

DECONSTRUCTION AND LAW: DERRIDA, LEVINAS AND CORNELL

Jacques de Ville*

Drucilla Cornell's book The Philosophy of the Limit has for a long time been an important reference point in attempting to understand the relation between deconstruction and law. This article examines some of the themes discussed by Cornell in this influential book. The article specifically evaluates the translation of Derrida's thinking into law as argued for by Cornell and concludes from this reading that Cornell to some extent misrepresents and also unnecessarily "tames" Derrida's thinking. Instead of leading to the radical transformation of law and society, Cornell's book gives support to an understanding of the relation between law and justice that is unlikely to have this effect. The article expounds a different reading of deconstruction based on a number of Derridean texts and argues that Derrida's thinking poses a more radical challenge to law than that presented by Cornell.

Le livre The Philosophy of the Limit de Drucilla Cornell est depuis longtemps un point de référence important pour tenter de comprendre la relation entre la déconstruction et le droit. Cet article examine quelques-uns des thèmes que discute Cornell dans ce livre imposant. Plus exactement l'auteur porte un jugement sur le transfert de la pensée de Derrida vers le droit tel que le soutient Cornell et en conclut que jusqu'à un certain point, Cornell donne une impression incorrecte de la pensée de Derrida et «l'atténue» sans nécessité. Plutôt que de mener à la transformation radicale du droit et de la société, le livre de Cornell appuie une conception de la relation entre le droit et la justice qui rend un tel effet improbable. L'article présente une interprétation différente de la déconstruction basée sur un nombre de textes de Derrida et soutient que la pensée de Derrida lance au droit un défi plus radical que celui que présente Cornell.

* Professor of Law, University of the Western Cape. This article was first presented as a paper at the Society of Law Teachers of Southern Africa Conference at the University of Cape Town, 3-6 July 2006. I would like to express my gratitude to Paul Cilliers, Pierre de Vos and Solly Leeman, as well as two anonymous reviewers for their helpful comments on a previous draft of this article.

I. INTRODUCTION

In Cornell's wonderful and influential book, *The Philosophy of the Limit*,¹ she attempts to bring about a fusion between the thoughts of *inter alia* Derrida and Levinas.² Legal scholars are clearly indebted to Cornell for being one of the first to point out that Derrida is not simply a 'relativist' and that deconstruction does not entail a method,³ but that there is an "ethical dimension" to his thinking which had hitherto gone unnoticed. This book remains one of the most authoritative books on the relation between deconstruction and law. As it appears from recent contributions to the *Cardozo Law Review*,⁴ the question of the "translation" of Derrida into law remains a contentious issue. This article, although written many years after the publication of *PoL*, aims at contributing towards that debate through a close reading of *PoL* in order to ascertain whether its claims (to entail an accurate reflection of the relation between deconstruction and law) are justified. In other words, the question is whether the "translation" of Derrida into law has been faithfully executed by Cornell.⁵ My answer to this question is regrettably to a large extent in the negative. My aim in this article will be to examine those "inaccuracies" of translation. This is one reading of *PoL* which in my view has not been adequately undertaken in spite of a number of reviews and discussions of this fine book.⁶ I hope that my reading of *PoL* will provide a basis for an alternative translation of Derrida into law.

It could be argued that some of the criticism that is voiced in this article (assuming that it is accurate) is unfair because many of the Derridean themes that are referred to here were developed by Derrida only after the publication of Cornell's book. My response to this charge would be that, as Derrida has often said, these themes were already evident in his many texts before 1992,⁷ although perhaps in a less developed form. Even if the criticism voiced in this article is unfair in the first sense, I believe that my discussion of Cornell's reading of Derrida is relevant if for no other reason than that it shows the differences in thinking between her and Derrida on the relation between deconstruction and law. It must be acknowledged that my task, fourteen years after the publication of *PoL* and with the assistance of many more texts of

1 Drucilla Cornell, *The Philosophy of the Limit* (New York and London: Routledge, 1992) [Cornell, *PoL*].

2 See Preface to *ibid.*

3 See Pierre Schlag, "A Brief Survey of Deconstruction" (2005) 27 *Cardozo L. Rev.* 741 [Schlag, "Survey"]; and Jack M. Balkin, "Deconstruction's Legal Career (2005) 27 *Cardozo L. Rev.* 719 for respectively an analysis and a defence (of deconstruction as a method).

4 (2005) 27 *Cardozo L. Rev.* 631-845.

5 For reasons of space and competence I refrain in this article from evaluating the accuracy of Cornell's translation of Levinas into law.

6 See Anne Barbeau Gardiner, "The Philosophy of the Limit" (Winter 1993) 22(2) *CLIO* 180 for a review by someone who, because of Cornell's left politics, does not think the book is so "fine".

7 See Jacques Derrida, *Rogues: Two Essays on Reason*, trans. by Pascale-Anne Brault & Michael Naas (Stanford: Stanford University Press, 2005) at 39 [Derrida, *Rogues*]; Jacques Derrida *et al.*, "Hospitality, Justice and Responsibility: A Dialogue with Jacques Derrida" in Richard Kearney & Mark Dooley eds., *Questioning Ethics: Contemporary Debates in Philosophy* (London and New York: Routledge, 1999) 65 at 80-82 [Derrida *et al.*, "Hospitality"].

Derrida and on Derrida,⁸ is no doubt, in a sense easier than the one Cornell set for herself in the 1980s and early 1990s, when her “alliance” with Derrida was most explicit.⁹ It furthermore can be noted that Cornell, as recently as 2003, repeated many of her earlier claims espoused in *PoL* regarding Derrida and law.¹⁰

My main “charge” against Cornell, as will appear from the discussion below, is that she “modifies” and “tames” Derrida’s radical thinking in translating it into law. One could argue that this move of Cornell is deliberate; that she intentionally decides to follow (her reading of) Levinas (and in this way go “beyond” Derrida) in synchronizing “the affirmation of the Saying with its negation in the said”¹¹ or, stated differently, in aspiring “to enact the ethical relation.”¹² Cornell nevertheless still claims to be following Derrida, in that she will be “attempting to *say* what Derrida *does*,” and that she will “take us beyond Derrida’s own relative silence.”¹³ She also frequently refers to “Derrida’s philosophy of the limit.”¹⁴ The accuracy of these claims has to be tested.¹⁵ As will appear from the discussion below, I believe that there are a

8 My reliance on secondary texts will of course not be indiscriminate. In support of my reading of Derrida and criticism of Cornell, I will rely on those texts which, on my reading, remain very close to Derrida’s texts.

9 See note 14 below on the notion of ‘alliance’ in Cornell’s texts.

10 See Drucilla Cornell, “Rethinking Legal Ideals after Deconstruction” in Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey eds., *Law’s Madness* (Ann Arbor, University of Michigan Press, 2003) 147. This analysis contains no reference to Derrida’s many later texts of the 1990s. In Drucilla Cornell, *Between Women and Generations: Legacies of Dignity* (Lanham: Rowman & Littlefield Publishers, 2005), a hauntingly beautiful and personal text, Cornell does make reference to a few of Derrida’s later texts [Cornell, *Between Women*]. This is also the case in Drucilla Cornell, “Derrida: The Gift of the Future” (2005) 16 (3) *Differences: A Journal of Feminist Cultural Studies* 68 where Cornell reflects on some of the reactions to Derrida’s death.

11 Cornell, *PoL*, *supra* note 1 at 89.

12 *Ibid.* at 84. See also at 64 where Cornell states that instead of preferring one to the other, she will read Derrida and Levinas together in order to enact a non-violent relation to otherness. The ethical relation is at times linked to the utopianism that Cornell detects (wrongly, in my view) in Derrida’s thinking; see at 8, 186 fn 13. A discussion of utopianism and its relation to deconstruction follows below.

13 Cornell, *PoL*, *supra* note 1 at 90.

14 *Ibid.* at 130, 138 and 178. It is interesting to note that in some of her other publications Cornell criticizes Derrida or expressly indicates her disagreement with Derrida; see e.g., Drucilla Cornell, *Beyond Accommodation: Ethical Feminism, Deconstruction, and the Law* (New York and London: Routledge, 1991) 96, 110, 118 [Cornell, *Beyond Accommodation*]; and Cornell, “Rethinking Legal Ideals after Deconstruction” *supra* note 10, at 164 on points similar to those discussed in *PoL* which are attributed to Derrida and incorporated within the model presented in *PoL*. In *Beyond Accommodation* at 96-97 Cornell presents her approach as merely “an alliance” with deconstruction. This is not the case in *PoL*. Cornell has explained her use of the notion of “alliance” in an interview with Penny Florence; see Drucilla Cornell, “Toward the Domain of Freedom: Interview with Drucilla Cornell by Penny Florence” in Cynthia Willet ed., *Theorizing Multiculturalism: A Guide to the Current Debate* (Oxford: Blackwell, 1998) 219, at 230. Cornell notes here that she would never call herself “a Derridean” and that she refuses to keep her alliances with different male philosophers “neat”. This implies both an identification and a dis-identification with the philosopher concerned.

15 Cornell herself claims that Critical Legal Studies has ‘misappropriated’ and ‘misinterpreted’ Derrida (Cornell, *PoL*, *supra* note 1 at 100). She also criticizes other feminists for making the “mistake” of directly translating deconstruction “into a ‘positive’ political or legal programme” of a “tolerance of difference” (*Ibid.* at 103-105, 181). Like Cornell, I do not believe that there is only one way in which Derrida can be translated into law, but that there are more and less accurate ways of doing this. Cornell’s attempt is clearly more accurate than those of others,

number of problems with this approach, apart from the fact that it does not remain true to Derrida. Despite its declared aims, this article should not be read or understood as simply a theoretical exercise in purity, but as a reflection on how “best” to respond to the injunction of unconditional justice which we have inherited from the tradition.

The discussion below will proceed by focusing on and discussing a number of themes in *PoL* and ascertaining in each instance how this corresponds with Derrida’s thinking. Reference will also be made to some of Cornell’s other texts to get as clear an understanding of her thinking as possible. First, however, an overview will be given of the central themes of *PoL*.

II. THE PHILOSOPHY OF THE LIMIT AND DECONSTRUCTION

PoL claims to be an interpretation of deconstruction, which Cornell renames “the philosophy of the limit”. This renaming, she claims, indicates more clearly what deconstruction is really about. It also aims at reflecting the relationship between Derrida and Levinas’s ethics of alterity.¹⁶ The notion of the “limit” in this renaming exercise is required, Cornell says, because she wishes to retain the notion of an ideal towards which we should strive. The “limit” indicates that an ideal can never be said to represent the “truth” or claim that it is “just.” In the words of Cornell:

This book will attempt to reformulate the juridical and legal significance of this recognition of the limits of idealism, if idealism is understood to give us a system that can successfully incorporate what is other to the system and thereby erase the system’s contradictions.¹⁷

The theme of the limit is also evident in the following passage:

The Law of Law [or the Good] calls us to interpretation through an appeal to justice, and this process of interpretation also projects the good of the community, which is itself only an interpretation and not the last word on what the good of the community actually could be.¹⁸

but, as stated before, I believe that her attempt suffers from serious shortcomings. Rodolphe Gasché, *The Tain of the Mirror* (Cambridge, Massachusetts and London, England: Harvard University Press, 1986) at 7-8 explains the notions of “truth” and “accuracy” insofar as readings of Derrida’s (open) texts are concerned as follows: “Derrida’s philosophy...is plural, yet not pluralistic in the liberal sense....This plural nature, or openness, of Derrida’s philosophy makes it thoroughly impossible to conceive of his work in terms of orthodoxy...primarily because it resists any possible closure, and thus doctrinal rigidity, for essential reasons. Still, such openness and pluralism do not give license to a free interpretation of Derrida’s thought, or for its adaptation to any particular need or interest. Nor are all the interpretations of Derrida’s thought that seek legitimacy in such openness equally valid” [Gasché, *Mirror*].

16 See Cornell, *PoL*, *supra* note 1 in the Preface and at 1 and 110.

17 *Ibid.* at 2. See also Cornell, *Beyond Accommodation*, *supra* note 14 at 169.

18 Cornell, *PoL*, *supra* note 1 at 113.

Cornell's argument in *PoL*, in summary form, is that the insights of deconstruction can be relied on to provide us with an approach to legal decision-making. The model that she constructs on this basis makes provision for a paradox or "aporia"¹⁹ between the following "orders":

first, the Good. This is a reflection of the ethical relationship of responsibility for the other and is based on Levinas's thinking. This is a relation which is asymmetrical in nature. This relation cannot be concretized within a legal system, but nevertheless commands us, calls us to justice.²⁰

second, the good. This is a legal order based on the principle of reciprocal symmetry. This principle is required because the Good cannot be directly translated into law, as conflicting claims need to be harmonized. Reciprocal symmetry is the best we have at the moment, even though it inevitably leads to the disregard of certain others. The legal order with its conflicting legal principles needs to be interpreted in light of the principle of reciprocal symmetry. This interpretation entails recollective imagination. We should look to the past (the "might have been") and project the principles we find there into the future (the "should be").

These two orders are presented by Cornell as uncrossable.²¹ In the above model, Cornell gives expression to her understanding of some of the "ideas" that she finds in Derrida's texts. These include the other, the remains, the ideal community, utopia, mourning, memory and responsibility. In what follows, these notions will be enquired into in more detail.

III. THE OTHER

On the question of "the other" in law, the following passage, where Cornell gives an exposition of Levinas's thought and with which she appears to agree, needs to be quoted in full:

The basis of ethics is not *identification with* those whom we recognize as like ourselves, instead the ethical relation inheres in the encounter with the Other, the stranger, whose face beckons us to heed the call to responsibility. The precedence of the Other means that my relationship to her is necessarily asymmetrical. Reciprocity is, at the very most, the affair of the Other.

19 As we will see in what follows, the relation between these two "orders" in Cornell's model turns out to not present us with an aporia or a non-road (Jacques Derrida, "Force of Law: The 'Mystical Foundation of Authority'", trans. by Mary Quaintance in Drucilla Cornell, Michel Rosenfeld & David Gray Carlson eds., *Deconstruction and the Possibility of Justice* (New York and London: Routledge, 1992) 3 at 16, but instead with hope or an aspiration [Derrida, *Possibility of Justice*].

20 Cornell, *PoL*, *supra* note 1 at 91, 98-100, 105.

21 *Ibid.* at 157, 166 (also in Cornell, "Rethinking Legal Ideals after Deconstruction" *supra* note 10 at 150, 162).

In the asymmetrical and yet face-to-face relation with the Other, the stranger who calls to me, the subject first experiences the resistance to encapsulation of the “beyond.” In the face-to-face relation we run into the infinity that disrupts totality.²²

This encounter with the other is closely related to “the Good,” as appears from the following passages:

Through the encounter of the Other who calls me, the subject first experiences the resistance to encapsulation of the Beyond. The Law of Law or the Good, is precisely the echo of the Call of the other as a prescriptive command directed toward the future that disrupts the Hegelian system and the pretense of any system to have adequately represented the totality of what “is” Good. The Law of Law “is” as rupture of the status quo.²³

[A]s we have also seen in Levinas, the Good is precisely what eludes our full knowledge. We cannot grasp the Good but only follow it as the command of the Other. It is precisely the Good, the Law of Law, as responsibility to the Other that calls us to justice.²⁴

This understanding of Levinas/Derrida has very important consequences for Cornell’s proposed model for judicial decision-making. Cornell, for example, says that the judge owes a responsibility to *the parties* that come to court (“the actual individuals”) and not to the legal system.²⁵ This leaves her with a dilemma. In *Roe v Wade*²⁶ the question then would inevitably arise who the “other” is that gives us access to infinity: the single, pregnant woman who instituted the action to have the Texas abortion law declared invalid (and those who supported her) or those who opposed the action, including the State (or perhaps, the fetus)?²⁷ For Cornell, every person who is involved in a court case is a potential “other”.²⁸ In the criminal context, every convicted criminal is

22 Cornell, *PoL*, *supra* note 1 at 66. See also at 99.

23 *Ibid.* at 98-99.

24 *Ibid.* at 100.

25 *Ibid.* at 143. This Cornell compares with the position of Luhmann whose focus is said to be on the system.

26 (1973) 410 U.S. 113.

27 Cornell, *PoL*, *supra* note 1 at 152. Cornell views the fetus as the other “Other” and solves the dilemma as follows: “Of course, the fetus can itself be recognized as Other, with infinite right. But whether or not this recognition is to be embodied in law, the Justices must directly confront the woman as Other, they cannot simply follow along with the system which, as constituted, allows the rights of women to go unnoticed.”

28 For criticism of this approach of Cornell, see also William Rasch, “Immanent Systems, Transcendental Temptations, and the Limits of Ethics” in William Rasch & Cary Wolfe eds., *Observing Complexity: Systems Theory and Postmodernity* (Minneapolis, MN: University of Minnesota Press, 2000) 73 at 85-87.

said to be an “other”,²⁹ whereas in the civil context, every person who loses a court case is an “other”.³⁰

This approach clearly leaves the ethical relationship with not much of a role to play in a legal system. The best the legal system can strive for when every person involved in a court case is a potential other is the reconciliation of all interests, whilst acknowledging that this is not possible to achieve.³¹ On this interpretation of the relation between “the ethics of alterity” and law, it makes sense rather to focus on the ideals towards which law should strive or aspire, because what is required from us in the ethical relation is something impossible (not *the* impossible) and therefore largely irrelevant. The ethical relation and its relation to law conceived as such, also leaves us with something very close to relativism. If every person involved in a court case is a potential other who has to be recognized and whose perspective should ideally be respected, it is safer to ignore “the Good” and focus on the law and that towards which it should strive. This is clearly not in accordance with Derrida’s thinking. Not only does Derrida insist that every decision, in order to be responsible, has “to give itself up to the impossible decision,”³² he also insists that justice is not something which is “Good,” at least not for “us”.³³ Derrida’s approach to justice can be compared more favourably with the words which J.M. Coetzee, in *Waiting for the Barbarians*,³⁴ places in the mouth of the magistrate of an imperial outpost who had been deposed, assaulted and incarcerated after contact with the “barbarians”. The magistrate manages to escape from his cell when twelve “barbarians” are captured and brought into

29 Cornell, *PoL*, *supra* note 1 at 113. Cornell indicates her agreement with Cover in this respect as follows: “[F]or Cover, the danger of legal interpretation is that because it purports to heal the rift, it blinds us to the wound of the fragmentation of our so-called community as we violate the perspective of the Other in the criminal sentence.... The legal system as a mechanism of social control operates through the inscription of the sentence on the back of its victims.”

30 *Ibid.* at 114: “[W]hen one legal interpretation is vindicated as to what constitutes the good of the nomos, it is imposed upon the other as if the Good, in the strong sense, had been achieved.”

31 See Druilla Cornell, *Transformations: Recollective Imagination and Sexual Difference* (New York and London: Routledge, 1993) 35-36 [Cornell, *Transformations*]: “Synchronization...points us to the real problem: How do we develop an institutional analysis which allows us not only to synchronize the competing rights of individuals, but also the conflicts between the individual and the community, and between different groups in society? The goal of a modern legal system is synchronization and not rational coherence. Synchronization recognizes that there are competing rights situations and real conflicts between the individual and the community, which may not be able to yield a “coherent” whole. The conflicts may be mediated and synchronized but not eradicated. In Dworkin, rational coherence depends on the community acting as a single speaker. In reality, a complex, differentiated community can never be reduced to a single voice. Synchronization recognizes the inevitable complexity of the modern state and the imperfection of all our attempted solutions.” See also Cornell, *PoL*, *supra* note 1 at 137: “The Other is other to the system. Incorporation into the system is the denial of the Other.” This approach shows a number of similarities with the ethics of “comprehensive pluralism” of Michel Rosenfeld, “Derrida’s Ethical Turn and America: Looking Back from the Crossroads of Global Terrorism and the Enlightenment” (2005) 27 *Cardozo L. Rev.* 815. Rosenfeld contrasts his approach with Derrida’s “ethics of difference.” On my reading, Rosenfeld does not show an adequate understanding of the notion of “singularity” in Derrida’s thinking.

32 Derrida, *Possibility of Justice*, *supra* note 19, at 24.

33 See further para. VI below.

34 (London: Vintage, 1980).

town. He joins the crowd in viewing the spectacle. The magistrate makes some kind of attempt to prevent the torture and breaking of bones that are taking place. He reflects on his actions as follows:

Would I have dared to face the crowd to demand justice for these ridiculous barbarian prisoners with their backsides in the air? *Justice*: once that word is uttered, where will it all end? Easier to shout *No!* Easier to be beaten and made a martyr. Easier to lay my head on a block than to defend the cause of justice for the barbarians: for where can that argument lead but to laying down our arms and opening the gates of the town to the people whose land we have raped? The old magistrate, defender of the rule of law, enemy in his own way of the State, assaulted and imprisoned, impregably virtuous, is not without his own twinges of doubt.³⁵

The need to identify the other is of course part of the problematic situation with which one is faced when one attempts to translate Levinas's thought directly into law.³⁶ There is seldom only one party in court who can be compared with the face-to-face relation.³⁷ On my reading of Derrida, Cornell's is a failed attempt to translate the asymmetrical relation to the other into law. Pointing out some of the differences between Derrida and Levinas will assist us in evaluating this claim. On Derrida's analysis, what Levinas proposes regarding the encounter with the other (and which Cornell adopts as part of her model for decision-making) is not possible – it is an empiricism (an unmediated mode of experience) which does not take account of language.³⁸ There is no possibility of an encounter of the other as other.³⁹ The other so encountered will always be a phenomenon within language.⁴⁰ In other words, we cannot get outside of language and experience the other as other (and in this way access infinity).⁴¹ This, of course, does not mean that there are no

35 *Ibid.* at 118. Compare in this respect Jacques Derrida, "Hospitality" in Gil Anidjar ed., *Acts of Religion* (New York and London: Routledge, 2002) 358 at 361 [Derrida, *Acts of Religion*]; and Anne Dufourmantelle & Jacques Derrida, *Of Hospitality*, trans. by Rachel Bowlby (Stanford: Stanford University Press, 2000) 25-27 [Dufourmantelle & Derrida, *Of Hospitality*]; and Derrida *et al.*, "Hospitality", *supra* note 7 at 70-71, on absolute hospitality.

36 The same problems are faced by those who review *PoL*. Adam Thurschwell, "On the Threshold of Ethics" (1994) 15 *Cardozo L. Rev.* 1607 at 1636-1639 argues, following Cornell, that all those litigants who lose, whether in civil or criminal cases are others. This is contested, at least partly, by Elizabeth Weed, "Reading at the Limit" (1994) 15 *Cardozo L. Rev.* 1671 at 1681 fn 41 who notes that she disagrees "with Thurschwell's characterization of convicted criminals as Others to the law; they may be losers but they are not necessarily Others."

37 See also Schlag, "Survey", *supra* note 3 at 749-751.

38 In Cornell, *Beyond Accommodation*, *supra* note 14 at 26-31 Cornell agrees with Derrida in this respect in her discussion of Husserl and phenomenology.

39 Jacques Derrida, *Paper Machine*, trans. By Rachel Bowlby (Stanford: Stanford University Press, 2005) 144 [Derrida, *Paper Machine*]; Derrida *et al.*, "Hospitality", *supra* note 7 at 71.

40 Jacques Derrida, "Violence and Metaphysics: An Essay on the Thought of Emmanuel Levinas" in Jacques Derrida *Writing and Difference*, trans. by Alan Bass (London and New York: Routledge 2001 ed.) 97 at 190.

41 Drucilla Cornell, "Rethinking the Beyond within the Real (Response to Rasch)" in Rasch & Wolfe, *supra* note 28, 99 at 105 has more recently noted that she has become critical of her "own

encounters with actual persons, whether in daily life or in law. However, using the terminology of “the other” in law as a reference to persons or parties leads to all kinds of problems. As we saw above, the question almost inevitably arises ‘which one of the two or more parties is the other?’ The reason for Derrida’s argument that we cannot encounter the other as other is to emphasize that we always tend to view and treat those we encounter through an appropriation from within our own privileged and self-serving perspective or paradigm. However, he does not dismiss Levinas’s insistence on asymmetry. Translated into law, we can say that a case is always viewed from within the terminology and prejudices which form part of the legal tradition, with property interests usually playing a predominant role. A case nevertheless provides an opening, a chance for asymmetry, unconditional justice. Therefore a case “is” and “is” not, a pure event, an event which gives justice a chance.⁴² On the one hand, the legal tradition provides for its own application to the case in accordance with norms or principles (the conditional), thereby neutralizing the event, approaching it from out of some horizon.⁴³ On the other hand, an analysis of the legal tradition shows that it contains within itself an injunction of unconditional justice, of allowing the impossible event.⁴⁴ The latter would require that we not approach the future, that which happens, with conditions and from a horizon, as a “case” to which the law is to be “applied”.⁴⁵ Justice “is” completely without self-interest. Derrida speaks of justice in the same breath as absolute hospitality and the perfect gift.⁴⁶

appropriation of Immanuel (sic) Levinas, on which I rely in *The Philosophy of the Limit*, to represent the ethical as the beyond within the real” (105). This distancing from Levinas has on my reading more to do with Cornell’s reading of Levinas’s representation of the feminine than with his position that the (encounter with) the other gives access to infinity. Cornell still states that it is the other to the system who as observer can view the system as system and as delimited by virtue of her “very outside or marginalized position against that system” (104). It is furthermore “the ‘beyond within the real’ and the delimitation of the system by its other that keeps open the space for the ethical and political challenge to what ‘is’ because what ‘is’ is never simply there” (104). One can say that the other as subject or as “observer” in Cornell’s model still has (or at least gives) access to the beyond within the real. See also Drucilla Cornell, “Civil Disobedience and Deconstruction” in Nancy J. Holland ed., *Feminist Interpretations of Jacques Derrida* (University Park, Pennsylvania: The Pennsylvania State University Press, 1997) 152-153 where she relies on Levinas to explain Derrida’s intervention into Lacan. She states here, consistent with the above, that “Levinas’s messianic conception of justice demands the recognition of the call of the Other, which always remains a call and can never be fully answered.”

42 See Derrida, *Rogues*, *supra* note 7 at 135, 143-144. This of course applies not only to a court case, but to (almost) any kind of legal writing (including the enactment of legislation).

43 See also *ibid.* at 151-152. What Pierre Legrand, “Paradoxically, Derrida: For a Comparative Legal Studies” (2005) 27 *Cardozo L. Rev.* 631 at 649 says of Kötz’s book (Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law*, trans. by Tony Weir, 3d ed. (Oxford: Clarendon Press, 1998) can also be said of the traditional approach to the application of law: “It reveals ‘the desire to be all-powerful, to control the meanings of experience before encounter so as not to be overwhelmed.’”

44 Derrida, *Possibility of Justice*, *supra* note 19.

45 See Jacques Derrida, “Autoimmunity: Real and Symbolic Suicides: A Dialogue with Jacques Derrida” in Giovanni Borradori, *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida* (Chicago and London: The University of Chicago Press, 2003) 85-91 for a deconstruction of the concept of an event.

46 See Derrida *et al.*, “Hospitality”, *supra* note 7 at 68-69.

Although there are a number of references to “the other” and to “others” in *Force of Law*, specifically with reference to Levinas,⁴⁷ Derrida clearly views a “case” as an “event” which gives a chance for justice:

“Perhaps,” one must 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 the experience of absolute alterity is unrepresentable, but it is the chance of the event and the condition of history.⁴⁸

It would, in my view, perhaps be less confusing in the legal context to speak of the event or the *arrivant* (that which or who comes),⁴⁹ rather than “the other,” when we think of how deconstruction can be “translated” into law.⁵⁰ A focus on the event, rather than on some specific “other”, would allow us to rethink without calculation many of the injustices in law, including those with regard to women, the environment, “animals,” immigration, children, religious and other minority groups, as well as economic injustices and the injustices of the criminal justice system.⁵¹ This would also allow us to think of a “case” that comes to court as the chance for a unique event, providing a chance for, as well as a risk of, unconditional justice. To speak as Cornell does of a reconciliation of interests as that which we should strive towards, even if regarded as impossible, gives legitimacy to those interests (usually situated on the political right) which fundamentally oppose and wish to restrict to the greatest extent possible the impossible: unconditional justice, absolute hospitality and the perfect gift.

Another text of Derrida which frequently leads to similar misconceptions, namely that every person (also in the legal context) is an other, is *The Gift of Death*⁵² where Derrida uses the phrase *tout autre est tout autre* (every other (one) is every (bit) other).⁵³ This text is also sometimes relied on to argue that every case entails a sacrifice of the interests of the party that loses.⁵⁴ We do not

47 Derrida, *Possibility of Justice*, *supra* note 19, at 22.

48 *Ibid.* at 27. See also at 24-25.

49 See Jacques Derrida, *Aporias*, trans. by Thomas Dutoit (Stanford: Stanford University Press, 1993) 33-34 [Derrida, *Aporias*]; Jacques Derrida & Elisabeth Roudinesco, *For What Tomorrow...A Dialogue*, trans. by Jeff Fort (Stanford: Stanford University Press, 2004) 51-53 [Derrida & Roudinesco, *For What Tomorrow*].

50 It would of course not be “wrong” to speak of “the other” in translating Derrida into law, provided this terminology is used to refer to the unforeseeable, the event, or the incalculable; see Derrida & Roudinesco, *For What Tomorrow*, *supra* note 49, at 49.

51 See in this regard Derrida’s discussion of many of these issues in *ibid.* at 179.

52 Jacques Derrida, *The Gift of Death*, trans. by David Wills (Chicago and London: The University of Chicago Press, 1995) [Derrida, *Gift of Death*].

53 *Ibid.* at 68-71; see e.g., Desmond Manderson, “Proximity and the Ethics of Law” (2005) 28(3) U.N.S.W.L.J. 697 at 703-704.

54 Derrida, *Gift of Death*, *supra* note 52 at 85-86; see Johan van der Walt, *Law and Sacrifice: Towards a Post-Apartheid Theory of Law* (London and Johannesburg: Birkbeck Law Press and Wits University Press, 2005) 11-14, 20. On my reading, the extensive publications of Van der Walt on deconstruction and law closely resemble that of the earlier work of Cornell (of the late 1980s to the early 1990s). The notions of plurality, reconciliation and sacrifice that he

have space here for a lengthy analysis of *The Gift of Death*. It would be sufficient to note that, read in context, what Derrida is saying here is that nothing justifies the drawing of a distinction between and giving to those that are near and dear to us, rather than others (those we do not know or who are far away).⁵⁵ What he says can hardly be translated into an argument that in every court case the person who loses (irrespective of the interests or political views of that person) is an other whose loss should be mourned, or that because of this “undecidability”, posed by the presence of many others, we are fated to revert to legal principles.

IV. THE REMAINS

Cornell closely ties the notion of “the other” to the notion of the “remains” in *PoL*. Following Charles Peirce’s criticism of Hegel and linking this to Levinas’s encounter with the other as other, Cornell puts forward the notion of “secondness” and links this in turn to deconstruction. She explains the notion of secondness as follows:

The second aspect of deconstruction more accurately described by the notion of the limit is related to what Charles Peirce in his own critique of Hegelian idealism called secondness. By secondness Peirce indicates the materiality that persists beyond any attempt to conceptualize it. Secondness, in other words, is what resists. Very simply, reality is not interpretation all the way down. As we will see, Derrida continually points to the failure of idealism to capture the real.⁵⁶

In *Transformations*⁵⁷ Cornell describes secondness as “the real that resists” and as “that against which we struggle and which demands our attention to what is outside ourselves and our representational schema.” Secondness is also equated with the “irreducible exteriority of what Adorno called the ‘suffering physical.’”⁵⁸ Cornell⁵⁹ points out that Peirce does not deny the mediation of all human knowledge of reality. Nevertheless, secondness is what remains; that which cannot be fully captured by any system of signs. Cornell⁶⁰ furthermore tells us that “[s]econdness reminds us that there is an irreducible otherness that remains ‘beyond’ to all systems of conscious meaning.” Cornell, in other words, expresses the view that there is a reality outside of language⁶¹ which cannot be captured by language. Through a reading of Levinas this “reality” is

develops in his publications since the late 1990s find their correlates in Cornell’s notions of secondness, synchronization and the remains.

55 See also Jacques Derrida *et al*, “On Forgiveness: A Roundtable Discussion with Jacques Derrida” in John D. Caputo, Mark Dooley and Michael J. Scanlon eds., *Questioning God* (Bloomington and Indianapolis: Indiana University Press, 2001) 52 at 68-69 [Derrida *et al*, *Questioning God*].

56 Cornell, *PoL*, *supra* note 1 at 1.

57 Cornell, *Transformations*, *supra* note 31 at 26.

58 *Ibid.* at 26.

59 *Ibid.* at 26.

60 *Ibid.* at 26.

61 See also *ibid.* at 25.

equated with the other who is not represented in language. The other is the real that resists, the remains:

Adorno shares with Derrida a critique of Hegelian totalisation in the name of the remain(s), the otherness of “things” that can never be adequately captured by any imposed definitions. Such an exposure refuses the *idea* that what “reality” is can ever be reduced to our conception of it....The “conversation of mankind,” for Derrida, does not do away with the Other to us as “material” reality. In this sense, Derrida is closer to Charles Peirce in his understanding that there “is” a reality labeled by Peirce as secondness. In his beautiful essay on the death of his friend Paul de Man, he spoke of the secondness of death itself. “It” is not interpretation all the way down for Derrida. Paul de Man is dead, and that death and one’s powerlessness before it has all the force of hitting against a barrier that Peirce called secondness. Derrida’s philosophy of the limit exposes *the limit* of the move to objective “spirit,” particularly in the form of “the conversation of mankind,” as the answer to all our questions.⁶²

The notion of secondness is ambiguous enough to make us think that there is a correlation to Derrida’s thinking. However, the differences could not be greater. Although Derrida does speak of that which resists, the remains, I still need to find the text where Derrida says that there is a reality outside of language which resists interpretation. Does Derrida’s famous “there is nothing outside of the text”⁶³ not say it all? For the sake of clarity we should perhaps refer to Derrida’s explanation of this enigmatic saying:

What I call “text” implies all the structures called “real,” “economic,” historical,” socio-institutional, in short: all possible referents. Another way of recalling once again that “there is nothing outside the text.” That does not mean that all referents are suspended, denied, or enclosed in a book, as people have claimed, or have been naïve enough to believe and to have accused me of believing. But it does mean that every referent, all reality has the structure of a differential trace, and that one cannot refer to this “real” except in an interpretive experience.⁶⁴

Derrida does in the above passage speak of the “real,” but he does so in a special sense. The “remains”, of which Derrida speaks in *Glas*⁶⁵ and which Cornell relates to “the other” that cannot be encapsulated within the system,⁶⁶

62 Cornell, *PoL*, *supra* note 1 at 178.

63 Jacques Derrida, *Of Grammatology*, trans. by Gayatri Chakravorty Spivak (Baltimore and London: The John Hopkins University Press, 1974) at 158.

64 Jacques Derrida, *Limited Inc*, trans. by Samuel Weber (Evanston, Illinois: Northwestern University Press, 1988) 148.

65 Jacques Derrida, *Glas*, trans. by John P. Leavy, Jr. and Richard Rand (Lincoln and London: University of Nebraska Press, 1986).

66 Cornell, *PoL*, *supra* note 1 at 63 and further.

“is” something completely different from secondness or materiality. Because of her vacillation between Derrida and Levinas, it is not always clear whether this “other” that Cornell refers to is a concrete other (person) or that which is in excess to representational systems. Cornell at one point in *PoL* does explain that she understands the notion of “the other” in two different ways:

Ethical alterity [sic]⁶⁷ is not just the command of the Other, it is also the Other within the *nomos* that invites us to new worlds and reminds us that transformation is not only possible, it is inevitable.⁶⁸

As we saw earlier, Cornell follows Levinas in saying that the concrete other person gives access to the infinite Other.⁶⁹ Both “others” can therefore on a certain reading of Cornell be identified with the “remains”.⁷⁰ Cornell’s reading of Derrida (and Adorno) as “materialists”⁷¹ as well as the way in which “the other” is generally used in *PoL*, however, indicate that “the remains” in Cornell are primarily those who are “other” to the system.⁷² This is a problematic understanding of the concept of the “remains”. The “remains” that Derrida speaks of cannot be identified with a physical person as Cornell supposes. Instead “the remains” refers to that which escapes representation, as, for example, justice or absolute hospitality, the pure gift or absolute forgiveness; that which is never present as such, but of which a trace remains in the same. In an interview Derrida has explained the notions of trace and the remains as follows:

A trace is never present, fully present, by definition; it inscribes in itself the reference to the spectre of something else. The

67 Cornell does sometimes correctly refer to Levinas’s philosophy of *alterity*.

68 Cornell, *PoL*, *supra* note 1 at 111.

69 This comes out very clearly in an earlier article by Drucilla Cornell, “Post-Structuralism, the Ethical Relation, and the Law” (1988) 9 *Cardozo L. Rev.* 1587, specifically at 1624-1625 [Cornell, “Post-Structuralism”].

70 See also Cornell, *PoL*, *supra* note 1 at 69 and Cornell, “Beyond Accommodation” *supra* note 14 at 143-144.

71 Cornell, *PoL*, *supra* note 1 at 56, 72, 178. The references to “materiality” in Paul de Man’s texts that Derrida discusses in Jacques Derrida, *Memoires for Paul de Man*, Revised ed, trans. by Cecile Lindsay *et al* (New York: Columbia University Press, 1986, 1989) 52-53 are linked by Derrida to (1) that which is without presence and without substance, (2) thinking (as opposed to knowing) and (3) “true ‘mourning.’” As one can see, especially in Derrida’s later texts, these ‘themes’ are linked to unconditional justice, absolute hospitality and the pure gift. At 53, Derrida also links “matter of this sort” to “memory” (as opposed to interiorizing recollection) and memory in turn is associated with “rupture, heterogeneity, disjunction” (at 56) and the “to come” (at 58) [Derrida, *Memoirs*].

72 Cornell, *PoL*, *supra* note 1 at 63, 66, 97. Cornell’s reading of Adorno (specifically at 21 and 23-24, 25-26, 35) also appears to assist her in her understanding of Derrida. The ethical relation sometimes is characterized by a return to nature (see especially at 34). That Cornell understands the remains in this way is also the reading of Christina Crosby, “Language and Materialism” (1994) 15 *Cardozo L. Rev.* 1657 at 1658 and 1659; and Thurschwell, *supra* note 36 at 1630 and 1638. Thurschwell at 1638 refers specifically to *PoL* at 149 where Cornell says that the tradition or system “is called to remember its own exclusions and prejudices.” On my reading, Cornell also adopts this approach in Drucilla Cornell, “Rethinking the Beyond of the Real” (1995) 16 *Cardozo L. Rev.* 729, specifically at 730-731 and 791-792.

remainder is not present either, any more than a trace as such. And that is why I have been much taken up with the question of the remainder, often under this very name or more rigorously under that of *restance* or remaining. The remaining of the remainder is not reducible to an actual residue, or to what is left after a subtraction, either. The remainder is not, it is not a being, not a modification of that which is. Like the trace, the remaining offers itself for thought before or beyond being. It is inaccessible to a straightforward intuitive perception (since it refers to something wholly other, it inscribes within itself something of the infinitely other), and it escapes all forms of prehension, all forms of monumentalization, and all forms of archivation. Often, like the trace, I associate it with ashes: remains without a substantial remainder, essentially, but which have to be taken account of and without which there would be neither accounting nor calculation, nor a principle of reason able to give an account or a rationale (*reddere rationem*), nor a being as such.⁷³

The above passage again shows that Cornell misinterprets Derrida. One could have let it pass were it not for the serious political consequences of such misinterpretation. If “the remains” refer simply to every person who loses a court case (as we saw above),⁷⁴ deconstruction would have no (or at least very conservative) political consequences. Those who resist the “transformation” of society through court action would then be “others” who are owed an infinite responsibility and who, when they “lose”, would have to be “mourned”. If this is the case, it would have been better if deconstruction had never “happened.”⁷⁵ If the remains, instead, refers to that which escapes knowledge, to unconditional hospitality, to the perfect gift, and to unconditional forgiveness, the political consequences of any deconstruction could be immense for all those who are traditionally excluded or marginalised through the structure of thinking referred to by Derrida as carno-phallogocentric.⁷⁶

V. MOURNING

A similar problem arises in Cornell’s discussion of Derrida’s reflections on mourning.⁷⁷ Cornell’s exposition of Derrida’s analysis of mourning is accurate

73 Derrida, *Paper Machine*, *supra* note 39, at 151-152.

74 See para. III.

75 Derrida often says that deconstruction is not something that one does; it is something that “happens” or which is constantly at work; see Derrida *et al*, “Hospitality”, *supra* note 7 at 65; Derrida, *Memoirs*, *supra* note 71 at 73; Jacques Derrida & Maurizio Ferraris, *A Taste for the Secret*, trans. by Giacomo Donis (Cambridge: Polity Press, 2001) 64-65, 80 [Derrida & Ferraris, *Taste for the Secret*].

76 See Jacques Derrida, *Points...Interviews, 1974-1994*, Elisabeth Weber ed., trans. by Peggy Kamuf et al (Stanford, California: Stanford University Press, 1995) 280 [Derrida, *Points*]. In interviews with Derrida the political implications of his thinking appear very clearly; see in this respect eg Derrida & Roudinesco, *For What Tomorrow*, *supra* note 49; and Derrida, *Paper Machine*, *supra* note 39.

77 Cornell, *Pol*, *supra* note 1 at 72-81.

with one exception: her analysis is influenced by the notion of secondness⁷⁸ which was discussed above. This has an impact on the way in which she translates the notion of “mourning” into law. Cornell’s “act of remembrance” remains a calculation⁷⁹ and steers clear of the incalculability of justice.⁸⁰ In what follows, Derrida’s analysis of mourning will first be enquired into, after which an attempt will be made to “translate” this analysis into law.

Derrida, reading Freud, shows that mourning has a paradoxical structure.⁸¹ Mourning is “the attempt, always doomed to fail (thus a constative failure, precisely), to incorporate, interiorize, introject, subjectivize the other in me.”⁸² Mourning is doomed to failure, and thus to impossibility, because the other is greater than us⁸³ and therefore “resists the closure of our interiorizing memory.”⁸⁴ The other appears to us as other in her death or in the anticipated possibility of her death and in this way makes clear to us our own limits, having to harbour something within us that is greater than ourselves.⁸⁵ A “successful” work of mourning traditionally requires that the other be completely incorporated within the self.⁸⁶ Such a work of mourning, however, would mean that we are no longer true to the memory of the other - the other

78 *Ibid.* at 1 and 72: “[D]eath...shatters the subject’s illusion that he is the meaning-giving center and puts him in touch with ‘the materiality of actual history.’ We confront the materiality of actual history not so much through the confrontation with our own death which always remains beyond us, but instead through the death of Other [sic]. The starkness of losing one you love to death throws us against ‘irreducible exteriority.’” Compare in this respect Derrida, *Memoirs*, *supra* note 71 at 28-29: “The *selbst*, the *soi-même*, the self appears to itself only in this bereaved allegory, in this hallucinatory *prosopopeia* – and even before the death of the other *actually* happens, as we say, in ‘reality.’”

79 The “act of remembrance” that Cornell argues for is undoubtedly a necessary and often much neglected aspect of legal decision-making.

80 In my view Cornell’s statement (Cornell, *PoL*, *supra* note 1 at 151) about the anxiety that the “deconstructibility of law” promotes is misplaced: “As women, our rights can always be undermined.” The impossible justice that Derrida speaks of in my view holds little threat for women, at least not in this context. The undermining of women’s right to abortion is more likely to occur through a disregard of the justice that Derrida equates with deconstruction (justice in this “sense” can be equated with incalculable equality and equal freedom – see Derrida, *Rogues*, *supra* note 7 at 48-49).

81 See Derrida, *Memoirs*, *supra* note 71 at 6. This paradoxical structure, on my reading, is excellently portrayed in J.M. Coetzee, *The Master of Petersburg* (London: Vintage, 1994) where Dostoevsky returns to Petersburg (in secret because of his many creditors) and mourns the death of his stepson, Pavel Isaev. In Cornell, *Between Women*, *supra* note 10 at 195-197 fn 7 the paradoxical structure of Derrida’s reflections on mourning are referred to with approval by Cornell. It is not completely clear from this footnote and the text accompanying it (xix-xx) whether Cornell has changed her views regarding secondness. I am not convinced that she has. See also Drucilla Cornell, *Defending Ideals: War, Democracy, and Political Struggles* (New York and London: Routledge, 2004) 111-114.

82 Derrida, *Points*, *supra* note 76 at 321.

83 Pascale-Anne Brault & Michael Naas, “Editors’ Introduction” in Jacques Derrida, *The Work of Mourning* (Chicago and London: The University of Chicago Press, 2001) 1 at 10 [Brault & Naas, *Work of Mourning*].

84 Derrida, *Memoirs*, *supra* note 71 at 34.

85 *Ibid.* at 34 and 37-38.

86 *Ibid.* at 34: “Memory and interiorization: since Freud, this is how the “normal” “work of mourning” is often described. It entails a movement in which an interiorizing idealization takes in itself or upon itself the body and voice of the other, the other’s visage and person, ideally and quasi-literally devouring them.”

would be completely incorporated within the self, which would mean that the other is no longer remembered as other. The other would be betrayed. In mourning the other, there is always the danger and almost inevitability of narcissism.⁸⁷ Mourning is taking pity upon oneself.⁸⁸ Respecting the alterity of the other, not taking, or being unable to take the other in myself (what Derrida refers to as the impossible mourning),⁸⁹ would mean, of course, that the mourning is unsuccessful. Therefore I *must* and I *must not* take the other into myself.⁹⁰ Derrida's reflections on mourning show us that this structure (of mourning) is constitutive of the subject. The self (and friendship) is always from the beginning affected by this structure, because the one (friend) will die before the other. We are thus always already in mourning:

This carrying of the mortal other "in me outside me" instructs or institutes my "self" and my relation to "myself" already before the death of the other....Even before the death of the other, the inscription in me of her or his mortality constitutes me. I mourn, therefore I am, I am – dead with the death of the other, my relation to myself is first of all plunged into mourning, a mourning that is moreover impossible.⁹¹

Translated into law, we are being placed under an obligation to approach the legal tradition in mourning. The law only lives "in us" and "for us." At the same time, the law contains something greater than this (our representations of it): unconditional justice. Justice always resists and can never be fully represented in law.⁹² We should remind ourselves here again of Derrida's reflections on the mystical foundations of authority.⁹³ Every legal decision repeats the founding violence of law (where the question of justice was posed and deferred) through a conserving violence where the question of justice is again posed and deferred.⁹⁴ A legal decision is therefore in a sense a mourning of the singular event of the founding violence of a legal system. A case that comes to court can also be compared with the death of a friend (each time unique) which interrupts the self; which shows that the self, the law, is never at one with itself. Brault and Naas express this experience of the death of a friend as follows:

87 Brault & Naas, *Work of Mourning*, *supra* note 83 at 6-7.

88 *Ibid.* at 7.

89 Derrida, *Memoirs*, *supra* note 71 at 6.

90 Derrida, *Points*, *supra* note 76 at 321.

91 *Ibid.* at 321.

92 Brault & Naas, *Work of Mourning*, *supra* note 83 at 11 say something similar regarding mourning: "In mourning, we must recognize that the friend is now both only "in us" and already beyond us, in us but totally other, so that nothing we say of or to them can touch them in their infinite alterity."

93 Derrida, *Possibility of Justice*, *supra* note 19.

94 *Ibid.* at 13-14, 23. The distinctions between "founding" and "conserving" violence are of course those of Walter Benjamin, "Critique of Violence" in Marcus Bullock & Michael W. Jennings, eds., *Walter Benjamin: Selected Writings*, vol 1: 1913-1926 (Cambridge: The Bellknap Press of Harvard University Press, 1996) at 236-252.

In mourning we find ourselves at a loss, no longer ourselves, as if the singular shock of what we must bear had altered the very medium in which it was to be registered. But even if the death of a friend appears unthinkable, unspeakable, we are nonetheless, says Derrida, called upon to speak, to break the silence, to participate in the codes and rites of mourning. "Speaking is impossible," writes Derrida in the wake of Paul de Man's death, "but so too would be silence or absence or a refusal to share one's sadness."⁹⁵

Cornell thinks that when Derrida speaks of our responsibility towards heritage and that this heritage contains a "sheaf of injunctions," he requires of us "to remember its own exclusions and prejudices."⁹⁶ Cornell of course has good reason to say, applying this to abortion, that in the event that a fresh decision needs to be taken on this issue or when evaluating past decisions, we must remember "the history in which women did not have the right to an abortion."⁹⁷ Cornell's discussion of abortion clearly shows the injustice of which law is capable. And the law, even when it allows for abortion, will perhaps never be able to allow for justice in this respect for all women. Not because of the restrictions that need to be imposed as a result of the progressive development of the unborn, but because of the restrictions on access to safe abortion facilities by those who are poor within a country that provides abortion facilities, as well as by those from other countries and in other countries. The work of mourning is thus, indeed, a question of knowledge,⁹⁸ as Cornell correctly points out. It is about knowledge of the law in the past, of its consequences⁹⁹ as well as a calculated projection of the consequences of changes to the law.¹⁰⁰ But it is also more than that.¹⁰¹ And this "more" is already inscribed within the legal tradition as a promise.¹⁰² The "sheaf of injunctions" that Cornell refers to is actually a reference to the excessive injunctions that are inscribed in the heritage, such as the pure gift, unconditional justice and unconditional hospitality, as compared to the more restrictive and conditional forms thereof.¹⁰³ A textual analysis, in other words, is required which has the potential for "radical transformation."¹⁰⁴ Looking at the real exclusions of the system is important, but that still amounts to calculation.

95 Brault & Naas, *Work of Mourning*, *supra* note 83 at 5.

96 Cornell, *PoL*, *supra* note 1 at 149.

97 *Ibid.* at 149. For a few remarks by Derrida on abortion, which show his stance, see Derrida & Roudinesco, *For What Tomorrow*, *supra* note 49 at 139-140.

98 Jacques Derrida, *Specters of Marx: The State of Debt, the Work of Mourning, & the New International*, trans. by Peggy Kamuf (New York and London: Routledge, 1994) at 9 [Derrida, *Spectres of Marx*].

99 Cornell, *PoL*, *supra* note 1 at 149, 152, 153.

100 *Ibid.* at 152

101 Memory, as we see in Derrida, *Memoirs*, *supra* note 71 at 56 and 58, is to be distinguished from interiorizing recollection (which is what "memory" is for Cornell).

102 See Rodolphe Gasché, "Europe, or the Inheritance of Responsibility" (2005) 27 *Cardozo L. Rev.* 587.

103 See Derrida *et al.*, *Questioning God*, *supra* note 55 at 58-59.

104 This phrase is Cornell's; see Cornell, *Transformations*, *supra* note 31 at 35.

Mourning and doing justice¹⁰⁵ are thus not simply about calculation, but about infinite responsibility, not only to those who are near us (and who can make it to the abortion clinic or the court room in time), but also to those who are far, because, what could ultimately justify our choice between these women?¹⁰⁶ The position is similar insofar as gay rights are concerned.¹⁰⁷ Not prosecuting those classified as “gay” for how they express their sexuality is only one step in an infinite number of steps that need to be taken to ensure the equal treatment of gays in all respects, everywhere.¹⁰⁸ The same applies to those who are discriminated against on the basis of their race,¹⁰⁹ as well as on other grounds. An incalculable equality is what justice demands of us.¹¹⁰

But remembrance, the conjuring of the legal tradition and its effects, also gives rise to anxiety. To respond to the tradition, to be responsible for the tradition, entails the absence of “any certainty or symmetry;”¹¹¹ it “upsets all calculations, interests, and capital.”¹¹² Mourning the suffering of those who died because of the law (mourning justice), which in a sense happens when one decides a case or reflects on the law in a certain way, might appear to be hospitable, but it always gives rise to “a movement of repulsion or restriction.”¹¹³ As in mourning, the law almost inevitably will attempt to cushion the trauma of the singular event, as well as “assimilate it, interiorize it and incorporate it.”¹¹⁴ Nevertheless, recognizing the promise of unconditional justice, the spectrality within law, is clearly different from and is bound to have different consequences, compared to viewing law as purely identical to itself or with an assured inside,¹¹⁵ as we find in most theoretical accounts of law.

VI. THE SAME AND THE BEYOND

Cornell is aware of Derrida’s criticism of Levinas, specifically that “there can be no rupture with metaphysics except from within the tradition.”¹¹⁶ Yet she does not believe that the tradition contains within itself anything of the infinite (or, at least, she sometimes denies it):

105 See Derrida, *Spectres of Marx*, *supra* note 98, at 98 for the link drawn between the two.

106 Derrida, *Gift of Death*, *supra* note 52 at 68-71. The slogan from the 1970s which Cornell, *PoL*, *supra* note 1 at 153 refers to is also interestingly enough without limitation: “women want abortion now.”

107 See the discussion of *Bowers v Hardwick* (1986) 478 U.S. 186 in Cornell, *PoL*, *supra* note 1 at 159-167.

108 Women and gays are the two “marginalized” groups that Cornell, *PoL*, *supra* note 1 at 11 specifically argues for.

109 See Cornell, *PoL*, *supra* note 1 at 139-140 on *Brown v Board of Education* (1954) 347 U.S. 483.

110 Derrida, *Rogues*, *supra* note 7 at 48-49.

111 Derrida, *Specters of Marx*, *supra* note 98 at 109.

112 *Ibid.* at 136.

113 *Ibid.* at 108 on conjuring spectres.

114 *Ibid.* at 98.

115 *Ibid.* at 99, 109.

116 Cornell, *PoL*, *supra* note 1 at 69.

We cannot escape representational schemes. Yet, at the same time, we must recognize their inevitable infidelity to radical otherness. The Saying cancels itself as soon as it is said.¹¹⁷

As we saw above, Cornell tends to draw a strict distinction between law and justice.¹¹⁸ This is a consequence of the prior distinction that Cornell draws between the encounter of the other and the entry of the third.¹¹⁹ We also saw earlier that Cornell seems to follow Levinas in saying that the encounter with the other exposes us to infinity (or “the Good” in her terms). In *Violence and Metaphysics*¹²⁰ Derrida contends that access to the infinite is not obtained through an encounter with the other as Levinas claims. It is something that only language allows and at the same time disallows. Derrida is of the view that the infinite arrives at the same instance in which the same is posited. The infinite can therefore only be accessed (and not accessed) through the same:

What authorizes him [Levinas] to say “infinitely other” if the infinitely other does not appear as such in the zone he calls the same...?¹²¹

[T]he same is not a totality closed in upon itself, an identity playing with itself, having only the appearance of alterity, in what Levinas calls economy, work, and history.¹²²

The infinite, excess, “is” in other words already in the same, in law, inscribed in law.¹²³ A literal encounter with an other in court is not required for this excess to show itself. Every linguistic expression, including that of Cornell in *PoL*, is a response to the other.¹²⁴ In the words of Derrida:

Each time I open my mouth, I am promising something. When I speak to you, I am telling you that I promise to tell you something, to tell you the truth. Even if I lie, the condition of my lie is that I promise to tell you the truth. So the promise is

117 *Ibid.* at 70.

118 *Ibid.* at 157, 166 (also in Cornell, “Rethinking Legal Ideals after Deconstruction” *supra* note 10 at 150 and 162). The relation between law and justice is explained well, in my view, by Christoph Menke, *Ability and Faith: On the Possibility of Justice* (2005) 27 *Cardozo L. Rev.* 595.

119 See Cornell, *PoL*, *supra* note 1 at 105.

120 *Supra* note 40.

121 *Ibid.* at 156.

122 *Ibid.* at 158.

123 Gasché, *Mirror*, *supra* note 15 at 104-105 puts it as follows: “The impure and unconditional heterology focuses on an alterity that does not lend itself to phenomenologization, that escapes presentation of itself in *propria persona*. This ‘radical’ alterity thus marks a ‘space’ of exteriority at the border of philosophy, whether or not philosophy is explicitly phenomenological. It is situated on the margin of what can be meaningfully totalized.”

124 See Jacques Derrida “Remarks on Deconstruction and Pragmatism” in Chantal Mouffe, ed., *Deconstruction and Pragmatism* (London and New York: Routledge, 1996) 77 at 82-83 [Derrida, *Deconstruction*].

not just one speech act among others; every speech act is fundamentally a promise.¹²⁵

This of course does not mean that the promise (of justice) is fulfilled in every speech act, but it does mean that law interrupts itself, a text interrupts itself, deconstructs itself because it is not homogeneous.¹²⁶ Derrida would be unlikely to agree with Cornell's statement referred to above that "[t]he Saying cancels itself as soon as it is said." As we have already seen, this understanding of Cornell has important consequences for her construction of the relationship between law and justice. There are nevertheless moments in *PoL* when Cornell recognizes the self-transcendence of the same. This is, however, portrayed in a more moderate form in her model for decision-making, than Derrida's understanding of such excess. When she discusses the differences between Derrida and Levinas, Cornell correctly points out that

Derrida emphasizes the 'self-transcendence' of the Same. The iteration of the same 'is' as transformation. Even if Levinas is read to displace the rigid dichotomy of transcendence and immanence – and I believe this is how he should be read – he does not, like Derrida, focus our attention on the self-transcendence of the Same.¹²⁷

Cornell also expresses her agreement with Derrida in this respect.¹²⁸ Cornell however does not appear to understand fully the significance of this. In translating the self-transcendence of the same into law, Cornell bridles Derrida's thought of the impossible. We saw this in her reference to the ethical relation as "the Good."¹²⁹ Cornell also speaks of "the dream of Justice."¹³⁰ For Cornell there has to be a "translation" of the "prior" ethical relationship into law. Cornell believes that the ethical relation is something that we should aspire to, even though it cannot be actualized.¹³¹ This again shows her alliance with (a certain reading of) Levinas rather than Derrida and her misunderstanding of the non-concept of *différance*.

125 Jacques Derrida *et al*, "The Villanova Roundtable: A Conversation with Jacques Derrida" in John D. Caputo ed., *Deconstruction in a Nutshell: A Conversation with Jacques Derrida* (New York: Fordham University Press, 1997) 22-23 [Derrida *et al*, *Roundtable*].

126 Jacques Derrida, *Adieu to Emmanuel Levinas*, trans. by Pascale-Anne Brault & Michael Naas (Stanford, California: Stanford University Press, 1999) 118 [Derrida, *Adieu*]. See also Derrida *et al*, *Questioning God*, *supra* note 55 at 58-59.

127 Cornell, *PoL*, *supra* note 1 at 109. See also at 84.

128 *Ibid.* at 110-111.

129 See para. II *supra*. On Derrida's reading of the idea of the Good in Plato and its relation to the unconditional, see Derrida, *Rogues*, *supra* note 7 at 134-140.

130 *Ibid.* at 183. For Derrida, justice is a desire rather than a dream; see Jacques Derrida *et al*, "A Discussion with Jacques Derrida" (2001) 5(1) *Theory and Event* para 33 available at <http://muse.jhu.edu/journals/theory_and_event/toc/tae5.1.html> (date accessed: 21 June 2006). Justice, the impossible, is also that which we can *think*, rather than *know*; see Jacques Derrida *et al*, "Die Tragiese, die Onmoontlike en die Demokrasie: 'n Onderhoud met Jacques Derrida" (1999) 3 *Fragmente* 35 at 39-40.

131 Cornell, *PoL*, *supra* note 1 at 84.

VII. THE IDEAL OF COMMUNITY

As we saw in the summary of *PoL* above,¹³² the notion of reciprocal symmetry and consequently of an “ideal community” is one of the central themes of the book. On Cornell’s interpretation Derrida “hesitantly recognizes the dream of communicative freedom, the ideal of community or communalism understood as belonging together without violence.”¹³³ This ideal community is one where there would be reconciliation without unity.¹³⁴ Cornell relies on the following passage from *Violence and Metaphysics* in support of this claim:

A community of the question, therefore, within that fragile moment when the question is not yet determined enough for the hypocrisy of an answer to have already initiated itself beneath the mask of the question, and not yet determined enough for its voice to have been already and fraudulently articulated within the very syntax of the question. A community of decision, of initiative, of absolute initiality, but also a threatened community, in which the question has not yet found the language it has decided to seek, is not yet sure of its own possibility within the community. A community of the question about the possibility of the question.¹³⁵

Cornell then proceeds to ask whether, but in effect to claim, that the “question about the possibility of the question” is “the dream of communicative freedom, in which this dream of reconciliation is no longer conceived as a unity.”¹³⁶ This is a very doubtful passage on which to base a claim that Derrida supports the notion of an ideal community. Derrida has often distanced himself from the idea of a community. For example in one interview he said: “I don’t much like the word community, I am not even sure I like the thing.”¹³⁷ So how should we then understand the above passage? Derrida’s relation to the notion of community is a complex one. On the one hand, he does not reject the idea that there “are” communities, for example a legal community or different legal communities within a specific country around questions of or approaches to interpretation. This need not be something bad although it can be bad, as Cornell knows and describes so well: when unity, totality and homogeneity are privileged, as happens in patriarchal and homophobic communities.¹³⁸ At the same time a “community” is instituted on the basis of a promise, a perhaps; in the case of a legal community, the promise or perhaps of justice which forbids that community

132 See para. II.

133 Cornell, *PoL*, *supra* note 1 at 60. See also at 40.

134 *Ibid.* at 57.

135 *Ibid.* at 57 quoting from Derrida, *Violence and Metaphysics* at 80 (page 98 in the edition I consulted, *supra* note 40).

136 *Ibid.*

137 Derrida, *Points*, *supra* note 76 at 355; Jacques Derrida, *Politics of Friendship*, trans. by George Collins (London and New York: Verso, 1997) 304-305 [Derrida, *Friendship*]; and Derrida & Ferraris, *Taste for the Secret*, *supra* note 75 at 24-25.

138 Derrida *et al*, *Roundtable*, *supra* note 125 at 13.

from collecting or gathering or closing itself,¹³⁹ but instead opens it up at the moment of its formation.¹⁴⁰ To refer to this opening, this “impossible perhaps”, as an ideal community, is problematic because of the very notion of “community” itself. Caputo¹⁴¹ in his inimitable style expresses the problem with this notion as follows:

What he [Derrida] does not like about the word community is its connotations of “fusion” and “identification”.... After all, *communio* is a word for a military formation and a kissing cousin of the “munitions”; to have a *communio* is to be fortified on all sides, to build a “common” (*com*) “defense” (*munis*), as when a wall is put up around the city to keep the stranger or the foreigner out.

The passage from *Violence and Metaphysics* quoted earlier must be understood in light of these reflections of Derrida. Derrida is speaking in that passage of the philosophical community, the community of the question. What enables this community, what makes it possible, is “the question of the question.” This question is not about the dream of an ideal community, as Cornell supposes, but the originary question, the pure question, the question as such.¹⁴² The question relates to philosophical language, a philosophical language which is traditionally dominated but not completely controlled by questions of identity, conceptuality and the law of non-contradiction.¹⁴³ This traditional language, questions in the language of the same and is thus inhospitable to the other. The possibility of the question of the question places the host, the subject, the I, in question (the host as hostage) and thus has a concern for “the possibility of philosophical language to receive or welcome what precedes or exceeds it.”¹⁴⁴ This is the question (the questioning of the question) that is implicitly raised by Levinas in *Totality and Infinity*.¹⁴⁵ The question of the possibility of the question thus relates to the question of unconditional hospitality to the other (before all questions).¹⁴⁶ In the words of Derrida:

Does hospitality consist in interrogating the new arrival? Does it begin with the question addressed to the newcomer...: what is your name?...Or else does hospitality begin with the

139 Derrida, *Points*, *supra* note 76 at 355.

140 Derrida, *Friendship*, *supra* note 137 at 38 on democracy.

141 John D. Caputo, “Community without Community” in Derrida *et al*, *Roundtable*, *supra* note 125 at 108-109.

142 Michael Naas, *Taking on the Tradition: Jacques Derrida and the Legacies of Deconstruction* (Stanford: Stanford University Press, 2003) 97 [Naas, *Tradition*].

143 *Ibid.* at 102.

144 *Ibid.* at 94.

145 Emmanuel Levinas, *Totality and Infinity: An Essay on Exteriority*, trans. by Alphonso Lingis (Pittsburgh: Duquesne University Press, 1969).

146 Naas, *Tradition*, *supra* note 142 at 102-103, 112-113. See also Derrida in Dufourmantelle & Derrida, *Of Hospitality*, *supra* note 35 at 29: “The question of hospitality is thus also the question of the question.”

unquestioning welcome, in a double effacement of the question
and the name?¹⁴⁷

The question of unconditional hospitality, as we know, is tied intimately with the perhaps, the promise of what is to come and of what remains to come. The question nevertheless emerges with the third - who is there from the beginning¹⁴⁸ which implies the inevitability of a negotiation between the unconditional and the conditioned.¹⁴⁹

Another passage of Derrida on which Cornell relies in relation to her notion of an ideal community and, more specifically of reconciliation, has to be scrutinized. Cornell refers to a passage in Derrida's *Des Tours de Babel*¹⁵⁰ to suggest that "Derrida's ambivalence toward giving voice to 'redemptive' perspectives does not just express the reluctance to 'represent' divine aspiration."¹⁵¹ According to Cornell this "reluctance" -

is not found in all of his texts. In his essay on Walter Benjamin's "The Task of the Translator," Derrida appeals to the promise of reconciliation in a messianic tongue as the promise of translations. Yet Derrida insists it is a *promise* of reconciliation and not an achieved reality. But he reminds us, "[a] promise is not nothing," and indeed he suggests that without this promise the task of the translator would be impossible. Derrida is surprisingly sympathetic to Benjamin's assertion that translation is a "redemptive" task, because it inevitably appeals to the promise of reconciliation in a messianic tongue.¹⁵²

Cornell knows that the passage she refers to deals with the reconciliation of languages in the context of translation. The promise that is at issue in this passage is a promise of reconciliation, of the translation touching the untouchable of the translated text, the untouchable that resists the translation, the remains of language.¹⁵³ Translation, Derrida points out, has a paradoxical structure which makes it both necessary and impossible.¹⁵⁴ It is interesting to note that this is the only passage of Derrida that Cornell relies on in this chapter to make the claim referred to above: that Derrida also dreams "of communicative freedom, in which this dream of reconciliation is no longer conceived as a unity."¹⁵⁵ In the discussion that follows the above-quoted

147 Dufourmantelle & Derrida, *Of Hospitality*, *supra* note 35 at 27-29.

148 Derrida, *Adieu*, *supra* note 126 at 32, 56.

149 Naas, *Tradition*, *supra* note 142 at 103-106.

150 See Jacques Derrida, "Des Tours de Babel" trans. by Joseph F. Graham in *Difference in Translation* (Ithaca and London: Cornell University Press, 1985) 165 [Derrida, *Translation*]; see also the reprint of this text in Derrida, *Acts of Religion*, *supra* note 35 at 104-133.

151 Cornell, *PoL*, *supra* note 1 at 59.

152 *Ibid.*

153 Derrida, *Translation*, *supra* note 150 at 191-192.

154 In a later text, Derrida would relate this impossible moment of pure translation to forgiveness or mercy; see Jacques Derrida, "What is a "Relevant" Translation?" (Winter 2001) 27 *Critical Inquiry* 174.

155 Cornell, *PoL*, *supra* note 1 at 57.

passage, it is, furthermore, clear that she relies on *Des Tours de Babel* to make this claim about Derrida, reconciliation and “communicative freedom.” Leaving aside the issue of the permissibility of this “translation” by Cornell of the notion of reconciliation from one context to another, it would not be untrue to say that Derrida is in favour of reconciliation between those in a community or between different communities, countries or religions. His relationship with the concept of reconciliation (in this sense) is nevertheless a complex one. Whereas politically he favours reconciliation, he believes that a reconciliation worthy of the name cannot be equated with a “compromise,” a “deal” or a strategic calculation.¹⁵⁶ A reconciliation worthy of the name would be one that is just.¹⁵⁷ This, in a sense, would mean that one would have to suspend the hope of redemption, of reconciliation and also of “re-constituting a healthy and peaceful community.”¹⁵⁸ Derrida can in other words be said not to be against the hope of redemption, reconciliation and an ideal community, but at the same time he would say that “when one is not ready to suspend the determination of hope then our relation with the other becomes again economical.”¹⁵⁹

The notion of utopianism is closely associated with the ideal of community in Cornell’s thinking.¹⁶⁰ According to Cornell, Derrida’s thinking is to be distinguished from liberalism due to the “Utopian moment” in his thinking “that cannot be erased.”¹⁶¹ I agree with the distinction between Derrida and liberalism, but I disagree with Cornell’s criterion for the distinction. The “to come,” “the impossible” and the “messianic” in Derrida’s texts, on my reading, should not be equated with utopia. Derrida has often distanced himself from the notion of utopia with its connotations of the distant future instead of the here and now.¹⁶² This does not mean that Derrida completely rejects the notion of utopia, seeing that it has “critical powers that we should probably never give up on, especially when we make it a reason for resisting all alibis and all ‘realistic’ or ‘pragmatic’ cop-outs.”¹⁶³ Cornell’s utopia cannot of course be accused of a lack of urgency – she does stress the importance of urgency in *PoL*.¹⁶⁴ Cornell’s ideal community is furthermore something which needs to be taken account of and aspired to in every judicial decision, according to her model. Nevertheless, as the word “aspiration” makes clear, Cornell’s model for decision-making remains within the order of the “I can,” of “ipseity,” of

156 Jacques Derrida & Richard Kearney, “A Dialogue with Jacques Derrida” (Spring 2004) *Philosophy Today* 4 [Derrida & Kearney, “Dialogue”]; Derrida *et al*, *Questioning God*, *supra* note 55 at 56-57.

157 *Ibid.*

158 Derrida & Kearney, “Dialogue”, *supra* note 156 at 5.

159 *Ibid.* at 4-5.

160 We find more references to utopianism in Cornell, *Beyond Accommodation*, *supra* note 14, and its apparent link with deconstruction. Apart from the references in the word index, see pages 18-20, 35, 91, 107-108. See also Cornell, “Rethinking the Beyond” *supra* note 41, at 102-103 where Cornell again links Derrida with utopianism.

161 Cornell, *PoL*, *supra* note 1 at 8 read with 186 fn 13; also 146, 156 and 182.

162 See e.g., Derrida, *Deconstruction*, *supra* note 124 at 82-83.

163 Derrida, *Paper Machine*, *supra* note 39 at 131.

164 See e.g., Cornell, *PoL*, *supra* note 1 at 134, 153.

subjectivity and of knowledge.¹⁶⁵ Distancing oneself from a “subject-centered approach to the ethical”¹⁶⁶ is not sufficient to interrupt subjectivity in judicial decision-making.

Part of the problem is that Cornell appears to misunderstand the implications of *différance* which she specifically links with utopianism.¹⁶⁷ Cornell asserts that she fully accepts the implications of *différance* without seemingly realizing what they are:

What I am suggesting is that the dissemination of convention, through *différance* as the nonfull, nonsimple, and differentiating, origin of differences, disrupts the claims of ontology to fill the universe, and more specifically, the legal universe.¹⁶⁸

Instead of noticing the paradoxical structure of normative concepts that *différance* leads to, including its implications of a general economy of excess with no return to the self,¹⁶⁹ Cornell only notices its disruption of the same, with her utopia returning to herself. For her, *différance* creates two distinct orders. Cornell’s ideal community undoubtedly retains something of the opening within itself of Derrida’s understanding of identity. Her ideal community, her utopia, is a more open one than many “communities” currently in existence, but it is by no means what one could call radically open. What it promises remains foreseeable, remains sure of itself, of exactly what the other is entitled to and of what is required of us as “an ideal community.”

VIII. THE GOOD AND LEGAL PRINCIPLES

The task Cornell foresees in the light of Levinas’s thought is explained as follows:

In Levinas, although there is an inevitable diremption between the Law of Law, the Good, and the actual, we can also not escape our responsibility, particularly if we are law professors, judges, and lawyers, to elaborate principles of justice which can guide us in the effort to synchronize the competing claims of individuals and to adjudicate between divergent interpretations of doctrine.¹⁷⁰

This passage again shows the rigid distinction that Cornell tends to draw between law and justice. The Good cannot be directly translated into law, Cornell¹⁷¹ says, because legal principles always violate difference. Legal

165 See Derrida, *Rogues*, *supra* note 7 at 84-85 where he distinguishes the impossible from a regulative idea.

166 Cornell, *PoL*, *supra* note 1 at 102.

167 See Cornell, *Beyond Accommodation*, *supra* note 14 at 108.

168 Cornell, *PoL*, *supra* note 1 at 110.

169 See Jacques Derrida “Différance” in *Margins of Philosophy* trans. by Alan Bass (Chicago: The University of Chicago Press, 1982) 1 at 19.

170 Cornell, *PoL*, *supra* note 1 at 100.

171 *Ibid.* at 105.

principles, she believes, can nevertheless play a role in minimizing violence. As all claims cannot be vindicated, we thus need legal principles in order to guide us through the maze of competing legal interpretations.¹⁷² Legal principles are needed, in Levinasian terms, because of the entry of the third. The primary principle that Cornell invokes in this regard is that of reciprocal symmetry.¹⁷³ The ability of a principle “to *synchronize* the competing universals embodied in the *nomos*” will ultimately determine whether it (the principle) will find a place in the legal system.¹⁷⁴ Reason plays an important part in this model: “An essential aspect of thematization,” Cornell says, “is the practical use of reason to synchronize the competing demands and perspectives of individuals through the appeal to legal principle.”¹⁷⁵ Although reason is linked to critical thinking, to the command to be just and to “the exercise of ethical responsibility to the Other,”¹⁷⁶ there is no indication that Cornell’s concept of reason or her legal principles leave room for an interruption of subjectivity.¹⁷⁷ In spite of her adoption of many Derridean themes, the legal principles which Cornell believes should be established remain the products of an autonomous subject.¹⁷⁸

The Good is beyond any of its current justifications. As a result, when we appeal “back” to what has been established, we must *look* forward to what “might be.” As we do so, we represent what “might be.” Without a simple origin the very process of discovery of legal principles from within the *nomos* will also involve invention. It is this specific appeal to the “ought to be” that demands a vision of the Good that goes beyond the appeal to convention. The “origin” we evoke in our thematizations is ultimately a representation of the future. Legal interpretation demands that we remember the future.¹⁷⁹

As can be seen, Cornell’s principles are closely related to her notion of “recollective imagination” in interpretation. This involves legal precedent, or the past and the projection of future ideals through which the community

172 *Ibid.* Costas Douzinas & Ronnie Warrington, “A Well-Founded Fear of Justice: Law and Ethics in Postmodernity” in Jerry D Leonard ed., *Legal Studies as Cultural Studies: A Reader in (Post)Modern Critical Theory* (State University of New York Press, 1995) 197 at 219-220 criticize Cornell for her invocation of legal principles. They argue that principles always entail universalism and therefore do violence to the unique. In Cornell’s defence, she does point out that legal principles also inevitably violate difference by creating analogies between the like and the unlike (the same with guiding factors). However, she believes that flexible principles or guidelines minimize such violence (compared to formalistic principles); see Cornell, *supra* note 1 at 105-106.

173 Cornell, *Pol*, *supra* note 1 at 106.

174 *Ibid.*

175 *Ibid.*

176 *Ibid.* at 107.

177 See also above on subjectivity and the ideal community. On the need for a disruption of subjectivity in order for a decision and an event which welcomes the other to stand a chance, see Derrida, *Friendship*, *supra* note 137 at 68; and for discussion, see Geoffrey Bennington, *Interrupting Derrida* (New York and London: Routledge, 2000) 27 and 43-44.

178 Some scholars have noted this feature in Cornell’s later texts; see Maxine Eichner, “On Postmodern Feminist Legal Theory” (2001) 36 *Harv. C.R.-C.L.L. Rev.* 1 at fn 78.

179 Cornell, *Pol*, *supra* note 1 at 110-111. See also at 118.

seeks to regulate itself.¹⁸⁰ The principles internal to a legal system¹⁸¹ thus contain an openness to the future or “would be’s”.¹⁸² We begin with the past in taking decisions, but the process is also prospective because of the potential inherent in the past.¹⁸³ There is a promise of synchronization in law.¹⁸⁴ The recollection of legal principles is never mere exposition, but involves the imagination and the positing of ideals.¹⁸⁵

In invoking ideals, Cornell claims to be following not only Levinas, but also Derrida. Cornell refers in this regard to Derrida saying that “there is nothing less old-fashioned than the traditional emancipatory ideals.”¹⁸⁶ This is not completely accurate. In the passage that Cornell refers us to, Derrida speaks of “emancipatory battles” and “the classic emancipatory ideal.”¹⁸⁷ Cornell¹⁸⁸ furthermore clearly misunderstands Derrida’s reference to ideals. In *Force of Law*,¹⁸⁹ Derrida makes the point that what he is saying about justice, as the impossible should not be confused with the Kantian regulative idea.¹⁹⁰ He explains that this is because the notion of an idea implicates a horizon which means that it is limited and also that it does not contain the sense of urgency or of unconditionality.¹⁹¹ Cornell however reads Derrida to say (after having read Luhmann who says this) that “the ideal cannot guide us precisely because it is the ideal and thus not present.”¹⁹² Her other explanation of why Derrida distances himself from the notion of an ideal is correct: the ideal is simply a rationalized projection of our current norms.¹⁹³ However, Cornell then does not draw the seemingly logical conclusion that justice is something other than an ideal for Derrida. She instead concludes that we must still work with these ideals as ideals.¹⁹⁴ Justice, she says, simply “demands the recognition of the possible contamination of the ideal itself.”¹⁹⁵ According to Cornell,¹⁹⁶ Derrida, because he wants “to prevent the justification of one norm as justice...appeals

180 Cornell, *Transformations*, *supra* note 31 at 23.

181 Cornell, *PoL*, *supra* note 1 at 118-119, 165.

182 Cornell, *Transformations*, *supra* note 31 at 27.

183 *Ibid.* at 27-28.

184 *Ibid.* at 35.

185 *Ibid.* at 39.

186 Cornell, *PoL*, *supra* note 1 at 108.

187 Derrida, *Possibility of Justice*, *supra* note 19 at 28.

188 Cornell, *PoL*, *supra* note 1 at 134-135.

189 Derrida, *Possibility of Justice*, *supra* note 19 at 25 and 26

190 As Derrida, *Rogues*, *supra* note 7 at 48-49, and 133 also shows, he has a complex relation to the ideals of equality, freedom and dignity.

191 See also *ibid.* at 84 and 142.

192 Cornell, *PoL*, *supra* note 1 at 134.

193 *Ibid.* at 135.

194 In “Rethinking Legal Ideals after Deconstruction” *supra* note 10 Cornell presents her position regarding ideals as a parting of ways with Derrida. On Derrida’s response to a question as to what should be done “after deconstruction,” see Derrida *et al.*, “Hospitality”, *supra* note 7 at 65: “Your question started with the phrase ‘after deconstruction’, and I must confess I do not understand what is meant by such a phrase. Deconstruction is not a philosophy or a method, it is not a phase, a period or a moment. It is something which is constantly at work and was at work before what we call ‘deconstruction’ started, so I cannot periodize. For me there is no ‘after’ deconstruction – not that I think that deconstruction is immortal – but for what I understand under the name deconstruction, there is no end, no beginning, and no after.”

195 Cornell, *PoL*, *supra* note 1 at 135 (emphasis added).

196 *Ibid.*

to the overflowing of the performative.” She refers in this regard to the ideal of the “rational man” in legal thinking. This is not untrue, but the overflowing of the performative does more than this. The overflowing of the performative “is” justice, which as we saw above, “is” also in excess of ideals. Insofar as reason, equality, freedom and dignity can be regarded as (emancipatory) “ideals” that play a role in Derrida’s thinking, their structure is not of an ideal nature. All these concepts have a paradoxical structure in Derrida’s thinking, which invokes an aporia of the conditional and the unconditional.¹⁹⁷

Cornell’s legal principles thus are (following Levinas) based on a “translation” from the “prior” ethical relation with the other which calls for a “disruption” or innovation of the system, but not in such a way that subjectivity or the value of “the good of the community”¹⁹⁸ is put into question. As we saw above, the infinite, the Saying, incalculable justice, absolute hospitality, in Derrida’s elaboration of these Levinasian concepts,¹⁹⁹ are thus given almost no space in Cornell’s model. Cornell moves from asymmetry (which Derrida also refers to as the impossible and the perfect gift) directly to symmetry²⁰⁰ without retaining the paradoxical structure of normative concepts. Abandoning the paradoxical structure of normative concepts has led to deconstruction being understood as merely responsiveness, or as simply making transformation or alternative solutions possible.²⁰¹ To say it again: Cornell’s use of the concept of the “Good” as a synonym for justice indicates that her model of decision-making holds little threat for the (no doubt more open) community and its values.²⁰² The host does not risk becoming a hostage.²⁰³ Cornell thus chooses a “tamer” or more domesticated reading of Levinas than does Derrida.²⁰⁴ It is this reading, I believe, that allows Cornell to move so easily from justice to the principle of reciprocal symmetry. The other calls us to justice (understood at times as a respect for singularity),²⁰⁵

197 See in this respect Derrida, *Rogues*, *supra* note 7.

198 Cornell, *PoL*, *supra* note 1 at 113.

199 The “concept” of absolute hospitality was admittedly developed in detail by Derrida only after the publication of *PoL*.

200 Cornell, *PoL*, *supra* note 1 at 84-85.

201 See e.g., Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge: Cambridge University Press, 2001) 73-79 (2001); and A.J. van der Walt, “Dancing with Codes – Protecting, Developing and Deconstructing Property Rights in a Constitutional State” (2001) 118 *South African L.J.* 258-311 at 302-303 (reading Jennifer Nedelsky, Johan van der Walt, Karin van Marle and Joseph Singer). These readings amount to a reduction of deconstruction with the subject remaining firmly in place.

202 This can also be seen in Cornell’s description of the “ethical relation.” Cornell, *PoL*, *supra* note 1 at 13 says that this relation “focuses on the kind of person one must become in order to develop a nonviolative relationship to the Other;” see also at 62.

203 Cornell’s understanding of the notion of asymmetry with reference to Levinas is insightful in this respect (Cornell, *PoL*, *supra* note 1 at 53): “The alterity of the Other is displayed in her separateness or asymmetry in her stance toward me. She is the stranger; yet as the orphan, the widow, and the hungry, she is also the one who judges me on the basis of my responsibility to her. In Levinas, responsibility does not await reciprocity, and therefore the relationship to the other is necessarily asymmetrical.”

204 Compare in this respect Derrida, *Adieu*, *supra* note 126 at 55-64.

205 Cornell, “Post-Structuralism”, *supra* note 69 at 1591-1592.

but because of the third, competing demands need to be synchronized.²⁰⁶ The question is whether Cornell's "taming" of the notion of infinite responsibility in setting out the structure of decision-making does not translate into irresponsibility. As Derrida says

Without silence, without the hiatus, which is not the absence of rules, but the necessity of a leap at the moment of ethical, political, or juridical decision, we could simply unfold knowledge into a program or course of action. Nothing could make us more irresponsible; nothing could be more totalitarian.²⁰⁷

Cornell's notion of "responsibility," in spite of her claims to the contrary, remains a calculation.²⁰⁸ In Cornell's model, although she prescribes the critical questioning of a given legal system, there is no need for a leap, only a muted infinite responsibility towards the other. By ultimately not questioning subjectivity in decision-making and the good of the (albeit more open) community, we remain locked within the spheres of politics and law.²⁰⁹ Cornell's model, although insisting that no legal system can be regarded as just²¹⁰ and although it calls for the radical transformation of the existing system,²¹¹ still does not provide us with the necessary theoretical means of bringing this about. Instead, it provides us with an ideal which remains within the order of knowledge, and therefore of subjectivity and ipseity, and which allows us to believe that under certain circumstances we have done enough to bring about justice.²¹² It is a model which ultimately ensures a good conscience.

Cornell's principles could be "saved" from irresponsibility, but then they need to be linked more directly to justice. In the same way in which justice as law and justice as absolute responsibility towards the event are both part of the paradoxical structure of justice, Cornell's principles of law could be understood as having a paradoxical structure. By understanding law like this (as containing an excess within itself, as interrupting itself as other),²¹³ it also becomes less necessary to identify the other in a specific case, to be able to say who the other is. As indicated above, the need to do justice is not dependent upon some suffering or marginalized other standing before a court, although it can and does happen (yet, by that time there is already an element of

206 See also *ibid.* at 1619-1620; and Cornell, *PoL*, *supra* note 1 at 89 where this is also motivated by "the striving for happiness" or the "longing to be happy" as "[w]e do not have much fun in the ethical relation."

207 Derrida, *Adieu*, *supra* note 126 at 117. See also Jacques Derrida, *The Other Heading: Reflections on Today's Europe*, trans. by Pascale-Anne Brault & Michael B. Naas (Bloomington and Indianapolis: Indiana University Press, 1992). 71-72

208 See Cornell, *PoL*, *supra* note 1 at 115, 147, 149, 150.

209 *Ibid.* at 156 where Cornell describes the function of deconstruction as giving us "the politics of utopian possibility" (my emphasis).

210 *Ibid.* at 116, 118.

211 *Ibid.* at 144-147, 156.

212 See *ibid.* at 150.

213 Derrida, *Adieu*, *supra* note 126 at 51-55.

familiarity and loss of strangeness).²¹⁴ The promise and appeal of language is involved in each singular act of engagement, a promise that belongs to language (and to law).²¹⁵ In the context of judicial decision-making, responsibility requires that even before a specific plaintiff or applicant seeks a remedy, a welcome should be extended to what or who comes. This welcome, this willingness to sacrifice the self, is thus not dependent on knowledge – that is, on who the applicant is or what the case is about.

IX. CONCLUSION

To conclude, Cornell's project in *PoL* should be distinguished from deconstruction.²¹⁶ Cornell's model allows the subject to remain firmly in place, perhaps a more open-minded subject,²¹⁷ but a subject nonetheless,²¹⁸ who cannot be said to have been displaced, decentered or re-inscribed.²¹⁹ As we saw, a change in judicial decision-making is proposed with reference to principles such as reciprocal symmetry. Like the subject, the law remains firmly in place, not haunted much by an asymmetrical justice. Cornell's project ultimately amounts to a political reduction of the "hyperethics" or "hyperpolitics"²²⁰ of deconstruction. It is perhaps necessary to point out that Derrida nowhere encourages his readers to *misread* him or any other text, as some appear to believe. Derrida *reads* the tradition with reference to the logic of *différance* as containing a trace of the impossible, the condition of possibility of the tradition, of ethics, of politics, of law (the possible). There is clearly a major difference between such a *reading* of texts and a *misreading* which simply appropriates texts (including that of Derrida) so as to support the reader's own restrictive ethical, political or legal views (the possible), irrespective of the sophistication of such views.²²¹

My problem is not that Cornell proposes a programme for political action – it is surely permissible for women, gays or anyone else to do so, also with reference to Derrida's texts. Indeed, through deconstruction a space is left open for such a more "hospitable" politics. My unease lies in the fact that – although Cornell speaks of the *philosophy of the limit* rather than

214 Derrida, *Aporias*, *supra* note 49 at 33-34; and Naas, *Tradition*, *supra* note 142 at 159, 164 remind us that once we know who the other/the arrivant is, s/he is no longer other.

215 Derrida, *Deconstruction*, *supra* note 124 at 82-83.

216 I do not wish to imply hereby that deconstruction has a single form; see in this regard Derrida, *Memoirs*, *supra* note 71 at 17.

217 In Cornell, *PoL*, *supra* note 1 at 59 Cornell speaks of "the dislocation of the centered, sovereign subject," but this subject has little role to play in her model for decision-making.

218 See e.g., *ibid.* at 37 after a reading of Adorno: "The focus [in Adorno] is less on doing what is right in accordance with one's duty than on the development of an attitude of tenderness toward otherness and gentleness toward oneself as a sensual creature." Although Cornell does approach Adorno critically, her understanding of the ethical relation corresponds with this reading of Adorno; see *ibid.* at 89.

219 See Derrida, *Points*, *supra* note 76 at 258. See also Peggy Kamuf, "Deconstruction and Feminism: A Repetition" in Holland *supra* note 41 at 103 for an excellent (implicit) critique of Cornell's position in this respect.

220 See Derrida, *Rogues*, *supra* note 7 at 152.

221 I am not necessarily accusing Cornell of espousing such a view. I have not read anything where she states that Derrida authorizes or encourages such readings. In fact, she states in Cornell, *PoL*, *supra* note 1, at 81 that "[d]econstruction does not impose itself upon the text it reads."

deconstruction – her model for decision-making is presented as if this is ultimately what Derrida means by deconstruction. There is clearly a difference between taking a political decision with reference to paradoxical concepts or principles (which is what responsibility in Derrida's terms requires)²²² and a model of decision-making which allows one to take decisions on the basis of unitary principles without paradox (which is what Cornell's model requires). In taking decisions in terms of the latter model, we are required only to do the possible; there is no aporia, no undecidability and therefore no responsibility; only calculation and narcissism. Presented as "deconstruction," this gives one a very narrow and skewed view of deconstruction which makes it less politically powerful and radical than it can potentially be. Deconstruction as presented by Cornell becomes simply another political project.²²³ It thereby closes off the legal system from the event, from justice, from equality without limits, from what or who remains to come.

222 See in this respect, Derrida's remarks in Derrida, *Paper Machine*, *supra* note 39 at 152 on some of his previous political engagements (including opposing the death penalty and apartheid and arguing for the freeing of Mandela): "I would like to think that these forms of engagement and the discourses that supported them were themselves in agreement (it isn't always easy) with the ongoing work of deconstruction. So I tried to adjust a discourse or a political practice to the demands of deconstruction, with more or less success, but never enough. I don't feel a divorce between my writings and my engagements, only differences of rhythm, mode of discourse, context, and so on."

223 This does not mean that I reject Cornell's politics. I have not read anything in Cornell that I am not willing to subscribe to as a political practice.

