

WHY DECONSTRUCTION IS BENEFICIAL

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Critical evaluation of laws is necessary because laws exert a direct impact on our lives. Laws define rights, responsibilities and permissible conduct against a background of legal consequences. Laws influence individuals' conduct and their perceptions of conduct. Critical evaluation of laws is also essential because laws are not created in a political or ethical vacuum. Society does not retrieve or create laws that are neutral, complete and incontestably legitimate. Laws are created and enforced by individuals and by institutions made up of individuals. Laws reflect the values held or promoted by those individuals. The forces contributing to laws' conception, growth and enforcement are fluid, constructed by changeable preferred socio-political conceptions of law and by the perceived social needs the laws regulate. Critical assessment of laws measures the justifiability of their origin, development and impact. Laws' contingent character, dependence on force in origin and development, and impact on human existence justify the continual investigation of their legitimacy.

The contemporary French thinker Jacques Derrida promotes such a constant investigation of bodies' legitimacy through an attitude of deconstruction. Deconstruction identifies, explores and questions the foundations informing systems of thought. Since the 1960s, Derrida's deconstructive attitude has challenged modern Western philosophical assumptions. Derrida's ideas have influenced later generations of postmodern thought, including Critical Legal Studies scholarship. These scholars' embracement of Derrida's deconstructive attitude has extended Derrida's initial philological concern to an examination of legal concepts and the enhancement of justice. In the 1990s, Derrida has acknowledged the relevance of his ideas to legal critique, and has urged a deconstructive approach to law and justice. It is this capacity of a deconstructive attitude to contribute to ongoing legal reconstruction and enhancement of justice that interests me.

This discussion first acknowledges postmodern ideas and Derrida's notion of *différance*, which justify the need for a deconstructive attitude. Postmodernity emphasises the contingency of knowledge and interpretation, the existence of multiple 'truths' rather than a metanarrative's omniscience, and situates subjects within their socio-historic contexts. These attitudes discredit Enlightenment claims to isolate transcendent knowledge and truths through the universal rational subject, which could then be claimed to legitimate law's structural and conceptual integrity. Derrida's idea of *différance* extends Ferdinand de Saussure's

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identification of language's dependence on differences to other systems of thought. Western philosophy's claims to legitimate positions from foundations of neutral absolutes are undermined by Derrida's uncovering of networks of deferred contingent meaning. This revelation of the political privileging of dominant philosophical positions supports the deconstructive attitude's adaptation to legal discourse, which is similarly susceptible to conceptual gaps and construction by political forces. The idea of some pure authority sourcing law is abandoned; law is instead exposed as being constructed by values, and this is where deconstruction becomes valuable.

Deconstruction and its motives of responsibility and increased justice are then explained. Deconstruction's exploratory nature is emphasised, and the criticism of its destructiveness is repelled. Deconstruction's diagnostic value in legal critique is endorsed; the foundations of laws become visible as contingent upon preferred socio-political perspectives. Once laws' contingent situation is appreciated, it becomes possible to assess laws' legitimacy from theoretical, ethical and political perspectives. It is in this sense that Derrida promotes deconstruction of law as the possibility of 'justice'; if the forces constituting a law are apprehended, it can be seen what perspectives and needs are not recognised. Deconstruction's weaknesses are also noted, particularly Derrida's claim that deconstruction is 'justice'. I suggest that beyond Derrida's purposes, deconstruction as a constant exploration may contribute to enhancing law and justice. Inquisitive rather than destructive, deconstruction should not be feared. Its inquiry can both confirm the validity of existing systems, and reveal aspects of them that can be improved. By deepening perceptions of entrenched legal principles, deconstruction is a valuable experience. Yet beyond deconstruction's necessary diagnostic step, further strategies are required to inspire normative change where needed.

I POSTMODERN ATTITUDES

In its recognition of multiple discourses and myriad truths, postmodern thought acknowledges the potential validity of conceptions of the good other than the dominant norm.¹ Because postmodern attitudes accept the impossibility of transcendent truths, claims to final truth no longer possess normative eminence. Epitomised by Derrida's exhortation of constant exploration, some postmodern perspectives like neopragmatism abandon the search for absolute truths because

1 Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge* (Geoff Bennington and Brian Massumi trans, 1984) xxiv. Liberalism also allows multiple conceptions of the (individual) good, but restricts the state's recommended sphere of action, limiting it to the public sphere and leaving the private sphere to individuals' own, presumably best, judgment. Yet this insistence on the separation of the public from the private spheres ignores the origins and founding violences created by the liberal project; for example, its marginalisation of homosexuals, women and children, and its prioritisation of the individual over the community, and commerce over ethics.

they recognise that 'truths' are contextual and transitory.²

Postmodern legal thought does not suggest that legal discourse be anarchic. To function, a legal system must have rules. But in denying laws' claims to independent and eternal legitimacy, postmodernism challenges legal discourse to be humble and open, to promote the production of more efficient and more just rules. Humility requires accepting the impossibility of attaining an eternally right answer. Openness demands receptivity to discourses and experiences previously ignored by law's idiom. Postmodern thought accepts that currently held positions are merely stages in an evolutionary process; law can never exhaust its potential for justice.

Postmodern attitudes to law are united by an understanding of knowledge as a construction created in a context of cultural, social, scientific and linguistic practices. Knowledge and truth, the foundations of logic and law, are contingent and fleeting, waiting only for new developments as society, culture and science advances, or as new knowledge appears which modifies previously held truths.³ In jurisprudence, this attitude makes redundant any theory which asserts claims to ultimate knowledge, and thought and action dependent on those claims. There is no substance which can prove the finality of any claim to knowledge.

Linked with the impossibility of absolute knowledge is the instability of language. Postmodernists refute the modern claim that language possesses determinate meanings and produces identical interpretations in all receivers. Rather, language is arbitrary and differential. Arbitrariness stems from the physical representation of letters and words bearing no connection with what they signify.⁴ Words and concepts derive their meaning from their context, from what they are not: 'The idea or phonic substance that a sign contains is of less importance than the other signs that surround it.'⁵ Differentiability makes the conceptual value of signs derive from the differences between that sign and others; perception of the difference between the word presented and others, so it is the difference that carries meaning, not something intrinsic in the word itself.⁶ Legal claims to truth are defeated when the scheme of understanding language is peculiar to each individual. Judgments about the legitimacy of positions occur in this atmosphere of constructed interpretations. There is no position of neutrality and objectivity outside this atmosphere that facilitates an unmediated appreciation of the worth of our judgments and interpretations of language. Language is a shifting, value-laden creature, not a neutral mirror that reflects 'reality'.⁷

2 Richard Rorty, *Philosophy and the Mirror of Nature* (1980) 178–179.

3 Thomas Kuhn, *The Structure of Scientific Revolutions* (3rd ed, 1996) 92, 94, 109; Rorty, *Philosophy*, above n 2, 170–171, 182.

4 Ferdinand de Saussure, *Course in General Linguistics* (Charles Bally and Albert Sechehaye eds, Wade Baskin trans, 1959) 69, 113. Again, at 117: '[Concepts]' most precise characteristic is in being what the others are not.'

5 Ibid 120.

6 Ibid 117–118: 'a segment of language can never in the final analysis be based on anything except its noncoincidence with the rest. *Arbitrary* and *differential* are two correlative qualities.'

7 Examples include words that have held different legal meanings and produced different legal consequences than they do now: woman, child, de facto, native title, reasonable, consumer.

Just as politicians cannot please all of the people all of the time, neither can any theory of law. Multiple truths' ascendancy over metanarratives precludes the construction of an accepted comprehensive legal theory. Given postmodern attitudes of contingency, jurisprudential theories seem unable to provide feasible positions. Yet without an organising theory to guide belief and measure law's legitimacy, how can law operate with any conviction that what it achieves is good? The apparent vertigo induced by this instability offends the human preference for certainty. Using claimed principles of truth to assert the validity of derived positions in contests with competing principles has traditionally provided comfort. Yet allegiance to fixed landmarks limits progress by reducing thought to closed combative argument, instead of working with differences and remaining open to newness to produce the most beneficial methods of achieving justice in diverse situations.

Law is created by value-laden subjects, and it operates in an atmosphere of contrasting values. Modern law has assumed the liberal homogeneity of its subjects; adult, male, Anglo-Saxon, heterosexual, rational, free, and independent. This conception of the subject ignores individuals and groups who do not fit those specifications. Further, the convergence of modernity's rational subjects through a unanimous perception is disabled once it is appreciated that subjects' perceptions differ. Realising the politically-constituted nature of the subject and of law demands an acknowledgment that law is partial. Yet the situatedness of the subject and of law is unavoidable; postmodern attitudes admit that the resolution of legal problems from a neutral position is impossible.⁸ However, potential injustices can be mitigated. To overcome the oppression of models limiting our thinking about society and justice, postmodern thought urges engagement with otherness; consideration of other perspectives and realities beyond that held and promoted by the dominant discourse.⁹

Unjust legal positions demand reconstruction through design. Even without foundational truths and neutral criteria for measuring justice, some designs demonstrably achieve more justice than others.¹⁰ Designs can be informed by history, by understanding what society requires, and by considering all possible solutions. The problem is that any proposed reconstruction privileges some political values over others. Legal reconstruction's feasibility depends ultimately on realpolitik; political, financial and social power, and electoral popularity.

Although demonstrating the inability of legal discourse to effect neutral

8 Gary Minda, *Postmodern Legal Movements* (1995) 243.

9 Michel Foucault, *Politics, Philosophy, Culture: Interviews And Other Writings* (Lawrence Kritzman ed, Alan Sheridan trans, 1988) *et al.* Foucault urges curiosity and care (328), and so the role of intellectuals is to 'question over and over again what is postulated as self-evident, to disturb people's mental habits, the way they do and think things, to dissipate what is familiar and accepted, to reexamine rules and institutions' (265).

10 Richard Rorty, *Contingency, Irony and Solidarity* (1989) 189. Rorty's fundamental premise is that although all perceptions are contingent on history, society and language, beliefs can still have the persuasive power and instrumental exigency which justifies their use as the basis of action. I think that these most demonstrably just designs appeal to values that are most universal and fundamental to humanity.

decisions, postmodern thought does not propose methods of evaluative and reconstructive design to improve the systems dominating the socio-cultural and legal atmosphere. Postmodernism's dispersion of jurisprudential theories is not accompanied by practical strategies beyond embracing otherness and engaging with the perspectives held by different races, classes, genders and individuals.¹¹ Similarly, Jacques Derrida's inquiry of deconstruction cannot itself achieve reconstruction. However, deconstruction remains desirable because by opening perceptions it can inspire reconstruction.

II DERRIDA — INTERESTS, MOTIVES AND *DIFFÉRANCE*

Derrida's theories are concerned with language, meaning and politics.¹² His overriding concern is to encourage an attitude of constant openness and inquiry. Deconstruction for Derrida was initially a philological concern, exploring the preferences embodied in dominant structural logocentric notions and the logocentric attitude itself.¹³ Now, Derrida accepts that his ideas, and deconstruction in particular, are adaptable to examine 'not what power is, but what powers may be in such and such a context.'¹⁴ I suggest that Derrida's recognition of the ethico-political inclinations of deconstruction links his ideas with their potential to enhance responsibility and justice in patterns of thought and societal institutions. Derrida's more explicit exploration of legal, political and ethical disputes, discussing contemporary concerns like abortion, euthanasia, medical experimentation, AIDS, drugs, homelessness, democracy and justice also indicates this movement from a philological concern to a political consciousness.¹⁵

The axis of Derrida's thought is that modern Western philosophy's attempt to identify and rely on fixed conceptual truths is untenable. Modernity's quest was to identify fulcrums of absolute truth from which to proceed and legitimise subsequent thought as neutral and just. Derrida argues that modernity's logocentricity is constructed, privileging certain perceptions and interests at the

11 Minda, above n 8, 245.

12 Jacques Derrida's engagement with the problems of meaning and its production impelled his investigation into linguistic theory, and his *Of Grammatology* (Gayatri Chakravorty Spivak trans, 1976) extended de Saussure's findings. Subsequent works further explored the philosophical constructs grounding Western thought. Derrida's works in the 1990s more closely relate his abstract philosophical thoughts to political reality. Derrida is now the Director of Studies at the Ecole des Hautes Etudes en Sciences Sociales in Paris and is Professor of Humanities at the University of California in Irvine.

13 Jacques Derrida, 'Hospitality, Justice And Responsibility' in Richard Kearney and Mark Dooley (eds), *Questioning Ethics* (1999) 65, 82.

14 Ibid 74.

15 Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority"' in Drucilla Cornell, Michel Rosenfeld and David Carlson (eds), *Deconstruction And The Possibility Of Justice* (1992) 3, 28–29; and Jacques Derrida, *Points . . . Interviews, 1974–1994* (Elisabeth Weber ed, Peggy Kamuf trans, 1995) *et al*, 360.

expense of the 'others', the devalued elements in binary pairs of concepts used to influence political and cultural existence. Western philosophy is marked by hierarchies that promote some concepts while degrading their opposites; this logocentric bias privileges and embeds certain systems of thought and practices.¹⁶ Rather than reflecting truths, these preferences are political constructs embodying power relationships. Derrida's goal is to expose the situatedness of these privilegings; they are texts constructed by signs and so they do not reflect absolute truths, and so cannot be used to inform claims to legitimise foundational knowledge. Because of the inability of language to capture truth, modernity's 'truths' claiming to legitimise philosophy and law are illuminated as political discourses influenced by an infinite play of values.

For Derrida, this lack of limits, truths and origins is a good thing. A postmodern attitude towards interpretation of meaning, signs and their play looks towards evolution and flow. This attitude 'is no longer turned toward the origin, affirms play and tries to pass beyond man and humanism . . . [beyond the quest for] full presence, the reassuring foundation, the origin and the end of play.'¹⁷ Derrida's idea of *différance* shows how interpretations of meaning and the positions adopted in reliance on meaning are contingent and unstable. As the nucleus of interpretation, *différance* demonstrates why a deconstructive attitude is beneficial.

Différance, perhaps understandable as the engine of interpretation, produces the instability of meaning. Individuals' interpretations of meaning and reality, and the legal and philosophical positions resulting from them, derive not from independent fixed truths but from a web of interdependent contingent interpretations.¹⁸

Différance has two elements. First, interpretations *differ* by being different in space; by distinguishing the meaning of a word or concept from another by distinction, spacing. *Différance's* spacing, through differing from something, emanates from this fact of being different due to the arbitrariness and differentiability of signs. *Différance* is not simply differentiation between concepts, as this allows the possibility of reference to a pure origin of meaning.¹⁹ Drawing

16 Above n 12, 3. Examples might include man/woman, reason/emotion, science/narrative, civilised/primitive, heterosexual/homosexual.

17 Jacques Derrida, *Writing And Difference* (Alan Bass trans, 1978) 292.

18 Jacques Derrida, *Positions* (Alan Bass trans, 1981) 26.

The play of differences supposes . . . syntheses and referrals which forbid at any moment, or in any sense, that a simple element be *present* in and of itself, referring only to itself. Whether in . . . spoken or written discourse, no element can function as a sign without referring to another element which is not simply present. This interweaving results in each 'element' . . . being constituted on the basis of the trace within it of the other elements of the chain or system. This interweaving, this textile, is the *text* produced only in the transformation of another text. Nothing, neither among the elements nor within the system, is anywhere ever simply present or absent. There are only, everywhere, differences and traces of traces.

19 Jacques Derrida, *Margins of Philosophy* (Alan Bass, trans, 1982) 13.

on de Saussure's identification of language as differential and arbitrary,²⁰ Derrida shows that this is not possible.

Second, interpretations *defer* by delaying until later, by having an interval in which meaning can become something. To defer is to reserve meaning, to defer it in time, to look to a becoming in the future as opposed to identifying and reducing a meaning to a presence. *Différance*'s deferral alludes to 'temporization'; the act of deferring meaning, of postponing it.²¹ This sense of *différance* denies the relationship of meaning to presence, thereby cracking the Platonic core of Western metaphysics: 'the relationship to the present, the reference to a present reality, to a *being*' is deferred because differentiability makes elements signify meaning by referring to past and future meanings in a shifting and centreless network of meanings.²²

Différance involves the movement and flow of myriad contingent interpretations, not a journey to a destination holding final meaning independent of other meanings and claiming legitimacy for itself on that basis. *Différance* has no limits because the chain of signification is infinite.

Différance is the systematic play of difference, of the traces of differences, of the spacing by means of which elements are related to each other . . . The activity or productivity connoted by the *a* of *différance* refers to the generative movement in the play of differences. The latter are neither fallen from the sky nor inscribed once and for all in a closed system, a static structure that a synchronic and taxonomic operation could exhaust.²³

But the idea of *différance* does not mean there are no meanings we can use to function. If this were so then communication and understanding would be impossible, the world rendered chaotic. *Différance* 'is the play which makes possible nominal effects, the relatively unitary and atomic structures that are called names'.²⁴ Nominal effects let society function and allow communication to be possible through some form of understood common meanings. *Différance* precludes climaxes of ultimate shared meaning, but accepts the viability of provisional temporary truths that allow thought and action to operate. But we should not believe that meaning is fixed, and therefore we should not unquestioningly accept the concepts which are claimed to legitimate political systems of ordering society.

Derrida applies de Saussure's identification of language's differentiability and arbitrariness to systems other than linguistics. Since there are no pure truths, the production of meaning through *différance* characterises all systems of thought and

20 de Saussure, above n 4–6. Differentiability refers to words having meanings different from each other; a word's conceptual value is not independent but is related to the differences between that word and others. An example is that the word/colour 'red' is impossible to define except by saying that it is all the words/colours that are 'not red'. Arbitrariness refers to the lack of a direct link between word and meaning; words simply possess the meaning they are imputed with. The word 'red' has no direct link with its meaning. These examples are adapted from Jonathan Culler, *Ferdinand de Saussure* (1986) 34–36.

21 Derrida, above n 18, 29.

22 Ibid.

23 Ibid 27.

24 Derrida, above n 19, 419.

institutions and structures; all these things are marked by a play of differences, a trace.²⁵ Laws and meanings are therefore irreducible to an originary presence of truth. Produced in an infinite space, laws and meanings are temporal manifestations of possible manifestations of laws and meanings, produced by privileging some conceptions over others. The endless chain of reference does not lead to a fixed truth but to a provisional truth whose persuasive value can be assessed. Accepting interpretation as *différance* enables otherness to present its claims to value, and this influences Derrida's prescription for deconstructive interpretation.

For Derrida, a more responsible reading involves normative elements that move beyond an attempt to capture a text's true meaning. Reading should first seek to understand a text; but it should then explore the positions and the supplements the text does not privilege.²⁶ Transgression of the text through Derridean-inspired reading requires an engagement with the text to first understand it and its forces. But any claimed legitimation of the text being interpreted must then be opened, examined from an informed perspective regarding the aims of the text.

This cannot be done from a neutral position. Informed perspectives from which a text is assessed are myriad, motivated by different factors that will affect the reading and assessment. The perspective chosen must therefore be explained and justified in the context within which the reading and assessment occurs. Then it can be seen that the text does achieve this, or does not achieve that, from first understanding its import, and then by moving outside the limits of that text, beyond an acceptance that it completely represents justice and truth. This involves a constant inquisitive openness and a continual questioning of meaning. This is why Derrida emphasises that an author

writes in a language and in a logic whose proper system, laws and life his discourse by definition cannot dominate absolutely. He uses them only by letting himself, after a fashion and up to a point, be governed by the system . . . the reading must always aim at a certain relationship, unperceived by the writer, between what he commands and what he does not command of the patterns of the language that he uses.²⁷

That is, reading must find not only what the writer has expressed and privileged,

25 Derrida, above n 18, 28–29.

Nothing — no present and *in-different* being — thus precedes *différance* and spacing . . . Subjectivity — like objectivity — is an effect of *différance*, an effect inscribed in a system of *différance*. This is why the *a* of *différance* also recalls that spacing is temporization, the detour and postponement by means of which intuition, perception, consummation — in a word, the relationship to the present, the reference to a present reality, to a being — are always deferred. Deferred by virtue of the very principle which holds that an element functions and signifies, takes on or conveys meaning, only by referring to another past or future element in an economy of traces.

26 Derrida, above n 16, 158–159.

27 Ibid 158. See 159 for what I think is a further exposition of this. First: 'The reading of the literary "symptom" is most banal, most academic, most naïve.' Second: 'once one has thus blinded oneself to the very tissue of the "symptom", to its proper texture, one cheerfully exceeds it toward a psychobiographical signified whose link with the literary signifier then becomes perfectly extrinsic and contingent.'

but what has been ignored and marginalised. Deconstructive inquiry is Derrida's recommended experience of achieving this insight.

III DECONSTRUCTION: INQUIRY TO ENCOURAGE IMPROVEMENT

The Latin root *construo* means 'build'. To construct something, to build it, materials must be chosen and used. To 'deconstruct' is to reverse the process. 'Deconstruction' is not *destruction* but 'de-construction'; a discovery of what materials were selected, and of how they were combined, to create the structure. This discovery also reveals the forces not used to contribute to the structure. In this way, the structure can be assessed to find its limits. To use the analogy of a building, deconstruction finds the materials used to create it, whether the building contains certain rooms or not, and whether the building caters for different needs. Deconstruction sees if the building originally used the most complete set of materials for the job, and if that set of materials remains complete. It asks if the building performs its intended function, and if there are any new functions that need to be fulfilled. Deconstruction asks whether there are functions that the building cannot perform because of the limits imposed by the nature of its original materials. Analytical positivism dismantles law to assess its structural integrity, insisting on its formal coherence, wholeness and unity. Legal value and truth emanates from the coherence of its closed systematic structure. In contrast, deconstruction identifies and questions the politically forced conceptual situation of the structure itself. In this way, deconstruction identifies the limits of the law's conceptual frame, revealing privileged, marginalised and ignored interests as products of founding and conserving legal violence.

Beneath deconstruction is an impulse towards an ongoing openness to possibilities of finding better ways of reaching more just results. This is not the same as a motive to find 'truth'. The object is not adversarial attack. Deconstruction simply reveals the forces relied on to build structures. In legal deconstruction, these forces are political, ethical and theoretical. This revelation of forces used and those forces marginalised can then be used to assess the integrity of the structure and its products. It may be that the utility of the structure is confirmed. But equally it may be that the illumination of the forces used and ignored in creating the structure point to possible improvements.

Derrida is concerned to see that social institutions work in a just way. Deconstruction's

questioning philosophy about its treatment of ethics, politics, the concept of responsibility . . . [orders itself] on an exigency . . . of response and responsibility.

Without this exigency, in my view no ethico-political question has any chance of being opened up or awakened today.²⁸

Derrida's deconstruction is not nihilistic, destructive or irresponsible. On the contrary, deconstructive inquiry is motivated by these exigencies of response and responsibility.

Justice is an infinite demand and an infinite quest. It is never possible to say we have achieved justice and can do no more. The possibility of constant improvement is recognised through an evolving knowledge of what works best, motivated by an ethic of social responsibility. The 'double movement' of deconstruction, is 'already engaged by this infinite demand of justice, for justice.'²⁹

The first motive of deconstruction is 'The sense of a responsibility without limits'.³⁰ Required here is an appreciation of

the history, the origin and subsequent direction, thus the limits, of concepts of justice, the law and right, of values, norms, prescriptions that have been imposed and sedimented there, from then on remaining more or less readable or presupposed . . . the task of a historical and interpretative memory is at the heart of deconstruction . . . the first way to do [justice] justice is to hear, read, interpret it, to try to understand where it comes from, what it wants of us, knowing that it does so through singular idioms . . . and also knowing that this justice always addresses itself to singularity, to the singularity of the other, despite or even because it pretends to universality.³¹

For Derrida this responsibility to examine the origins, impacts and limits of the norms which ground justice to reveal theoretical limits and practiced injustices is continual.³² Deconstruction, its derivation from *différance*, and its motives deny the possibility of closure.

In this way the legitimacy of theoretical and practical decisions can be assessed. This sense of responsibility is related to other concepts such as will, freedom, conscience, subject and community.³³ Deconstruction identifies laws' nature and operation, and suspends their assumed justifiability. It tries to reach a position outside the system which accepts its own legitimacy and completeness. This suspension of judgment of justice is essential for deconstruction; it creates the space 'in which transformations, indeed juridico-political revolutions take place'.³⁴

The second motive is

the demand for an increase in or supplement to justice . . . in the end, where will deconstruction find its force, its movement or its motivation if not in this always unsatisfied appeal, beyond the given determinations of what we call, in determined contexts, justice, the possibility of justice?³⁵

28 Derrida, *Points*, above n 15, 364.

29 Derrida, 'Force', above n 15, 19.

30 Ibid.

31 Ibid 19–20.

32 Ibid.

33 Ibid 20.

34 Ibid.

35 Ibid 20–21.

The search for justice is infinite, a constant reexamination and exploration dependent on consideration of changing states of knowledge and circumstance. This does not mean that the only possibility is a fatalistic retreat, surrendering to meaning's instability and the absence of transcendent truths. It simply means that the attitude of openness embraced by deconstruction produces a constant watchfulness, a perpetual openness to displace previous systems and previously adopted truths, and a willingness to substitute improved ones.

Derrida confirms this exploratory nature of deconstruction. The experience of deconstructing a text is to

work through the structured genealogy of its concepts . . . to determine from a certain external perspective that it cannot name or describe what this history may have concealed or excluded, constituting itself as history through this repression in which it has a stake.³⁶

The deconstructor's perspective of anti-foundationalism is prefigured; the goal is to challenge the text's claims to coherence, neutrality and objectivity. Texts' claims to freedom from values and political privileging demand deconstruction. Deconstruction rejects the idea that a text, here a law, merely reflects fixed truths. The law is revealed as a political artefact that in its creation overcame competing values.

For Derrida, deconstruction is not a 'methodical technique'.³⁷ Deconstruction is reducible to neither a method nor an analysis (the reduction to simple elements); it goes beyond critical decision itself. That is why it is not negative, even though it has often been interpreted as such despite all sorts of warnings. For me, it always accompanies an affirmative exigency, I would even say that it never proceeds without love.³⁸

This suggestive motive connects deconstruction with social progress. At other points Derrida refers to deconstruction as an 'experience'³⁹, as a 'movement'.⁴⁰ Deconstruction is an

absolute break . . . the tension between memory, fidelity, the preservation of something that has been given to us, and, at the same time, heterogeneity, something absolutely new, and a break. The condition of this performative success, which is never guaranteed, is the alliance of these to newness.⁴¹

36 Derrida, above n 18, 6.

37 Jacques Derrida, 'Sauf le nom' ('On the name') in Thomas Dutoit (ed), *On The Name* (David Wood *et al* trans, 1995) 43.

38 Derrida, *Points*, above n 15, 83.

39 Derrida, above n 37, 43.

40 Derrida, *Points*, above n 15, 211.

41 'The Villanova Roundtable — A Conversation with Jacques Derrida' in John Caputo (ed), *Deconstruction In A Nutshell* (1997) 6.

A constant affirmation is the purpose of deconstruction as a beneficial experience, not as a destructive process.⁴²

Humans generally prefer certainty to uncertainty. Accepting that there are better ways of thinking and behaving requires accepting our imperfectibility. It requires abandoning the philosophical, ethical, and legal signposts that history has set as landmarks to guide our way. These landmarks are not *the* way. They simply define *a* way that has been chosen, influenced by the knowledge and values held and promoted at the time the passage was charted. By seeking and being alert to improvement in our awareness and ways of thinking and acting, legal demarcations can be shifted to define a passage that will enhance justice. This attitude disorients those who seek security in the belief they possess pre-eminent methods of thought and action. This attitude is reconstructive, sponsored by an ethic of responsibility and justice. The deconstructive attitude relies on openness and the acceptance that there is no ultimate solution. Exploration and transformation are the goals.⁴³ Limiting the deconstructive attitude of inquiry, exploration and design is the inertia embodied by those afraid of the unknown and by those satisfied with the dominant position.

How is this attitude to be translated into action? Derrida's ideas illustrate the broad purpose of deconstruction but there is no one way to 'do' it.⁴⁴ Each deconstructive inquiry is unique; 'reading is a mixed experience of the other in his or her singularity as well as philosophical content, information that can be torn out of this singular context.'⁴⁵ Another indication of deconstruction's purpose lies in Derrida saying

it is the breakdown that lays bare the functioning of the machine as such. And with that, because these non-natural, historical, founded institutions were no

42 Derrida, *Points*, above n 15, 211.

I have constantly insisted on the fact that the movement of deconstruction was first of all affirmative — not positive, but affirmative. Deconstruction, let's say it one more time, is not demolition or destruction. Deconstruction — I don't know if it is something, but if it is something, it is also a thinking of Being, of metaphysics, thus a discussion that has it out with . . . the authority of Being or of essence, of the thinking of what is, and such a discussion or explanation cannot be simply a negative destruction. All the more so in that, among all the things in the history of metaphysics that deconstruction argues against . . . there is the dialectic, there is the *opposition* of the negative to the positive. To say that deconstruction is negative is simply to reinscribe it in an intra-metaphysical process. The point is not to remove oneself from this process but to give it the possibility of being thought.

43 *Ibid* 239. As Derrida says:

The only attitude (the only politics — judicial, medical, pedagogical, and so forth) I would *absolutely* condemn is one which, directly or indirectly, cuts off the possibility of an essentially interminable questioning, that is, an effective and thus transforming questioning.

44 *Ibid* 200.

45 *Ibid* 201.

longer working, they were found to be altogether unfounded, unfounded in law, illegitimate.⁴⁶

Here is a pragmatic concern that laws work in a justifiable way.

IV DECONSTRUCTION AND LEGAL CRITIQUE

In legal critique, deconstruction's inquiry reveals deficiencies in law's attempt to do justice. Derrida recognises that legal deconstructive questioning is only beginning, but insists it has important social potential.⁴⁷ Developments in critical legal theory such as those made by Critical Legal Studies scholars are 'from the point of view of a certain deconstruction, among the most fertile and the most necessary.'⁴⁸ Deconstruction 'has to challenge institutions, social and political structures, the most hardened traditions.'⁴⁹ The justifying factor is the political nature of law and society; in every legal decision is a political decision that prefers certain perspectives. The play of political, cultural and other values which influences the substance of law is the subject of deconstructive inquiry.

An analysis which is not merely a theoretical analysis, but at the same time another writing of the question of Being or meaning: deconstruction is also a manner of writing and putting forward another text. It is not a tabula rasa, which is why deconstruction is also distinct from doubt or from critique. Critique always operates in view of the decision after or by means of a judgment. The authority of judgment or of the critical evaluation is not the final authority for deconstruction.⁵⁰

Derrida applauds the pragmatic bent of legal deconstruction. These developments, say Derrida,

aspire to something more consequential, to *change* things and to intervene in an efficient and responsible, though always, of course, very mediated way, not only in the profession but in . . . the world . . . In an industrial and hyper-technologized society, academia is less than ever the monadic or monastic ivory tower that in any case it never was. And this is particularly true of 'law schools.'⁵¹

Consequences, change, intervention, efficiency, responsibility, the world. Derrida rejects academic meandering and urges a grounded critique of laws motivated by an active conscience to generate practical change in real situations.⁵²

Derrida's opinion of the foundation of law's authority provides the

46 Ibid 348. This comment occurs in the context of Derrida's discussion of the May 1968 uprisings in France; demonstrations against societal institutions that were 'non-natural, founded, historical things [that] were clearly no longer functioning.'

47 Derrida, 'Force', above n 15, 9. Indeed, Derrida applauds the efforts of CLS writers: 'their specialization and the acuity of their technical competence puts them, on the other hand, very much in advance of whatever state deconstruction finds itself in a more literary or philosophical field.'

48 Ibid 8.

49 Derrida, *Points*, above n 15, 213.

50 Ibid 212.

51 Derrida, 'Force', above n 15, 8-9.

52 See for example Part II of 'Force', above n 15, 29-67, which was originally a lecture delivered at a colloquium titled 'Nazism and the "Final Solution."'

atmosphere to relate deconstruction to law. For Derrida, law is effective because it influences individual and state behaviour. This effect exists whether or not the law is just. The existence of a law does not guarantee that the law is just. Further, the obedience to that law is not premised on the law's justness, nor is obedience to that law a consequence of the law's justness.

For Derrida, the foundation of laws' authority in this automatically asserted sense is mystical. By 'mystical', Derrida means that there is nothing existing at the moment of a law's creation that gives it justness or legitimacy. Legal manufacture is a performative and interpretative exercise using force and violence.⁵³ 'Force' and 'violence' imply that other possible interpretations are defeated and excluded from the substantive law. 'Violence' connotes the contest between conceptions of law, politics and morals, won by those conceptions embodied in the law. The first manifestation of violence is the originating violence which occurs upon a law's creation. The second is the ensuing preservation of this original product of violence.⁵⁴ Legal discourse therefore has an inherent limitation. Because no force exists independently of the law which guarantees a newly-created law's justness, the neutrality or justness of a law cannot be proved. All laws are nourished by a matrix of values and preferences; not one of objectivity, rationality and pure justness. Law's limit is its own performative power.⁵⁵ The 'silence' Derrida puts as law's mystical foundation of authority is this muteness from the lack of a vocal authority. '[W]alled up in the violent structure of the founding act'⁵⁶, this silence also indicates those other silences submerged by the preferred substance of the founded law. It could also be said to allude to the 'silence about the political consequences of this series of silences.'⁵⁷

Derrida thus characterises law as

essentially deconstructible, whether because it is founded, constructed on interpretable and transformable textual strata (and that is the history of law [*droit*], its possible and necessary transformation, sometimes its amelioration), or because its ultimate foundation is by definition unfounded.⁵⁸

I think law is deconstructible for both these reasons. And the benefit of this deconstructibility is that law can be transformed and improved when it needs to be; Derrida calls it 'a stroke of luck for politics, for all historical progress'.⁵⁹

Deconstruction questions the idiom in which law operates. This questioning reveals law's assumptions about the society and subjects it governs. Deconstruction might be most obviously beneficial to illuminate the context of ethically controversial legal problems like abortion, euthanasia, legalised drug use and medical engineering. But it should not be thought that more accepted legal

53 Ibid 13.

54 Ibid 31.

55 Ibid 13-14.

56 Ibid 14.

57 Margaret Davies, *Delimiting The Law* (1996) 77.

58 Derrida, 'Force', above n 15, 14.

59 Ibid.

principles and doctrines are not susceptible to deconstruction and hence to potential improvement.

An example is the construction of the individual subject as an Anglo-Saxon adult heterosexual male possessing reason, freedom and equality. This limitation of the subject of laws' operation affects the legitimacy and adequacy of all laws affecting individuals. Such a demarcation of the individual could not be said to automatically cause injustice, but deconstructive questioning of the precept allows a 'reinterpretation of the whole apparatus of boundaries within which a history and a culture have been able to confine their criteriology.'⁶⁰ When assessing the legitimacy of particular legal principles from the perspective of this limited cast of the subject, gaps can be revealed because the real natures of subjects differs from the universalised ideal.

Imagine law engaging with the perspectives and interests of the environment, women, indigenous peoples, unborn children, the family. By challenging inured legal structural limits like those privileging the human, the masculine, the Anglo-Saxon, the living, and the individual, deconstruction offers tantalising glimpses of what might be possible, of how revising perceptions and attitudes might contribute to enhancing justice. Deconstruction need not just be about seeking the perspectives of the legally unnormalised and unprioritised. By identifying traditional self-referential assumptions of the legally valid and the legally dominant and by considering alternatives to them, deconstruction is driven by an ethical motive towards those other perceptions, *and* towards those traditionally privileged perceptions. Those usually favoured by law's preferences might also benefit from reexamination of legal limits. Consideration of alternatives does not entail destruction of the existing 'order'. Rather, it has the transformative potential to enhance justice in a broader sense than merely by reevaluating habitually devalued perspectives.

V DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE

Derrida seeks justice by considering the experience of other realities and perspectives that exceed law's dominant images. Automatic applications of existing legal doctrines, especially combined with the exclusory aspects of operating within a legal idiom,⁶¹ cannot embody just decisions. Each case is unique, demanding fresh judgment to hope to secure a just decision. There is no possibility of justice if laws operate on assumptions of identical situations, politics,

60 Ibid 19.

61 For example, rules of evidence.

and subjects.⁶² Here is the conflict between universality's imposition of a dominant perception and otherness.

The problem of justice and law lies in this conflict between imposed universality and unique circumstance. The law fails to achieve justice if it applies reductive generality without considering the singularity of each case and the requirements these different realities produce. As Derrida says:

If I were content to apply a just rule, without a spirit of justice and without in some way inventing the rule and the example for each case, I might be protected by law (*droit*), my action corresponding to objective law, but I would not be just.⁶³

It is important to distinguish the senses of 'law' and 'justice' used here by Derrida. Law is that which is put by legal bodies to regulate our lives. Law is something that can be calculated, worked out, by bringing a legal dispute within applicable present statutes and case authorities. Law is limited to those expressions of regulation considered by lawmakers; hence the violence done to those conceptions not preferred by law both in its original formation and in its preservation. Law is the 'history of right, of legal systems' such as statutes, constitutions, institutions.⁶⁴ To this I would add the present workings of these systems. The history of law involves creation, development, change and reconstruction. Law is a phenomenon created by, preserved, and applied by force.⁶⁵ Yet it is not able to be externally legitimated as a neutral exercise of just force; law is a force harnessed by its makers and limited by its temperament. Law is therefore deconstructible because it is founded by forces that are able to be interpreted.

Each time you replace one legal system by another one, one law by another one, or you improve the law, that is a kind of deconstruction, a critique and deconstruction. So, the law as such can be deconstructed and has to be deconstructed. That is the condition of historicity, revolution, morals, ethics, and progress. But 'justice' is not the law. Justice is what gives us the impulse, the drive, or the movement to improve the law, that is, to deconstruct the law. Without a call for justice we would not have any interest in deconstructing the law.⁶⁶

'Justice' is therefore an abstract goal, a quality that transcends law. 'Justice' can never be ultimately done by a judicial act or by a statutory embodiment because it is unreachable; 'justice' is the incalculable other to 'law'. Justice compels us to enhance the law. Justice is the paramount quality of being, unrepresentable, unattainable, undeconstructible. We cannot reach it. Justice always 'remains, is yet, to come, *à venir* . . . It will always have it, this *à-venir*, and always has.'⁶⁷

62 Derrida, 'Force', above n 15, 17:

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

63 Ibid. This point is reiterated at 23.

64 Ibid 16.

65 Ibid 6.

66 Ibid 16–17.

67 Ibid 27.

However, there are degrees of justice and injustice, and this gradation of justice makes it possible for us to enhance the measure of justice promoted by law. Derrida accepts this: 'Perhaps it is for this reason that justice, insofar as it is not only a juridical or political concept, opens up for *l'avenir* the transformation, the recasting or refounding of law and politics.'⁶⁸ There are attitudes which therefore contribute to greater or lesser degrees of justice.

Derrida's axiom in the discussion of adjudicative justice is that

if the act simply consists of applying a rule, of enacting a program or effecting a calculation, we might say that it is legal, that it conforms to law, and perhaps, by metaphor, that it is just, but we would be wrong to say that the decision was just.⁶⁹

Law's temperament is not natural but posited; and so the formulaic application of law by judges is not just, but simply legal. Adjudicative justice can only result from reinterpretation and rejustification of the law, before any possible reapplication of it. Rather than a simple act of re-producing the text, existing precedents must be subjected to a 'reinstating act of interpretation, as if ultimately nothing previously existed of the law, as if the judge invented the law in every case.'⁷⁰ The singularity of cases and the impossibility of claiming that law embodies transcendent truth demands a new interpretative judgment of each case. 'Each case is other, each decision is different and requires an absolutely unique interpretation, which no existing, coded rule can or ought to guarantee absolutely.'⁷¹ Yet nor is justice done if the judge refuses to consult existing authorities. Derrida does not prescribe such an anarchic position. The moment of reproduction has its place. But justice requires constant reassessment of the justifiability of accepted legal precedents. The judge must not be a machine, equating the facts of each case to the nearest precedent and applying it. That is why a judge is so-called; the position is one of responsibility and requires the exercise of judgment. Nor is the position one of absolute power to make any decision a judge thinks fit; this would be even less a guarantee of justice than the machine-operated system. Laws' enforcement and the performance of the judicial function require some degree of certainty and accountability.

Deconstruction is concerned with law's claim to unity and homogenisation of meaning.

The privilege granted to unity, to totality, to organic ensembles, to community as a homogenized whole — this is a danger for responsibility, for decision, for ethics, for politics. That is why I insisted on what prevents unity from closing upon itself, from being closed up. This is not only a matter of description, of saying that this is the way it is. It is a matter of accounting for the possibility of responsibility, of a decision, of ethical commitments.⁷²

This attitude requires a recognition of singularity, which is not simply an attitude of unity or multiplicity, but rather one of recognising the presence of otherness and

68 Ibid.

69 Ibid 23.

70 Ibid.

71 Ibid.

72 Derrida, above n 41, 13.

the possibility of the presence of otherness. Nor does Derrida sink into anarchy:

this does not mean that we have to destroy all forms of unity wherever they occur. I have never said anything like that. Of course, we need unity, some gathering, some configuration . . . [but] pure unity or pure multiplicity . . . is a synonym of death.⁷³

Derrida does not seek through deconstruction and this requirement of fresh judgment a bewildering multiplicity. Rather, deconstruction as the possibility of justice seeks to recognise otherness; it acknowledges the heterogeneity of meaning and texts. Without this requirement, the other(s) will always be ignored, and justice will never be heightened.

Derrida condemns the totalitarianism, disharmony and dysfunction produced by a state's pure unity.⁷⁴ Yet nor can justice be served by an attitude of pure multiplicity; there must be some relative certainty and some structure to make a system work. The balance between these extremes requires a constant openness, a fluidity of attention to otherness, while maintaining a pragmatic attitude to avoid collapsing into dysfunctional uncertainty: 'a state as such must be attentive as much as possible to plurality, to the plurality of peoples, of languages, cultures, ethnic groups, persons, and so on.'⁷⁵ This attention to plurality and to otherness keeps a respectful distance from that which is accepted as legitimate.

Dissociation, separation, is the condition of my relation to the other. I can address the Other only to the extent that there is a separation, a dissociation, so that I cannot replace the other and vice versa . . . dissociation is the condition of community, the condition of any unity as such.⁷⁶

Deconstruction takes no thing for granted, including conceptions of 'justice'. It is grounded in a responsibility to justice, not a blind allegiance to existing law. It is funded by a commitment to responsibility and by engagement with otherness, those interests not represented by the law. Impelling deconstruction is an attitude of openness and awareness; 'constantly to suspect, to criticize the given determinations of culture, of institutions, of legal systems, not in order to destroy them or simply to cancel them, but to be just with justice, to respect this relation to the other as justice.'⁷⁷

Injustice occurs in all times and in all societies, even 'developed' ones, suggesting that 'justice' is infinite and unattainable. The forces controlling the human animal and its societal dynamics are too complex, individualistic and non-altruistic to allow the formation and continuity of a purely just society. In Western society, Darwinism and capitalism contribute to a combative society producing winners and losers. All that can be done is to remain open to new

73 Ibid.

74 Ibid 15.

75 Ibid.

76 Ibid 14–15.

77 Ibid 18. Caputo characterises deconstruction as inventionalism, an openness to newness that denies the conditions of essentialism (belief in and search for essential truths that are eternal) and at the same time of conventionalism (belief in and dependence on accepted/settled but contingent systems of thought and action). In contrast, inventionalism uses what exists, but assesses it, and continually searches for new ways of thinking and acting.

conceptions of justice, to new ways of reaching greater degrees of justice, which means maintaining an attitude of openness and inquiry and betterment.

VI WHY DECONSTRUCTION IS DESIRABLE BUT INSUFFICIENT

So what is justice? Does a conception of justice imply normativity or some type of preference of interests? Or is justice more easily identifiable by a process of elimination, to find out what is most and least recognisably unjust? Beyond deconstruction, does Derrida give any program for action?

Not in the sense that holds utility for policymakers, politicians or any individuals and bodies responsible for addressing real problems. Derrida simply says that deconstruction is justice; deferral of ultimate judgment, constant reexamination and an attitude of openness and betterment are all the justice we can embody. Justice as deconstruction in this sense is infinite, always evolving and never satisfied. Lilla thinks Derrida's positions on language, society and indeterminacy prevent him from urging a particular political perspective or plan of action, because no plan of action or thought can escape deconstruction.⁷⁸ Similarly, Rorty recognises Derrida's utopian motivation, but thinks Derrida's work is more privately oriented to pure metaphysical critique, as opposed to having direct public political consequences 'except in a very indirect and long-term way.'⁷⁹ Derrida admits the difficulty of moving beyond deconstruction to generate improved and feasible political programs.⁸⁰ Therefore, despite Derrida's progression from a more purely philological motive concerning philosophical assumptions to a more explicit contextualisation of this exploration's

78 Mark Lilla, 'The Politics of Jacques Derrida', *The New York Review*, 25 June 1998 36, 40.

79 Richard Rorty, 'Remarks on Deconstruction and Pragmatism', in Chantal Mouffe (ed), *Deconstruction and Pragmatism* (1996) 13, 16. Epitomising his pragmatic bent, Rorty characterises political thought as

a matter of pragmatic, short-term reforms and compromises — compromises which must, in a democratic society, be proposed and defended in terms much less esoteric than those in which we overcome the metaphysics of presence. Political thought centres on the attempt to formulate some hypotheses about how, and under what conditions, such reforms might be effected. (17).

80 Jacques Derrida, 'Deconstruction and the Other', in Richard Kearney (ed), *Dialogues with contemporary continental thinkers: the phenomenological heritage* (1984) 105, 119–120. In answer to the question 'Can the theoretical radicality of deconstruction be translated into a radical political praxis?', Derrida replies:

This is a particularly difficult question. I must confess that I have never succeeded in directly relating deconstruction to existing political codes and programmes . . . the available codes for taking such a political stance are not at all adequate to the radicality of deconstruction. And the absence of an adequate political code to translate or incorporate the radical implications of deconstruction has given many the impression that deconstruction is opposed to politics, or is at best apolitical. But this impression only prevails because all of our political codes and terminologies still remain fundamentally metaphysical, regardless of whether they originate from the right or the left.

implications for politics and ethics, there are no directions offered to move deconstruction's exploration beyond diagnosis to political reconstruction. However, I suggest that deconstruction is capable of inspiring continual evolution of law to enhance justice and ground law in social reality.

Recently, Derrida was asked how we should act after deconstruction.⁸¹ This question embodies my concern about the possibility of normative practical action based on persuasive informed positions. Like Derrida, I would distinguish deconstruction as an ongoing attitude from any attempt to isolate it momentarily. Instead of placing decisions 'after' deconstruction with a sense of closure, it would be more accurate to ask:

In light of a deconstructive inquiry and the consideration of these discourses and accepted states of knowledge at this time, how can we make a decision between competing solutions to use now, while accepting that this solution is only provisional and subject to continuous deconstructive exploration?

Undecidability does not paralyse us from action. I agree with Derrida that without perceiving undecidability, no choice is made; there is

no decision, in the strong sense of the word, in ethics, in politics, no decision, and thus no responsibility, without the experience of some undecidability . . . a decision has to go through some impossibility in order for it to be a decision. If we knew what to do, if I knew in terms of knowledge what I have to do before the decision, then the decision would not be a decision.⁸²

Undecidability is the recognition of competing responses to a situation.⁸³ Undecidability is the condition of 'justice' and responsibility as opposed to the formulaic calculation of 'law'. Without this search for competing responses — without the deferral of judgment, the recognition of currently held responses and the generation of alternative responses that have not yet been produced — there is no 'decision' but merely an unwitting response. Good decisions 'leap beyond the field of theoretical knowledge' while being 'prepared as far as possible by knowledge, by information, by infinite analysis.'⁸⁴ Terrifying decisions, leaping into the unknown, are informed and proactive; secure decisions based only on extant knowledge are wooden, embedding limits. Derrida accepts, then, that we cannot 'know' how to act because this would mean that no genuine decision had been made. I agree that a genuine decision on how to act cannot be 'known', but can be informed as widely as possible. The normativity of a decision on how to act cannot be escaped, but the merit of such a decision can be measured by its degree of informedness.

Decisions must be made. Society entrusts governmental individuals and bodies with the responsibility to make the decisions which regulate our lives. Derrida characterises the nature of decision-making and advocates the abstract features required of a legitimate decision, but he does not promote any specific solutions to practical problems. The problem with praxis — practice, action,

81 Derrida, above n 13, 65.

82 Ibid 66.

83 Ibid 66.

84 Ibid 66.

politics — is that we cannot know of a decision's ultimate justness, coherence or validity. For a decision to be made, going beyond a formulaic application which is no decision at all, there must be some breach of the known.⁸⁵ This must always hinge on a normative preference. There is no way to escape this influence of values. But a decision can be made and justified as more legitimate than another by demonstrating that it is informed by current knowledge and currently persuasive beliefs. This is why Derrida urges that

political, ethical and juridical responsibility requires a task of infinite close reading . . . [this is] the condition of political responsibility . . . to read events, to analyse the situation, to criticize the media, to listen to the rhetoric of the demagogues.⁸⁶

The responsibility required of decisions is onerous; Derrida describes it as terrible.⁸⁷ Responsibility and decisionmaking require information, fear, courage and risk of the uncertainty that lies beyond current knowledge. The quality of 'responsibility' comprises the 'ability' to select our 'response'. Formulaic application has an inherent security, a knowledge of bases and results, but it limits justice and can perpetuate injustice. Responsible decisions demand the courage of moving beyond the known, which although informed by current knowledge, can never be certain of the justness of the outcome, or of its longevity.

Deconstruction is a good attitude to have, but it is not itself justice. It does not provide any direct guidance about desirable practical action to address real problems. Nor will responses chosen to enhance justice through law be immune to deconstruction, since normative positions are contingent on political motives and deconstruction is an ongoing obligation. Derrida offers no program for reform, and he accepts that his idea of deconstruction by itself offers nothing politically or ethically reconstructive.⁸⁸ Liberal notions such as responsibility, conscience, intentionality and property are identified as the cornerstones of Western law, and with these Derrida juxtaposes the features of legal discourse;

the category of decision right down to its appeals, to medical expertise . . . [these tenets are] so theoretically weak and crude that I need not emphasize it here. And the effects of these limitations are massive and concrete enough that I don't have to give any examples.⁸⁹

Perhaps all of what Derrida asserts is valid, but the lack of real examples is a weakness.

However, despite operating in a normative vacuum, Derrida rejects the criticism that deconstruction is nihilistic.⁹⁰ Rather, deconstruction is essential to reconstruction.⁹¹ I suggest that this is correct; justice can be enhanced but not

85 Ibid 73.

86 Ibid 67.

87 Ibid.

88 See Derrida, *Points*, above n 15, 364: 'there is in fact no philosophy and no philosophy of philosophy that could be called deconstruction and that would deduce from itself a "moral component."' and Derrida, above n 13, 74.

89 Derrida, 'Force', above n 15, 25.

90 For example, Gillian Rose, *Dialectic of Nihilism* (1984) 1.

91 Derrida, above n 13, 77.

secured by a deconstructive attitude. Derrida accepts that justice requires legal embodiment.⁹² His contribution is to urge the continual reassessment of laws' legitimacy, and to promote the constant reinvention of laws to enhance justice. Impeding this is the inescapable contingency of all normative positions. Enhancing justice requires the adoption of the same methods that make it impossible:

even if justice is foreign to the process, it requires political action, rhetoric, strategies, etc. What is foreign to strategy requires strategy. That is the double-bind which causes the difficulty.⁹³

VII CONCLUSION

Life demands more than academic assertions to guide thought and action. Insight attains credit by enhancing life's quality. The diagnostic contribution of Derrida's thought is of immense value, and his motives of responsibility, openness, betterment and justice are commendable. A deconstructive attitude is preferable to the limits of formalism, but it is only the starting point for its ambition to further social justice. Laws' limits, based on preferences of dominant terms in binary oppositions just as they are in philosophy, can only be breached by engaging with these 'lesser' bodies and inquiring into their perspectives and needs. Critical examination of law's traditional privilegings is necessary to assess their legitimacy. The conceptual frames bounding laws need to be continually revisited. Together with deconstruction, persuasive methods of design and reconstruction are required. Perhaps Derrida's insight can motivate other thinkers to design improved legal principles in areas where justice can be enhanced.

92 Ibid 72-73.

93 Ibid 73.