all as well as from

²⁰³ Something similar is at stake when Derrida (note 109), 167 speaks of the 'law of the worst'.

²⁰⁴ Derrida (note 2), 366

²⁰⁵ Ibid 368

²⁰⁶ Ibid 404

²⁰⁷ Ibid 405

²⁰⁸ This can also be expressed through the notion of mastery which Freud alludes to in his interpretation of Ernst's game. Death, however, here functions as the 'master'; see Jacques Derrida, *The Work of Mourning*, 2001, 90; Jacques Derrida, *Resistances of Psychoanalysis*, 1998, 117-118; Derrida (note 2), 402-405.

²⁰⁹ Derrida (note 2), 405; see also Derrida (note 193), 60 where he uses the example of what is referred to as 'criminal' killing (or murder) and links this to the death drive (something for which no account can be given within any economic, political or social rationality). Derrida also refers to this as a monstrosity. Rationality can in other words not fully account for murder. It should be clear that also in this context Derrida does not equate the death drive with murder. The death drive is the origin of both good and evil, one could say.

being appropriated by the worst, but not without affirmation of the impossible, of death as the impossible.

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