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The reception of Jacques Derrida in American Critical Legal Studies

Entretien avec Duncan Kennedy*

Propos recueillis par Serpil Tunç Ütebay

Duncan Kennedy : Thank you very much for asking me for an interview about the influence of Derrida on American Critical Legal Studies (or cls[1]). I'm going to begin by rephrasing our topic. In the 1980's, the diverse group of American legal scholars who understood themselves to be part of the cls movement collectively "received" Derrida with very diverse understandings of what exactly he was saying. In my retrospective participant view, this was an important episode in the history of critical thinking about law in the United States. The ambiguities of the words reception and episode will be important as I try to answer your questions about the event.

Serpil Tunç Ütebay : Why do you prefer the word "reception" rather than "influence?"

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* Carter Professor of General Jurisprudence, Harvard Law School.
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1. I use the lower case for cls, not capital letters, to avoid making it sound like an organization or a school with dogma (D.K.).

D. K. : "Reception" to me indicates that the active parties or agents in the story were the American legal scholars reaching out to come to grips with Derrida's work. We thought we were the first American jurists to do this. Like many others we were encountering at the time, Derrida's texts were very difficult and it was hard for us to decide what they meant grammatically. We ended with a double translation, first from French into English and then by us from cryptic English into ordinary English.

None of us was a professional philosopher although all or almost all of us had had more or less elite American general education courses in college and an important handful had attended institutions like Yale where critical theory was taught. We were reading Derrida because we understood from general (not legal) American intelligentsia sources that he was the "next big thing" in French critical theory, a domain also inhabited by Sartre, Lévi-Strauss, Althusser, Gorz, Foucault, Baudrillard and random others. We were interested in ways in which European critical theory could help us develop and defend our own very specifically American legal project. We thought Derrida might be helpful for this purpose. This was a limited kind of interest because it was instrumental rather than addressed to his work taken as whole or to his place in his French context or for that matter to the American mainstream academic Derrida discussions. We eventually became aware that British critical legal studies has also a Derridian turn interestingly different from and distant from our own.

It would be more accurate to say we received the chapter, *The Dangerous Supplement,* from *Of Grammatology* and, only some time later, *Structure, Sign and Play in the Discourses of the Human Sciences, Force de Loi* and *Specters of Marx,* than that we received Derrida *tout court*. All of this adds up to what Diego Lopez Medina described in an analogical context as "an impoverished hermeneutical environment" for reception. Which means**,** bluntly stated**,** that we had very wide, undisciplined leeway in deciding what Derrida was saying and therefore how we would use him even before we got to his significance for legal theory.

S. T. Ü. : And what do you mean by an episode ?

D. K. : To say that Derrida's reception was an important "episode" is to say, precisely, that it was not "the whole story," not an epochal moment in the story of critical thinking about law, but one in a series of events that "moved things along" significantly without transforming the game. Episodes have endings within any given narrative although their effects can live on indefinitely. In this case, Derrida was received among us crits[2] during the 1980s. In the early 1990s, critical legal studies as a movement disappeared but the school itself remained. Those who were young members of the school in the 1980s read Derrida or at least about Derrida. After 1990, however, they stopped reading him or citing him. His impact persisted in their work and indirectly in the work of new recruits who had barely heard of him, but the episode was long over. The enemies of critical legal studies, while it was alive as a combative legal academic movement, liked to attack the Derridian influence as a sign of mystified nihilism. Since its demise Derrida has lost even that caricatural role. This is a sad story but of course time is a turning wheel.

S. T. Ü. : What series of events are you referring to ?

D. K. : The events comprising the genealogy of the practice of internal critique of legal rationality, more pretentiously, "legal reason," in the American legal academy. By a genealogy I mean a series of texts in which those later in time respond in some way, and to some extent, to those earlier in time. It's not an "origin story," but the story of twists and turns and new combinations from multiple starting points that bring us to something that interests us in the present. That's the evolving narrative that we receivers wanted to contribute to with our newly constructed versions of Derrida.

S. T. Ü. : What do you mean by internal critique ?

D. K. : The maker of a legal argument universally but implicitly asserts the coherence of his reasoning (Austin, "How to do things with words"). When he or she says "the law is x" or "the law should be x" we understand them to also implicitly assert that "this is an internally

2. Terme désignant ceux qui se réclament des Critical Legal Studies (Ndlr).

coherent set of assertions about law and x." This means that it doesn't simultaneously assert contradictory statements or leave gaps in crucial reasoning chains or rely on arbitrary choices to define vague terms or… Internal critique as I am defining it is, first, the discursive practice of finding flaws of this kind not just in isolated cases but across some interesting domains of law. Second, it is the practice of speculating about the significance of endemic failures – their degree of generality, their necessary or contingent existence, their causes, their history and so forth.

For the cls milieu that received Derrida in the 1980's, the single most important theory event was the rediscovery of sociological jurisprudence and legal realism as internal critique. I will call this the "SJ/realist" revival. These currents of the period 1900-1945 had gradually died out, in one interpretation, or a dogmatically centrist legal academic mainstream had crushed them, in ours. The second defining event for crits was our choice to incorporate, one at a time and randomly, something or other from many disparate strands of critical theory, including Marxism, existentialism, structuralism, psychoanalysis, post-structuralism, radical feminism and the left literary theory of the time into our work. A crucial social/political context was the arrival of significant numbers of women and people of color into law schools and into the cls milieu. Our present purpose is to assess the Derridean "episode" in the story, that is, to assess the way he was received into the genealogy at that time, and the place that he occupies in it now.

In the late seventies and eighties, we were, without realizing it, creating a new historical narrative of internal critique that began with Oliver Wendell Holmes and Roscoe Pound, but unearthed and canonized Wesley Hohfeld and Robert Hale, continuing with Morris and Felix Cohen, Walter Wheeler Cook, Thurman Arnold, Jerome Frank and Karl Llewellyn. I could name a dozen more who produced an article or two extending SJ/realist critique to some particular doctrine. We weren't aware that our Americans were in touch with and in many ways resembled the very loose, short lived French

tendency of Geny, Saleilles, Demogue, Gounod, Josserand and Gurvitch, inter alia.

S. T. Ü. : How could Derrida be part of such a list ?

D. K. : Because many of us read Derrida's use of the term "deconstruction" in *The Dangerous Supplement* chapter as closely analogous to the legal theoretical practice of our whole genealogical ancestry of sociological jurists and legal realists. They had devoted the bulk of their critical work to debunking "legal formalism" (or Classical Legal Thought) as built on analytic mistakes sustained by the abuse of deduction. Derrida's critique of the writing/speech distinction fit perfectly well with this practice. In fact, it fit so well with the tenor of American critiques of "formalist" judicial reasoning that deconstruction lost its particular Derridian meaning and the philosophical context giving it that meaning. In a striking example of the buoyant trans-Atlantic flotation of signifiers, deconstruction is now a common, not an esoteric term in American legal discourse. It means nothing more than "to take apart" an argument in any way that shows it fails to do what its proponent claims it can do.

S. T. Ü. : That doesn't seem enough to be called an "incident" let alone an "episode!"

D. K. : You're quite right if that was all there was to it, but there was a good bit more. A first point is that the emerging scholarly community of cls-identified scholars took up Derrida's specific deconstruction of the writing/speech dyad in *Of Grammatology* in the course of an intense discussion of the role of categories in law. The starting point for the discussion was the discovery, in the course of the SJ/realist revival, of internal critiques dating back to the turn of the 19th century, of the grand "Classical" (late 19th century) jurisprudential legal distinctions. These included public/private, free/coerced, law/equity, act/omission, right/remedy, contract/tort, objective/subjective, fault/strict liability, substance/form, substance/procedure, etc.). In each dichotomy the realists found a dominant (public, free, law, act, right, contract, objective, fault, substance).

Although no one at the time produced anything like a general critique of dualities, a dozen critiques of particular distinctions looked in retrospect like Derridian deconstructions. Their most common technique was to show that the other side, the "supplement" in Derrida's language, plays a constitutive rather than merely supplementary role in the dominant. It might even be the "crux of the matter" when understanding a legal institution or law in general. In any case, the prevailing idea that reasoning from the dominant or its "logic" could define the law normatively or descriptively was just wrong. The canonical concepts, taken up one by one, but without abstracting the critique, were incoherent. And that was as true of the supplement as of the dominant because the supplement in its turn was internally riddled with dominant matter.

A single (famous) example: Lon Fuller's famous legal realist contracts case book (1947) begins with damages for breach of contract before discussing the formation of contracts. This unprecedented move was apparently intended to suggest that what counts as the "real" law is the pattern of coercion that follows (i.e. the remedy) when the agreement (establishing the right) is breached. The cases are arranged to show that there are no solutions (e.g. specific performance, expectancy, reliance, restitution) to the basic remedies question that are logically required by the notion of freedom of contract. The student learns that the rational and also the common law way is to isolate the important types of cases and then assess the social policies implicated in the choice of remedy according to the type.

S. T. Ü. : You think that American jurists had already invented deconstruction when they "received" Derrida?

D. K. : Yes and no. Derrida's writing/speech deconstruction was not different from the realist ones like Fuller's or, for example, Robert Hale on "Coercion and Distribution in a Supposedly Non-Coercive State" or Morris Cohen's article "Property and Sovereignty." But what the technique meant to the sociological jurists and realists was, it seemed to us, completely different from what it seemed to mean to Derrida. Derrida theorized deconstruction in general using the apparatus of contemporary French and German philosophy, treating it

as something of obvious importance for ethics, but with not even an allusion (it was 1966) to law.

By contrast, the American pre-WWII critics of juridical reason as they found it had a strongly positive, meliorist agenda. They were in favor of getting rid of the Classical dichotomies in order to open the way to reasoning based on what they thought were the "real issues." Their critiques, however pointed, were never more than "ground-clearing" for their normative agendas.

S. T. Ü. : What were their normative agendas? And what do you mean by "ground-clearing?"

D. K. : Where there was no logically compelled answer based on precedent or statute or the pure logic of liberal legal order (freedom of contract, the rule of law, security), the judge resolving a gap, or conflict or ambiguity, or the law professor advising, should look to some combination of "extra-juristic" social considerations. These included depending on the jurists everything from utility to fairness to morality to institutional competence to tradition to administrability, but nothing that could be denigrated as "ideology." When they argued for specific policy solutions, they were generally, but no means always, mildly progressive (for more altruistic duty and less individualist immunity) with some more politically radical, and others, quite conservative.

S. T. Ü. : Did you disagree with that?

D. K. : Not at all about the need for an extra-juristic moment, although what they called policy we came to see as better described as "politics." And we also had various different normative agendas for law, across a similar range. For example, I was one of the minority who called themselves "radicals" but most of us called ourselves "leftists" or "progressives" or "feminists" or "anti-racists," with little need to specify further. The reception of Derrida was not about the choice of a normative agenda or normative arguments about law. It was about reviving SJ/realist internal critique. The critiques had turned out to be collateral damage in the mainstream Cold War against doctrines that might appear subversive of the popular conception of

the rule of law. As we saw it, the mainstream blunted the radical edge of their realist fathers while embracing their decidedly moderate legal reform projects. More, they wrote their fathers out of their own history along with the whole transnational critical legacy. Their failure was our historic opportunity!

S. T. Ü. : And now at last perhaps I can ask how Derrida was received in this context?

D. K. : We received him, as we understood him, as a contested reference in our internal debate about how far to take the multiple rediscovered SJ/realist internal critiques of "formalist" legal reasoning.

S. T. Ü. : Why do you make air quotes around "formalist?"

D. K. : That was SJ/realist name for the dominant mode of Western legal thought at the end of the nineteenth century but we renamed it "Classical Legal Thought" to avoid the denigrating overtone of "formalism" (see Bonnecasse in the 1930s).

S. T. Ü. : What was the internal debate about?

D. K. : One way to see it is as a process of radicalization of the SJ/realist critiques in steps, although the sequence is logical rather than chronological because all the steps were debated at the same time. It only became clear little by little that they could be reconstructed as a conceptual progression. The debate was about the role of "binaries" in legal reasoning. The SJ/realists, as we saw, criticized particular Classical legal distinctions as incoherent. The discussion of binaries in general in American legal descriptive and normative discourse begins with us in the 1970s and 1980s, deploying newly acquired continental sources. The first moment (in the logical progression, not in time) was the Saussurian idea that the scope of reference of a sign depends on the scope of reference of other signs in the same neighborhood. A binary in this usage is a pair of signs taken to mutually occupy between them a whole neighborhood. Everything that is not one is the other and vice versa.

The second step was highly important and derived from Piaget in *Six Psychological Studies* (the "schema") and Lévi-Strauss in

The Savage Mind (*bricolage*). The concepts constituting the Classical legal binaries could be analyzed as though they were linguistic signs. The Classical legal binaries have the odd quality that, as jurists developed one or the other side in practice, they did so by repeating the binary pair inside it. Equity turned out to be crucial within law and law crucial within equity. Fault turned out to have elements of strict liability (the objective standard) and strict liability has a fault based boundary (the requirement of an act). The opposed pair used again and again is a "schema."

This reiteration of the structure within the binary is a practice of adaptation of existing materials to new uses rather than a practice of rational derivation of a solution from a set of premises, so well described as *bricolage*. We developed it by analogy (admittedly far-fetched) to a classic passage in *The Savage Mind*. Australian Native kinship systems supposedly adapted to changing conditions by bricolage consisting of reiterating a preexisting symbolic (totemic) distinction between groups within a surviving group when the group bearing the other ritual element disappeared. The analogy to equity surviving within law after its supposed abolition seemed… obvious.

This was the first or *structuralist* stage of the critique.

Recognizing this internal structure of the binary has a dramatic consequence for the jurist who is supposed to deploy it to resolve a perceived gap, a conflict or an ambiguity in the doctrine that he regards as applicable to the case or statute to be interpreted. Locating the fact situation on one side of the binary doesn't answer the question of how to adjudicate it, because choosing a norm to apply will involve a second choice between the dominant and the shadow element within that side.

Contract as imagined domain of free individual choice is loaded with doctrines that on their face value represent the idea of involuntary duties to others: the doctrines of duress, fraud and undue influence, not to speak of fiduciary duty and constructive trust, enshrine tort and unjust enrichment ideas (see Gardner). Even the objective standard for interpreting offers and acceptances involves strict liability for the mistaken promisor. Neither the individualist nor

the "altruist" doctrines have built-in limitations. As norms, they demand to be applied without telling the interpreter how far to take them. The choice of how far to expand or restrict the "exceptions" – which are logically necessary to the idea of contractual "autonomy" – is constrained by the structure of alternatives built into the binary. But it is arational (not irrational) because not "warranted" or logically required one way or another by the structure.

S. T. Ü. : Rather than denouncing the decision as "arational" why not just say that these cases require a judgment of proportionality?

D. K. : The common notion that in some situations one applies a "balancing test" (European "proportionality") is in a sense descriptively true, but a test obviously without a common measure for the elements balanced or even a method to determine what gets into the balance in the first place. So the balanced decision is outside the contradictory structure of categories, but it is likewise arational – not irrational – just not rationally determined once the rational and critical process of framing is complete. The appeal to balancing is nonetheless the most common way in which American legal thinkers (not Europeans, except for Robert Alexy) normalize through denial the problem of legal rationality. This phase of the development is beyond structuralist, rooted in the phenomenology of legal argument with a strong dose of Hegel, called *the method of contradictions*.

S. T. Ü. : Is this any more than the common legal positivist idea shared by H.L.A. Hart and Kelsen that "the law" has limits and when it "runs out" the jurist has to resort to "extra-legal" but by no means irrational normative ideas?

D. K. : First, I need to reiterate that we are speaking only of the development of SJ/realist critiques of the crucial categories of Classical Legal Thought or "legal liberalism." And the assertion is not that "the law" runs out but that they – this specific subset of binaries – are incoherent, because as Classical jurists developed them over time they built them around contradictory normative directives. Historical inquiry can, for example, list the specific sequence of stages over which the jurists developed the public/private binary to deal with

more and more of the legal order until, like the heliocentric theory, it collapsed under the weight of its own exceptions and anomalies. A "contradiction" is quite different from, a bit more than, a simple gap, conflict or ambiguity in the legal order. The difference appears when we try to figure out what happens when the jurist responds to a gap, conflict or ambiguity by proposing to resolve it by a new doctrinal formulation of the binary.

The jurist (who has not yet been forced to the last resort of "balancing") proposes a new norm that will produce an outcome in the case while closing the gap, settling the conflict or resolving the ambiguity *as it arises in the case at hand*. The decision is, in the legalist ethos, meant to apply to future cases. But because the materials the jurist has are contradictory, the solution will not "settle" anything beyond whatever force stare decisis may retain in the system. The dilemmatic categorical distinction will reproduce itself within the new category made to replace it. In developing equity, the jurists chose new norms that looked like pushing equity further or scaling back in the "legal" direction. New rules meant to make equity more "certain" (law-like) generated new gaps, conflicts and ambiguities posing yet again the choice between situational justice and legal certainty.

"The law" is the text justifying the decision as legally correct because required by (subsumed under) the norm as reinterpreted. In the next case, when a gap conflict or ambiguity "arises" (Hart's odd phrase) or jurists create one, whatever categorical refinement of the Classical binary explained the decision will be put again to the test of internal critique. In interpreting the prior version of the binary, the jurists will invoke on opposite sides the same contradictory arguments, norms and precedents that produced it in the first place. The choice will be once again arational (not irrational). And so on, with "turtles," or the same unstable binary, "all the way down." We called this (where we thought we'd found it) a doctrinal structure of "*nested oppositions*."

S. T. Ü.: It's not obvious to me how Derrida fits into this account… But maybe we can relate the concept of "nested opposition" to Derrida's concept of "iterability."

D. K.: We received and invoked Derrida as an important contributor to the critical genealogy that interprets arational decision as a "leap" from within the dilemmatic structure of opposed categories. In this "*decisionist*" view the decider accepts responsibility for his "warrantless" choice, including the possibility that there was a categorically required choice that he failed to identify or construct and that the decision will have disastrous unintended consequences.

The decisionist view that Derrida was taken to support has a long history within the genealogy of the internal critique of legal rationality, in law and social theory. In law, Holmes is its first American protagonist (the idea of juridical "can't helps") followed by Hutchinson (the "judgment intuitive") and Jerome Frank (oedipal basis of desire for certainty). But many SJ/realist thinkers preferred to focus on the alleged external determinants of choice, such as the "personal preferences" or "ideological orientation" of the judge. Alternatively, mainstreamers focus away from the dilemma of arationality onto the question of method when answering the legal question: pragmatic policy balancing versus rights and principles, narrow versus broad positivism, etc.

In Europe the same positions thrived and were disputed vigorously up to the 1930s. In Germany, the question came from Rudolf von Jhering, the other founder of the internal critique of legal rationality, with his mockery of the "Heaven of Legal Concepts." Kantorowicz, Radbruch, Stampe and Heck parallel the Americans. In France, René Demogue seems to have been the only explicit (and brilliant) theorist of decisionism with the same foundation in meticulous critique of the Classical private law distinctions.

The "*The Dangerous Supplement*" chapter was one of a group of texts that allowed us to claim that our decisionist tradition in law was not idiosyncratically legal but rather the development (not "application") within legal theory of sophisticated continental critical philosophy. The philosophical version of decisionism we claimed was

roughly existentialist. It might be referred back to Pascal's "leap of faith" but the most important references that we discovered at the same time we read Derrida were Nietzsche's *Genealogy of Morals* and Max Weber's essay *Politics as a Vocation*. Dostoevsky's *The Grand Inquisitor* and Sartre and Camus, as we had assimilated them through the pop culture of the 1950s and 60s American left/modernist intelligentsia, were background knowledge.

S. T. Ü. : There was nothing particular to Derrida, beyond the decisionist posture?

D. K. : We rediscovered the genealogy of decisionism in the SJ/realist genealogy at the same time that we received the continental critical theory sources rather than in the order of their historic development. The result is that it is not possible to separate a distinct Derridian role in decisionism in cls. But it is possible to attribute a quite distinct influence of Derrida on the deepening and widening of the analytic as it morphed from the critique of liberal legalism (the Classical categories) into what we called the *"indeterminacy debate."*

This was the internal debate over the question how far to take the arationalist argument beyond where we left it a moment ago, with gaps, conflicts and ambiguities arising in the application of the Classical binaries understood to have revealed themselves little by little to be incoherent because embracing contradictory principles. Did the critique apply to other legal binaries? To any categorical distinction in legal discourse? Or to all binaries and distinctions, period? This was, we realized right away with *The Dangerous Supplement,* a very Derridian question, and Derrida had a major impact on the discussion. And I would say "he," as received, was at first a very bad influence. He seemed, for one part of the cls or "crit" group, to establish as an incontrovertible truth of life in language that all "binaries" (in the Saussurian sense) were dilemmatic. That would seem to include (though Derrida had nothing to say about law) the whole categorical apparatus of legal discourse.

This incontrovertible truth had, for the "maximalists," the equally incontrovertible consequence that any actual dispute about correct legal interpretation within the existing structure of legal

categories could be turned into a hard case by a skilled lawyer with enough time, so that there are right answers only in cases no one cares about enough to make them hard. The arguments of the two sides will always be subject to refutation by internal critique. Argument within the categorical structure of the (Western logocentric) legal order must always end in stalemate and the law always runs out.

In my humble opinion this reading of deconstruction was wrong and it had a negative effect in several ways on the indeterminacy discussion. Not least because of its inconsistency with the virtually universal experience of lawyers and lay people dealing with rule systems. It made a convenient target for the "nihilism" charge that both liberals and conservatives love to level at critical theory (in alteration with the charge of vulgar Marxism). But it was consistent with a maximalist strand of American legal realism (but not sociological jurisprudence) in categorically rejecting any kind of categorical determinacy. It seemed to be the position of Felix Cohen in his famous *Transcendental Nonsense* article and Thurman Arnold in *The Folklore of Capitalism*. Many Europeans read the Kantorowicz of the Free Law School this way. In France, François Gény misattributed some such theory to his friend René Demogue. Along with the American pseudo-Derridian version, there was an American Wittgensteinian one (no rule can determine the scope of its own application, etc.).

S. T. Ü. : That seems hardly Derridian to me. Did you have an alternative?

D. K. : My own position, which I claim to this day, was that there was no denying the phenomenology of boundness by categorical argument and no denying the possibility that the experience of boundness will disappear under the impact of disintegrating argument or the passage of time, or change of circumstances in the world or in the capacity of the interpreter. But just as legal work (a critical idea traceable to the *Economic and Philosophical Manuscripts of 1843-44)* can undo the experience of being bound by an interpretation, legal work can also produce it, turning a chaos into a little Cartesian grid.

These possibilities mean that legal work is the site for Nietzschean assertions of the will to power as well as of pseudo-mechanical rule following. I think this is actually close to Derrida's version of deconstruction, although derived from Sartre's opening essay in *Being and Nothingness*. Both boundness and openness are "events" that occur or do not occur in some context of human action and not "essential" properties of the text being interpreted. The "truth of the matter" is inaccessible because there is "no outside" of the legal discourse of validity (no "hors texte").

Of course, neither of these positions was mainstream, even within the larger group of jurists who identified with critical legal studies. Most of us were mainly engaged in more or less creative legal interpretation of existing legal materials combined with more or less groundbreaking legal sociology or legal history, all directly or indirectly in the service of leftist causes. Everyone rejected Dworkin's "*No Right Answer?"* challenge. But interpretation either asserted a single doctrinally correct answer or left a margin for policy analysis or rights reasoning understood as rational in their own right. The indeterminacy debate involved jurists with all these positions.

S. T. Ü. : What were the stakes in the debate?

D. K. : They were multiple and considerable, at least they seemed so to us. I think figuring out the stakes is more interesting than tracing the ways in which maximalists did battle with fellow crits who were committed to one version or another of the possibility of doing correct legal reasoning, with us phenomenologists on the sidelines experienced often or usually as unintelligible.

In its early phase (before faux-Derridian maximalism), the indeterminacy idea was an important part of a cls critique of the strategy the SJ/realists, our beloved ancestors, adopted in their attempt to discredit "Lochnerism." The United State Supreme Court and the most powerful state supreme courts had constitutionalized a particular Classical version of the rights of private property and freedom of contract. The point of this move, epitomized by the famous 1905 *Lochner* case striking down maximum hours legislation for bakers, was to justify the judicial nullification of the populist and progressive

social legislation of the period from the 1890s to the Great Depression of the 1930s.

The SJ/realist argument was that the supreme courts should abstain from interpreting the available constitutional materials as authorizing them to review federal and state legislation regulating property and contract rights. The argument was that the legal materials relevant to the question of the constitutionality of social legislation were hopelessly indeterminate, open to equally plausible but politically opposite interpretations. The choice of an interpretation was therefore in itself "inherently political" and consequently inappropriate for judicial decision. Our critique of the critique was that these very SJ/realists had brilliantly shown that basic private law questions of the definition of property and contract rights were also underdetermined yet they favored a large agenda of progressive private law judicial reform.

S. T. Ü. : How did they show that?

D. K. : Their critique of Classical private law rights as sources of categorical reasoning from abstractions to legal particulars was similar to the critiques of the other categories. Rights exist in relation to other rights and social interests. Freedom of speech in relation to the interest in reputation. Freedom of contract in relation to the social interest in keeping property "in circulation" (rule against perpetuities). They are stated without incorporating either their limits or a principal to govern conflicts. Balancing seems inevitable. Along with the external problem of neighbors there is an internal problem. Rights as defined in Classical legal thought contain principles and counter-principles. In Hohfeld's canonical demonstration, the term "property," in law, is a complex combination of the right as freedom of action and an "opposite" right to security. To be mediated by "considerations of justice and policy." The SJ/realists unhesitatingly endorsed judicial law making on that basis.

By treating constitutional review of property and contract legislation as political by contrast with judicial law making in private law, the argument for abstention contributed to a specious but appealing "passivist" argument against the "activist" Warren Court's

judicial innovations when liberals gained control of the Court. The better position would have been to acknowledge the political in the judicial decision and defend progressive positions on the merits, deploying the elements in the complex of contradictory legal materials that favored the politically correct outcome.

S. T. Ü. : There had to have been stakes beyond the interpretation of that historical incident?

D. K. : There were two more moments in the deployment of the indeterminacy argument. The first occurred in the late 1970s and early 1980s as the crit identified group was just emerging and found itself periodically or at least occasionally under attack by young jurists (quite a few British or Canadian) who were boldly devoted to the reinvigoration of a Marxist analytic that would dare to say its name and claim its history. This group correctly understood the early crits as at best false friends of their Marxist revival, in part because of our mildly countercultural aesthetic and early Marx enthusiasm but also because we charged them with a pre-realist understanding of the role of law in capitalism.

An important aspect of modern comprehensive social theories is that with the sole (?) exception of Max Weber they include law as obviously an element in social ordering but discuss it in ignorance of or just ignoring the post-Classical (post-"formalist") history of legal thought. We answered our self-avowed Marxists by developing this charge against the Marx of *Capital*. We pointed out that Marx defined the "forces and relations of production," the famous "base," by reference to the "commodity form," which he in turn defined in an essentialist juristic vocabulary derived from the Classical theory of property developed by his law teachers (Savigny, etc.). If we had read Derrida at the time, we might have said the legal "superstructure" was the dangerous supplement to the "material" base.

We deployed against base/superstructure Marxism the same indeterminacy argument the SJ/realists had used to attack American Big Capital's claims to constitutional protection for its absolute property rights. There was nothing material about the relations and moreover they were historically and currently highly variable and, to

make matters even worse, Pashukanis on the commodity form was no less incoherent. Acknowledging this would have made wages and profit relative to the legal order and destabilized Marx's laws of motion (based on the rate of exploitation).

S. T. Ü. : There had to have been pushback against the critique?

D. K. : Yes there was. The third moment in the story was far more problematic and involved a good bit of irony as well as a good bit of Derrida. This was the role of the indeterminacy claim in the *"rights debate"* within the crit grouping. As I've already mentioned, the reception of Derrida occurred in the early 1980s as part of the project of a younger generation of progressive (some radical, some liberal, some just leftist) initially mainly white male law professors, joined by substantial numbers of white women and men and women of color, representing groups new to legal academia. We shared both New Left normative agendas for micro- and macro- social transformation and legal reform, and a strong critique of legal academia, reflecting our recent transition from one side of the podium to the other. Within this group of several hundred jurists, there were perhaps a hundred who identified with or sympathized with critical legal studies.

By far the dominant trend for the larger progressive group was to understand law as a system (capitalism, patriarchy, white supremacy) that was evil because it denied people their rights, whether human, or universal, as in the UN Declaration, or constitutional as in the Bill of Rights and the 14th Amendment of the U.S. Constitution. These were economic and social as well as political and civil rights. The Constitution was understood sometimes as the binding legal enactment of progressive values and sometimes as an obstacle to be reinterpreted in light of higher norms or evaded as irredeemably capitalist or sexist or racist. Left legal analysis elaborated "correct" left concrete meanings for the abstractions, cheering on or denouncing courts, legislators and administrators as well as law reform initiatives, accordingly. This was a notable change from the reform agendas of previous left jurists who had advocated

either socialist transformation of the property regime or "planning" to overcome capitalist chaos.

Against this background the crit radicalization of the decisionist position was highly controversial. For the obvious reason that it seemed to be inconsistent with the crucial role rights played in progressive legal thinking. There they were understood as coherent at the level of theory and immensely consequential at the practical level. Crits and crit sympathizers took the critique seriously and engaged their colleagues (including me) in the rights debate. The debate is well worth study even today, with many strong arguments for and against the critique and the various progressive reconstructions. We won't be concerned with the part of the debate that was about whether casting progressive demands in rights language had a bad ("individualist") origin or bad consequences in practice but rather about the internal critique of the rights notion.

The debate was not, typically, about the specific SJ/realist critiques of property and freedom of contract, or the specific early cls critique of the SJ/realist position on Lochner, or about property in Marxist theory. What gave the debate its energy was that the critique was general and therefore threatened the claimed rationality of newly developed personal rights of outsiders, including the poor, women, people of color, sexual minorities and people with disabilities. Reasoning from these rights was at the core both of left legal scholarship and of left activist law practice.

The center piece of rights consciousness for the new generation of left activist lawyers of which we were a part was "equal protection." For the progressive mainstream it entailed a right against discrimination, a right to accommodation of differences and a right to "affirmative action" to remedy present differences shown to be the consequence of earlier rights violations. It was not at first obvious that the SJ/realist and crit critiques of property and contract rights implicated these new rights, creations of the liberal Warren Court but erratically expanded and contracted by the conservative Burger Court. But the intense litigation of the legal meanings of the sub-rights

revealed problems at least analogous to those of the Classical categories.

S. T. Ü. : How were these new rights problematic?

D. K. : For equality rights the first problem was the traditional difficulty of deciding between formal and substantive conceptions of the normative ideal of non-discrimination. The dominant category was formal legal equality but with substantive equality as the dangerous supplement constantly threatening to disrupt it and no mediating principle. Accommodation, for its part, required deciding what "differences" deserved that treatment and at what cost to the rights (legally protected interests) of accommodators.

Force de Loi and *Specters of Marx,* part of Derrida's turn in this period to writing about law, had as far as I could tell, no influence at all on these debates. Those of us who thought of ourselves as students of the Derrida of *Of Grammatology* bringing its insights to bear on our own largely untheorized field tended to find Derrida on law unsatisfying because he clearly had no idea of what we saw as the major accomplishments of the critical tradition of which we were part. For that reason many of his specific arguments, and a surprising turn to social democratic pieties, seemed unoriginal or unsophisticated or even confused(!).

As was true for the legal reasoning debate, however, the earlier Derrida contributed mightily to the rights debate by suggesting a universalization of internally critical moves that the SJ/realist jurists had invented and the crits had pushed back into visibility as part of our challenge to the mainstream. But Derrida was much more important at an altogether different level of the confrontation. The crit subgroup in, or interested in, or sympathetic with critical legal studies, was divided along what you could call an axis. At one end, full and whole hearted embrace of the truth of rights as things in the world objectively knowable and at the same time morally imperative – objective value judgments, so to speak – requiring the legal enactment of a left social democratic agenda for every aspect of life.

At the other end of the axis were a minority crit faction, including maximalists and phenomenologists. We applied to progressive rights reasoning, whether civil, political, social or economic, the same critiques the SJ/realists, and later ourselves, had leveled at formalist property and contract rights. Leading to the same decisionist conclusion. We were for the same or similar radical reform agenda and believed in the same legal tools. But the tools, and legality in general, were, as Weber would put it, "disenchanted." There were quite a few positions in the middle, for example what was called "strategic essentialism," a kind of split consciousness combining deep commitment to legalist argument with disillusioned rejection of claims for law's immanent trend toward justice. Or the position that rights are a true catalogue of human needs and longings, and one feels that power along with a utopian glimpse in arguing rights, quite apart from their "existence" in theory and regardless of their internal contradictions and the need for balancing in application.

People near the two poles tended to critique each other's positions politely but with a real below-the-surface animus. The critique of rights included the notion of "rights fetishism," with its background in Marx's fetishism of commodities analytic. It also included an aversive reaction to the particular tonal quality of rights assertion. The believing rights speaker grounds powerful moral assertion on a "something" that is abstract but claims to permit "rightness" of the kind attached to logical argument about controversial real world questions. When s/he successfully asserts a right categorically, rather than in the chastened form of a balancing test, it seems, given the critique of rights, "phallogocentric" – a perfect example of practical power derived from nothing more than aggressive authoritative-sounding word magic.

Against the phenomenologists and maximalists there was the charge of nihilism dressed up in mystificatory hyper-theoretical mumbo jumbo that served to exclude all but an elitist few from the discussion.

S. T. Ü. : Was there an outcome?

D. K. : Nobody won and nothing was settled and today it seems like ancient history lying in wait for resurrection. Rather than rehearse it, I'll trace the Derridian "episode" in cls further along a deconstructive path from concept to concept, not a chronological sequence but a tidy reconstruction after the fact of what we lived as exciting but chaotic theory overload. For us phenomenologists there was nothing inevitable about the path, and deconstruction *here* did not mean deconstruction *there* and certainly not deconstruction everywhere. The only claim is that these things happened (for those for whom they happened). In other words, there is nothing like Hegel's (to me unconvincing) claim that his stages in the phenomenology of spirit are analytically/causally linked through a "logic" of contradictions overcome. Derrida's "ça se déconstruit" ("it deconstructs itself") is an improvement but goes a little too far in the opposite direction unless paired with the equally possible "ça ne se déconstruit pas."

S. T. Ü. : I'm not sure you can get away with producing a "tidy reconstruction" while denying that its tidiness has any meaning at all.

D. K. : An excellent point! But for the moment, on with the story.

S. T. Ü. : As you wish but it would have been interesting to pursue the point in the context of your reading of Derrida.

D. K. : For another time. The decisionist critique of the asserted or assumed rationality of rights reasoning on behalf of the new identity groups was bound up with, in some not yet clear way, the "*identity critique*." It had its origin in the emergence of an intense feminist debate, starting with the category "woman" that was carried on in the crit-leaning group at the same time and with the same sources as it was in the larger national and international feminist theory movement. Here Derrida along with Foucault and Judith Butler was at last openly acknowledged as a big influence.

The new generation of progressive legal academics (including the crit subgroup) claimed equality rights on behalf of the now

familiar list of women, people of color, sexual minorities, Native Americans and the disabled. The claimants had rights consciousness before they went to court for legal recognition of what they understood to be pre-legal categorically defined entitlements of individual members of "communities" with distinctive "identities." They and their lawyers defined their identities over time through a process that looks like a sort of aborted deconstructive sequence. The "rights of man" in the liberal story were the rights of men *and* women with the rights of women severely curtailed by comparison with men's rights. Recognizing the falseness or hypocrisy of the universal "Man" threatened subversion of the gender order with women in the role of dangerous supplement.

The feminist subject claiming universality at the beginning of second wave feminism, was like her predecessor in first wave feminism, implicitly a white woman attacking a white gender order and black feminists attacked her in the name of black women's distinctive cultural identity. But then first gay and then LGBQ activists attacked the exclusions that had been built into the claimed distinctive traits of white and black men and women. Trans rights advocates fitted their case to the paradigm, adding the "T" as an obvious move.

Queer theory in law is in part a reaction against the way that liberal, cultural and radical feminists (but not MacKinnon) imagined the trans-historical subjects on whose behalf they demanded rights of all kinds. To the extent that the sequence of critiques of gender binaries includes no critique of identity per se, it is obviously not at all Derridian or Foucaldian.

In other words, each new gender subcategory whether supposedly "essential" in the sense of biologically or environmentally determined and so outside choice, or understood as indeed *sometimes* chosen, is born proclaiming its categorical difference from its opposites. This was obviously true of the feminist critique of male pseudo universalism and the black feminist critique of white feminists hoist by their own petard and of lesbian feminists. It is perhaps most striking for the trans movement, which seems to have a biologically

determined truth of identity as its cornerstone. And reversed only I think in the gay and lesbian claim in the campaign for gay marriage to be just like straight people in all the ways that mattered.

S. T. Ü. : And what would be, according to you, a more Derridian or Foucaldian way of seeing it?

D. K. : The counter is that the "truth of gender" is Freud's polymorphous perversity and all gender identities are neurotic rigidifications and constrictions, for good and ill, feeding all kinds of non-sexual social practices à la Marcuse. Foucault convinces that they are social constructs so that even what people experience as ultimately their own unique sexual being, their "gender identity," is better understood as "discipline" thinking its order through them. Judith Butler's analysis of gender as a semi-coerced performance of coherent identity opens the possibility of resistance from within the hall of mirrors that seems to show coherent identity to be a universal. Queer theory validates the sense of conflict and contradiction that many people feel in their own desires and their own ethics about sex. "Yes I am that and its opposite and neither of the two." It authorizes rebellion against the gender discipline regime, even, or even especially, when reformed to recognize plurality without renouncing coherence.

There is an analogy with the rights debate, and they mutually reinforce each other. The categorical affirmation of coherent gender identity as denial of internal and external contradictions is like the categorical affirmation of rights in denial of the same sort of internal and external contradictions. Another good example of phallogocentrism.

It is striking that in the general feminist/post-feminist debate the most sophisticated, brilliant Foucaldian/Derridian anti-essentialists in gender matters tend to be devotees of formalist legal interpretation on behalf of "women," "etc." The striking exception is Catharine MacKinnon's brilliant (not Derridian) deconstruction of the consent/coercion binary as applied to the sex lives of (her sample of) married women in her first *Signs* article. In the more common case (Judith Butler comes to mind), the disciplinary isolation of legal studies allows it to function for outsiders to legal theory as an

imagined refuge for pre-critical legal longings (particularly for rights righteousness). But on the inside of the legal academy that idea seems… like pre-Derridian wishful thinking.

Given the critique of gender identity, the "next step" conceptually but of course not chronologically, is *the critique of identity (that is, the "subject") tout court*. This is to my mind the thrilling accomplishment of the cultural modernism of the turn of the 19th century through the 1940s. For me a key text in philosophy-speak is the opening chapter of Sartre's *Being and Nothingness* arguing step by step, against Descartes, that to be human is precisely not to be able to assert as a rational proposition that "I am." Here Derrida, like Foucault, is icing on the cake cooked by Hegel, Husserl and Heidegger. But for American cls, I think it is clear that the critique of the experience of consciousness as false coherence, as defense against radical instability in the moment and over time, derives from modernist fiction and poetry, and modern art : it may be studied in school but mainly picked up in the process of cultural literacy amid the crises of the sixties and after.

S. T. Ü. : This seems like the end of the road, conceptually speaking?

D. K. : The crit critique of the fundamental ideas of our leftist allies had a last turn, against the categorical formulation of the notion of capitalism. It emerged in the 1980s just as we were receiving Foucault's "Two Lectures" in *Power/Knowledge* and crucially Derrida's "Structure, Sign and Play in the Discourses of the Human Sciences." These two pieces formulated in general terms strategies of critique we had been pursuing at retail, so to speak, without realizing what they had in common. These were critiques of social theoretical pretensions of two kinds: to the "*scientificity*" of their analytic and to the "*systematicity*" of the social order as interpreted by that analytic.

Beginning with scientificity, the cls critique of the base superstructure distinction for failing to grasp the dependence of the economic variables of wages and profits on a variable legal structure was also a critique of the claim that Marxism was a form of science, like biology, say, as opposed to history or literature. The SJ/realist

critique of the coherence of the Classical conception of the property right that was built into Marx's definition of commodity seemed to have a devastating effect on the notion that there was any close analogy between the analytics of volume one of *Capital* and the analytics of nineteenth century physics or biology, even putting aside the way they were transformed in the twentieth century.

In Derrida's still influential version, Marxism along with psychoanalysis and monotheistic theology shared a powerful originary image of a structure organized around an obscure center. This was the base in Marxism, the unconscious in psychoanalysis and a hidden God in monotheism. The obscure center nonetheless organized and in some sense was held to determine the real life phenomena arranged around it. The "play of the signifier" over time constantly undoes the solidity of the center and the dependence of the periphery. This seemed so right! And then both Foucault and Derrida asked pointedly in whose interest was the belief in the scientificity of the conception in question.

This kind of analytic was central to the cls *critique of mainstream law and economics* as an apologetic pseudo-science. Feel free to skip it and note that we are almost at the end. The issue was the argument that the criterion of economic efficiency should govern judicial and administrative legal interpretation (aka law making) across the whole domain of private law. The mainstream discourse pairs efficiency in a binary with distributional equity as dangerous supplement. Efficiency is supposedly objectively based, capable of deductive elaboration to deal with new situations and benefits from the (dubious) claim to scientificity of academic economics proper. It is moreover supposed to be universally acceptable ethically (i.e act to maximize welfare seen as the excess of winner gains over loser losses). On the other hand, judgments of distributional equity are "inherently" subjective and therefore arational. They are major objects of ideological controversy in the larger society. Therefore, judges and administrators should decide according to efficiency and leave judgments about the inevitable distributional consequences (often huge) to democratic decision in the legislature.

In a move that should by now be familiar, the critique points out that the efficiency judgment is dependent on a multitude of different judgments of distributional equity and, as a result, is likely to be even more arbitrary and unpredictable than a straightforward equity test would be. For example, the judgment that one proposed rule is more efficient than another means for law and economics that those affected (winners and losers) value that outcome more than the alternative, with valuation measured by willingness to pay. For example, in deciding on a rule, for any given consequence, say a factory's liability for damage to neighbors or regulation of consumer product safety, preferences of the rich count more than the preferences of the poor because their willingness to pay is backed by more cash. Using consumer willingness to pay under the existing distribution implicitly accepts it as equitably established.

One of many arguments that the efficiency criterion will be indeterminate in practice: we argued (following Scitovsky and IMD Little), that a rule choice based on an "other things being equal" measurement of efficiency will be arbitrary because it will modify income distribution, which will require modifying other rules based on the new valuations, and on and on, with the other-things-being-equal outcome in a given case dependent on the (arbitrary) order in which cases are decided. Avoiding this by trying to fix all rules in a single valuation (the dream of an efficient code) requires global judgments of distributional equity as the baseline.

The *cui bono* question arises here because everyone knows that leaving the distributive question to the legislature after judges or administrators make a new rule will only very rarely cause the legislature to review it and decide it "democratically." Disabling courts from making distributive judgments means there is no institutional mechanism for the equitable critique and adjustment of the legal status quo and so no danger for its beneficiaries.

SJ/realism and critical legal studies as they developed over the 20th century can be understood as a parallel critique of the scientificity of legal analysis as understood in Classical Legal Thought, particularly in Europe. As influenced by Kant rather than Bentham,

Classical legal discourse had for an obscure center the notion of "as much freedom for all is consistent with freedom for all." Around it were arranged the different specific legal regimes that supposedly put it into effect as simultaneous freedom of action and legal restraint on freedom of action. The critics demolished the structure, as we've seen, by the reversal of the binaries it generated, as in our first example of contract remedies at the beginning rather than at the end of the Fuller casebook. Once they were debunked, the loud and unabashed pretensions of Classical Legal Thought to be "legal science" begged to be challenged with the *cui bono* question. The legal regime in place in public as well as private law was the facilitating structure for gross inequality in all dimensions at once. The belief that it was the scientifically determined consequence of the Kantian maxim seems obviously to have tended to legitimate and entrench it.

S. T. Ü. : And how is systematicity different from scientificity?

D. K. : Debunking legal science as ideology was a starting point for the cls general theory of legal legitimation of the status quo, understood as a major function of law in "late capitalism." But the majority of the progressives arriving in the late seventies and the eighties had no great interest in the critique because they hadn't believed in legal science for a minute to start with. They were intensely engaged with liberal or radical law reform in the interests of the current victims of "The System."

The main system-ideas to which they (we) appealed to make sense of the world in the aftermath of scientificity were capitalism, patriarchy and white supremacy. The debate about capitalism is still alive and still is different from the other two because it is a meeting place (in LPE among other places) for uneasy allies. For one strand, the idea fulfills a yearning to theorize above and beyond the loose ahistorical "all things considered" pragmatism with individuated rights consciousness typical of American liberalism in its decadence. For the other, it represents a last attempt to salvage something from the wreck of traditional Marxisms.

For the defenders of the usefulness of the idea of capitalism, it was most definitely not about private ownership of the means of

production or about the base/superstructure distinction or historical materialism or the centrality of an industrial proletariat or about the inevitability of capitalist crisis and revolutionary opportunity. All of that was "off the table" so to speak, for pretty obvious reasons. What remained was a loosely theorized notion that the rich and the corporate governing class in industrial and post-industrial democracies use economic power translated into political power *translated* into legislative power to control the legal rules of the game of economic life. They tilt them, at every level from taxation to freedom of contract, in their favor, far enough to guarantee them a grossly unfair share of everything. I think this idea was widely shared across the left tendencies, including us crits.

A combination of analytic techniques from history to sociology, to economics, to anthropology combined with critical legal analytics could make and still do make this very abstract capitalism real and compelling at the much lower level of abstraction needed to inform activism. The debate, which is still alive today, forty years later, is rather about whether there is enough left of the Marxist tradition to build this conception back down or in liberalism to build it back up into something robust enough to provide conceptually compelling analysis and guidance at the intermediate level of abstraction.

To my mind as an observer of these efforts the first problem is internal to the idea and here it is one last time. As we argued already in the 1980s, to make sense of life under its sway we need the legal specification of the meanings of "profit" and "market" and "private property" and "capital" and "class." In practice, actual systems we will want to call capitalist have been fantastically variable over space and time with respect to all of these, including great variations in the degree of legal formality. The variations produce such great differences in political/economic outcomes that calling them all "capitalist" leaves the term without much more than the minimal (though important) abstract meaning we started with. The second problem is that the abstract regime idea contains no theory of limiting factors. It is obvious that in practice the profit motive and marketization are major elements, but only elements, not the whole, of

a larger socio-economic complex that includes a public sphere, the family and a pre-capitalist and an anti-capitalist sector, not to speak of the natural environment. The other elements interact with and interpenetrate the "capitalist" part in all sorts of countervailing and reinforcing (dangerously supplemental) ways. There is an odd parallel with the internal and external problems of categorical rights reasoning.

S. T. Ü. : Up to this point I miss the emotions and the mystical in Derrida as you received him.

D. K. : You're right. It was important to save this to the end, after clearing a lot of ground, because I think it was the most important part of his "influence." *The Dangerous Supplement* and *Structure, Sign and Play* reinforced what I'll call the antinomian tendency among the phenomenologist crits of the 1980s. Misunderstanding this tendency (along with ignorance and malice) is behind the claim the we were "nihilists." Antinomianism of the kind of I'm talking about starts with the idea that the letter of the law or "The Law as rationally developed" satisfy the ethical demand for justice in particular cases – at least much or most of the time. In these cases, no one even thinks to deconstruct.

But there is always the possibility that a person will experience the ethical as a demand to disregard both the letter *and* The-Law-as-rationally-developed, because they contradict a forceful moral intuition about the case at hand. Antinomianism is the doctrine upholding the morality of the decision to heed the intuition, stripping the law of its claims to respect and obedience. This is first of all a conclusion in the abstract about a legal proposition. But it might justify a decision, accepting responsibility for all the consequences, to publicly disrespect or disobey.

Crit antinomianism has some recognizable roots in the Pauline variant of American Protestant theology denouncing the letter as the death of conscience, or true moral sensibility, and in the American traditions of civil disobedience and conscientious objection to participation in war. We also received Nietzsche's *The Genealogy of Morals*, both as an antinomian declaration of war against Hegel and

all priests and as the originator of the *cui bono* argument Foucault and Derrida developed against scientificity and systematicity alike. And there is the reception in general intelligentsia culture of Kierkegaard's *Fear and Trembling* and pop existentialism loosely associated with Sartre.

The Derridian trope in question has the form: x (justice, friendship, love), if it exists, must have the following (impossible) traits and yet we "believe" in it enough to struggle for it. Two possible interpretations: "if justice exists it must subsume the case under a norm, but that is impossible" or "if justice exists it must treat like cases alike but that is impossible." I don't think, and I don't think Derrida thought, that the answer is nothing more than to struggle toward rule application and struggle toward like treatment. There is the gnomic, not to say Gnostic, maxim "deconstruction is justice." It is open to lots of readings and here is mine for a conclusion of our story: Suppose that deconstructive practice, motivated by an intuition of injustice, reveals the incoherence of the categorically formulated norm proposed to decide a particular case consistently with other cases. (Putting aside the possibility that the practice fails and "ça ne se déconstruit pas.")

The decider is then free to devise a just outcome within the intra-doctrinal space he has cleared. (A hint of Kelsen!) That means to respond to the demand for justice of a wounded Other, as a person, without a role constraint to the impossible demands of legality, taking "everything" into account. In this interpretation there is no justice without a deconstructive prelude, so it is a condition of its possibility but not a determinate formula. What happens in the space it creates is a decision not "warranted" by deconstructive practice any more than it is by the deconstructed legality that is nonetheless a constraining and also influencing context. It is arational and intuitive, but not irrational. In other words, a "decision" with the added element of responsibility to the undeniable but also impossible demand of the Other for recognition in all particularity.

S. T. Ü. : Thank you very much for this interview Professor Kennedy. Your participation in this issue is precious and it will be

very useful for understanding the reception of Derrida in American Critical Legal Studies.

D. K. : And my thanks to you as well, Serpil. You've helped me understand better what I think about all these things.