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JACQUES DERRIDA LAW AS ABSOLUTE HOSPITALITY

JACQUES DE VILLE

NOMIKOI
CRITICAL LEGAL THINKERS



Jacques Derrida

Jacques Derrida: Law as Absolute Hospitality presents a comprehensive account and understanding of Derrida's approach to law and justice. Through a detailed reading of Derrida's texts, Jacques de Ville contends that it is only by way of Derrida's deconstruction of the metaphysics of presence, and specifically in relation to the texts of Husserl, Levinas, Freud and Heidegger, that the reasoning behind his elusive works on law and justice can be grasped. Through detailed readings of texts such as 'To Speculate – on Freud', *Adieu*, 'Declarations of Independence', 'Before the Law', 'Cogito and the History of Madness', *Given Time*, 'Force of Law' and *Specters of Marx*, de Ville contends that there is a continuity in Derrida's thinking, and rejects the idea of an 'ethical turn'. Derrida is shown to be neither a postmodernist nor a political liberal, but a radical revolutionary. De Ville also controversially contends that justice in Derrida's thinking must be radically distinguished from Levinas's reflections on 'the Other'. It is the notion of absolute hospitality – which Derrida derives from Levinas, but radically transforms – that provides the basis of this argument. Justice must, on de Ville's reading, be understood in terms of a demand of absolute hospitality which is imposed on both the individual and the collective subject. A much needed account of Derrida's influential approach to law, *Jacques Derrida: Law as Absolute Hospitality* will be an invaluable resource for those with an interest in legal theory, and for those with an interest in the ethics and politics of deconstruction.

Jacques de Ville is Professor of Law at the University of the Western Cape, South Africa.

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Jacques Derrida

Law as Absolute Hospitality

Jacques de Ville

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List of abbreviations

For ease of reference, the following abbreviations are used for the texts of Derrida. Full references are given in the Bibliography.

<i>A</i>	<i>Adieu: To Emmanuel Levinas</i> (1999)
<i>AF</i>	<i>Archive Fever: A Freudian Impression</i> (1995)
'Ai'	'As if I were dead: an interview with Jacques Derrida', in <i>Applying: To Derrida</i> (1996)
<i>AIA</i>	<i>The Animal that Therefore I Am</i> (2008)
<i>AL</i>	<i>Acts of Literature</i> (1992)
'AO'	'Abraham, the Other', in <i>Judeities: Questions for Jacques Derrida</i> (2007)
<i>Ap</i>	<i>Aporias</i> (1993)
<i>AR</i>	<i>Acts of Religion</i> (2002)
<i>BS</i>	<i>The Beast and the Sovereign</i> , vol. I (2009)
'CC'	'Composing "Circumfession"', in <i>Augustine and Postmodernism</i> (2005)
<i>CF</i>	<i>On Cosmopolitanism and Forgiveness</i> (2001)
'CIP'	'A certain impossible possibility of saying the event', <i>Critical Inquiry</i> (2007)
<i>DCC</i>	'Dialogue with Jacques Derrida', in <i>Dialogues with Contemporary Continental Thinkers: The Phenomenological Heritage</i> (1984)
<i>Dem</i>	<i>The Instant of My Death/Demeure: Fiction and Testimony</i> , with Maurice Blanchot (1998)
<i>Dis</i>	<i>Dissemination</i> (2004)
'E&F'	'Epoché and faith: an interview with Jacques Derrida', in <i>Derrida and Religion: Other Testaments</i> (2005)
<i>EO</i>	<i>The Ear of the Other</i> (1988)
<i>ET</i>	<i>Echographies of Television</i> , with Bernard Stiegler (2002)
<i>Fors</i>	'Foreword: <i>Fors</i> : the english words of Nicolas Abraham and Maria Torok', in <i>The Wolf Man's Magic Word: A Cryptonymy</i> (1986)
'FT'	'Following theory', in <i>Life After Theory</i> (2003)

- FWT* *For What Tomorrow ... A Dialogue*, with Elisabeth Roudinesco (2004)
- Geschl I* ‘Geschlecht: sexual difference, ontological difference’, in *A Derrida Reader: Between the Blinds* (1991)
- Geschl IV* ‘Heidegger’s ear: philopolemology (Geschlecht IV)’, in *Reading Heidegger: Commemorations* (1993)
- G&L* *The Gift of Death 2d. ed. & Literature in Secret* (2008)
- Glas* *Glas* (1986)
- GT* *Given Time I. Counterfeit Money* (1992)
- HOG* *Edmund Husserl’s Origin of Geometry: An Introduction* (1989)
- ‘Host’ ‘Hostipitality’, in *The Derrida–Habermas Reader* (2006)
- Ltd* *Limited Inc* (1988)
- ‘LO’ ‘Living on’, in *Deconstruction and Criticism* (2004)
- MfPdM* *Memoires for Paul de Man* (1989)
- MO* *Monolingualism of the Other; or, the Prosthesis of Origin* (1998)
- MP* *Margins of Philosophy* (1982)
- ‘M&S’ ‘Marx & Sons’, in *Ghostly Demarcations: A Symposium on Jacques Derrida’s Specters of Marx* (1999)
- Neg* *Negotiations: Interventions and Interviews 1971–2001* (2002)
- ‘NM’ ‘The laws of reflection: Nelson Mandela, in admiration’, in *For Nelson Mandela* (1987)
- ‘OF’ ‘On forgiveness: a roundtable discussion with Jacques Derrida’, in *Questioning God* (2001)
- OG* *Of Grammatology* (1976)
- OH* *Of Hospitality*, with Anne Dufourmantelle (2000)
- ON* *On the Name* (1995)
- OS* *Of Spirit: Heidegger and the Question* (1989)
- ‘OtG’ ‘On the gift: a discussion between Jacques Derrida and Jean-Luc Marion’, in *God, the Gift and Postmodernism* (1999)
- ‘Pas’ ‘Passions: “an oblique offering”’, in *Derrida: A Critical Reader* (1992)
- PC* *The Post Card: From Socrates to Freud and Beyond* (1987)
- PF* *Politics of Friendship* (1997)
- PG* *The Problem of Genesis in Husserl’s Philosophy* (2003)
- PM* *Paper Machine* (2005)
- Points* *Points ... Interviews, 1974–1994* (1995)
- Pos* *Positions* (1981)
- ‘PP’ ‘Performative powerlessness – a response to Simon Critchley’, *Constellations* (2000)
- ‘Préjugés’ ‘Préjugés: devant la loi’ in *La Faculté de juger* (1985)
- Psy I* *Psyche: Inventions of the Other*, vol. I (2007)
- Psy II* *Psyche: Inventions of the Other*, vol. II (2008)
- ‘PTF’ ‘Preface: a time of farewells: Heidegger (read by) Hegel (read by) Malabou’, in *The Future of Hegel: Plasticity* (2005)

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- PTT* 'Autoimmunity: real and symbolic suicides – a dialogue with Jacques Derrida', in *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida* (2003)
QE 'Hospitality, justice and responsibility: a dialogue with Jacques Derrida', in *Questioning Ethics: Contemporary Debates in Philosophy* (1999)
R *Rogues: Two Essays on Reason* (2005)
Rel 'Faith and knowledge: the two sources of "religion" at the limits of reason alone', in *Religion* (1998)
Res *Resistances of Psychoanalysis* (1998)
'RM' 'The retrait of metaphor', in *The Derrida Reader: Writing Performances* (1998)
SA *The Secret Art of Antonin Artaud*, with Paule Thévenin (1998)
SM *Specters of Marx: The State of Debt, the Work of Mourning, and the New International* (2006)
SP *Speech and Phenomena and Other Essays on Husserl's Theory of Signs* (1973)
Spurs *Spurs: Nietzsche's Styles* (1979)
SQ *Sovereignities in Question: The Poetics of Paul Celan* (2005)
S/S *Signéponge/Signsponge* (1984)
'TF' 'To forgive: the unforgivable and the imprescriptible', in *Questioning God* (2001)
'TID' 'The tragic, the impossible and democracy: an interview with Jacques Derrida', *International Journal for the Semiotics of Law* (2010)
'TL' 'Thinking at the limits: a dialogue with Jacques Derrida', *Philosophy Today* (2004)
TOH *The Other Heading: Reflections on Today's Europe* (1992)
'TOJ' 'The time is out of joint', in *Deconstruction Is/In America: A New Sense of the Political* (1995)
TP *The Truth in Painting* (1987)
TS *A Taste for the Secret*, with Maurizio Ferraris (2001)
'VR' 'The Villanova roundtable: a conversation with Jacques Derrida', in *Deconstruction in a Nutshell: A Conversation with Jacques Derrida* (1997)
WA *Without Alibi* (2002)
WAP *Who's Afraid of Philosophy? Right to Philosophy I* (2002)
'WB' 'Women in the beehive: a seminar with Jacques Derrida', *Differences: A Journal of Feminist Cultural Studies* (2005)
WD *Writing and Difference* (1978)
WM *The Work of Mourning* (2001)



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Introduction

[D]econstruction cannot be transgression of the Law. Deconstruction *is* the Law. It's an affirmation, and an affirmation is on the side of the Law.

Derrida 'WB' 149

'Deconstruction is justice', Derrida states famously in 'Force of law: the "mystical foundation of authority"'. 'Deconstruction *is* the Law', Derrida says in the above epigraph, dating from 1984. Is this not a clear instance of Derrida (again) contradicting himself? Did he not in 'Force of law' strain to distinguish between justice and law? Yet here, in the context of a discussion of 'Before the law', he seems to associate deconstruction with law. In his early texts on law, as we have often been told in commentaries, Derrida points to the absence of a legitimate foundation for law. The attempt to find such a foundation, he allegedly says there, leads to infinite regress. In 'Force of law' Derrida is said to repeat this claim and then in addition to argue that justice is about a concern for the singular individuals before the law, as opposed to law's generality. Read thus, there can indeed be said to be a belated turn to ethics in 'Force of law'. The above epigraph would then serve as further evidence of such a 'turn'. In line with this reading, Derrida in 1989 wished no longer to simply associate deconstruction with the absence of foundations, but also with singularity. Such a reading, which is incidentally not uncommon in the legal context, misses everything that is at stake in Derrida's thinking. As Derrida himself notes in 'Force of law' (AR 235), the themes of justice, ethics and politics were at the forefront of many of his earlier texts, such as the texts devoted to Levinas, including 'Violence and metaphysics' (1964), as well as *Glas* (1974), 'To speculate – on Freud' (1980), 'Before the law' (1982), 'Declarations of Independence' (1976), 'The laws of reflection: Nelson Mandela, in admiration' (1986), etc. He furthermore notes that '[i]t goes without saying that discourses on double affirmation, the gift beyond exchange and distribution, the undecidable, the incommensurable or the incalculable, on singularity, difference and

heterogeneity are also, through and through, at least oblique discourses on justice' (AR 235). This means that all his texts can in a way be said to relate to justice. Little attempt has been made thus far to enquire into this assertion by Derrida, and to establish what it means for an understanding of the concept of law. *Law as Absolute Hospitality* seeks to do so, through a slow, detailed and contextual reading of a number of Derrida's texts, including some of those mentioned above.¹ It will seek to chart a new direction in the reception of Derrida in the legal context and, at least to some extent, beyond that context as well. What will come to the fore is a very different understanding of the concept of law than has dominated legal discourse up until now. The main focus of this introductory chapter will be an outline of Derrida's broader 'project'. Without a grasp of this project, it is simply impossible to contemplate the transposition of his thinking to the legal context. Derrida's relation to Heidegger, Husserl, Levinas and Freud will, because of their significant influence on his project, play an important role throughout this book and will be briefly considered here within the context of Derrida's project. Before coming to that, we will first analyse some of the most influential readings of Derrida in the legal context thus far, which *Law as Absolute Hospitality* will seek to distinguish itself from. This analysis will at the same time introduce certain aspects of Derrida's thinking. To conclude the chapter, an explanation will be given of the title of the book and a brief analysis will be undertaken of the sequence and content of Chapters 2 to 8.

Dominant readings of Derrida in the legal context

Since Derrida appeared on the legal radar in the 1980s, his texts have been discussed and referred to in numerous legal works. Such references have varied from the sympathetic to the downright hostile. Almost without exception, the hostile readings are characterised by a superficial reading of Derrida. Detailed attention will not be given to these readings here, although *Law as Absolute Hospitality* as a whole seeks precisely to address the many misconceptions that exist in relation to Derrida's thinking. The sympathetic readings unfortunately sometimes fare little better. As noted above, they are in many instances similarly informed by a lack of appreciation or disregard of Derrida's broader project. In what follows, a number of influential readings of Derrida in the legal context will be briefly engaged with. The scholars to be discussed are faithful to Derrida's thinking in varying degrees. The engagement with the readings of these scholars will set the scene for a

1 In the legal context, this kind of approach (analysing in detail the texts of Derrida) has not as a rule been followed, perhaps with the exception of commentaries on 'Force of law'. Outside of the legal context, it is more often employed.

different reading of Derrida in the legal context, which will seek to follow him as closely as possible.²

The methodical reading

In the early reception of Derrida by Critical Legal Studies (CLS) in the United States, Derrida's deconstruction of hierarchical oppositions, such as that between speech and writing, was employed to 'deconstruct' hierarchical oppositions to be found in law.³ One of the problems that plagued the CLS reception of Derrida was the descentance of CLS from legal realism. Legal realism, as is well known, promoted a view of law freed from all transcendentalism. Derrida's challenge to transcendentalism made him appear as a kindred spirit, whereas the position was much more complex. In the early reception of Derrida his analysis of language was consequently relied on to show that some legal concepts and doctrines are usually or traditionally privileged over others (in US law), for no definitive reason, and that legal concepts and doctrines are thus ultimately constructs which have no basis in reality. In the case of CLS this 'deconstruction' was motivated by left political thinking. From this early reception of Derrida it was however easy to derive the conclusion that deconstruction is simply a technique of argumentation which could be relied on by both the political left *and* the right. Deconstruction in some hands thus soon became a politically neutral method which could be used to overturn the preferences shown in any argument or rule. In one highly influential version of this reading,⁴ Derrida's deconstruction of the speech–writing opposition was understood as entailing the 'temporary' reversal of this hierarchy, by viewing speech as a kind of writing. This new privilege could however, in turn be reversed. What Derrida ultimately shows, it was contended, is that neither of the two terms can be privileged, as they are mutually dependent on each other. This same 'method' can, so the argument goes, be applied in the legal field to any kind of hierarchy that exists, for example in relation to rules informed by a view on human nature: that is, whether human nature is characterised by

2 This said, there are of course limits to the extent of 'closeness' to Derrida's thinking in a book of this nature. *Law as Absolute Hospitality* gives an account of Derrida's thinking, and thus proceeds by way of reason and calculation, which is of course exactly what Derrida places in question in his writing. Closeness would furthermore require following Derrida's 'style', which would make it difficult to explain Derrida's thinking in an accessible way. This book will therefore almost without exception be in the constative mode, even when its primary 'theme' is Derrida's notion of absolute performativity (see Chapter 2).

3 See e.g. Tushnet (1984); Dalton (1985); and Frug (1984). For a brief analysis and other similar types of argument, see Douzinas and Gearey (2005: 64–9).

4 Balkin (1986–7). Balkin, to his credit, indicates that his version of deconstruction does not necessarily correspond with that of Derrida. This way of proceeding nonetheless assumes that different brands of 'deconstruction' can be constructed at random (and 'sold' to legal scholars).

self-interest vis-à-vis the belief that it is characterised by altruism and community. Neither of these two ways of viewing human nature can however serve as a foundation, as they are both different from and mutually dependent on each other. Deconstruction in this way, it was argued, provides the possibility of emancipation from dominant ways of thinking – that is, the belief that there is one foundational, complete and self-sufficient principle.

This reading of Derrida, as well as other similar readings, tends to retain a distinction between language on the one hand and (social) reality on the other. Derrida's famous statement that '[t]here is nothing outside of the text' (*OG* 158) is as a result understood to mean that language only imperfectly represents reality. In this reading of Derrida, truth thus remains fully intact, with all attempts to grasp it through language being incomplete. Derrida's understanding of the notion of 'text' is however very different from the way it is presented in this reading. Because of the importance of this issue for the rest of our analysis, it will be useful to now already give attention thereto. Different from the way in which Balkin and others understand it, 'text' for Derrida already includes a description and a grasping of 'things' or 'reality'. Hegel was the first to propagate this view regarding the relation between thinking and reality, noting in relation to Kant's noumenon or 'thing in itself' that there is no beyond to the phenomenon (Hyppolite 1974: 125). Things are simply the way they appear to us. For Heidegger (1962: 246–52), similarly, in so far as man's relation to the world is concerned, *Dasein* is already thrown into the world and 'is' thus Being-in-the-world. This means that there is no world or reality outside of *Dasein* the existence of which has to be proven, as for example Descartes attempted or Kant's 'thing in itself' to which one has no access. Both these 'metaphysical' approaches assume a subject that is world-less and that seeks to assure itself of a world (Heidegger 1962: 250). Language for Derrida similarly does not stand vis-à-vis 'reality', but is already in its construction of 'reality' a 'text', which is why he states that 'there is nothing outside of the text' or that 'life is a text' ('FT' 27). He has explained his notion of 'text' as follows:

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

(*Ltd* 148)

The 'text', or what Derrida refers to elsewhere as 'the text in general' (*Pos* 44, 59, 60) furthermore does not have an inside that can be clearly distinguished

from an outside, in the same way in which life cannot simply be opposed to death, as is assumed by metaphysics. As appears from the reference to the ‘differential trace’ in the above quotation, and following from the analysis of Derrida’s relation to Freud,⁵ the text is structured by a ‘desire’ for death (*Pos* 88) which is what motivates every deconstruction. Although it is therefore not incorrect to point to Derrida’s adherence to the view that language has no basis in reality, it is premature to stop at this point, and to believe that this is all that Derrida asserts. The view that language has no basis in ‘reality’ is to be found also in ‘structuralist’ thinking such as with Saussure, a view which Derrida further develops. Derrida more particularly seeks to analyse with reference to Freud’s notion of drives and of the unconscious, the ‘laws’ which determine constructions of ‘reality’.

The postmodern reading

A kind of reading of Derrida which ties in closely with the above methodical reading is to the effect that Derrida exposes all views or constructions of reality as subjective, which would have the consequence that he himself cannot complain about ‘incorrect’ readings of his own texts. In my own interaction with ‘postmodern’ legal scholars I am likewise often confronted with the argument that Derrida’s approach emphasises the instability of written texts, and that his own texts speak of undecidability, indeterminacy and dissemination. Multiple readings of Derrida’s texts would therefore be possible and no objective criteria would be available to judge one reading as ‘better’ or ‘more accurate’ than another.⁶ Viewed as such, the present book would simply provide a partial reading of Derrida, a ‘Freudian’ or ‘Heideggerian’ reading perhaps. Just as valid would be a ‘Nietzschean’, ‘Levinasian’ or ‘Foucauldian’ reading of Derrida. The relativist or ‘postmodern’ reception of Derrida in the legal context has made debate about the content of Derrida’s texts or his relation with other thinkers more or less impossible, as all interpretations of these texts are viewed as ‘subjective’.

Derrida has frequently disassociated himself from postmodernism.⁷ In ‘No (point of) madness – maintaining architecture’ Derrida (*Psy II* 87–8) notes that the idea of the postmodern ‘still surrender[s] to the historicist compulsion’. He continues as follows in his evaluation of this categorisation of time periods:

5 See below.

6 I should perhaps confess here that a number of years ago, with the help of mostly secondary readings, I also understood Derrida in this way. For an example of such a reading, see Wheeler (1993: 125–45, 209–38).

7 See e.g. ‘M&S’ 228–9, 263–4 on the need to distinguish Derrida’s work from postmodernism and the failure to do so as a ‘facile, demagogic, grave error’ and ‘a massive failure to read and analyze’. See further *TS* 9 on the mistrust deconstruction has for any kind of periodisation.

It is as if one wished yet again to order a linear succession, to periodize, to distinguish between the before and the after, to limit the risks of reversibility or repetition, transformation or permutation: a progressivist ideology.

(*Psy II* 88)

Derrida has responded similarly to attempts to associate deconstruction with modernity, noting that as soon as:

we give it the label of ‘modernity’, we inscribe it in a certain historical system of evolution and progress (a notion derived from Enlightenment rationalism) which tends to blind us to the fact that what confronts us today is *also* something ancient and hidden in history. I believe that what ‘happens’ in our contemporary world and strikes us as particularly new has in fact an essential connection with something extremely old which has been covered over (*archi-dissimulé*).

(*DCC* 112)

These comments, where the repetitive nature of Freud’s death drive feature prominently (‘something ancient and hidden in history’ and ‘something extremely old’) again show the importance of an understanding of Derrida’s broader project when one seeks to comprehend his relation to law. The association of deconstruction with relativism has in similar fashion been clearly refuted by Derrida. In another interview he expresses himself as follows in this respect:

[R]elativism is a doctrine which has its own history in which there are only points of view with no absolute necessity, or no references to absolutes. That is the opposite of what I have to say. Relativism is, in classical philosophy, a way of referring to the absolute and denying it; it states that there are only cultures and that there is no pure science or truth. I have never said such a thing.

(*QE* 78)⁸

Derrida’s problematising of truth does not therefore mean the total rejection of truth, nor does it simply lead to the belief that there are many truths, but instead to an investigation into that from which truth derives (*Ltd* 150).⁹ In

8 See similarly *Ltd* 137.

9 See also *Neg* 224 on the ‘foolish simplicity of aligning Nietzsche’s thought with relativism’. If one is relying on a ‘Nietzschean’ reading of Derrida, account has to be taken of Derrida’s comment on the law at stake in Nietzsche’s discourse, specifically in the *Genealogy of Morals* (*Neg* 223–4): ‘The law, or this “must,” can, indeed, be read in all the prescriptive modalities of Nietzsche’s discourse. When he speaks of the different hierarchies of force and of differences of force, there must also be law. The reversal of values or their hierarchical ordering presupposes law – hence the foolish simplicity of aligning Nietzsche’s thought with relativism.’

so far as the charge of relativism refers to interpretation as a subjective exercise, it can clearly be seen from the above quotation that Derrida does not subscribe to such an approach.¹⁰ As a reading of any of his texts will furthermore show, he always respected the basic principles of reading, even though he at the same time sought to go beyond these principles. This subversion of the traditional rules of reading however happened in a very rigorous manner, as the rest of this book will seek to show. The notions of truth, correctness and accuracy are thus not abandoned by Derrida, but re-inscribed (*Ltd* 150). They therefore retain their value and can in a way be used, also against *Law as Absolute Hospitality*, to contest the accuracy of the readings argued for here. Even if Derrida has distanced himself from postmodernism and relativism, there are of course still academics who insist on reading him in this way as they themselves believe that interpretation is something purely subjective (independent of what Derrida might have to say on the subject). Derrida, and Heidegger before him, however clearly and convincingly showed that such an approach is founded in the metaphysics of presence, more specifically the illusion of the self-presence of the subject.¹¹ Freud hammered the final nail into the coffin, in respect of both reading and writing.

What is therefore required in determining Derrida's relation to law is a careful and as rigorous as possible a reading of his texts, in context, as Derrida often insisted should happen.¹² In so far as *Law as Absolute Hospitality* can, for attempting such a reading, be accused of attempting to 'police' the reading of Derrida, this 'policing' takes place with the aim of fending off a metaphysical reading of Derrida; and metaphysics, it needs to be noted, always relies on a police force itself for its own protection, and a much more powerful one at that.¹³ It is for similar reasons in this book not about claiming any proprietary right over Derrida, but precisely about insisting on the force of expropriation in his texts. It is also not about claiming to be a (or 'the only') legitimate heir, but precisely to point to and affirm that which is 'illegitimate' in Derrida's texts¹⁴ and which often escapes scrutiny. This said, are things not perhaps different in the legal field? Do rigorous readings of philosophers in the legal field really matter? Legal scholars have after all through the ages interpreted philosophers in a variety of ways to make their thinking applicable and useful to law. This has not always taken place with the greatest degree of rigour, but law has nonetheless often benefited immensely from such

10 See also *QE* 78–9.

11 See in this respect Chapters 4 and 7.

12 See e.g. *MS* 236–8; *Ltd* 146–7, *R* 173 fn 14.

13 See Derrida *TP* 325–7.

14 See in this regard 'M&S' 222–3, 232–3.

adaptations.¹⁵ Even though there may on the face of it be merit in this argument, it does appear that something different is at stake in the case of Derrida's thinking. To give a metaphysical interpretation to Derrida, as often happens in the legal context, can no doubt have some benefit for law, and ultimately for the community served by that law. This is however precisely the problem with the argument. Derrida's attempt to exceed metaphysics concerns itself not in the first place with the strengthening of law and of the community, but exactly with the suspension of law, and tied to that, with the auto-immunity (or desire for death) of the community served by such law. Interpreting Derrida in a metaphysical manner can thus be done, and it may indeed benefit law and the community it serves, but it is perhaps the ultimate form of injustice towards a thinker like Derrida to interpret him in this way. If more attention is given to the nuances of Derrida's thinking than has happened thus far, a conception of law can be developed which can (to some extent) exceed metaphysics with its circular economy. Anyone who has a concern for justice and ethical responsibility has little choice but to take up the radical challenge posed by Derrida's texts.

The ethical-liberal reading

A more sophisticated and less instrumentalised interpretation of Derrida has made it difficult to distinguish between deconstruction and *political liberalism*. This was astutely observed by Frank Michelman (2002: 246–62) in comparing his own (republican) liberalism with one of these versions of deconstruction. In this version, judges are in light of Derrida's analysis of justice called upon to recognise the plurality of interests (the political); to re-evaluate in each new case the sacrifices deemed just(ified) in earlier (similar) cases, and ultimately to acknowledge (and mourn) the destruction of plurality or the unjust sacrifice decided upon.¹⁶ In this version, we can say that justice, which is understood as the (full) recognition of the plurality of interests, is tragically impossible. The only thing which (this version of) deconstruction seems to do different from political liberalism, Michelman noted, is to view as *unjust* the 'sacrifice' in pursuit of a social goal that goes along with politico-legal decision-making. Liberalism on the other hand accepts this as an inevitable feature of decision-making and moreover does not refrain from regarding a legal decision as 'just' when it is adequately justified. This kind of ethical-liberal version of deconstruction has been adopted by a number of (legal) commentators, although they diverge at certain points. Levinas is often invoked as additional authority in arriving

15 See e.g. the discussion of Berman (1983: 120–64).

16 See van der Walt and Botha (2000); and see further van der Walt (2005a).

at this kind of reading of Derrida.¹⁷ This is often tied to a similar kind of argument as we find in the methodical reading earlier referred to, that is, that representational systems such as a legal system cannot adequately represent reality, here individual interests.

The argument in another influential ethical–liberal version of deconstruction which adopts these ideas goes briefly thus: Levinas points to the claim which others make on me. This claim goes beyond the rights and duties allocated by means of the legal system. Derrida adopts this position of Levinas. The responsibility of a judge consequently is towards the parties to a dispute rather than the legal system. This (seeming) insistence of deconstruction on the singular, it is believed, has the potential of leading to greater transformation (Cornell 1992). Others, adopting a similar reading of Derrida, have however criticised this ‘deconstructive ethics of difference’ for making impossible the evaluation of competing claims. Derrida’s condemnation of religious fundamentalism in an interview after the events of September 11, 2001, is as a result viewed as contradictory, as an ‘ethics of difference’ after all calls for the equal recognition of all others (Rosenfeld 2008). The contention of *Law as Absolute Hospitality* is that these ethical–liberal readings each in their own way entail an unjustified and unfortunate domestication of Derrida’s thinking.¹⁸ Derrida’s concern with the other has much more radical consequences than is typically portrayed in these readings.¹⁹ That is the case because deconstruction concerns itself with *the* impossible, not simply with what is impossible. Furthermore, although it can indeed not be disputed that Levinas plays an important role in Derrida’s thinking, there are also significant divergences in their thinking.²⁰ In this respect one needs to carefully consider the implications of Derrida’s thinking on ‘the other’ for subjectivity. In some of these liberal readings of deconstruction, the subject tends to be left in place even when something of the ‘ethical’ dimensions of Derrida’s thinking is grasped. Derrida’s response to a question from Vattimo about the self making room for the other in *A Taste for the Secret*, shows that much more is at stake here than a subject with an ‘ethical responsibility towards the other’:

‘Leaving room for the other’ does not mean ‘I have to make room for the other’. The other is in me before me: the ego (even the collective ego)

17 There is another influential non-liberal reading of Levinas and Derrida which tie them closely to psychoanalysis and specifically serves as a slight ‘correction’ to Lacan; see Douzinas (1995); and see below.

18 At the same time I have to again confess that I at some stage found these readings of Derrida, specifically by Cornell and van der Walt, very convincing; see de Ville (2000, 2004).

19 For a more detailed analysis of some of these readings of Derrida, see de Ville (2007a, 2007b, 2007c).

20 See similarly Saghafi (2010: 10–11).

implies alterity as its own condition. There is no ‘I’ that ethically makes room for the other, but rather an ‘I’ that is structured by the alterity within it, an ‘I’ that is itself in a state of self-deconstruction, of dislocation. This is why I hesitated just now to use the word ‘ethical’. This gesture is the possibility of the ethical but is not simply ethical, which is why I speak of the messianic: the other is there in any case, it will arrive if it wants, but before me, before I could have foreseen it.

...

Which means that I am not proprietor of my ‘I’, I am not proprietor of the place open to hospitality. Whoever gives hospitality ought to know that he is not even proprietor of what he would appear to give.

(TS 84–5)

The cosmopolitan reading

The last reading to be discussed here can be termed a cosmopolitan or utopian understanding of deconstruction. This refers to the important and unique contribution of Douzinas, one of the first legal scholars to have commented on Derrida’s texts. Douzinas’s reading is based on a fusion of sorts of the insights of, among others, Derrida, Levinas, Lacan and Foucault. In his earlier texts, Douzinas, in collaboration with others, adopted a Levinasian approach in setting out the relation between the self (or the law) and the singular other, which he viewed as similar to the relation posited by Derrida in ‘Force of law’ between (universal) law and (unique, singular) justice (Douzinas and Warrington 1994: 231–2; Douzinas 2000: 348–51).²¹ This was combined with a Lacanian understanding of desire, that is, a desire for the (m)other, also referred to as *jouissance* or the death drive, the latter being understood by Douzinas (1995: 1326–7) in an essentially Oedipal sense. The face-to-face relation with the other, according to Douzinas, in other words at the same time evokes unconscious desire. In a recent text, *Human Rights and Empire*, Douzinas combines the above model with Derrida’s notion of a ‘democracy to come’ in developing a political philosophy of cosmopolitanism. Douzinas takes account of Derrida’s relation to Marx, and in doing so, admirably goes beyond the ethical–liberal readings analysed briefly above. It exposes and resists, like Derrida (as well as Foucault and others), the (still) totalitarian character of liberal democracies. To his further credit, and here he indeed seems very close to Derrida, Douzinas (2007: 294) subscribes to a notion of *cosmos* which ‘uproots every city, disturbs every filiation, contests all sovereignty and hegemony’, extending ‘beyond nations and states, beyond the nation-state’. At stake here is what Douzinas (at 293) refers to as a ‘cosmopolitanism to come’, which he compares favourably with Derrida’s notion of

21 For an analysis of this kind of reading of Derrida, see Chapter 6.

a new International in *Specters of Marx*.²² From Douzinas's subsequent contention, it however becomes clear that Derrida is invoked to support a thinking of cosmopolitanism in oppositional terms. Similar to CLS in the United States, the paradoxes detected by Douzinas, do not become aporias in the sense that they do in Derrida.²³ Douzinas's contention (at 295), invoking Derrida's *Rogues*, that 'this attack on sovereignty does not take place in the name of non-sovereignty but in that of another sovereign, the individual' therefore raises certain questions. The reading given to *Rogues* clearly corresponds with the above Lacanian–Levinasian model. The (metaphysical) opposition between the particular and the universal – that is, between presence and representation, as a result – however remains. This reading does not quite do justice to what Derrida is saying in *Rogues*, when read in context. In line with the exposition of Derrida's project in this chapter, Derrida seeks to show here how the concept of sovereignty is in the process of self-destruction, in a more accelerated form today than in earlier times. One of the ways in which this happens is (indeed) by way of international human rights. Derrida is not however arguing here for the opposition of one form of sovereignty by another. This is made clear in *Rogues* itself, in the texts where he problematises the foundation of (human) rights in the notion of sovereign subjectivity (*AR* 246–7, *PTT* 132–3), as well as in 'Violence and metaphysics' where he challenges Levinas's analysis of the relation with the other.²⁴ The analysis in *Rogues* is thus about the auto-immunity or 'implosion' of the concept of sovereignty itself. This is one of the ways in which the (metaphysical) opposition between the singular and the universal, as well as other metaphysical oppositions is transcended. Whereas for Douzinas (2007: 295) the principle of sovereignty thus ultimately remains intact (playing itself out in oppositional form),²⁵ Derrida seeks to affirm auto-immunity as the condition of possibility, as well as the displacement of sovereignty, with implications for both the state/law *and* the individual.

As we will see in more detail in Chapter 3, serious difficulties furthermore present themselves when one attempts to construct a philosophical model

22 Certain questions can be raised about this analogy. Apart from the fact that Derrida has problematised the notion of cosmopolitanism (e.g. in *CF*), the new International in *Specters of Marx* is not of the order of an a-temporal future 'to come' as e.g. justice, the gift and democracy in Derrida's texts, but 'refers to a profound transformation, projected over a long term, of international law, of its concepts, and its field of intervention' (*SM* 105). The cosmopolitanism to come in Douzinas's model thus on the one hand (by virtue of its 'to come' nature) seeks to go beyond temporality, yet Douzinas (2007: 296 fn. 13) still refers to it as an ontology, and thus remains within temporality.

23 See Chapter 6.

24 See below.

25 This is so especially in relation to human rights, where Douzinas (2007: 197) opposes a view of human rights as an instrument of state/empire (human rights as ideology) on the one hand, to a view of human rights as opposing sovereignty in these forms (human rights as revolutionary critique, linked to Oedipal desire) on the other.

based on a belief in the universality of the Oedipus complex, as Douzinas does. The adoption of Lacan's notion of the Real, understood in an Oedipal sense (Douzinas 2007: 46–7), for instance makes it impossible for this 'political philosophy' to escape from what characterises metaphysics par excellence, that is, circular exchange.²⁶ Because of its Levinasian heritage, and especially because it does not fully take on board Derrida's reading of and problematising of Levinas's thinking, the positing of an 'ontology' of alterity or of plural singularities', as Douzinas acknowledges himself, remains within metaphysics (Douzinas 2000: 349–51; 2007: 296).²⁷ This retention of a discourse within metaphysics will almost inevitably lead to difficulties in founding a radical left legal politics in the long run. This difficulty also stems from the reading given to *Rogues*, where the (sovereign) self, the I as (lacking) subject, even though it becomes somewhat destabilised or 'shifting', ultimately remains in place in Douzinas's model.²⁸ To give only one example, the Levinasian attachment to (only) the human face, almost inevitably leads to an alignment with the traditional man–animal distinction,²⁹ with all its accompanying cruelties.³⁰ The notion of absolute hospitality, which as Derrida (*CF* 16–17) points out, relates to 'a manner of being there, the manner in which we relate to ourselves and to others', appears to have a much more 'radical' political potential, at least in this respect.³¹ The 'Great Law of Hospitality', as Derrida notes in speaking of the medieval tradition, entails:

An unconditional Law, both singular and universal, which ordered that the borders be open to each and every one, to every other, to all who might come, without question or without their even having to identify who they are or whence they came.

(*CF* 18)

26 See in this respect *GT* 15, and see further Chapter 5. Douzinas does not seem to take account of Derrida's problematising of Lacan's 'Seminar on "The Purloined Letter"' (Lacan 2006: 6–48) in 'The purveyor of truth' (*PC* 411–96).

27 See in this respect also 'M&S' 257–8.

28 See e.g. Douzinas (2007: 42).

29 See Douzinas (2007: 51) where the issue is raised but not further pursued. Simply extending rights to animals (in relation to which Douzinas 2001: 197 takes a sceptical stance), will of course not address this issue; see *Points* 255–87.

30 See also *AIA*. Similar questions can be raised in relation to the implications of Critchley's analogous reading of Derrida (via Levinas) in terms of a politics of ethical difference. Critchley's claim of an 'impasse of the political in Derrida's work' (Critchley 1999b: 236) and of the need for a supplement to ensure that it has a future (at 237) is highly problematical. The present text will show that there is no such 'impasse' in Derrida's thinking and that it is par excellence about the future.

31 When the 'starting point' is an affirmation of absolute hospitality, the (progressive) effects are likely to be greater also in other respects, compared to when one starts off with the 'singularity of the self', e.g. in Douzinas (2007: 42).

Although Douzinas's approach can in many respects be commended, especially in its taking on board of certain psychoanalytical insights, it is necessary to go beyond the Oedipus complex, in teasing out the implications of Derrida's thinking for law.

Derrida and the metaphysics of presence

Although Derrida's 'project' has been analysed many times before, this needs to be returned to here. What appears to have happened in the legal context is that legal scholars have in their understanding of Derrida generally been restricted to the insights offered by commentaries which do not in all respects appreciate the nature of Derrida's broader project. Where legal scholars have relied on Derrida's texts themselves, insufficient attention has often been given to detail. *Law as Absolute Hospitality* will seek to steer clear of these pitfalls by not only enquiring into *what* Derrida says, but also into *why* he says it – that is, by enquiring into his broader project. Without an appreciation of Derrida's 'project', notions which he often refers to in his texts such as undecidability, singularity, the other, aporia, the impossible, difference, deference, *différance*, the text, iterability, the future, the 'to come', responsibility, as well as Derrida's relation to conceptuality in general, can easily be misunderstood. An understanding of Derrida's broader project is also essential to be able to appreciate his relation with earlier thinkers and it is moreover only then that a meaningful debate can take place with contemporary philosophers. When speaking of Derrida's project, the reference is of course to his deconstruction of the metaphysics of presence. Metaphysics (from *meta* = after, beyond; and *physis* = nature)³² of course concerns itself with the founding principles of existence or being, for example Plato's Ideas. In brief, Derrida's contention is that all Western philosophy (even when, as in for example empiricism and logical positivism, metaphysics is seemingly rejected), is based on a desire for 'presence' as its founding principle. Because of their (implicit) reliance on philosophy, that is, metaphysics, the language (specifically Western languages) used in academic discourse and everyday thinking are based on the same principle (*Pos* 19). In his texts Derrida shows the problematic nature of this founding principle in its many guises and at the same time seeks a passage beyond it. One of the manifestations of metaphysics is the setting up of hierarchical oppositions, such as that between good–evil, pure–impure, proper–improper, meaning–nonsense, essential–accidental, original–imitation, normal–abnormal, speech–writing, nature–culture, literal–metaphorical and reason–madness, where the first term serves as foundation or as a form of 'presence', with the second term representing a 'fall' from presence which is to be understood in terms of the first term.

32 See however Chapter 7 on Heidegger's problematisation of this translation.

Plato's Ideas is one of the ways in which this oppositional structure has been grounded in Western philosophy.³³ In considering Derrida's relation to law – our specific aim here – a basic understanding of this project is all the more essential because of law's enclosure within metaphysics through its reliance on the concepts and typical thought-processes of metaphysics (*Pos* 13).³⁴ It is then also specifically by considering Derrida's relation to the thinking of Husserl, Heidegger, Freud and Levinas that we can come to a better understanding of this project.³⁵ As the relation between the thinking of Heidegger and Derrida is analysed in detail in Chapters 4 and 7, the discussion of Heidegger here will be relatively brief, in comparison with the others. As will become clear from the discussion that follows, Derrida's project can be summed up by saying that what is ultimately at stake is the relation between life and death.³⁶

Husserl

In Derrida's first texts the 'project' of deconstructing the metaphysics of presence proceeds through an analysis of the texts of Husserl (*PG*, *HOG*, *SP*). In the legal context, Derrida's relation to Husserl is seldom explored. In the texts of Derrida referred to, he shows the problematic nature of certain assumptions of Husserl, whose phenomenological thinking for Derrida represents the high point of metaphysics (*OG* 49), more specifically the belief in the 'presence of sense to a full and primordial intuition' (*SP* 5) – that is, the possibility of meaning, present to consciousness without the need for mediation through indicative signs or signifiers. Husserl's texts nonetheless point to a way beyond metaphysics by showing that presence is always invaded by nonpresence. What Derrida will ultimately seek to show, is the inter-relationship between life and death, which is illustrated par excellence by

33 See further below the discussion of Heidegger on other ways of grounding this structure.

34 This is of course not only the case in the West, but everywhere that Western legal ideas have been imported.

35 There are of course others who can be said to require discussion here too, such as Hegel, Kant, Nietzsche and Blanchot. A discussion of all the philosophers and thinkers who have influenced Derrida's thinking would however take us too far beyond our present concern: a brief discussion of Derrida's project.

36 It should perhaps be stated at the outset that I do not share in the general enthusiasm with which one of the recent readings of Derrida which also focuses on this relation – Hägglund (2008) – has been met. The main shortcomings of this book, centred around the notion of 'survival' in Derrida's thinking, is its disregard of the finer nuances in Derrida's thinking, including Derrida's relation to thinkers such as Freud and Heidegger, as well as of Derrida's broader project (see Naas 2009 and Laclau 2008 for a similar assessment, at least regarding the last point). Because of the attention it has attracted, and as its claims directly conflict with the reading of Derrida argued for here, Hägglund's book will be briefly referred to in the discussion below, as well as elsewhere in this book.

writing. Two of Derrida's texts on Husserl will be briefly analysed here so as to introduce Derrida's project.³⁷

In Derrida's 'Introduction' to Husserl's *Origin of Geometry* he explores the implications for truth and meaning of Husserl's analysis of the necessarily historical dimension of ideas, that is, their need to be expressed in language, and specifically in writing. Whereas Husserl believes that ideality remains unaffected by its expression in writing, Derrida shows by analysing the structure of writing that this cannot be the case. The reason for expressing an idea for the first time in writing, as Derrida points out, is the insufficiency of the speaking subject in so far as the absolute grounding of such ideal objectivity is concerned (*HOG* 87–9). What is necessary for the ideal objectivity of meaning to be constituted is the possibility of it being repeated or reactivated and shared by others, even after the death of the original inventor and his initial audience. Ideas expressed in graphic signs as a necessary requirement for their constitution, as a consequence become public property, with the unavoidable risk of losing their (original) meaning, of becoming empty repetition, of the death of sense (meaninglessness), in other words. The necessary expression of truth in language furthermore goes along with the irreducible, radical equivocality of language which always again needs to be rendered univocal by the author as well as the reader (*HOG* 100–4). Its expression in graphic signs moreover carries the risk that the sign may be destroyed (*HOG* 87–94). Truth and ideal objectivity are thus made possible by what at the same time places it at risk of absolute destruction. Death seems in a strange way to be lodged 'within' the concept itself, one could say (*HOG* 88). To summarise: the graphic sign within which an idea finds the possibility of its indefinite repetition as well as its possible disappearance is what in advance and in the first place makes meaning and truth possible. As we will see, this has important implications for the concepts employed in law, including the very concept of law itself.

The (metaphysical) idea of the possibility of meaning fully present to consciousness, which Husserl himself complicates through his analysis of time as well as of language, is explored by Derrida in *Speech and Phenomena* (1967). This analysis, as Derrida will also point out in a later text, ultimately tells us something about the structure of experience in general (*Ltd* 10). In so far as language is concerned, Derrida shows that Husserl, and in this he (Husserl) follows in the footsteps of all his metaphysical predecessors, shows a preference for the voice, as simulating the conservation of presence, over and above the graphic sign (*SP* 15–16). This appears more specifically in the distinction which Husserl draws between signs functioning as expression

37 A number of excellent commentaries are available on these texts; see e.g. Marrati (2005: 1–44); Lawlor (1995: 151–84); Bernet (1989); Ijsseling (1986: 90–112); Allison (2004: 113–20).

(*Ausdruck*) and as indication (*Anzeichen*), which he (Husserl) nevertheless himself later complicates by admitting that in all instances of communication, signs fulfil an indicative function. The problem for Husserl is that the relation of indicative signs with meaning is via a detour, whereas expressive signs involve no such mediation (Marrati 2005: 65). This prejudice in favour of the voice, Derrida contends, has to do with the attempt of metaphysics to seek its foundation in the living present (*SP* 5), and thereby to deny the necessary relation to death (*SP* 10, 54). This relation is expressed in the graphic sign (*SP* 40, 54), which explains the prejudice against writing. Derrida, tying in with his analysis in the 'Introduction', but here more critical of Husserl, will thus in *Speech and Phenomena* seek to show:

an irreducible nonpresence as having a constituting value, and with it a nonlife, a nonpresence or nonself-belonging of the living present, an ineradicable nonprimordality.

(*SP* 5–6)

In his reading of Husserl, Derrida shows that the self can relate to itself only via language understood in terms of writing (that is, by way of indicative, as compared to expressive, signs), so that truth and meaning can never be fully present in consciousness (for example in interior monologue, as Husserl contends), but always require mediation through signifiers, marks or traces (indicative signs). No examples can thus strictly speaking be given of signs fulfilling an expressive function. The indiscernibility of consciousness and language, Derrida notes, introduces 'nonpresence and difference (mediation, signs, referral back, etc.) in the heart of self-presence' (*SP* 15). Similar to what we saw in the 'Introduction' to the *Origin of Geometry*, Derrida furthermore shows that meaning is not the result of an intentional act. Instead, the (radical) absence of the speaker/writer, as well as of the object described, shows itself to be a structural condition for meaning (*SP* 92–7). This even applies in saying 'I' or 'I am' in representing oneself to oneself in so-called solitary mental life, which in Husserl's phenomenology functions as full presence and origin (*SP* 95):

the signifying function of the *I* does not depend on the life of the speaking subject ... [W]hether or not life as self-presence accompanies the uttering of the *I*, is quite indifferent with regard to the functioning of meaning. My death is structurally necessary to the pronouncing of the *I*.

(*SP* 96)³⁸

38 Gasché (1986: 191–2) points out that Derrida in a sense 'generalizes' the notion of 'indication' in this reading of Husserl, another way of referring to the arche-trace.

In so far as time is concerned, Derrida challenges Husserl's contention of a present moment where meaning can be fully present to consciousness. Husserl specifically contends that this is the case in interior monologue where there is no need for signifiers (signs functioning as indication) as these mental acts 'are "lived by us in the same instant" (*im selben Augenblick*)' (*SP* 59). At stake here, Derrida notes, is a perception of the present 'as punctuality of the instant' (*SP* 61). This privilege accorded to the present (living) now, Derrida adds, 'defines the very element of philosophical thought, it is evidence itself, conscious thought itself, it governs every possible concept of truth and sense' (*SP* 62). Husserl (1999: 186–221) in *The Phenomenology of Internal Time-Consciousness* seems to adopt a somewhat different view, noting that every present moment or 'now' is essentially linked with the retention of the past and an anticipation or protention of the future. In terms of the latter view there can thus be no present moment which is completely isolated from the past and the future.³⁹ Husserl nonetheless even here can be said to rely on the now as source point (*SP* 61–2; *OG* 67). This view of time and its relation to consciousness can be challenged with reference to, and by way of the further development of, Freud's notion of the unconscious (*SP* 63).⁴⁰ Husserl's original analysis of time nevertheless allows us to no longer think of the present as a simple self-identity and thus to challenge his (Husserl's) idea of 'the same instant' as well as his argument against the need for signs in the self-relation (*SP* 64–6). Although, as Derrida acknowledges, there is clearly a difference between the representation of signs and the retention of the past (in thinking about temporality), both involve repetition, not from a position founded on presence, but the repetition and return of what Derrida refers to here as a 'primordial' trace (*SP* 67).⁴¹ The structure of writing, which Derrida discloses here, that is, 'the operation of differing which at one and the same time both fissures and retards presence', including its effaceability as a trace, thus in a strange way points to an 'originary' movement through

39 Häggglund's understanding of temporality remains restricted to this notion of time in Husserl and consequently stays within the limits of metaphysics (see Häggglund 2008: 15–16; 2009: 5–8; for a similar assessment see Johnston 2009: 152–3). In order to exceed the concept of time, which as Derrida points out, is per definition metaphysical (*MP* 63), it would have to in addition take on certain Freudian and Heideggerian insights, which Häggglund does not do.

40 Derrida at this point refers to 'Freud and the scene of writing' (*WD* 196–231). See further 'Me-psychoanalysis' (*Psy I* 133), where Derrida, in a reading of Nicolas Abraham, points out that 'Husserl understood the Unconscious from the standpoint of experience, sense, presence, as "the forgetting of experiences that once were conscious"'. Derrida, with Abraham, will attempt to think 'the Unconscious ... by removing it from this whole phenomenological axiomatic of sense and presence' with reference to what can be referred to as the (unpresentable) kernel, the crypt, the phantom within the ego, or an 'artificial unconscious'. See further below, on Freud.

41 This is of course not a trace left by an originary presence.

which presence (as well as its metaphysical opposite, absence) appears. Derrida also refers to this ‘movement’ as *différance* or the ‘differential trace’. This movement is a necessary one as full presence would entail both being absolutely alive and being absolutely dead (*SP* 102).⁴² The nonpresence which was shown to be lodged within presence, that is, death, in other words produces the desire for presence in a return movement. This desire for presence, or what can also be termed the understanding of Being⁴³ as presence, has characterised metaphysics from the start, as we will see below in our discussion of Heidegger. The reasons for this movement, which clearly shows the contamination rather than the separation of life and death, will become clear in the discussion of Heidegger, and perhaps even more so, in the discussion of Freud.

The implications of the above analysis for law will likewise become clear later on, although we can now already briefly mention some of these, in light of the structure of writing as analysed above, which will, in his later work, partly inform Derrida’s hyper-ethics or hyper-politics. It is precisely the life–death structure first explored in the readings of Husserl, which will determine Derrida’s ‘ethico-political’ explorations. Before we come to that, it is necessary to point out that the assumptions of metaphysics necessarily determine the way in which concepts are viewed, that is, in terms of an ideal essence. Berns (1998: 60) summarises the metaphysical idea of conceptuality as follows:

The aim of knowledge is the concept. A concept is an idealisation in which the object itself is present to consciousness. Such presence of the object in its singularity requires that rigorous and exact distinctions are made. The *telos* of the concept is to be distinguished in order to bring things to presence in their ideality. Vague concepts, concepts which flow over into other concepts or which entail empirical gradations, are not concepts. It is this or that but never (a little) this and (a little) that. Idealisations are thus always identities. Therefore a concept is also in principle repeatable in the strict sense of the word [as we see clearly in Husserl’s analysis].⁴⁴

Law, and specifically legal philosophy, knows very well the enquiry which follows upon this assumption, in its asking – specifically in the traditional debate between natural law and legal positivism – about the essence of law (‘what is law?’). This approach likewise underlies all the concepts which law

42 See also *Dis* 164.

43 The use of the capital B is in line with the practice followed in many translations of Heidegger’s texts, to distinguish ‘Being’ (a substantive, formed by turning the verb *sein* (to be) into a noun) more clearly from ‘beings’ or ‘a being’.

44 Own translation. See also *Ltd* 116–17; and Boshoff (2004: 379–80).

employs.⁴⁵ The written nature of concepts, as explored by Derrida through a reading of Husserl, that is their relation to death, as well as its implications, are yet to be explored in the legal context. In the chapters that follow, an attempt will be made to do so, specifically in relation to the concept of law itself. If there is furthermore no self-identity to consciousness or to the present moment, as we saw in Derrida's reading of Husserl in relation to time and language, politico-legal decision-making would have to be completely rethought. A judge can, for example, no longer be viewed as a fully conscious subject who has to (objectively) apply the law to the facts of the case or interpret the law with reference to background principles. As we will see in the discussion that follows, the acknowledgement of a certain 'alterity', which structures consciousness and the present, takes us well beyond contemporary debates on the subjectivity or objectivity of judicial decision-making.

Heidegger

In his enquiry into Being, Heidegger notes that Plato's Ideas, God as creator, the self-presence of the cogito, consciousness, subjectivity and the belief in a reality that is directly accessible to the senses, are some of the ways in which Being has through the ages been understood in Western philosophy. Being has, in other words, been understood as something that is secure and present, as is clearly shown by the notion of the calculating subject in modernity which will be discussed below. This has had a determining influence on conceptuality in metaphysics, which as a consequence is informed by or grounded in what Derrida refers to as onto-theology or the belief in a transcendental signified (*OG* 14, 23). In his analysis, first of *Dasein* and then of Being itself, Heidegger shows that these ways of understanding Being in metaphysics (in terms of beings) are tied to a certain way of thinking about death (or absence), that is, as something which stands opposed to life and which is on its outside. Heidegger wants to rethink death as part of Being and with that to rethink the meaning of Being. Being must according to Heidegger be understood not in terms of permanence, but as arising and passing away. Derrida ties his own thinking to Heidegger's 'project', but he takes a different stance towards metaphysics, a stance which, as we will see, is closely tied to the way in which he (Heidegger) views death. Marrati (2005: 184) thoughtfully summarises the relation between Derrida and Heidegger as follows:

45 See *WAP* 7 on this question as the oldest theme of philosophy. See further Hage and Von der Pfordten (2009: 17–33) for an argument about the importance of concepts to law; and see Berman (1983: 120–64) on the influence of Platonic and Aristotelian thinking for the development of legal conceptuality.

In the articulation of the ontic and the ontological, Derrida spies the power and desire of a philosophical discourse that wants to think itself and that, in order to do so, has also to think its other as *its* other, a process of reappropriation that protects it from any outside and from any exteriority such that ‘its *outside*, never surprises it, such that the logic of its heteronomy still resounds from within the vault of its autism’.

Heidegger believes that metaphysics has come to an end, that it needs to be destructed and overcome, in order to make possible a thinking of the truth or sense of Being itself, as well as a responding to Being as such (Heidegger 2007a: 279). The difficulty that Derrida detects in Heidegger’s attempt is that although Heidegger’s reliance on metaphysical conceptuality to overcome metaphysics is unavoidable, Heidegger does so without ‘changing terrain’ (*MP* 135). Heidegger more specifically continues to rely on the conceptual oppositions of metaphysics such as between the authentic and the inauthentic; he accords in typical metaphysical style a privilege to speech, the proper, light and proximity; shows a disdain for literature; and maintains the quest for a pure origin (*MP* 63, 129–34; *Pos* 10–11, 54). In doing so, Heidegger risks simply confirming metaphysics on a deeper, more fundamental level (*MP* 135). Derrida on the other hand seeks to change terrain through the ‘invention’ of a new conceptuality. He therefore prefers to speak of the ‘closure’ rather than the ‘end’ of metaphysics, and sees this closure as having been at stake in metaphysics since its beginning and throughout all the so-called ‘epochs’ of Being’s sending which Heidegger identifies – that is, the different ways in which Being has been viewed through the ages (*Pos* 56–7). Analysing the texts of metaphysical thinkers, Derrida shows that although dominated by metaphysics, there is also something in each of these texts (in those of Heidegger too, for example when he analyses the appearance and withdrawal of Being) that exceeds metaphysics. Metaphysics can in other words not simply be overcome.⁴⁶ However, as Derrida will show, *inter alia* in relation to justice, its field can be modified and also ‘exceeded’ in an atemporal moment (*Pos* 12). Another important characteristic of metaphysics, which will be referred to again repeatedly in the rest of the book and which Heidegger also at times risks succumbing to, is its restrictive economic circularity (*SM* 34). As we will see specifically in analysing the ethico-political concepts of metaphysics such as justice, the gift, hospitality, and democracy, they traditionally demand a return on investment; they expect and require a return to the self. When Derrida analyses these concepts in seeking to make them exceed their restricted economy, he then also does not enquire into their essence or ideal form as metaphysics typically does, but into their structure, their condition

46 It of course needs to be acknowledged that Heidegger’s own notion of ‘overcoming’ metaphysics is by no means simple.

of possibility, or the ‘law’ which regulates them. In the discussion that follows, we will see that this does not amount to ‘restoring the classical motif of the system’, but to the determination of ‘the possibility of *meaning* on the basis of a “formal” organization which in itself has no meaning’ (*MP* 134).

Levinas

As we saw earlier, it is especially Levinas’s reflections on the ethical relation to the other which have grabbed the attention of legal scholars. It has often been said that Derrida follows Levinas in this respect in going beyond metaphysics. Such a reading is not completely inaccurate, yet it cannot be accepted without a number of qualifications. A careful reading of ‘Violence and metaphysics’ is essential to understand the not-insignificant differences between the thinking of Levinas and Derrida. In his early texts, Levinas criticises the thinking of both Husserl and Heidegger for not making provision for a relation to the other (person) as infinitely or absolutely other. Husserl is said to view the other as another ego and Heidegger, to prioritise the relation to Being over beings. Levinas wishes to escape from both phenomenology and ontology as philosophies of violence (Naas 2003: 98). He protests against the concept, the state and totality (*WD* 110). Levinas then attempts to construct an ethical relation with the other which would not be subject to the domination of what he refers to as ‘the same’. He does so by positing the nudity of the face of the other which places me under an absolute obligation. Derrida first defends Husserl against this charge and points out that the other (person) can only be regarded as ‘infinitely other’ if the other appears as such in the zone of what Levinas refers to as ‘the same’ (*WD* 125).⁴⁷ The other must in other words be recognised as ego otherwise its entire alterity would collapse (*WD* 125). Dissymmetry and alterity are only possible because of this symmetry (*WD* 126).⁴⁸ According to Husserl, and Derrida agrees with him, ‘the intentional relationship of “ego to my world” cannot be opened on the basis of an infinitely other radically foreign to my world’ or by a God who determines this relationship (*WD* 132). This of course does not mean that the other or God only ‘exists’ through a production of the ego. The ego is limited to experiences in the living present which, as we saw earlier, includes the past present and the future present (*WD* 132). They can, however, only have *meaning* for an ego in general (*WD* 132). This does not however as yet fully explain how a relation with the other as other or an exceeding of the same is possible. As a first step, it is necessary to contemplate Being as is done by Heidegger.

Levinas’s charge against Heidegger in relation to Being is that ‘to subordinate the relation with *someone*, who is an existent (the ethical relation) to

47 See also Llewelyn (1985: 195); Bennington (2000: 204 fn. 8).

48 See in this respect the analysis of Saghafi (2010: 7–28).

a relation with the *Being of existents*, which, impersonal, permits the apprehension, the domination of existents (a relationship of knowing), subordinates justice to freedom' (Levinas 2002: 45; *WD* 97, 135). This is not the case, Derrida contends. Heidegger's move causes a first tremor in philosophical security and at the same time of self-confident presence (*WD* 134). Derrida specifically contests Levinas's charge that the ontological difference involves the 'priority' of Being to the existent (*WD* 136, 144). As there can be an order of priority only between existent things, and as Being is not an existent (it is nothing outside the existent), Derrida dismisses this charge (*WD* 136, 144). It is therefore not correct either to say that Heidegger's 'ontology' subordinates the ethical relation (*WD* 136–7). Indeed, as Derrida points out, no ethics in the Levinasian sense can be opened without a thought of Being (*WD* 137).⁴⁹ Furthermore, Being:

conditions the *respect* for the other *as what it is*: other. Without this acknowledgement, which is not a knowledge, or let us say without this 'letting-be' of an existent (Other) as something existing outside me in the essence of what it is (first in its alterity), no ethics would be possible.
(*WD* 138)⁵⁰

Without the possibility of distinguishing between the self and an other whom one is not, which is made possible by Being, violence would reign to such a degree that it could not even appear and be named, Derrida contends (*WD* 138).⁵¹ Being is furthermore not a concept or category with the result that its contemplation leads to the submission of the other (person) to our (totalitarian) power and violence, as Levinas appears to suggest in the quotation above (*WD* 139–41). Derrida therefore suggests that the experience of the face in Levinas as the foundation of ethics still presupposes Being (*WD* 143).

As we saw in the preceding section, Derrida nevertheless in a certain way goes beyond Heidegger's thinking of Being and in doing so, comes close to Levinas, but with a twist. As noted, Heidegger views (the relation to) death as an essential part of life,⁵² but still as the ownmost possibility of *Dasein* (Heidegger 1962: 294; 1984a: 101). To have a relation with the other as other (as Levinas requires), a different thinking of the relation with death is however

49 See also Ben-Dor (2007: 205–7); and Hirsch (1999: 29–30). Levinas's discourse can thus be read as ontic in nature, a discourse about beings; see further Llewelyn (1985: 199); Ben-Dor (2007: 209–10).

50 See also *WD* 141.

51 See further Chapter 5.

52 Heidegger (2000: 139) explains this in simple terms: 'For the capricious, life is just life. For them, death is death and only that. But the Being of life is also death. Everything that comes to life thereby already begins to die as well, to go towards its death, and death is also life.'

required. This is made possible, as we saw in the section on Husserl, by an analysis of the law of language and in addition by a reading of Freud. For Derrida no direct access to the other (or the other's 'face') is thus possible as it is for Levinas. The notion of the epiphany of the face, Derrida points out, remains tied to the metaphysics of light (*WD* 92, 118). The appearance of the self to the self as we saw above is only possible through 'mediation', and the same applies in so far as the appearance of another person (or thing) to the self is concerned (*SP* 15).⁵³ This shows again the importance of a reflection on 'mediation' itself, in this case of the language which Levinas uses. The face of the other can in a way, as Naas (2003: 100–1) puts it, be thought only within (philosophical) language, yet it can be thought differently, as Levinas indeed does. Metaphysical conceptuality can be imploded, as Levinas shows by way of, for example, the language of the face which he employs (*A* 76; Naas 2003: 111). As we also saw above, and as will be analysed in more detail in Chapter 2, this mediation, if analysed rigorously, involves a drifting, a going outside of the self, an 'experience' of death. This 'experience' – which can never be experienced as such – corresponds with Levinas's notions of responsibility, the welcome and hospitality. The 'difficulties' in Levinas's thinking of course does not mean that his texts should be ignored or rejected. As Derrida shows in a number of texts, Levinas can be read as giving expression in the philosophical language he uses, to another kind of beyond to the metaphysics of presence. Levinas in other words, at least implicitly, can be said to work at transforming (Greek) philosophical language from the inside, rather than as positing a radical (Jewish) exteriority outside of philosophical language (Naas 2003: 100). The seemingly small differences between Levinas and Derrida understandably become crucial in the reading of 'Force of law'.

The way in which Levinas transforms philosophical language as well as its hyper-ethical and hyper-political implications can be clearly seen in Derrida's essay 'A word of welcome', in *Adieu*. Here Derrida refers to Levinas's *Totality and Infinity*, and in a way to his whole oeuvre, as a text(s) on hospitality. It should be pointed out that hospitality is not to be understood here in a regional sense as one of the questions in ethics or as the name of a problem in law or politics, but as ethnicity itself (*A* 59; *CF* 16–17). Although it has profound implications for ethics on a personal level, it goes far beyond that towards the relation between states as well as the relation between states and individuals, including (economic and political) refugees, as well as the relation of states vis-à-vis citizens with a migration background. The question of sovereignty, both of the self and of the nation, is thus at the forefront of what is at stake here (*R* 149).⁵⁴ In *Adieu*, Derrida carefully traces the appearance of the word 'hospitality' and other related words such as welcome, attention,

53 See also Weber (2008: 178–9); Saghafi (2010: 7–28, 111).

54 See further Chapter 2.

and the face in Levinas's texts. In the concluding pages of *Totality and Infinity*, Derrida notes, 'hospitality becomes the very name of what opens itself to the face, or, more precisely, of what "welcomes" it' (A 21). With this statement it should already be clear that there is little difference between 'Violence and metaphysics' (1964) and *Adieu* (1997).⁵⁵ Both concern themselves with the importance of something unique within language in the possibility of welcoming the other.⁵⁶ The 'essence' of language, as Levinas (2002: 305) himself notes, and as Derrida (A 51) affirms, is hospitality. In *Adieu*, Derrida reads Levinas's texts, after his death, as having always already 'spoken' of this hospitality and other 'quasi-transcendental' words (A 25). *Adieu* is therefore a text on the concept of hospitality which, as Levinas notes, is 'opposed to "thematization"' (A 22).

Departing in a very subtle way from the predominant reading of Levinas, Derrida contends that the welcome offered *to* the other in Levinas's texts is always already a response to the welcoming offered *by* the other (A 23–4). To understand the difference in these two readings, this latter welcoming has to be carefully scrutinised. What Derrida specifically wants to show in this reading, which of course ties in very closely with Levinas's own project, is that this welcoming is not secondary in the sense that it follows upon a more primary being-at-home-with-the-self. The welcoming in question 'precedes' subjectivity, yet both subjectivity and the welcome are in a way a condition of possibility of each other (A 28). The structure of *différance* is clearly at stake here.⁵⁷ To read Levinas as explicating the structure of *différance* in writing about justice and the third is a particularly arduous task. As we know, Levinas is often read as saying that the face-to-face relation is later interrupted by the arrival of the third, or what he refers to as justice. Translated into the relation between ethics on the one hand and law–politics on the other, this means that the one-to-one ethical relation is interrupted by the arrival of others and thus of the law (justice as law). I am thus called upon to refrain from acceding to the demand of the other (and the same would apply in the case of a judge), because of the demand that third parties place upon me.⁵⁸ Derrida however points out that Levinas elsewhere notes that the third arrives without waiting and therefore has always already interrupted the face-to-face relation with the other (A 29, 60, 110). Derrida describes the 'double bind' which follows from this in the following terms:

55 See also Derrida's 'At this very moment in this work here I am' (*Psy* I 143–90).

56 The reference here is to *OG* 112; see also Naas (2003: 95).

57 The notion of *différance* will be important again towards the end of Derrida's reading when he argues (different from many Levinasian readers) that 'it is necessary to deduce a politics and a law from ethics' (A 115). This is made possible by the notion of *différance*. See further below where the notion of *différance* is explored in relation to Freud.

58 This is the position adopted by authors such as Cornell (1992); Douzinas (2000); and Manderson (2006).

The third does not wait; its illeity calls from as early as the epiphany of the face in the face to face. For the absence of the third would threaten with violence the purity of ethics in the absolute immediacy of the face to face with the unique. Levinas does not say it in exactly this way, but what is he doing when, beyond or through the dual of the face to face between two ‘uniques,’ he appeals to justice, affirming and reaffirming that justice ‘is necessary,’ that the third ‘is necessary’? Is he not trying to take into account this hypothesis of a violence in the pure immediate ethics of the face to face? A violence potentially unleashed in the experience of the neighbour and of absolute unicity? The impossibility of discerning here between good and evil, love and hate, giving and taking, the desire to live and the death drive, the hospitable welcome and the egoistic or narcissistic closing up within oneself?

(A 32–3)

This is the first step Derrida takes in the deconstructive reading of Levinas. The reflection on the relation between the other and the third, does not therefore stop here. We will return to the next step below. One of the consequences of this interruption, which has always already taken place, is the inevitable betrayal of the ethical relation, or of what Derrida refers to as justice ‘heterogeneous to law’ (A 33–4). Derrida however sees the ‘ethical relation’ in Levinas different from the way in which it is usually viewed.⁵⁹ He points out that for Levinas, the hospitable welcome is achieved par excellence by ‘the woman’ (A 36–8). Derrida reads this figure of feminine alterity as a welcoming *before* ethics (A 38–9). Although Levinas’s texts on the woman can also be given an androcentric reading, Derrida reads these texts in a way similar to his earlier reading of Nietzsche in *Spurs: Nietzsche’s Styles*.⁶⁰ At stake in this welcoming is a kind of hospitality which involves the host or master who welcomes someone in what he considers to be his house or his land, becoming the guest or tenant in his or perhaps rather in *her* own home, a *hostess* whose home or land ultimately does not belong to *her*, being dispossessed and expropriated in an ordinary sense (A 41–2).⁶¹ The space of this hospitality is furthermore beyond Being (A 48), which does not mean that its foundation is to be found in beings/existents. As Derrida notes in his

59 Hägglund’s criticism of certain ‘ethical’ readings of Derrida by way of Levinas (e.g. Hägglund 2008: 31), which is no doubt justified to some extent, unfortunately proceeds by way of the argument that one should not confuse Derrida’s ‘ultratranscendental descriptions’ with ‘prescriptions’ about what must be done. From such statements one can see clearly that the author makes little attempt to follow Derrida (who in the first place follows Heidegger) in seeking to go beyond metaphysics, and thus also beyond the is–ought or descriptive–prescriptive distinction.

60 See also *Psy I* 143–90 (‘At this very moment in this work here I am’); and A 43–4.

61 It should be clear that we are referring here to sexual difference, to be explored in Chapter 5.

discussion of the way in which Levinas transforms phenomenology, and the importance of this should be emphasised, hospitality ultimately involves an interruption of the self by the self as other (*A* 51–2), and thus not directly by the other (person).⁶² Derrida refers at this point implicitly to his earlier analysis of Husserl in *Speech and Phenomena* and of Levinas in ‘Violence and metaphysics’, noting (again) that the other ‘never makes itself accessible except by way of an appresentational analogy and so remains radically separated, inaccessible to originary perception’ (*A* 51).⁶³ The subject is in other words both host and hostage (*A* 54–5). ‘The word I’, as Levinas (2004: 114) notes, ‘means *here I am*, answering for everything and for everyone’. In language, which seems very close to that of a certain Freud, Levinas (2004: 111–12) also refers to the subjectivity of the subject as a ‘persecuting obsession’, and as ‘under accusation’. Being-at-home-with-oneself, Derrida furthermore points out, is for Levinas not the natural state, but is instead a response to an originary, uprooted wandering (*A* 92). There is thus nothing natural about the home – it is instead allotted, entrusted (*A* 93). This applies not only to the self or the family, but also to the territory laid claim to by a nation (*A* 92–3). The home is moreover not free from trauma. As Derrida notes, the election of the hostage is often described by Levinas not in a pacifying language, but in violent and traumatising terms (*A* 59). Here the Freud of the death drive is clearly at stake, when Derrida refers to ‘a memory before memory, the memory of a word that will have taken place even before taking place, of a past event that is older than the past and more ancient than any memory ordered along the lines of an empirically determined string of presents’ (*A* 69).

This hospitality goes far beyond a show of tolerance towards those who visit one’s home or land (*A* 72; *PTT* 124–30). If it is still called by this name, then this ‘tolerance’ must be of a love without measure (*A* 72). Hospitality understood thus, necessarily has important implications for state sovereignty, as we will again see in Chapter 2. Hospitality in this respect translates into what Levinas refers to as a messianic politics or a ‘Beyond the State in the State’ (*A* 73–6). It specifically involves a pre-originary, an-archic peace which goes beyond the political (*A* 49, 81–2). This peace does not simply entail the cessation of hostilities. The concept of peace, as Derrida points out, implies within itself eternity: an eternal peace (*A* 86–7). Any threat of war, whether conscious or unconscious, would destroy this peace (*A* 88). For Kant, whom Derrida is partly following here, war is the natural state, and peace has to

62 On my reading, Bennington (2000: 39–46) does not succeed in fully capturing the complexity of Derrida’s text in this respect. The notion of ‘the other (already) in me’ is briefly mentioned (43–4) and the relation to Freud noted (207 fn. 30), but this is not followed by a change in or an overturning of the earlier analysis (39–41) which pointed to the tension between the face-to-face relation and relation to the third party.

63 See similarly *OG* 189–91 in an analysis of Rousseau.

be instituted. Peace so instituted according to Kant remains threatened by war, and, Derrida adds, drawing the inevitable consequence from the notion of eternal peace, also by a promise which it itself threatening (*A* 89).⁶⁴ In the case of Levinas, peace is likewise not ‘natural’, yet everything begins with peace, a peace which goes beyond the merely institutional or politico-juridical and which has a sense of urgency about it (peace now), rather than a progressive movement (*A* 87–91). This ‘peace without process’ can also be referred to as the an-archic pre-originary welcoming which for Levinas, even inhabits war (*A* 90–1). Returning now to the relation between the other and the third, although in a sense we have never left it, Derrida notes that illeity in Levinas sometimes does not simply disrupt the face-to-face relation, but instead designates ‘the very transcendence of the face in the face to face, the condition of the You, the rupture of the I-Thou (and thus of a certain femininity, a certain experience of “feminine alterity”) in the experience of the neighbour’ (*A* 60). This is, for example, the case when Levinas refers to ‘the neighbour bearing the trace of a withdrawal that orders it as a face’ or to the prophetic word ‘which by essence is aroused by the epiphany of the face inasmuch as it attests to the presence of the third’ (Levinas 2004: 121; 2002: 213). What is usually read as a simple movement whereby the singularity of the face becomes effaced through ‘universality’ or ‘representation’ is read by Derrida as a double movement. In the legal–political sphere (in illeity) for example, the face becomes manifest and is thereby dissimulated, rendering it invisible (*A* 98): ‘The political dissimulates because it brings to light. It hides what it throws light on. Giving the face to be seen, bringing or attracting it into the space of public phenomenality, it thereby renders it invisible. Visibility renders invisible its invisibility, that is, the withdrawal of its epiphany’ (*A* 98). At stake here is Levinas’s transformation of metaphysical conceptuality, here the concept of hospitality which is now to be understood in an unconditional sense. As should become clear by now, this is not unrelated to the reference to the death drive mentioned in the quotation above, or to what Derrida refers to on the next page as ‘a disjunction in the immanence to the self’ (*A* 99). Derrida continues as follows:

In each case [referring to subsequent texts of Levinas], this disjunction has to do with the pre-originary ex-propriety or ex-appropriation that makes of the subject a guest [*hôte*] and an hostage, someone who is, *before* every invitation, elected, invited, *and* visited *in his own home in the home of the other*, in a given at home, an at home that is given, or, rather, loaned, allotted, advanced before every contract, in the ‘anachronism of a debt preceding the loan.’

[referring to Levinas 2004: 112]

64 See further Chapter 2 on the promise as a speech act.

And in addition, to return to the previous page of *Adieu*, there is another dissimulation (the one that is usually detected in reading Levinas): ‘The violence of the political mistreats the face yet again by effacing its unicity in a generality’ (*A* 98). Levinas’s face-to-face ethical relation is thus read as a transformation of metaphysical conceptuality. The violence that goes along with the treatment of singularity in general terms is not ignored, but is at the same time not where the analysis stops. The way in which to address this is for Derrida not (only) to criticise or decry law (and law’s conceptuality) for not being able to deal with the singular because of its inevitable generality,⁶⁵ but to transform or implode conceptual generality itself thereby giving hospitality (and a relation to the other) a chance.

Freud

In an interview with Roudinesco, Derrida notes that he became aware of the importance of psychoanalysis to his ‘project’ in 1965 (*FWT* 170). This means that his early texts on Husserl (‘“Genesis and structure” and phenomenology’ of 1959, and *HOG*, 1962), on Levinas (‘Violence and metaphysics’, 1964), and on Foucault (‘Cogito and the history of madness’, 1963), are some of the few where psychoanalysis plays no overt role. This does not however mean that psychoanalysis, and specifically Freud, plays no role at all in these early texts (*Pos* 83) or that there was an overturning of or an early ‘turn’ in Derrida’s project in 1965. There can rather be said to have been a ‘deepening’ of this project, a realisation therefore of the important ‘supporting’ role of Freud’s thinking in relation to the project of deconstructing the metaphysics of presence, as well as a further radicalisation of this project. The thinking of Freud thus in the mid-1960s starts playing an explicit role in Derrida’s elaboration of the problematic of the trace, of writing and of *différance*, in texts such as ‘Freud and the scene of writing’, 1966), *Of Grammatology* (1967, but published earlier as essays between 1963 and 1966), and ‘Difference’, from 1968.⁶⁶ Other important texts of Derrida on Freud include ‘To speculate – on Freud’, ‘Telepathy’, *Archive Fever: A Freudian Impression*, ‘Resistances’, ‘Psychoanalysis searches the states of its soul: the impossible beyond of a sovereign cruelty’; and then there are also a number of texts by Derrida on Lacan (‘The purveyor of truth’, ‘For the love of Lacan’), on Abraham and Torok (‘Me–psychoanalysis’, ‘Fors: the english words of Nicolas Abraham and Maria Torok’), and on psychoanalysis in general. In the latter texts, Freud, and to be more precise, not so much the Freud of psychoanalysis (that is, of the unconscious and the Oedipus complex) who is still under the determining influence of metaphysics, but the Freud of the death drive, plays

65 For discussion, see Chapter 6.

66 See in this regard Derrida’s remarks in *FWT* 170.

a 'central' role. This is not however where the influence of Freud in Derrida's texts stops. In an interview dating from 1971, Derrida (*Pos* 83) confirms that all his work after 1965 had been determined by Freud's thinking, and a reading of subsequent texts confirms that this influence was exerted until the end. Not only does Freud's name and works appear in many, if not most of Derrida's texts, but the deconstructive 'implosion' of metaphysical concepts such as writing and the trace, as well as of ethico-political concepts such as justice, friendship, hospitality, forgiveness, the gift, and democracy, would perhaps not have been possible if it was not for the influence of Freud.⁶⁷ At the same time, Derrida does not simply adopt, but radically transforms Freud's thinking in the process of putting it to work.

'To speculate – on Freud' in *The Post Card* (1980) involves a close reading of Freud's *Beyond the Pleasure Principle* (Freud 2001: XVIII 1–64). Derrida here in a sense confirms Freud's hesitant hypothesis of a death drive. In Derrida's reading of Freud's analysis, the death drive does not manifest itself; it therefore does not 'exist' in an ontological sense, and cannot be known epistemologically (*PC* 362, 399). Derrida's own earlier analysis of language furthermore assists him in radically transforming this hypothesis. How these two 'approaches' (a certain linguistics and a certain psychoanalysis) tie in with each other is perhaps best expressed in 'Shibboleth' when Derrida comments on the spectral errancy or revenance of words (*SQ* 53): 'One cannot say that we know this [about words] *because* we experience death and mourning. That experience comes to us from our relation to this revenance of the mark, then of language, then of the word, then of the name.' Derrida's reading of Freud on the death drive, thus confirms his earlier investigation of the law of writing, for example the development of the notion of iterability.⁶⁸ Iterability, as we will see in more detail in Chapter 2, refers to the ability of signs (or marks) to function in or be grafted onto other contexts and also to function in the event of the absence and even the death of their 'producer', the intended addressees as well as the referent, risking thereby – not as a chance but as a structural necessity – the loss of self-presence, of meaning, of readability, of property. It is then also through a close reading by Derrida of (the graphic marks of) *Beyond the Pleasure Principle* that Freud's hypothesis of a death drive and thus of something beyond the pleasure principle (and metaphysics) can be affirmed. This does not stem in the first place from the content of what Freud says – he instead confirms the sovereign domination of the pleasure principle and remains undecided about whether there 'is' such a beyond – but more so from what happens in Freud's text when writing about this beyond (*PC* 295, 397). Like that of Rousseau and others, Freud's text shows the operation of the law of *différance* beyond his own intentions.

67 See *WA* 276.

68 See also above, and *WD* 213.

It is not easy to summarise what happens in this intricate text of Derrida, which follows closely every turn of phrase in Freud's *Beyond the Pleasure Principle* as well as the (personal, familial and professional) circumstances surrounding the writing of this text. Freud's motivation for enquiring into a possible beyond to the pleasure principle (hereafter 'PP')⁶⁹ stems from the observation that some people tend to repeat unpleasant experiences. This is, for example, the case with the fort/da game of his grandson Ernst. Psychoanalytic patients likewise tend to repeat earlier traumatic experiences, including childhood events, in (recurrent) dreams, fantasies, and in the analytic situation through transference. All of these 'actions' appear to reflect a mysterious masochistic trend in the ego, tied to a compulsion to repeat, which seems to contradict the thesis of the dominance of the pleasure principle. In what follows, each of the seven chapters of *Beyond* will be discussed, the first three briefly, and the rest in more detail, as well as the points in each chapter which Derrida highlights.

In so far as the first chapter is concerned, Derrida highlights specifically Freud's remarks on the tendency in the mind towards the PP. Derrida also points to Freud's investigation of the relation between the PP and the reality principle (PR), Freud (2001: XVIII 10) commenting in this regard on the difficulty of educating the sexual instincts; as well as Freud's remarks that as a result of repression, what is effectively pleasure, may be experienced as unpleasure by the ego (2001: XVIII 11). In chapter II, Ernst's fort/da game is analysed, and Derrida points specifically to the role of the veiled bed in this game (into which Ernst throws his toys), and which Freud disapproves of; the fact that the toys were thrown away (*fort*) more often than they were returned by Ernst (*PC* 324–5); as well as Freud's relation with his (favourite) daughter Sophie (Ernst's mother). Also highlighted is Freud's raising of the question whether a 'drive for mastery', operating independently of and beyond the pleasure principle might explain this game (*PC* 325, 403). Chapter III of *Beyond* focuses on the compulsion to repeat, which Freud attributes to infantile sexual life and the repression thereof. Derrida notes specifically Freud's reference to this compulsion as demonic in nature and as returning without having been invoked by the subject or the pleasure principle (*PC* 341–2). Derrida however questions the privilege accorded here by Freud to the Oedipus complex (*PC* 340–1).

Chapters IV and V of *Beyond* reflect on the origin of consciousness, as well as its relation to external and internal stimuli. Freud describes specifically what happens when an onrush of internal stimuli overflows the psychic apparatus, with the PP losing its mastery. The psychic apparatus in this event panics and, no longer concerned with pleasure, seeks to bind and master the

69 The PP (in French pronounced pépé) has a double meaning here as it is also an affectionate term for grandfather, that is, Freud himself; *PC* 287 fn. 18.

incoming quantities of excitation (*PC* 348; Freud 2001: XVIII 29–31). These remarks tie in closely with Freud's earlier observation of the drive for mastery operating independently of the PP in the case of the fort/da game. The existence of such a drive is again noted by Freud when he reflects on repetitive dreams and comments that these dreams present an exception to or perhaps rather 'precedes', as Derrida notes (*PC* 350), the rule of dreams as the fulfilment of wishes and thus have a function which go beyond the PP (Freud 2001: XVIII 32). At stake here, Freud contends, is an attempt at the retrospective mastering of a stimulus. Freud furthermore notes that the drives and their representatives are not bound (*PC* 350, Freud 2001: XVIII 34). The binding of the PP thus appears to be secondary to a preceding unbinding or 'absolute astricture' (*PC* 350). The binding of excitation however already starts before the PP comes to impose its mastery (*PC* 350–1; Freud 2001: XVIII 35). A differential structure can thus be said to be at stake here which Derrida equates with the line or forward slash in the following formulation: PP + PR/pp. This line, Derrida notes, functions like a belt or lace which can be either relaxed or more tightly fastened: the differential stricture of a belt (*PC* 351).

In analysing these chapters, Derrida attempts to rethink the concept of repetition which plays such an important role in Freud's reflections. As traditionally understood, Derrida notes, repetition is understood as secondary, the repetition of something original. Repetition can however also be understood as originary in itself, as Freud's analysis and terminology of a 'backward path' indicates (Freud 2001: XVIII: 42, *PC* 351–2, 362). In light of these two forms of repetition, Derrida notes, repetition can be said to sometimes collaborate with the mastery of the PP and sometimes, 'older than the PP, and even permitting itself to be repeated by the PP, repetition haunts the PP, undermining it, threatening it, persecuting it by seeking an unbound pleasure which resembles ... an unpleasure chosen for its very atrocity' (*PC* 352). Derrida however immediately qualifies this statement. There is actually no 'sometimes ... sometimes', he notes; these forms of repetition do not oppose, but instead repeat each other. In other words, and as appears from 'Plato's pharmacy', which he invokes at this point, the one form of repetition implies the other; they cannot be thought separate from each other (*Dis* 166). Repetition, Derrida comments here, involves an 'incalculable double bind', and has a 'constitutive duplicity' (*PC* 352). Not sometimes ... sometimes therefore, but 'both at the same time'. When Freud thus speaks of repetition, we have to think of it in both ways described here.⁷⁰

70 This is taken up again later when Derrida (*PC* 381–4) comments on the relation between observation and language, with Freud remarking that the latter makes observation possible in the first place, and Derrida noting that speculative repetition starts the march.

Later in chapter V of *Beyond Freud* reflects on the origins of life in attempting to understand the nature of the drives. From the conservative nature of the drives (their tendency to restore an earlier state of things), he concludes that it must have been through external disturbing forces that inanimate matter was transformed into living entities (at 36, 38). The tension which in this way arose in the organism, which had until then been inanimate, he contends, must have tried to cancel itself out (at 38). In this way, Freud notes, the first drive or force came into existence, namely to return to the inanimate state.⁷¹ External forces again obliged the surviving organism to take ever more complex detours before reaching its ultimate aim of death. The (component) conservative drives in the ego, which aim at the self-preservation of the organism, self-assertion and mastery, Freud contends, ultimately seek to make the organism ‘follow its own path to death’ or ‘die only in its own fashion’ (at 39).⁷² They seek to ‘ward off any possible ways of returning to inorganic existence other than those which are immanent in the organism itself’ (at 39). The conservative drives, Derrida extrapolates, thus seek to ensure that the organism follows its own, proper path towards death, thereby preventing it from going directly towards death (*PC* 358–9). They paradoxically fight most energetically against what would make them reach their aim (that is, death) most rapidly (Freud 2001: XVIII 39). The conservative drives, the guardians of life, were thus according to Freud, originally the ‘myrmidons’ or ‘satellites’ of death (at 39). All living organisms can be said to seek to return to the inanimate state, but do so in the form of detours of longer or shorter duration (at 38–9).⁷³ In his analysis, Derrida attaches great importance to the remarks of Freud on the proper (*eigenen Todesweg des Organismus*), seeing that they tie in closely with his own project, and more specifically, because they open the possibility of going beyond the metaphysical opposition of life and death. In Freud’s analysis, the function of the conservative drives is, as Derrida notes, to help in one’s death ‘being a return to the most proper, to the closest to oneself, as if to one’s origin’ (*PC* 355–6). These drives in other words give expression to the desire for the proper, for presence. The non-proper, on the other hand, must be sent away, a reappropriation of oneself has to take place until death (*PC* 355). However, this attempt at self-appropriation is ultimately impossible, Derrida contends (*PC* 356). Freud specifically raises the question whether the belief in the familiar domesticity of death (death as an internal necessity of life, rather than an accident or

71 See also Freud (2001: XII 107).

72 Derrida (*PC* 358–9) points to the similarity here of Heidegger’s analysis of *Dasein*’s relation to death as a condition of authenticity, with its implications of a certain relation to the proper.

73 The conservative drives thus ultimately serve death, because as Freud argues, they find their origin in the need to restore an earlier state of things, i.e. the inorganic state which the organism had been forced to abandon (at the origin of life).

chance) is not perhaps an illusion to help us bear the burden of existence (Freud 2001: XVIII 45, *PC* 363). Translating this question into Heidegger's terminology, thereby seeking to go beyond Heidegger's *Destruktion* of metaphysics, Derrida raises the following rhetorical question: 'and if the authenticity proper to *Dasein* as *Sein zum Tode*, if its *Eigentlichkeit* were but the lure of a proximity, of a self-presence (*Da*) of the proper, even if in a form which would no longer be that of the subject, of consciousness, of the person, of man, of living substance?' (*PC* 363) Derrida furthermore refers to this 'lure' as a 'great narrative poem, the only story that one always tells oneself, that one addresses to oneself, the poetics of the proper as reconciliation, consolation, serenity' (*PC* 363). Whereas Heidegger views the denial of one's own death as inauthentic, Derrida thus raises the question whether this (inauthentic) relation to death – that is, the inability to 'own' one's death or the non-access to death as such – is not actually more 'primordial' than the authentic relation with death which Heidegger appears to privilege (Heidegger 1962: §51–53; *Ap* 76–7); and moreover, whether this 'authentic' relation is not a ruse. As Freud (2001: XIV 296) points out in *Thoughts for the Times on War and Death*, which Derrida invokes at this point, our unconscious 'does not believe in its own death ... it does not know its own death'.⁷⁴ The implication of this insight of Freud is that what the unconscious refuses to accept is precisely that which it ultimately desires (*AF* 10–12). The impossibility of appropriating one's own death, stems more specifically from the fact that the drive towards the proper does not have its foundation in itself, but always involves a return to the self within what can be termed a *differential* relation of forces. This means that the movement of self-appropriation (that is, subjectivity) can never arrive at a full (economic) circle (*PC* 362).⁷⁵ The self can arrive, Derrida notes, 'only by itself differing/deferring itself in (its) totally-other, in a totally-other which should no longer be its own' (*PC* 359). The 'nature' of this 'totally-other' will become clear when we discuss the concept of pleasure in more detail below. The way in which the self arrives at itself is evident also in Freud's writing of *Beyond*, which compulsively repeats (like Ernst's *fort/da* game) the process of sending away (*fort*) and thus attempting to master that which comes to him and threatens him (as well as psychoanalysis) from beyond. Before analysing this further, let us enquire into the famous Freudian (metaphysical) opposition between Eros and Thanatos.

74 Heidegger (1962: 298) interestingly says something very similar about *Dasein*'s factual Being-towards-its-end: 'And it hides this Fact from itself by recoinning "death" as just a "case of death" in Others – an everyday occurrence which, if need be, gives us the assurance still more plainly that "oneself" is still "living".'

75 A belief in the primordial nature of the Oedipus complex seems to be tied to a circular economy – a desire for the own (the mother); see *GT* 15–17; *PC* 413–496 ('Le facteur de la vérité'); and for discussion, de Ville (2008).

Can what was said above about the conservative nature of the drives, be said of all the drives, Freud asks. He notes that the sexual drives seem to rather aim at ensuring the immortality of the organism as compared to the conservative drives which, as we saw, ultimately aim at death (at 39–40). Freud (at 40–1) here (provisionally) posits an opposition between the sexual instincts, which he calls the true life instincts on the one hand and the conservative or ego instincts on the other.⁷⁶ He however later abandons this opposition in light of the implications of narcissism, psychoanalysis having shown that the self-preservative instincts too are of a libidinal nature (at 52–3). Freud nonetheless insists on an oppositional structure, this time between what he terms ‘life instincts’ (later referred to as *Eros* at 60–1 fn) and ‘death instincts’, the latter to be distinguished from the ego instincts (at 53). As Derrida notes, it seems possible for Freud at this point to demonstrate scientifically the existence of libidinal instincts (the conservative ego drives themselves being libidinal in nature), but not anything beyond that. Yet Freud is not prepared to let go of his suspicion of the ‘existence’ of death instincts (at 53), ‘evidence’ of which he then proceeds to seek in sadism (as a perversion, injuring the sexual object). Sadism, he notes, would be difficult to explain should *Eros* (the instinct to preserve life) from which it then necessarily has to be derived, is the only drive that exists (at 54). Freud (at 54–5) therefore posits a relation between the death instinct and what he refers to as ‘original sadism’ or ‘primary masochism’.⁷⁷ He argues that by means of the muscular apparatus and under the influence of the narcissistic libido, the death instinct is turned away from the ego towards external objects, thereby entering the service of the sexual function (at 54).⁷⁸ In this ‘original’ mode, it appears from Freud’s other writings, the infliction of pain is not the aim of the actions. It simply involves the exercise of the drive for mastery referred to above (Freud 2001: XIV 128; Laplanche and Pontalis 1973: 402; *PC* 404).

In chapter VII the question of pleasure is taken up again, together with the question of binding. Freud summarises his findings by noting that the binding of the instinctual impulses can be said to be one of the earliest and most important functions of the mental apparatus. As mentioned before, at this stage no account is taken of the development of unpleasure. This does not however mean that the PP is ‘suspended’, Freud (at 62) notes, as this binding takes place ‘on behalf of the pleasure principle; the binding is a preparatory act which introduces and assures the dominance of the pleasure principle’.⁷⁹ Derrida (*PC* 396) comments that the binding at stake here appears

76 See also *PC* 362–3.

77 See also Freud (2001: VII 158 fn. 2; XIX 164); *PC* 405; as well as Laplanche and Pontalis (1973: 245, 403).

78 See also Freud (2001: XIX 163–4); Laplanche and Pontalis (1973: 218); *PC* 404.

79 See also Laplanche and Pontalis (1973: 51); *PC* 400.

to be indifferent to pleasure–unpleasure and at the same time interested or inspired by the PP. The preparatory act is thus both teleological and indifferent. The PP itself, as we saw earlier, is furthermore in the service of a more general function, that is, rendering the psychic apparatus unexcitable, returning to the inanimate state (*PC* 396). The PP moreover stands in a strange relation to ‘pleasure itself’, when one refrains to think of the latter in essentialist terms, as Freud tends to do. This is nonetheless not the case everywhere. In chapter I, Freud (at 10) seems to acknowledge the unmeasured or unbounded nature of pleasure, as well as its self-limiting nature (*PC* 398–400). At stake here, it appears, is a kind of ‘stricture’, the nature of which appears clearly from Derrida’s rhetorical question: ‘Does not pleasure remain ... a master whose sole indefinitely produced operation, insensitive to any lesson from experience, would always amount ... to producing itself only by limiting itself strictly, as strictly as possible? in arriving only to erase itself?’ (*PC* 398) The PP itself thus amounts to a limitation of pleasure, which is ‘essentially’ unmeasured (*PC* 400). The PP would thus involve a limiting of pleasure so as to make it possible (*PC* 399). The limiting of pleasure consequently cannot be said to take place only by virtue of the PR, as chapter I of *Beyond* appears to suggest. The PR actually has no independent role to play here. Reality is effectively produced by the imposition of measure by pleasure upon itself, Derrida contends (*PC* 400). The PP (here alluding specifically to its double meaning specified above) is thus not the master, subject or author of this process, but simply an emissary (*PC* 400). Understanding pleasure in this way, in terms of a ‘drive for mastery’ or for ‘domination/power’ which necessarily limits (and thereby masters) itself (*PC* 403), also transforms the notion of instincts or drives in Freud. As Derrida formulates it, ‘[t]he drive to dominate must also be the drive’s *relation to itself*: there is no drive not driven to bind itself to itself and to assure itself of mastery over itself as drive’ (*PC* 403).

Derrida’s ‘adoption’ of Freud’s theory of the death drive appears to happen in a double sense, which can be best expressed in terms of the logic or ‘stricture’ of *différance*, which will play an important role also in Derrida’s later more explicitly ethico-political texts. The drive for the proper, the strongest drive as we saw above, if carried out to its end, leads to death. Full, absolute presence, we can also say, equals death (*PC* 285–6; *Dis* 164; *OG* 244). The same would happen if there is no limitation or binding of pleasure:

If it limits itself absolutely, it disappears. Inversely, if it can be put thus, if it liberates something as close as possible to the *pp* [the primary process] (a theoretical fiction), thus if *it does not limit itself*, not at all [*pas du tout*], it limits itself absolutely: absolute discharge, disbanding, nothingness or death.

Irresolution belongs to this impossible logic. It is the speculative stricture between the solution (non-binding, unleashing, *absolute* untightening:

absolution itself) and the non-solution (absolute tightening, paralyzing banding, etc.).

(PC 401)⁸⁰

Derrida can perhaps also be said to reformulate Freud's contention as to the possibility of a death drive beyond the pleasure principle. Derrida refers to this beyond as 'power' (PC 405). This power is not however a unity and is not situated beyond what Freud refers to as the death drive, which, as Derrida notes, overflows power and, at the same time, functions as its origin and limit. At stake in Derrida's reformulation is, more precisely, a *différance* of power (PC 405). This *différance* lasts until death, until the moment the doorkeeper closes the door, meant specifically for Kafka's man from the country, but which he is never allowed to enter (chapter 3). This *différance* of power is at stake in all of Derrida's texts as appears from the 'Envois' in *The Post Card* where he relates the story of how he was asked by a student why he does not simply kill himself (PC 15). His response, as he reports it, was elusive and in the form of a question: 'what proves to you that I do not do so ... and more than once'? The suicide at stake here, as appears from his counter-question, involves repetition, and not the 'once and for all' of suicide as traditionally conceived (see also *Dis* 225).

The differential relation between forces which exceed the opposition between life and death at stake in 'To speculate – on Freud', as noted, also come to the fore in Derrida's later more openly ethico-political texts.⁸¹ This should not be viewed as strange, as the drive for power which is analysed here finds such clear expression in the notions of sovereignty and subjectivity, the deconstruction of which is at stake in most, if not all of Derrida's texts. The law of *différance*, as Derrida specifically spells out in *The Post Card*, does not

80 See also PC 286; WD 202; SP 150–1. Hägglund's reading of *Beyond* suffers from the employment of the restricted notion of (Husserlian) temporality referred to above, as well as a very restricted, subject-centred notion of 'desire' (Hägglund 2009). He is as a result not able to follow Freud/Derrida to the end in conceiving of an immeasurable pleasure (where pain and pleasure are no longer viewed in oppositional terms), which necessarily limits itself and thereby 'radically' displaces subjectivity. This is closely tied to Hägglund's understanding/appropriation of death in the thinking of Freud: the death drive and the pleasure principle according to Hägglund (simply) operate in terms of the same principle. This leads him to reject Freud's theory of the death drive as 'untenable' (at 13) and Derrida's adoption of the Freudian death drive as 'mistaken' (at 21). It would perhaps have been more advisable for him to question his own understanding of death in the thinking of Freud and Derrida. Hägglund's overly simplistic construction of the logic, drive or desire of/for survival in Derrida's thinking, has a snowball effect. It ultimately allows the subject, albeit mortal, to remain fully in place. It furthermore leads to the misjudging of the 'ethico-political' implications of deconstruction and more specifically of the notion of undecidability; see further Chapter 6.

81 Derrida comments specifically on the 'political' nature of Freud's reflections in WA 252, 258.

restrict itself to individual human beings: '[e]very being-together ... begins by *binding-itself*, by a binding-itself in a differential relation to itself'. This again has important implications for conceptuality.⁸²

Title and series

In the above section, we saw how Derrida's careful reading of Husserl, Heidegger, Levinas and Freud points the way towards exceeding metaphysics. In this respect, the reflections of Husserl on language, Heidegger on Being, Levinas on hospitality, and Freud on the death drive, play a central role. In every instance, Derrida does not simply 'appropriate' their thinking for his 'project', but develops it in a radically new direction. The mention of hospitality in relation to Levinas brings us to the title of this book, which contains in summary form the book's modest but nonetheless important claim. When we start by considering the notion of *hospitality* in the title, we can perhaps already grasp something of the possible practical implications of Derrida's deconstruction of the metaphysics of presence discussed above in broad terms. Derrida enquires in a number of his texts into the question of hospitality, which brings it in close relation to his thinking on law and justice.⁸³ In brief, Derrida distinguishes in these texts between what he terms absolute or unconditional hospitality on the one hand and restricted or conditional hospitality on the other. Although the notion of hospitality perhaps has a broader field of application than law/justice, hospitality is also a more convenient way in which to express the relation between justice and law posited in 'Force of law'. Absolute hospitality in Derrida's texts can in other words be understood as another name for justice, and restricted hospitality, for law (*OH* 25–7). The metaphysical understanding of a concept such as hospitality is according to Derrida dominated by the idea of presence to the self of consciousness. It in other words reflects a belief in a subject (a host), both in an individual and in a collective sense, which is fully present to itself. In metaphysics the actions of such a subject in offering hospitality are consequently also understood in terms of a restricted economy or as characterised by a return to the self. Whereas restricted hospitality refers to the usual ways in which the master of a house or the laws of a country impose conditions on visitors, absolute hospitality entails no such restrictions. It shows no concern for the self or the self as subject, whether in an individual or in a collective sense. As we saw above and will see again in later chapters, there is a direct relation between (Derrida's reading of) Freud's death drive and justice, absolute hospitality, the gift, friendship, forgiveness and the democracy

82 See similarly *Psy I* 134–5 where Derrida refers to pleasure with reference to Freud/Abraham as exceeding 'the order of sense, of presence, and of signification'.

83 See *PM* 66–9; *AR* 356–420; 'Host' 208–30; *A*; *CF* 3–24.

to come in Derrida's texts. In the same way in which the concept of the 'subject' is 'constituted' by a desire for death, all politico-legal concepts implicitly also give expression to this relation. Derrida can be said to 're-conceptualise' these concepts so as to give expression to the desire for death. Hospitality understood in this unconditional sense thus entails a meaninglessness, which must now be viewed as an 'essential' part of the structure of this concept.

More practically, absolute hospitality according to Derrida would demand an unlimited opening of all borders (and of the home), whereas restricted hospitality refers to the legal (and personal) limitations that, for the sake of self-protection, are necessarily placed on absolute hospitality. At stake are two equally imperative 'laws' which form part of the 'concept' of hospitality and which are not in opposition to each other, but in a differential relation. These restrictions in the case of the nation-state usually relate to the possibility of integration and the contribution that the person concerned can make to society. Law thought of as restricted hospitality in other words involves a calculation as well as the imposition of all kinds of restrictions on those who may or may not visit a specific country or region as well as for how long they are permitted to stay and what they may and may not do. Absolute hospitality or justice, on the other hand, requires that there be no such limitations. If a judge (or a legislature) is therefore to do justice in the case of (economic) refugees, it must, as Derrida spells out in 'Force of law', be realised that the limits which law imposes, ultimately have no foundation. The existing inhabitants of a nation-state are as we know always such as a result of invasion, occupation, murder and robbery, often in the long-forgotten past. Absolute hospitality as a consequence requires that 'each and every one' should be welcomed without exception (*CF* 18). In developed countries this evokes images of masses of poor immigrants streaming into the state, of the current inhabitants ultimately losing their majority status as well as their culture, their language, their religion, their identity, their rights, their homes and even their lives. Absolute hospitality and justice as described by Derrida entail a hyper-ethics and hyper-politics which can only with disastrous consequences be given effect to in law or politics (or on a personal, ethical level). This realisation does not however in the least mitigate the demand which deconstruction seeks to affirm. What is required on a politico-legal level, and which is implied in the concept of hospitality as deconstructed, is inevitably a negotiation with the non-negotiable, with unconditional justice, with absolute hospitality; a negotiation so as to arrive at the 'better' or the least bad (*A* 112).

Another part of the title which requires consideration here and which was mentioned in the first section is the reference to *the law*. In the paragraph from which the opening epigraph is taken, Derrida in response to a question on the 'destructuring of law' notes in more detail the following:

We cannot be sure there is a way of deconstructing Law. You see, deconstruction cannot be transgression of the Law. Deconstruction *is* the Law.

It's an affirmation, and affirmation is on the side of the Law. This is rather difficult. Usually we represent deconstruction as a negative or destructuring movement, which it is not. It is an affirmative movement, first: and then, *as* an affirmation, it is not an affirmation against the Law or going beyond the Law. What is difficult to think is that Law *is* an affirmation, has the structure of an affirmation. It's not something which limits the desire or forbids the transgression. As soon as you affirm a desire, you perform something which is the Law. The Law says 'yes.' That's difficult to understand. The Law is not simply negative.⁸⁴

When we read this response together with Derrida's texts on justice and hospitality, it is clear that what Derrida says here about 'the Law' amounts to something very similar as justice and hospitality. It is furthermore clear from what Derrida says about desire and transgression that the law at stake here is tied closely to the Freudian 'desire' for death mentioned above or what Derrida elsewhere refers to as 'the impossible'. In an interview with Borradori (*PTT* 134) Derrida similarly speaks in relation to the impossible, with clear reference to Kant, of 'heteronomy ... a law come from the other ... a responsibility and decision of the other – of the other in me, an other greater and older than I am'. When Derrida speaks about law, a double law is therefore often at stake, for example 'the unconditional law of hospitality' and *laws* which in a concrete sense regulate hospitality in a conditional sense (*OH* 79).⁸⁵ In *Of Hospitality* Derrida speaks of this unconditional law in terms which clearly echo what is said in 'Before the law', as 'above the laws' and 'thus illegal, transgressive, outside the law, like a lawless law, *nomos anomos*, law above the laws and law outside the law' (*OH* 79; *AL* 204). This other law, the law itself, the law above other laws, a law beyond legality, also comes to the fore in Derrida's essay on Mandela ('NM' 15, 34). Deconstruction, the law (itself), absolute hospitality and justice can thus be said to refer in a way to the same 'thing'. 'The law' in our title should then likewise be understood in a double sense, as a reference both to the law in the sense of a legal system (*le droit*), and the law itself (*la loi*).

The series within which *Law as Absolute Hospitality* is published is *Nomikoi: Critical Legal Thinkers*. The Greek *nomikoi* is derived from *nomos* (law) and refers to a lawyer, someone learned in law, an expert in law, an interpreter or teacher of (Mosaic) law. In light of what was said above, Derrida can be said to be a *nomikos* par excellence.⁸⁶ It is however somewhat more difficult to think of Derrida as a 'critical' legal thinker in one of the senses of 'critical', in light of his own remarks about the relation between deconstruction and

84 Derrida 'WB' 149.

85 See also *PM* 67.

86 See also Goodrich (2005: 813) who describes Derrida as 'a *nomikos* or adviser to lawyers'.

criticism. In ‘Letter to a Japanese friend’, Derrida for example comments that ‘deconstruction is neither an *analysis* nor a *critique* ... in a general sense or in a Kantian sense. The instance of *krinein* or *krisis* (decision, choice, judgment, discernment) is itself, as is all the apparatus of transcendental critique, one of the essential “themes” or “objects” of deconstruction’ (*Psy II 4*).⁸⁷ Deconstruction thus involves a movement beyond ‘criticism’, the latter remaining a metaphysical activity. If one wants to nonetheless classify Derrida as a *critical* legal thinker as is done here, ‘critical’ has to be understood in the sense of important, discerning, crucial, vital or indispensable. To such a characterisation there can be little objection.

Sequence and overview of chapters

The texts of Derrida which will be analysed in detail in the chapters that follow all relate to the concepts of law, justice and hospitality, alluded to in the title. This detailed reading involves an attempt at following closely the outline of Derrida’s reading of each of the texts under discussion. This is a crucial first step in seeking to establish some of the implications for law of Derrida’s thinking. The inclusion of an analysis of Derrida’s texts with law and justice as explicit themes such as ‘Before the law’, ‘Declarations of Independence’ and ‘Force of law’ therefore speaks for itself. This can also be said of *Specters of Marx* where Derrida expands further on his analysis of justice in ‘Force of law’. In so far as the inclusion of a reading of Derrida’s ‘Cogito and the history of madness’ (Chapter 4) as well as of *Given Time* (Chapter 5) is concerned, this follows from Derrida’s definition of justice in ‘Force of law’ as without reason and theoretical rationality, as ‘madness’ and also as a ‘gift without exchange’ (*AR* 254). These are of course not the only texts of Derrida that deal with law, justice and hospitality.⁸⁸ All of Derrida’s texts where law makes its appearance can, for reasons of space, not be dealt with in the same detail here, but they will be referred to in support of the analysis undertaken.

The sequence of the chapters that follow is partly chronological – that is, based on the order in which Derrida’s texts on which the chapters are based have been published. Chronology is of course an arbitrary method to use in the case of Derrida, as we also saw in the above analysis in relation to time. In the end, it nevertheless seemed to make sense, mainly for pedagogical reasons, to start with a somewhat later text (‘Declarations of Independence’, dating from 1976) which draws on Derrida’s early work in relation to speech–writing, the promise, speech acts and iterability, and to proceed more or less chronologically thereafter. This sequence should make it somewhat easier to

87 See also *Points* 212; and ‘M&S’ 261.

88 See also *Glas*, *AL* 221–52 (‘The law of genre’), *WAP* 1–66 (‘Privilege’); ‘NM’.

understand the argument presented here and also points to the continuity in Derrida's thinking. The chapters can nonetheless be read in any order. In Chapter 2 – 'Declarations of independence' – Derrida's well-known essay with the same title will be analysed in detail. An enquiry will be made into speech-act theory, representation, the signature, and the proper name. The chapter seeks *inter alia* to give an explanation of the importance of language and psychoanalysis in Derrida's thinking as well as the 'law' at work in his thinking and to explain more specifically how it finds expression in 'Declarations of Independence'. The chapter in this regard specifically investigates the importance and role of the notion of iterability, as well as death, loss of meaning, loss of ownership and loss of sovereignty in Derrida's texts. The contention is that if we take account of Derrida's reading in 'Declarations of Independence', it is possible to view constitutions in a very different way, more specifically their 'origins', with inevitable implications for national legal systems as well as for international law. Chapter 3 – 'Before the law' – includes a close reading of 'Before the law', a text of Derrida on Kafka's text with the same title as well as on Freud's *Totem and Taboo*. The latter book repeatedly makes its appearance in Derrida's texts, but in 'Before the law' we find the most detailed reading thereof by Derrida. Freud's *Totem and Taboo* enquires into the origins of religion, morality, social institutions and law. Freud contends that this origin is to be found in a crime, the killing of the primal father by a band of brothers, followed by the institution of totemism and the prohibition of incest. Freud's psychoanalytical account of the origins of the totem and the prohibition of incest has been challenged from various quarters. The chapter seeks to answer the question whether Freud's *Totem and Taboo* and its theory of the primal horde in relation to the origins of law should be dismissed in light of this criticism, or whether some insight can still be gained from it. The second option will be chosen, it being submitted that Derrida's text points to the importance of reading Freud in a specific way, and more specifically to a reconsideration of the originary nature of the Oedipus complex.

In Chapter 4 – 'Madness and the law' – two of Derrida's texts on Foucault will be scrutinised with the aim of establishing the relation between law and madness. As noted above, Derrida defines justice in 'Force of law' in terms of madness. We will see in this chapter, first with reference to 'Cogito and the history of madness' that the madness referred to here is not the popular and everyday idea of madness, but a 'total' madness which exceeds metaphysics and which places in doubt all certainties. In Descartes' *Meditations*, which Foucault analyses, although in Derrida's view not rigorously enough, this total madness is alluded to when the evil genius enters the stage. Derrida argues that madness in this form does not start being interned in the 'classical age' as Foucault asserts, but that it is so interned by the rise of language and reason. Descartes' *Meditations* furthermore show that philosophy (and consequently law too) can never completely exclude madness; it asserts itself in the midst of madness: 'I think, even if I am completely mad', is what Descartes

effectively asserts. Through an analysis of ‘Doing justice to Freud’ the close relation between Freud’s death drive on the one hand, and madness and justice on the other, is moreover pointed to. In Chapter 5 – ‘The gift beyond exchange’ – the relation between justice and the gift in Derrida’s thinking will be explored. Derrida’s analysis of the gift takes place with reference to Mauss’s anthropological study of the gift in archaic societies, as well as Heidegger’s thinking on the ‘giving’ of Being and of time. The chapter will show that an understanding of the ontological difference or the relation between Being and beings in Heidegger’s thinking, as well as Freud’s speculations on the death drive, are essential to comprehend the notions of the gift and of justice in Derrida’s thinking. These are ‘situated’ beyond Being in the same way in which *différance* in Derrida’s thinking goes beyond the ontological difference. In this chapter the relation between the gift and mourning as well as the gift and sexual difference will furthermore be enquired into.

Chapter 6 – ‘Force of law’ – will propose a reading of Derrida’s essay with the same title. The analysis above of Husserl, Heidegger, Levinas and Freud, as well as the reading of the texts in Chapters 2 to 5, will play an important role in teasing out the implications of what Derrida says in this famous text. This chapter will engage specifically with earlier readings of ‘Force of law’ in the legal context and will attempt to chart a new direction in the understanding of this text. The contention is specifically that the notions of singularity, undecidability, and the ‘mystical’ foundation of authority need to be understood in a different way than traditionally argued for in the dominant interpretation(s). Chapter 7 – ‘The haunting of justice’ – will show how in Heidegger’s *Der Spruch des Anaximander*, this fragment is related to the thinking of Being, the latter having been ‘forgotten’ by metaphysics. Derrida’s reading of Heidegger’s *Der Spruch* highlights specifically those parts of Heidegger’s text where that which precedes Being’s gathering – that is, Being’s disjoining or dissemination – is pointed to. This disjoining, Derrida contends, speaks of the gift of a day more ancient than memory itself and ties in closely with certain aspects of the thinking of Marx. This gift of Being, which Heidegger’s text also speaks of, it will be argued, involves a ‘higher law’ which can serve as a ‘measure’ for the evaluation, interpretation and transformation of positive law. Chapter 8 – ‘Hospitality towards the future’ – gives a summary of the findings in earlier chapters and specifically enquires into the task of the (legal) philosophers of the future. Nietzsche calls on these new philosophers in *Beyond Good and Evil*, and Derrida echoes this call in *Politics of Friendship*. It is contended that these philosophers will rethink legal conceptuality as well as legal sources, opening them to what can be referred to as the ‘dangerous perhaps’.

Declarations of independence

'Declarations of independence' (hereafter 'DoI'), dating from 1976, the year marking two hundred years of US Independence, is one of the earliest essays of Derrida which explicitly has law as its theme. It is a short essay, presented for the first time at the University of Virginia in Charlottesville, which draws on Derrida's other texts in which he enquires in more detail into concepts such as speech acts, representation, the proper name and the signature. In 'Force of law' (*AR* 235) Derrida refers to this essay among others in refuting the claim that his texts hitherto had shown little or no concern for the themes of justice, ethics and politics. Close scrutiny of 'DoI' confirms that there is no break or turn in Derrida's thinking from the time of the presentation of this essay to 'Force of law'. With the benefit of hindsight, all the claims Derrida makes about justice in 'Force of law' are already to be found, or at least anticipated, in 'DoI'. Moreover, the undeniably 'ethico-political' placing in question of sovereignty in Derrida's texts of the 1990s and the early 2000s is clearly already at stake here. In 'DoI', Derrida more specifically seeks to challenge the traditional view that a state is founded by the people as sovereign and as the originating source of political power (*pouvoir constituant*), and thus of the notions of self-government and democratic self-determination. The point of this deconstruction is not however simply to reveal the consequent absence of origin in the founding of a state, nor to simply reject these founding democratic ideas, but to enquire into their 'pre-origin' or condition of possibility, thereby reinscribing these ideas within new 'concepts' which go beyond the restricted economy of metaphysics.

The difficulty with this text of Derrida is its brevity and accompanying elusiveness as well as the fact that in challenging sovereignty, it relies without referring to them explicitly, on a range of his other texts which challenge traditional philosophical ideas about language. Different from what is at times stated, and as is shown by a somewhat more careful analysis of his texts, Derrida never abandons his earlier analysis of language and literature, when he starts to address more openly politico-legal issues. This is to be seen, for example, in 'Force of law' and *Specters of Marx* where the notion of performative speech acts plays a prominent role. These later texts thus rely either

explicitly or implicitly on Derrida's earlier analysis of language and literature. To understand the nature of Derrida's analysis in 'DoI', it is furthermore essential to keep in mind his relation to structuralism (Chapter 3). In this respect the texts of Lévi-Strauss are of course paradigmatic, for example his analyses of myth. Lévi-Strauss shows himself to be less concerned with finding the meaning of individual myths, than with exposing the structure which underlies all myths. Derrida's relation to the work of Lévi-Strauss and to structuralism in general is complex and it would perhaps be accurate to say *both* that he places in question the central presuppositions of structuralism (Sedgwick 2001: 194) *and* that he takes structuralism to its ultimate consequences (Berns 1998: 25). Derrida finds specifically problematic structuralism's reliance on the fundamental principles of metaphysics such as the search for an origin, its reliance on metaphysical concepts, as well as its reliance on the typical oppositional structure of metaphysics.¹ Moreover, structuralism's emphasis on 'the accomplished, the constituted, the *constructed*', in Derrida's view, disregards the importance of force in giving rise to the construct (*WD* 5). 'Force' is here to be understood in a specific 'sense', as a force of weakness which gives rise to language (*WD* 27); it is itself without meaning, and finds expression for example in the notions of 'iterability' and 'performative powerlessness' which will be explored below. As we will see in this chapter, Derrida, as typically happens in structuralist texts, explores underlying structural conditions in his analysis of concepts, but these show an acute regard for 'force'. We could moreover say that Derrida's reliance on the notion of 'structure' is no longer to be understood in its metaphysical sense, but in a quasi-transcendental sense which exceeds metaphysics and which, as we saw in Chapter 1, he sometimes refers to as a 'stricture'.²

To enable a close reading of 'DoI', it is also necessary to address briefly the way in which Derrida deals with the conceptual oppositions of metaphysics.³ The most well-known example of this is the speech-writing opposition which is analysed in *Of Grammatology* and 'Plato's pharmacy'. Often, in relying on or relaying this typical deconstruction of hierarchical oppositions in the legal context, not enough care is taken in discerning as well as in explaining the motivation behind the steps taken in doing so, the steps themselves as well as the 'translation' of such deconstruction into law.⁴ In attempts at 'translation', it has been contended, for example, that deconstruction sanctions the overturning of all or any hierarchical opposition(s) in a specific legal system.⁵ This in turn easily leads to the conclusion that deconstruction is relativistic

1 See *WD* 278–93.

2 See also *BS* 301.

3 Jacques Derrida, *Pos* 41–2; *Ltd* 21; *WD* 19–20.

4 For a detailed analysis of 'Plato's pharmacy', see de Ville (2010b).

5 See the discussion in Chapter 1.

as well as that it can be instrumentalised. Things are somewhat more complex as will also appear from the more detailed discussion below. One of the themes of 'DoI' is, for example, the distinction between constative and performative speech acts. With reference to what was said above, it is important in reading 'DoI' to note that in deconstructing texts or hierarchical oppositions, Derrida does not simply overturn or equalise, and thereby expose the 'undecidability' between (an existing hierarchy of) concepts. What he does or what happens through his reading of texts is that a further inscription takes place. Derrida searches for and brings out the condition of possibility of concepts. This leads to the invention of 'non-concepts' such as iterability, general writing or *différance* within which the concept(s) analysed are reinscribed. Derrida's analysis of constative and performative speech acts, representation, the signature, and the proper name, which are the most prominent themes in 'DoI', illustrates this well and will be explored within this context in what follows. Although all of these aspects are closely interlinked, they will be discussed separately for explicatory purposes.

Speech acts: founding a state

The constative and the performative

In 'DoI' Derrida asks the question whether the people, in declaring themselves free, are simply declaring or stating an existing state of affairs or whether they actually only become free through the performative act of the Declaration (*Neg* 49). The following passage from the Declaration is of specific interest here:

We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these united Colonies are, and of Right ought to be Free and Independent States, that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved.

This passage, in two instances, clearly relies on both the performative and the constative modes, by invoking God to secure this conjoining (*Neg* 51–2).⁶

6 Honig (1991: 104–11) focuses her analysis of the constative–performative speech acts specifically on this invocation of the absolute. She seeks to negotiate a compromise between the readings of Arendt and Derrida of the Declaration, with both said to point to the need to go beyond the constative invocation of the absolute through political intervention. In relation to Derrida, this is not an accurate claim in all respects.

In so far as the first instance is concerned, as Derrida points out, in spite of what the Declaration may claim, the people do not ‘exist’ as an entity before the signing of the Declaration. The people give birth to themselves only through the act of signature (*Neg* 49–50).⁷ The representatives, when they ‘sign’ in the name of the people, likewise only obtain this right or the legitimacy to sign, retroactively (*Neg* 50). The people, through the intervention of their representatives, thus give themselves a name, as well as the power, right or ability to sign, and they do so in the future perfect tense (*Neg* 50).⁸ The second instance of a performative–constative structure involves the erasure of another state signature, by dissolving the paternal or maternal link with the colonial country (*Neg* 50).

‘DoI’ does not fully explore and only alludes to Derrida’s other texts which deal with the performative–constative speech-act distinction initiated by J. L. Austin.⁹ A constative speech act consists in the saying or describing of what exists and can be tested for its truth or falsity against reality. An example: ‘It is raining today.’ A performative speech act on the other hand does something in so far as it is uttered (Austin 1975: 6). Examples of performative speech acts are promises (‘I promise to do this or that’), apologising, the naming of a ship, marrying (‘I do take this woman as my lawful wedded wife’), the making of a bet, bequeathing something to someone, making a gift, bidding someone welcome, forgiving someone, making a judgement, and here, declaring one’s own independence (Austin 1975: 5, 9, 45–6). These utterances cannot be evaluated as to their truth or falsity. They are rather to be evaluated as to their success or failure, depending on whether the conditions conventionally required by the context are fulfilled (Austin 1975: 14–15). When I make a promise, for example, I am not commenting on an event; my speech act instead constitutes the event, produces the event (‘CIP’ 446). The importance of the discovery of performative speech acts by Austin for Derrida lies in the fact that a performative speech act does not have its ‘reference’ outside of itself. It in other words does not refer to something that exists beyond language and prior to language (*Ltd* 13). It rather produces or transforms a situation. Although, as Austin later acknowledges, a constative speech act can actually be said to do the same, Derrida notes that this is not constitutive of its internal structure; it is not its manifest function or aim (*Ltd* 13). Another important

7 See also ‘NM’ 17–18.

8 The attempt by Evans (1990: 175) to discredit Derrida’s reading by showing that a fixed ground for the Declaration (and the Resolution preceding it) can be found in the people of the colonies, shows little understanding of the intricacies of Derrida’s terminology (such as *différance* and undecidability) as well as of his broader ‘project’ (Chapter 1).

9 Austin (1975: 4) remarks that performative utterances commonly masquerade as statements of fact. He then notes that ‘[o]f all people, jurists should be best aware of the true state of affairs. Perhaps some now are. Yet they will succumb to their own timorous fiction, that a statement of “the law” is a statement of fact.’

aspect of the identification of the performative for Derrida lies in the movement away from the truth value of an utterance and its replacement by the value of force, that is, the original production of an effect rather than the transference of a thought-content. The performative thus departs from the traditional idea of communication, that is, and as we will see further below, the transmission of a prior meaning, idea or thought dominated by an orientation towards the truth (*Ltd* 13–14). In ‘DoI’, Derrida at first stresses the performative nature of the Declaration, despite its pretension, in order to legitimise itself, to be a constative speech act:

Such an act does not come back to a constative or descriptive discourse. It performs, it accomplishes, it does what it says it does: this at least would be its intentional structure. Such an act does not have the same relation to its presumed signer – to whatever subject (individual or collective) engages itself in producing it – as a text of the ‘constative’ type, if in all rigor there are any ‘constative’ texts and if one could come across them in ‘science,’ in ‘philosophy,’ or in ‘literature.’ The declaration that founds an institution, a constitution, or a state, requires that a signer engage him- or herself.

(*Neg* 47)

One may be tempted to infer from this emphasis of Derrida on the performative nature of the Declaration as well as from his later statement about the people not existing before the Declaration, that he simply wishes to question the legitimacy of this performative, to expose its vicious circularity, or that he wishes to emphasise the fact that a foundational origin (in this case God) is always needed. From the fact that Derrida describes this retroactivity, with reference to Francis Ponge, as ‘fabulous’, one might even be tempted to conclude the converse: that he praises in Arendtian fashion performatives of this nature (*Neg* 50).¹⁰ One could also focus on Derrida’s remark about the obscurity or ‘undecidability between, let us say, a performative structure and a constative structure [which] is required to produce the sought-after effect’ (*Neg* 49) and conclude that he simply points to a contradiction or instability in the founding of a state.¹¹ Such readings perhaps do not go far enough. When account is taken of other texts of Derrida where he challenges the constative–performative speech-act distinction, it is clear that the point he is

¹⁰ See Arendt (1963).

¹¹ See Norris (1987: 195–8, concluding that the contradiction in the founding of a state which Derrida points to is ‘indispensable to civilized existence’); and Horwitz (2002: 159–63, reading Derrida as saying that the undecidability between the constative and the performative makes the act of foundation impossible yet necessary, the point of this deconstruction being to render visible ‘the political event that founds social structures and relations’ (at 162) and to reveal ‘the unstable point of every order and institution’ (at 163)).

making may be somewhat more complex. The Austinian structure analysed above implies that a performative utterance such as the Declaration of Independence brings about an event as a consequence of the conscious and intentional presence of the person(s) who participate(s) in the accomplishment of the performative. Derrida seeks to problematise these notions, that is, the conscious and intentional presence of a subject, which Austin still associates with performative utterances (*Ltd* 14; Austin 1975: 15), as well as the notion of an ‘event’. Derrida’s problematisation proceeds specifically by way of an analysis of the notion of iterability – that is, the iterable structure of the signs, marks or traces that are employed in such utterances. As we will see, this has important implications for the notions mentioned above, and for constitutional theory in general. The notion of iterability has to be understood with reference to Derrida’s analysis of the metaphysics of presence as well as of the structure of communication, and requires a slight detour here.

Language and origin

As noted in Chapter 1, Western philosophy from Plato to Heidegger is in Derrida’s view characterised by the metaphysics of presence. Metaphysics, as we saw, is based on certain assumptions and prejudices tied to an ideal of presence. This is not so by accident or because of a mistake, but for necessary reasons, which are as we saw ‘quasi-psychoanalytical’¹² in nature. All the metaphysical thinkers through the ages have sought a secure foundation for truth, origin or telos, which effectively coincides with itself, on which their philosophical systems are built, for example Plato’s ideas, Descartes’ ‘thinking I’, Kant’s transcendental subject, Hegel’s absolute spirit and Heidegger’s Being. These philosophical models regard this pure foundation as independent from anything exterior, for example the material element of a sign with which such a truth or origin is posited. For Derrida, metaphysics, which covers the whole of Western philosophy as well as its derivatives, is characterised by its insistence on the existence of the intelligible (the truth, meaning, or the signified) without the need for exterior representation. Since Descartes specifically, it is believed possible for the subject to have a meaning or truth in his mind and only thereafter to express this meaning in words through reliance on the material elements (sounds or marks) of speech and writing. The advance made by Saussure was to posit a sign (*signe*) consisting of an auditory or acoustic image (signifier, *signifiant*) and a corresponding concept, ideal object or meaning (signified, *signifié*). Saussure, through the notion of

12 Referred to as such because although it ties in with certain elements of Freud’s thinking, it goes beyond certain founding truths on which psychoanalysis is built, such as the Oedipus complex.

the sign, thus posits against the metaphysical tradition a signified which is inseparable from a signifier, a two-sided unity in other words. Another important step that Saussure takes, in tension with his construction of the phonic character of the linguistic sign, is to state that '[I]n linguistic signals are not in essence phonetic. They are not physical in any way. They are constituted solely by differences which distinguish one sound pattern from another' (de Saussure 2008: 164). Saussure furthermore proceeds by stating that the value of a sign within language is not an inherent characteristic of such sign, but a consequence of the differences between signifiers and between signifieds. It is in other words not substance that makes the functioning of signs possible (as one might think based on Saussure's construction of the sign), but difference. That this is indeed the case, Saussure, in spite of his preference for speech as the model of language, illustrates with reference to writing which shows (better than speech) the process of differentiation at work. Saussure explains the importance of difference in this respect as follows:

In the language itself, there are only differences. Even more important than that is the fact that although in general a difference presupposes positive terms between which the difference holds, in language there are only differences, and no positive terms. Whether we take the signification or the signal, the language includes neither ideas nor sounds existing prior to the linguistic system, but only conceptual and phonetic differences arising out of that system. In a sign, what matters more than any idea or sound associated with it is what other sounds surround it.

(de Saussure 2008: 166)

There is thus no origin, no purity of self-presence or self-possession in an individual or collective sense which only afterwards gets spoilt by the introduction of a system of differences. The originary violence of language as a system of differences already leads to the loss of that which never was (*OG* 112). The so-called origin is interrupted already from the start. This partly explains the privilege traditionally accorded to speech (because of the evanescence of sound, the phoneme, and its seeming proximity to the idea itself), and the consequent condemnation of writing. There is however more to this typical hierarchical opposition, as we will see below, returning us to Freud.

Communication and iterability

As Derrida points out in 'Signature, event, context' (dating from 1971), the traditional approach to communication (which is also relied on in speech-act theory by Austin) is based on a specific idea of how meaning is constituted. In accordance with this model, the signifiers used in writing or speech do not in principle have any effect on the meaning, ideas or thoughts it is supposed

to transmit (*Ltd* 4). These signifiers simply serve as a vehicle, transport or site of passage for meaning, ideas or thoughts. They follow upon a pure presence. Derrida's reference in 'DoI' to Jefferson as merely the 'secretary' and 'draftsman', as responsible for writing (not in the creative or initiating sense of the term), who cannot sign, as having been delegated 'the task of drawing up what they [the delegates] knew *they* wanted to say' (*Neg* 48, 52) seems to allude to this traditional understanding of writing.¹³ Jefferson plays the same subordinate role as Theuth (Thoth), the god of writing, in Plato's *Phaedrus*, analysed by Derrida in 'Plato's pharmacy'.¹⁴ In this view, '[w]riting thus only intervenes at a time when a subject of knowledge already possesses the signifieds, which are then only given to writing on consignment' (*Dis* 136).¹⁵ The problem with this model, as Derrida points out, and tying in with our discussion in the previous section, is that it fails to recognise the constitutive role of language, and more specifically that language should be understood in terms of writing, and not speech.¹⁶ The proponents of the traditional model, because of their privileging of speech, as a consequence fail to enquire into the structure of writing. It is important to note that Derrida's focus here on writing is not due simply to an overturning of the traditional speech–writing hierarchy. As we will see, this privilege accorded to writing is merely a transitional step and is at this point motivated by the fact that writing (as Saussure also realised) displays somewhat better than speech the way in which signifiers operate in the constitution of meaning. Derrida's contention is that the proponents of the traditional model of communication specifically do not examine in writing the structural absence of the sender from the marks he or she abandons and which continue to produce effects beyond his or her presence. This clearly happens in writing, but it is not restricted to writing (*Ltd* 5). This 'absence' is traditionally understood as a continuous modification and progressive extenuation of presence (*Ltd* 5–6).

Classical speech-act theory is thus in Derrida's view based on a theory of communication which fails to recognise the constitutive role of writing and as a result does not investigate or take account of the conditions of possibility of writing itself. Following in the footsteps of the metaphysics of presence,

13 See also McDonald (1999).

14 See *Dis* 91–7; for analysis, see de Ville (2010b). The role is nevertheless an ambivalent one, as will be indicated below.

15 We see this idea being expressed when a written constitution is described as serving the function of a storehouse or memory (*Speicher*) of the consciousness, desires or meaning (*Sinn*) of a political community (Halter 2003: 532), or as medium of the cultural self-positing of a people, a mirror to their cultural inheritance (Häberle 2006: 204).

16 Language, from Latin *lingua* (tongue) is of course a problematic concept in itself (implying that speech constitutes the essence of language), and Derrida, as we know, prefers the term 'writing' in thinking about language, see e.g. Hobson (2010: 266): for Derrida, 'language is a kind of writing, a kind of text'. See also Vasterling (1987: 214).

it furthermore privileges speaking or the voice. The latter happens because of the fact that what is said, seemingly does not cease to belong to the speaker, and because the sensible 'body' of the signifier seems to disappear in the act of speaking (*SP* 76–8). According to Derrida, this privilege accorded to speech and the condemnation of writing is directly related to the attempt made by metaphysics to domesticate, dissimulate and annul death (*SP* 53–5; *Dis* 123–30).¹⁷ There are in other words, as pointed out above and as will be enquired into in more detail below, quasi-psychoanalytical reasons for the prejudice. The seemingly self-present living act of speech appears not to 'risk death in the body of a signifier that is given over to the world and the visibility of space' (*SP* 77–8). Derrida then enquires specifically into the implications of the notion of 'absence', which bears a specific meaning here and which is such a clear characteristic of writing, but which does not remain restricted to writing in this sense. It can likewise be said of language in general, of speech, and even of experience in general (*Ltd* 10). In order for it to function as writing, thus its condition of possibility, one's written 'communication' must remain legible, repeatable, or iterable in the absolute absence and thus in the event of the death of every determined addressee in general (*Ltd* 7). This structure also applies in so far as the sender or producer of written words is concerned. The disappearance, absence or death of the sender does not prevent in principle the signs or marks from continuing to function, to be legible and to produce effects. The marks 'signed' by an author continue to function in his or her radical absence, thus also in the event of his or her death. These marks can furthermore be read without knowing what the author consciously intended to say (*Ltd* 9). In addition, it is possible for a mark to break with the context of its present inscription (including all the 'presences' which organise such inscription, i.e. sender, intention, addressee, referent, meaning) and be inscribed in a different context (*Ltd* 9, 12). This force of rupture, which structures the mark, is according to Derrida caused by spacing, the separation of the mark from all other elements in the context within which it is inscribed, including possible referents (*Ltd* 9–10). For Derrida this structure with its specific inclusion of (non-identical) repetition and alterity (*iter*), which he refers to as 'iterability', is not simply a characteristic of writing, but its condition of possibility, its 'law' (*Ltd* 15, 17). He explains this as follows:

[I]f one admits that writing (and the mark in general) must be able to function in the absence of the sender, the receiver, the context of production,

17 As Zima (1994: 37–8) correctly points out, this condemnation of writing typically does not take place with reference to technical reasons, but for moral, psychic and social reasons: writing places in doubt the stability of meaning as well as the direct presence of truth.

etc., that implies that this power, this being able, this possibility is always inscribed, hence necessarily inscribed as possibility in the functioning or the functional structure of the mark.

(*Ltd* 48)

The possibility of the death of the addressee as well as of the sender is thus inscribed within the structure of the mark (*Ltd* 8; *SP* 93–7). This ‘absence’ as a condition of possibility of writing is furthermore not simply a modification of presence as is normally assumed – it constitutes a break with presence. Writing, one could also say, leaves behind a mark which remains and which is iterable in the absence of and beyond the presence of the subject who appears to have produced or emitted it (*Ltd* 9). The mark survives them a priori, lives on after them (‘LO’ 64).

Derrida uses a similar kind of analysis in his deconstruction of the performative–constative speech-act distinction. He points out, for example, (*Ltd* 15) that Austin, in spite of recognising that ‘infelicity is an ill to which *all* acts are heir which have the general character of ritual or ceremonial, all *conventional* acts’ (Austin 1975: 18–19), ultimately regards the possibility of failure as a mere accident which does not tell us anything of the structure of the utterances that are analysed (Austin 1975: 21–2). Derrida points out that this approach is typical of the idealisation involved in the metaphysics of presence:

It consists in recognizing that the possibility of the negative (in this case, of infelicities) is in fact a structural possibility, that a failure is an essential risk of the operations under consideration; then, in a move which is almost *immediately simultaneous*, in the name of a kind of ideal regulation, it excludes that risk as accidental, exterior, one which teaches us nothing about the linguistic phenomenon being considered.

(*Ltd* 15)

Austin specifically excludes from consideration – because of their (inherent) failure or infelicity as performative speech acts – performative utterances by an actor on a stage, introduced in a poem or spoken in soliloquy – that is, the non-serious (citational) use of language (*Ltd* 16). He takes account only of ‘ordinary circumstances’ (Austin 1975: 22). Derrida however views the risk to which all performative speech acts are exposed and which Austin explicitly excludes from consideration (mere mechanical repetition or parody) as an essential predicate or law, as constituting their structure (*Ltd* 15–19). As he asks rhetorically in this respect:

Could a performative utterance succeed if its formulation did not repeat a ‘coded’ or iterable utterance, or in other words, if the formula I pronounce in order to open a meeting, launch a ship or a marriage were not identifiable

as conforming with an iterable model, if it were not then identifiable in some way as a 'citation'?

(*Ltd* 18)

It should be clear that what is at stake here is not simply a feature or characteristic of writing, but a condition of possibility in the quasi-structuralist sense referred to earlier. Derrida's argument in relation to death as a condition of possibility of communication is also underpinned by the Freudian analysis discussed in Chapter 1, which considerably strengthens the argument. To grasp what is at stake in the notion of iterability, it is essential to understand the role of Freud's thinking in this respect. This quasi-Freudian analysis further undermines the reliance in classical speech-act theory on the conscious ego in identifying a performative utterance, namely the belief that speech acts have a fully conscious structure. This approach is, as we have seen, typical of philosophy since Descartes, philosophy having been constructed on the basis of the full presence of the subject of consciousness to itself. Derrida shows that this is an illusion. This belief ignores what happens unconsciously in speech acts or what Derrida refers to as the 'structural unconscious' of speech acts (*Ltd* 73–7).¹⁸ A certain kind of dislocation from self-present experience always takes place. Self-consciousness is itself structured by iterability. Self-consciousness can in other words only occur, self-consciousness can only arrive at itself, because of what Derrida refers to elsewhere as *arche-writing*, that is (the desire for) death (*OG* 60, 68–9). The notion of iterability, understood thus, therefore complicates significantly the traditional notion of communication, as well as the understanding of the Declaration of Independence as a performative speech act. Iterability problematises specifically Austin's assumption that conscious intention fully determines the force of a performative utterance (*Ltd* 14). Its force, it now appears, is determined by what Derrida refers to as the 'essential absence of intending the actuality of utterance ... [a] structural unconsciousness ... [which] prohibits any saturation of the context' (*Ltd* 18). Iterability furthermore shows that what is understood, in the traditional view, to communicate meaning (i.e. language on the model of writing), actually expropriates, dispossesses or dislocates the control supposedly retained by the subject.¹⁹

18 As Derrida has pointed out elsewhere, the Freudian distinction between consciousness and the unconscious is itself a metaphysical distinction. In *BS* 183 he therefore speaks rather of 'differences of force' in all living beings.

19 Iterability, similar to *arche-writing*, can be said to imply 'the loss of the proper, of absolute proximity, of self-presence, in truth the loss of what has never taken place, of a self-presence which has never been given but only dreamed of and always already split, repeated, incapable of appearing to itself except in its own disappearance' (*OG* 112).

Performative powerlessness

At stake in Derrida's analysis in 'DoI' is therefore not simply the undecidability between the constative and the performative speech acts of the Declaration.²⁰ Of greater importance is the structure of the performative speech act of the Declaration as always already split. This structure is explored further by Derrida in some of his other texts, confirming what was stated in the introduction of this chapter regarding the overturning of metaphysical oppositions as well as the Freudian aspect of the notion of iterability referred to in the preceding paragraph. In *Rogues* Derrida for example elaborates further on the 'notion' of undecidability of the constative and performative touched on in 'DoI', showing clearly that something more is at stake here than an undecidability in the ordinary sense:

Now, just like the constative, it seems to me, the performative cannot avoid neutralizing, indeed annulling, the eventfulness of the event it is supposed to produce. A performative produces an event only by securing for itself, in the first person singular or plural, in the present, and with the guarantee offered by conventions or legitimated fictions, the power that ipseity gives itself to produce the event of which it speaks – the event that it neutralizes forthwith in so far as it appropriates for itself a calculable mastery over it.

(R 152)²¹

Performativity in its classical sense has a necessary relation with legitimised power ('PP' 466–7). In 'Force of law' Derrida therefore speaks of the 'time' of justice in terms of an 'overflowing of the performative' (AR 256). As compared to the intentional consciousness of performative speech acts, justice, he contends, entails an irreducible 'thoughtlessness and unconsciousness' as well as a to-come which must be rigorously distinguished from the future (AR 255, 256). A few pages later, Derrida mentions in similar fashion a 'pure performative' and an 'absolute performative', when he compares the revolutionary founding of law with Kafka's *Before the Law* (AR 270). In *Specters of Marx* Derrida refers to an 'originary performativity' which does not, as performative speech acts do, conform to existing conventions, but 'whose force of *rupture* produces the institution or the constitution' (SM 36). Alluding

20 Austin had already noted that all constative speech acts implicitly share the same structure as performative speech acts ('(I tell you that) this is what I saw') (*Ltd* 19; AR 256). In his later texts, e.g. *PTT*, Derrida relies on this structure to comment on the Gulf War and events of September 11, 2001, as instances where (as is generally the case) the media does not, as they pretend to do, simply report on events (thus a constative speech act), but also makes the event (thus a performative); see also 'CIP' 446–8.

21 See Chapter 6 on the notion of undecidability in Derrida's texts.

to his own 'Before the law', he refers to this originary performativity as '[v]iolence of the law before the law and before meaning, violence that interrupts time, disarticulates it, dislodges it' (*SM* 37). In *The Post Card*, in analysing Freud's *Beyond the Pleasure Principle*, Derrida reads Freud's speculations in this respect as themselves overflowing the pleasure principle, even though Freud will remain non-committal about such a beyond (*PC* 301–2). Freud is thus effectively engaging in a 'perperformative' which goes beyond his conscious intentions (*PC* 136).

A performative speech act such as the Declaration of Independence thus cannot constitute an event in the 'pure' sense²² in so far as it is subject to the 'order of the masterable possible' (*WA* 233–4). For an event which is worthy of the name, without sovereignty and without power, both the constative and the performative must capitulate to a performative powerlessness ('CIP' 467–8). The force of an event, as Derrida notes, is 'irreducible to the force or the power of a performative, even if it gives to the performative itself, to what is called the *force* of the performative, its chance and its effectiveness' (*WA* 235). The event, as Derrida further points out in *Without Alibi*, belongs to the perhaps, in keeping with the impossible (at 235). The 'impossibles' which Derrida explores in his later texts, such as the gift, justice, hospitality and forgiveness, which go beyond sovereign mastery and the circularity of economic exchange, can thus be said to all be 'examples' of events in this pure sense ('CIP' 448–52). With Derrida's invocation of the impossible, the notion of iterability which is explored especially in his earlier texts is not abandoned. The impossible, which is of course another name for *iter*, the other (not to be confused here with another person), can be said to form part of the structure of iterability. As was the case in the exploration of the structure of writing, the impossible (giving expression to the relation to death) exceeds the ability, power, control and mastery of the subject ('CIP' 454). Having shown the way in which meaning and the truth require language to function (Chapter 1) and having shown the structure of writing (as the model of language), the further implications of the operation of iterability are now explored. Iterability is viewed, so to speak, from the 'other side'. Derrida's deconstruction of the Freudian death drive here again comes to the fore. Iterability is, as we saw, always already in place as the condition of possibility of speech acts. This means that the repetition at stake here does not take place in a linear movement, that is, as a movement towards the future, a future that will become present. Iterability, as Derrida notes, means that 'the arrival of the *arrivant* – or the coming of the inaugural event – can only be greeted as a return, a coming back, a spectral revenance' ('CIP' 452). It is

22 Derrida analyses the concept of an event in a number of texts; see e.g. 'CIP'; *AR* 257; *PTT* 90 where the event is related to the *Ereignis* in Heidegger as well as the Freudian death drive, referred to as an auto-immunitary process; see further Chapter 1.

this return, which is not at the disposal of any subject, that makes sovereignty strictly speaking impossible (*BS* 130–1).

The promise

The structure explored above, can also be found in the notion of the promise. In ‘DoI’ Derrida starts off as follows: ‘It is better that you know right away: I am not going to keep my promise.’ This statement clearly alludes to Austin’s discussion of promises as a typical example of performative speech acts (Austin 1975: 11). In *Memoires for Paul de Man* Derrida notes that ‘we always promise too much’ with which he means to say that a ‘promise is always excessive’ (*MfPdM* 93–4). As a performative, a promise cannot simply relate to (what will happen in) the future, as then it would effectively fall within the category of a constative speech act. For Derrida this excess moreover does not relate to a promised content which I would not be able to keep, but to a disturbance or perversion which also dislodges it from its apparent performative structure. This again has to do with the structure of language (on the model of writing) which Derrida here ties to de Man’s perversion of the Heideggerian expression *die Sprache spricht* (language speaks) into *die Sprache verspricht (sich)* (language promises or language involves a slip of the tongue) (*MfPdM* 94–5). This promise or perversity, which Derrida, tying in with the above discussion, also refers to as ‘a kind of fatal drift’ (*MfPdM* 98), forms part of the structure of language and ‘precedes’ the speech act which is at stake:

It is a *faktum*, a fact of language which has established the impossibility of the promise and over which we have no control. This ‘fact’ is not natural, it is an artefact, but an artefact which for us ... is already there, as a past which has never been present. We might say that it is historicity itself – a historicity which cannot be historical, an ‘ancientness’ without history, without anteriority, but which produces history. Before the act [of language], there is no speech; nor before speech is there an act. There is this *fact* to which we are recalled by a strange recollection which does not recall any memory.

(*MfPdM* 95)

The intersection between Heidegger and the Freudian death drive, which Derrida also explores elsewhere (*PC*), is clearly at stake in this passage. Heidegger’s saying (*die Sprache spricht*), as Derrida points out, already gives expression to the important idea that language is not a governable instrument and thus subject to the control of a subject (*MfPdM* 96). De Man, in Derrida’s reading, takes this even further with the notion of an *Ur-sprechen* (an arche-language) (*MfPdM* 98). The promise which Derrida speaks of here with reference to de Man is clearly more than a performative speech act. Every

speech act, every sentence invokes and is inscribed within the space of what can be referred to as an ‘arche-promise’ (*MfPdM* 119).²³ Tying in with the previous section, one can speak of this arche-promise as a promise which entails both a threat and a chance, and thus also as justice, a gift without exchange, absolute hospitality as well as the democracy to come (*SM* 201, 210–12; *R* 91). In *Monolingualism of the Other* Derrida explains as follows the structure of the arche- or messianic promise without proper content contained in language:

An immanent structure of promise or desire, an expectation without a horizon of expectation, informs all speech. As soon as I speak, before even formulating a promise, an expectation, or a desire *as such*, and when I still do not know what will happen to me or what awaits me at the end of a sentence, neither *who* nor *what* awaits whom or what, I am within this promise or this threat – which, from then on, gathers the language together, the promised or threatened language, promising all the way to the point of threatening and *vice versa*, thus gathered together in its very dissemination.

(*MO* 21–2)²⁴

This ‘originary’ promise is given, although at the same time erased, in every Declaration of Independence or founding Constitution as its condition of possibility, similar to what happens to the arche-trace (*MP* 24). This arche-promise, which is necessarily linked to a loss of property and absolute hospitality, tends therefore to end up in a betrayal, in a return primarily, if not exclusively, to the interests of the (collective) self, the people as ‘origin’, as sovereign. The event (in the absolute sense) is thereby neutralised, but this cannot completely exclude the haunting of the founding document by the impossible.

Representation

In ‘DoI’, Jefferson is referred to as representing, in drafting the Declaration, the representatives of the people who do not as yet exist at the time of drafting. The representatives, as Derrida points out, had the right to revise, correct and ratify the draft prepared by Jefferson. The right to sign the Declaration belongs to the ‘good people’ who, Derrida notes, ‘declare themselves free and independent by the relay of their representatives and of their representatives

²³ See also *Psy II* 153.

²⁴ See also *MO* 67–8. As Derrida notes here (*MO* 68), the promise is threatening contrary to what is generally thought about the promise: it promises the impossible. No distinction can thus be drawn between promise and terror (*MO* 73).

of representatives' (*Neg* 49). As we saw above, it is only through the signing of the Declaration that the people come into existence and that the representatives obtain their legitimacy (*Neg* 50). If the people do not as yet exist at the time of the drafting of the Declaration, we may ask who the representatives actually represent at this stage. It is not easy from these passages to understand Derrida's stance towards representation. Does he attempt to problematise and thereby call on us to abolish representation, for example political or parliamentary representation? Some passages in 'Force of law' where Derrida discusses Walter Benjamin's opposition to representation or where Derrida seems to oppose respect for singularity to the generality of law, may create this impression.²⁵ Derrida's famous statement that '[t]here is nothing outside of the text' (*OG* 158), has similarly been interpreted as if 'a signifier only imperfectly represents the thing it signifies' with all attempts to grasp it through language being incomplete and a mere supplement (Balkin 1986–7: 760). On these readings, Derrida would draw a distinction between language on the one hand and reality on the other.²⁶ From what was said in the previous section, from Derrida's broader project which problematises the metaphysics of presence, as well as from Derrida's texts that deal with the question of representation, it appears that things are more complex. In a number of texts, Derrida distances himself from the anti-representative prejudice (*AR* 298; *Psy I* 108). This prejudice, he notes, is closely aligned to the prejudice against writing.²⁷ The problem for Derrida lies therefore not in the inability of representation to convey reality. He instead seeks to analyse the traditional prejudice against representation, to analyse the concept of representation, and more specifically to reflect on its relation to the unrepresentable (*Psy I* 115).²⁸

Let us first turn to the notion of a text, noting that in 'DoI' Derrida mentions that Jefferson (the representative of the representatives) 'suffered because he clung to his text' (*Neg* 52). It is important to note again here that the notion of text for Derrida already includes a description and a grasping of 'things' or 'reality'.²⁹ There is a clear relation between Derrida's notion of the text and the notion of performative speech acts which was discussed earlier. Account must specifically be taken in this regard of the notion of the 'general text' which Derrida speaks of elsewhere (*Pos* 44, 59–60). The notion of the 'general text' is relied on by Derrida to refer to the 'origin' of textuality

25 See Chapter 6.

26 See similarly, van der Walt (2005a: 7); Thurschwell (1994: 1638, 1639); and see Chapter 1.

27 For Rousseau (and in all metaphysics) writing is a mere supplement to speech, a mediated representation of thinking. He associates writing and representation with death, evil, alienation, immorality, vice, chance, risk, loss of meaning, loss of self-sameness, loss of autonomy and loss of freedom; *OG* 296–307.

28 For an excellent analysis of Derrida's thinking on the relation between representation and death in the context of photography, see Saghafi (2010: 83–98).

29 See the discussion in Chapter 1.

as is the case with arche-writing or the differential trace at the 'origin' of speech and writing.³⁰ In slightly different terms, one can say with reference to Derrida's analysis in 'Plato's pharmacy' that the text is 'invaded' by and structured by (the 'desire' for) death which motivates every deconstruction.³¹ This relation between the trace, the text and sovereignty is confirmed by Derrida when in *The Beast and the Sovereign*, he notes in discussing Lacan's views on animals, that he (Derrida) chose the concept of trace in his early work over the signifier because 'the structure of the trace presupposes that *to trace* comes down to *effacing a trace* as much as imprinting it' (at 130–1). From a psychoanalytic point of view, man as well as animals can consciously erase their traces, although this is not necessarily effective as these traces (whether individual, social, historical, political or technical) can always return. The trace, understood here in a pre- or non-linguistic sense (*BS* 141), therefore effaces itself, which means that God, man and beast cannot be its sovereign subject and do not have at their disposal the power to efface it.

This brings us back to the question of representation. Freud, as Derrida points out, uses the terminology of representation and delegation specifically when he speaks of the relation between the conservative drives and the death drive (*Psy I* 123; *PC* 259–409).³² We saw in Chapter 1 that in order for life to be possible at all, this drive or instinct has to already restrain, limit or bind itself, independently of, but also in collaboration with the pleasure principle (Freud 2001: XVIII: 35; *PC* 350–1, 396). The conservative drives which appear to serve the pleasure principle or to be the guardians of life are also or in the first place the satellites or couriers (*Trabanten*) of death. They seek to keep the organism away from a death that would not be its own (Freud 2001: XVIII 39; *PC* 82, 356, 360). The representation at stake here can be said to show the structure of representation in general, as seeking to represent the 'unrepresentable' or 'unpresentable'. It is not only that the unrepresentable *cannot* be represented, but rather and also that it *must not* be represented, Derrida points out (*Psy I* 126).

When we think about language as a system of representation in the above terms (as compared to language as a representation of reality), we can say that it is made possible by the 'relation' to death or the desire for death. Language, in spite of its repeated attempts to give expression to or to 'represent' the proper, thus belongs to or actually 'represents' the other, that is, death (*MO* 25). It is furthermore exactly because language does not belong to us

30 See Gasché (1986: 278–93).

31 We will return to the notion of the text in the section on the signature below.

32 Derrida seems to allude to this relation when he comments on Jefferson's draft of the Declaration: 'You know what scrutiny and examination this letter, this literal Declaration in its first state, underwent, how long it remained and deferred, undelivered, in sufferance between all those representative instances, and with what suspense or suffering Jefferson paid for it' (*Neg* 48).

that it gives rise to what Derrida refers to as ‘appropriative madness ... jealousy without appropriation’ (*MO* 24). Language, he notes, ‘is nothing but jealousy unleashed’ (*MO* 24). This then perhaps explains Jefferson’s suffering:

It would appear that he suffered because he clung to his text. It was very hard for him to see it, to see *himself* corrected, emended, ‘improved,’ shortened, especially by his colleagues. A feeling of wounding and mutilation should be inconceivable for someone who knows not to write in his own name, his proper name, but *simply by representation* and in place of another. If the wound is not erased in the delegation, it is because things are not so simple, neither the structure of the representation nor the procuration of the signature.

(*Neg* 52)

Jefferson’s attempted appropriation of the text cannot succeed. This is because of the structure of the text, its opening, like a door, its inscription within the general text, which we could also refer to as a ‘wound’.³³ Jefferson, who wanted to have the last word on how the text should read, can be said, with reference to Derrida’s reading of Celan’s poetry and Freud’s reflections on the death drive, to suffer from the same wound, a wound which does not heal, yet which he (Jefferson) seeks to close, to master (*SQ* 152–3, 166–8).³⁴ Things are thus not always as simple as they appear, which may provoke us to risk saying that although Jefferson and the other representatives appear to be the representatives of the people, they at the same time ‘represent’ the ‘desire’ of the people (as well as their own) for death, or what Derrida will later refer to as absolute hospitality and unconditional justice, which cannot or rather ‘may not’ be brought to presence.

The signature

‘[*W*]ho signs, and with what so-called proper name, the declarative act that founds an institution?’ Derrida asks (*Neg* 47). He declares this to be the main focus of his essay. At first sight, three possibilities seem to arise here as answer to the question: the people, their representatives, or perhaps Jefferson. Derrida first deals with a number of complexities in relation to a signature that founds an institution, which he compares with what happens in the case of a scientific

33 See also ‘CC’ 44, where Derrida, speaking about his *Circumfession*, notes that what is at stake in the *circum* is a wound or scar that remains open, not a full circle. This is to be compared with what Derrida says elsewhere on the unscathed and the immune, in relation to auto-immunity; see *Rel* 1–78. See also ‘AO’ 22–3 where the wound is discussed in relation to originary guilt, which Derrida associates with the universal structure of being Jewish. On this notion of guilt, see further Chapter 3.

34 See also *PC* 348; and *SM* 24.

text, which could be categorised as a constative speech act. In the latter instance, in order to attain objectivity, it is required that the text not be linked too closely to the author, and be able to more easily cut itself off from the name of the author. It is however different in the case of a declaratory act that founds a state or other institution. Here the signature as an act of language or writing *necessarily* maintains a link with the instituting act (*Neg* 47), even though the institution must also be able to function independently of its founders. This link is in other words a condition of possibility for the coming into being of an institution, or as Derrida puts it: ‘the founding act of an institution – the act as archive as well as the act as performance – *must maintain within itself the signature*’ (*Neg* 48). This is linked to its structure as a performative speech act and the traditional view on the role of the signature in speech-act theory:

By definition, a written signature implies the actual or empirical non-presence of the signer. But, it will be claimed, the signature also marks and retains his having-been present in a past *now* or present [*maintenant*] which will remain a future *now* or present [*maintenant*], thus in a general *maintenant*, in the transcendental form of presentness [*maintenance*]. That general maintenance is in some way inscribed, pinpointed in the always evident and singular present punctuality of the form of the signature. Such is the enigmatic originality of every paraph. In order for the tethering to the source to occur, what must be retained is the absolute singularity of a signature-event and a signature-form: the pure reproducibility of a pure event.

(*Ltd* 20)

The discussion above in relation to intention and consciousness has already raised the question as to whether a signature can actually be understood in the above way. Derrida raises the stakes when, soon after considering the relation between a signature and the founding act, he asks ‘whose signature exactly’ is at stake here: ‘Who is the actual signer of such acts? And what does actual [*effectif*] mean?’ (*Neg* 48) Although Jefferson was by right the draftsman or ‘writer’ of the Declaration, Derrida reminds us that he was not by right the signatory. The representatives were also ‘in principle’ not the signers of the Declaration. Although they did sign in fact or adopt the Declaration in their own name, they also signed for others. As the Declaration indicates, the representatives signed in the name of the ‘good people’ (*Neg* 49), this attribute indicating their fine intentions. It is therefore by right the ‘good people’ who sign and declare themselves to be free and independent ‘by the relay of their representatives and of their representatives of representatives’ (*Neg* 49). Derrida here touches on the question of the necessarily aporetic constative–performative structure at stake here (as referred to above), as well as the overdetermined temporality of this event. This is no accident, as Derrida

notes, but can be said of every signature. The interesting thing about the ‘good people’ as signatory is, as noted earlier, that they do not as yet exist as an entity before the Declaration. ‘[O]nly in the act of the signature’, Derrida (*Neg* 49) comments, is birth given to the people as possible signer. ‘The signature invents the signer’, he says (*Neg* 49). This furthermore happens by way of a ‘fabulous retroactivity’, as it is only when coming to the end of the signature that the authority arises to sign. This retroactivity (an act in the future perfect tense) is furthermore to be seen in the people’s representatives who are only through the signature, and thus after the fact, legitimised to act as the people’s representatives. Before the Declaration there is therefore no one who is by right authorised to sign, and the Declaration can be said to produce and guarantee its own signature. Derrida attempts to explain what happens here as follows:

With this fabulous event, with this fable that implies the structure of the trace and is indeed only possible by means of the inadequation of the present to itself, a signature gives itself a name. It opens *for itself* a line of credit, *its* own credit for itself *to* itself. The *self* rises forth here in all cases (nominative, dative, accusative) as soon as a signature gives or extends credit to itself, in a single ‘coup de force,’ which is also a stroke [*coup*] of writing, as the right to writing. The ‘coup de force’ makes right, founds right or law, gives right, *brings the law to the light of day, gives both birth and day to the law* [*donne le jour à la loi*]. Brings the law to the light of day, gives both birth and day to the law: read *The Madness of the Day* by Maurice Blanchot.

(*Neg* 50)

This is a complex passage which requires careful analysis. Before doing so, we need to take note of yet another signatory, another ‘subjectivity’ who signs (*Neg* 51), and whose signing (likewise) raises the question of sovereignty. The people, in inventing for themselves a signing identity, as Derrida notes, sign the Declaration in the name of the laws of nature and in the name of God. God, the creator of nature and the founder of natural laws, in effect guarantees the rectitude of popular intentions and of the unity and goodness of the people. God thus provides the ‘good people’ with the ultimate signature, confirming that they are (factually) and ought to be (legally) free and independent (*Neg* 51–2). There are consequently only countersignatures in this ‘differential’ process, Derrida notes, and he asks ‘Who signs all of these authorizations to sign?’ (*Neg* 51, 53)

Let us now return to Blanchot’s *The Madness of the Day* which Derrida refers to in the above quotation and which he analyses in other texts.³⁵ This

35 For an analysis of the relation between Derrida and Blanchot, including the distinction between the narrative and narratorial voices at stake here, see Saghafi (2010: 101–27).

detour will assist us in eventually answering Derrida's question as to the actual signatory of the Declaration. It will in addition help us to understand what Derrida means when he refers to the process as 'differential' (*Neg* 51) and to the fact that there are only countersignatures here. In 'Living on', Derrida enquires into the scene of the demand placed on the main character in *The Madness of the Day* to give a narrative of the events that occurred to him (an accident in which he nearly lost his sight). Derrida's analysis of the narrative seeks to move away from the (metaphysical) question as to its essence (what is narrative?) to the analysis of the prior scene of origin of narrative. The question is whether the narrative of the origin of narrative, the representation or staging of the demand (*mise-en-scène*) still qualifies as a narrative ('LO' 72). Strictly speaking, as Derrida notes, it is not a *mise-en-scène* that is at stake here, but a 'judicial framing' or a 'jurisdiction of frames', as a staging still relies on the notion of presence, on the eyes as origin: 'the origin of visibility, the origin of origin, the birth of what, as we say in French, "sees the light of day" ... when the present leads to presence, presentation, or representation' ('LO' 72). In Blanchot's *récit* (story)³⁶ this demand of a narrative is 'staged' or narrated: a narrative is demanded from the main character, a violent putting-to-the-question, as Derrida refers to it ('LO' 78). He has to explain the accident for the sake of remedial justice (*AL* 234). As Derrida notes, the demand of the authorities amounts to a demand for 'an *author*, an *I* capable of organizing a narrative sequence, of remembering and telling the truth' ('LO' 81). This demand, in the name of the law, as Derrida points out, is 'mad for light' ('LO' 74; *AL* 234). The character is however incapable of responding to this demand of the authorities. He does not succeed in taking on the role of narrator (*AL* 234). He tells them 'that he cannot manage to identify with himself sufficiently, or to remember himself well enough to gather the story and *récit* that are demanded of him – which the representatives of society and the law require of him' (*AL* 234). The *récit* is furthermore structured in such a way that there is no real beginning and end; it folds in upon itself with no original performative speech act ('LO' 79). Instead, what seems to be the beginning of the story is folded back inside, and the same happens to the supposed end of the story. The middle of the story in turn quotes, without quotation marks, the beginning and anticipates or quotes in advance the end of the story. In this way the demand for truth is itself, as Derrida puts it, 'recounted and swept along in the endless process of invagination' ('LO' 81). In the repetition of the demand for a *récit*, which we find in the final paragraphs, and the declaration as to its impossibility ('A story? No. No stories, ever again') it is similarly impossible to determine which is a quotation of the other ('LO' 82). Likewise the actual occurrence of the supposed event is impossible to determine (*AL* 237). The *récit* is therefore

36 This text is elsewhere titled 'Un récit?', and 'Un récit'; *AL* 241.

without beginning and without end, without content and without border. This same structure, as Derrida points out, is a feature of all texts, whether in narrative form or not ('LO' 82):

Even before it 'concerns' a text in narrative form, double invagination constitutes the story of stories, the narrative of narrative ... the apparently outer edge of an enclosure [*clôture*], far from being simple, simply external and circular, in accordance with the philosophical representation of philosophy, makes no sign beyond itself, toward what is utterly *other*, without making itself be 'represented,' refolded, superposed, re-marked within the enclosure, at least in what the structure produces as an effect of interiority.

('LO' 83)

At stake in this *récit* is furthermore the important distinction which Blanchot draws between the narrative voice and the narratorial voice, the latter being the voice of the subject identical with itself ('LO' 86):

The narratorial voice is the voice of a subject recounting something, remembering an event or a historical sequence, knowing who he is, and what he is talking about. It responds to some 'police,' a force of order or law ('What "exactly" are you talking about?': the truth of equivalence).

Viewed thus, the US Declaration of Independence appears to respond to a demand, purportedly in the narratorial voice, yet it at the same time unseats the subject. A division of the subject therefore takes place, which we can by way of another 'narrative' of Blanchot (*The Instant of my Death*) trace to death, to be distinguished from dying (*Dem* 53–4). Blanchot also defines the narrative voice as 'a neuter voice that speaks the work from that place-less place in which the work is silent' (Blanchot 1999: 467). It is not an I, an ego, even when the narrative refers to it as I, he or she ('LO' 87). This neuter voice is beyond dialectical contradiction and opposition, surpasses negativity, and gives passage to a double affirmation (yes, yes, to both life and death, a yes which is measureless, excessive and immense (*AL* 243–5). It is furthermore this I of the narrative voice, stripped of itself, who brings forth to light, who gives birth to law, both the law (*la loi*) and the representatives of law (*AL* 246). The narrative voice is in this respect coupled with the feminine or a female element, the law herself (*la loi*), whom the narrative voice finds sexually seductive and wishes to seduce (*AL* 247–8). The law herself plays. She plays at being born like any person, 'born of the one for whom she becomes the law' (*AL* 249). The narrator submits himself to that which/whom he is the author of, the mother of – his mad daughter (*AL* 250): 'My daughter's madness is to want to be born – like anybody and nobody [*comme personne*]' (*AL* 250). Although he submits to her, he does not shrink before her, but instead

frightens her, tempts her and in doing so alarms her, as he does with her representatives in his inability to provide them with the truth:

That the 'I' here does not always accompany itself is by no means borne lightly by the lawmen; in fact, he alarms thus the lawmen, he radically persecutes them, and, in this manner, conceals from them without altercation the truth they demand and without which they are nothing. But he not only alarms the lawmen, he alarms the law; one would be tempted to say the law herself, if she did not remain here a silhouette and an effect of the *récit*. And what is more, this law whom the 'I' frightens is none other than 'me,' than the 'I,' effect of this desire, child of his affirmation, of the genre 'I' clasped in a specular couple with 'me.'

(AL 248)

The allusions to Freud's *Beyond the Pleasure Principle* in this passage should be clear. The 'desire' at stake in the preceding passage is in other words for death, which can be equated with madness in the transgressive sense (Chapter 4) as well as with the perfect gift (Chapter 5). The gift in turn, at this point returning to the passage from 'DoI' quoted above which refers to Blanchot's *The Madness of the Day*, makes possible the extension of credit to the self (GT 43–5). There is clearly something 'illegitimate' in this extension – the stealing, in effect, of a signature (S/S 108).³⁷ This is not however where the analysis stops. In 'DoI' as well as in 'Force of law', Derrida equates this extension of credit to an act of faith – the only foundation for the authority of law, he notes with reference to Montaigne, is the belief in it (AR 240; Neg 52). This (secret) reliance on an act of faith, which as Derrida notes, involves 'an appeal to blind confidence, the testimonial that is always beyond proof, demonstrative reason, intuition' (AR 70), clearly undermines law's supposed rational or ontological foundation (AR 240). The philosophical distinction (and opposition) between faith and reason, law usually associating itself with the latter, is itself made possible by what Derrida elsewhere refers to as an originary faith (Rel 60–1). As we will see in somewhat more detail in Chapter 6, this pure faith involves a 'breaking with knowledge or given norms' or what can be referred to as 'a venture into absolute risk, beyond knowledge and certainty' (G&L 7–8). Law, it appears, has no fixed foundation, but is instead made possible (and its supposedly pure presence made impossible) by this originary faith, or what can also be referred to as the law (*la loi*) before the law, the gift, justice, madness or the arche-trace.

This structure of law is, as Derrida furthermore notes, tied to 'the in-equation of a present to itself' (Neg 50). The future perfect referred to earlier,

37 See also S/S 108: 'Every time I sign, I give myself the representation of the gift of what I cannot give myself. I give myself something I will never, in any case, have had.'

should not be understood in the sense of a future that will arrive ('LO' 82; *AR* 256). At stake in this inadequation, the 'fabulous retroactivity' (*Neg* 50), and 'the *simulacrum of the instant*' (*Neg* 51) is what can be referred to as an 'atemporal temporality' (*G&L* 66) or the 'future anterior' which Derrida in a number of texts (*PF* 249–50; *R* 6; *AR* 269) links with the incalculable, the unconditional, the 'to come', and the impossible, as that which makes time and meaning possible. This atemporal temporality, which is clearly tied to the (radically forgotten) desire for death as well as the withdrawal of Being, thus refers to a time that will never be present; it exceeds the time of the present, and bears no relation to a past or a future as a modified presence (*SP* 142–3). As Heidegger showed, *Dasein's* experience of temporality involves an essential relation to the past and the future, and specifically to its own death. Although Derrida views death and time in some respects differently from Heidegger, this structure informs Derrida's notion of disjointure or of a disjunction in time, and which he ties to the self-erasure of the trace (*SM* 20–34; *MP* 65–6).

We cannot conclude this section without referring to 'Signature event context', *Signsponge* and *Glas* where Derrida enquires in detail into the notion of the signature, in the last two texts with reference to Francis Ponge and Jean Genet. We will see that what he says here ties in closely with the above analysis of *The Madness of the Day*. In classical speech-act theory, the signature, as well as the word 'hereby' play a role in writing similar to that of the presence of the speaker in the case of oral utterances (Austin 1975: 57). The signature therefore traditionally has the role of guaranteeing legitimacy, authority and meaning, thereby seeking to ensure the continuing presence of the author to the document in question (*Ltd* 19–20). God, as we saw, is referred to in the Declaration as the final and ultimate signatory – the transcendental signified that assures presence and meaning (*Neg* 52).³⁸ From the earlier analysis of the marks or traces utilised in speech and writing we however know that this 'presence' is strictly speaking impossible. The signature is an effect; its condition of possibility lies in its iterability:

Effects of signature are the most common thing in the world. But the condition of possibility of those effects is simultaneously, once again, the condition of their impossibility, of the impossibility of their rigorous purity. In order to function, that is, to be readable, a signature must have a repeatable, iterable, imitable form; it must be able to be detached from the present and singular intention of its production. It is its sameness which, by corrupting its identity and singularity, divides its seal [*sceau*].

(*Ltd* 20)

38 See also Norris (1987: 197).

The signature as an intentional, fully present and singular speech act thus does not lie at the origin of a founding document such as a Declaration of Independence. In order to function, a signature must be iterable, imitable – it must be detachable from the intention of its production, also when the signatory dies. The signature thus bears witness to the death of the signatory, to the fact that ‘I am already dead’, writing ‘out of a past that has never been present and out of a death that has never been alive’ (*Glas* 19b). Once inscribed within or on the border of a text, the signature becomes part of the text and is thereby put on stage, into play, into the abyss (*S/S* 22). As a consequence, ownership of the text is lost (*S/S* 56). The signature overflows itself in ‘an altogether receptive, open and welcome’ sense (*S/S* 80). Derrida revealingly refers in *Signsponge* to this (differential) process as ‘a certain coitus of signatures’ (*S/S* 50) and as an ‘orgasm’ (*S/S* 56) which should of course be understood with reference to what was said earlier about writing. Something similar thus happens to the signature as to the narratorial voice of the ‘I’ in *The Madness of the Day*. This is why Derrida in ‘DoI’ can say that there are only countersignatures here. All signatures, whether of the representatives, the people, or God, respond to, are allowed to sign by a ‘pre-originary’ or general signature, the signature of the entirely other (*S/S* 50, 82, 128–132), namely the desire for absolute pleasure.³⁹

The proper name

There is necessarily a close relationship between the signature and the proper name. This we already saw above in the main question Derrida poses for discussion in ‘DoI’ (47): ‘[*W*]ho signs, and with what so-called proper name, the declarative act that founds an institution?’ The representatives sign the Declaration in their own names but also in the name of and by the authority of the (good) people and ultimately in the name of God, as we saw (*Neg* 48–9). Derrida refers in this respect to God as the ‘best’ name for the last instance which has to relate what ‘is’ to what ‘ought to be’ (*Neg* 52). The invocation in this founding act of the people and of God must be understood within the context of the metaphysical desire for presence, and at the same time as an expression of the political onto-theology of sovereignty.⁴⁰ A performative speech act such as a declaration, it appears, is directly tied to the notion of sovereignty, and thus to God. The concept of sovereignty, Derrida notes in his later texts where the deconstruction of this concept is at stake,

39 See *S/S* 54, 128–32. The other should here also not be understood as another person, but as death.

40 Carl Schmitt (1985: 36) remarks in this respect that ‘[a]ll significant concepts of the modern theory of the state are secularized theological concepts’. Derrida follows him in this assessment.

has a theological origin, the true sovereign being God (*FWT* 91–2; *BS* 16–17). Viewed historically, the monarch was first accorded this authority, and thereafter the people or the nation, with the same (phallogocentric) theological attributes as God and the monarch.⁴¹ In these texts Derrida initially adopts the definition by Carl Schmitt (1985: 5) of the sovereign (*le souverain*, i.e. masculine) as the one who decides the exception, who can suspend rights and the law, who is in other words above the law and can make the law (*FWT* 91–2; *BS* 16, 32; *R* 76). Schmitt (2007: 26) moreover defines the sovereign, thereby tying in with his definition of the political, as the capability of drawing a distinction between the friend and the enemy (*BS* 10).

By pointing to the sovereignty of the people (of the United States) and ultimately to God, the Declaration of Independence seeks to invoke a presence and a ground. It attempts to ground the Declaration in proper names (with a fixed meaning and referent) outside of the act of language and writing which the Declaration is, unsoiled by the common (*AR* 109). Proper names are specifically relied on here because, although part of language, they seek to situate themselves outside of language. Yet, the proper name is always already inscribed within a system of classification, a system of appellation and of difference, resulting in the obliteration of the proper (*OG* 110). The proper name is a mark like any other; it is immediately also improper, a common noun. Like any common noun it is imposed and therefore also immediately effaced, erased or expropriated. What was said earlier in relation to writing applies *a fortiori* to the proper name. Because the proper name will ultimately survive the one it names, it announces my death, carries a death sentence (*AL* 432). In the same way in which language (with writing as model) is structured by its possibility of functioning in the absence, in the event of the death of the sender and of the addressee, the proper name is structured by the possibility of functioning after the death of who it names. The name is therefore ‘always and a priori a dead man’s name, a name of death’ (*EO* 7).⁴² It lives on; it is destined to survive me, and the same applies to God (*AL* 432; *Ltd* 82–3).⁴³

Derrida analyses the structure of the proper name in detail in *Of Grammatology*. At stake here is the prohibition on the mentioning of proper names imposed by the Nambikwara as recounted by Lévi-Strauss and which he (Lévi-Strauss) succeeds in finding out when little girls in acts of revenge reveal these proper names to him. Derrida however notes that what we have here is not strictly speaking an interdiction on the use of proper names, nor is it proper names that are eventually revealed:

41 See in this regard *FWT* 92; *R* 14, 17; *BS* 53–4.

42 See also *PC* 39: ‘The name is made to do without the life of the bearer, and is therefore always somewhat the name of someone dead.’

43 As Derrida indicates elsewhere (‘E&F’ 42), in deconstructing the onto-theological tradition of sovereignty it would be necessary to ‘disassociate God’s sovereignty from the very idea of God. We would have God without sovereignty, God without omnipotence’.

The expression ‘proper name’ is improper, for the very reasons that [Lévi-Strauss’s] *The Savage Mind* will recall. What the interdict is laid upon is the uttering of what *functions* as the proper name. And this function is *consciousness* itself. The proper name in the colloquial sense, in the sense of consciousness, is ... only a designation of appurtenance and a linguistic-social classification. The lifting of the interdict, the great game of denunciation and the great exhibition of the ‘proper’ ... does not consist in revealing proper names, but in tearing the veil hiding a classification and an appurtenance, the inscription within a system of linguistic–social differences.

(OG 111)

What the girls reveal are thus not proper names strictly speaking, or absolute idioms, but ‘already varieties of invested common names’ (OG 111). The act according a so-called proper name already involves the suspension of the vocative absolute (OG 112). Derrida does not however dream of restoring this loss of self-presence and of the proper, but instead notes that it is always already lost. Such self-presence is only dreamt of, and cannot appear as such (OG 112).⁴⁴ This destruction of the proper, as we saw earlier, gives expression to the relation to death (OG 183–4). So does the image (OG 184), which perhaps clarifies somewhat Derrida’s invocation of the story of the hatter told by Franklin to Jefferson. The hatter consults with his friends about a signboard for his shop. The friends propose all manner of deletions to what he had in mind, including the reference to himself as the producer of the hats, so that the signboard eventually only bears the image of a hat, with his name under it. Derrida’s description of Jefferson’s possible reaction to this story as ‘strongly undecided’ should presumably be understood in relation to the above. Jefferson, Derrida suggests, desired for his own name to be immortalised under a map of the United States, thus for the new state to effectively bear his name. According to Freud, a hat, as well as an umbrella and a pair of shoes, mentioned as alternatives by Derrida to the story of the hatter (*Neg* 53) are all sexual symbols.⁴⁵ A map, as we furthermore know, is itself a sexual symbol and a form of writing (Freud 2001: V 356; OG 107–8). Jefferson’s ‘greatest desire’ (*Neg* 53) therefore ultimately appears to be for absolute pleasure, for death. And something similar can be said of the people of the United States, and of any state. By giving itself a name, it inscribes itself within a system of signification, by virtue of a desire for death.

The above necessarily ties in closely with Derrida’s analysis of sovereignty in *Rogues* and elsewhere. What has not as yet been mentioned in the discussion

44 In *MP* 66 Derrida points out that the ‘as such’ refers to the appearance of something in its presence; the ‘as such’ however precisely evades us forever. See also ‘AO’ 24–6.

45 See Freud (2001: XV 154, umbrella; XV 157, hat; XV 158, shoes).

of sovereignty is that it is as a rule presented as silent, unavowable and indivisible (*R* 100, 109).⁴⁶ It furthermore engenders like a father, but is itself withdrawn from genesis and becoming (*R* 138). In all of this it of course mirrors God (*R* 157). As Derrida puts it: '[S]overeignty itself (if there is one and if it is pure) always keeps quiet in the very ipseity of the moment proper to it, a moment that is but the stigmatic point of an indivisible instant' (*R* 100–1). Sovereignty's indivisibility, as Derrida notes, excludes it in principle from being shared, that is, from time and from language. This is because sovereignty reveals itself in the exception which is a-temporal and a-historical; it also withdraws from language which per definition shares and universalises. The sovereign is precisely the one who does not have to respond, who has a right to silence, who does not have to take responsibility for his acts, who has the right to a certain irresponsibility (*BS* 57). Sovereignty however necessarily has to rely on language (on the model of writing), has to justify itself by means of law, as we saw for example with the Declaration of Independence, so that no pure sovereignty can be said to exist:

To confer sense or meaning on sovereignty, to justify it, to find a reason for it, is already to compromise its deciding exceptionality, to subject it to rules, to a code of law, to some general law, to concepts. It is thus to divide it, to subject it to partitioning, to participation, to being shared. It is to take into account the part played by sovereignty. And to take that part or share into account is to compromise its immunity. This happens as soon as one speaks of it in order to give it or find in it some sense or meaning. But since this happens all the time, pure sovereignty does not exist; it is always in the process of positing itself by refuting itself, by denying or disavowing itself; it is always in the process of disavowing itself; it is always in the process of autoimmunizing itself.

(*R* 101)⁴⁷

In a similar way in which Derrida had shown in his earlier work the need for mediation – that is, signs, marks or traces for the self in relating to itself and to others (*SP* 6–7; *Pos* 28–9), thereby placing in question the notion of the sovereign subject (Chapter 1) – he contends here that sovereignty, because of its need for language and the need for it to be clothed with meaning, is necessarily shared, divided and partitioned, thereby compromising itself. Once one tries to justify sovereignty, for example through a founding document,

46 As Schuppert (2003: 157–8) furthermore reminds us, sovereignty relates both to the greatest power inside and the ability to operate outside the state without any limitation. This dual operation of sovereignty is likewise indivisible.

47 Although the context of this passage is international law, it can, as appears from its correspondence with our earlier discussion, clearly also be applied on a national level.

one necessarily uses language and in so doing inevitably places sovereignty at risk. The reason for this we saw above in the analysis of language on the model of writing. The same point can likewise be reached through an analysis of the concept of sovereignty itself and through an observation of what is happening with sovereignty in the world today, including the sovereignty of the only remaining superpower (*PTT* 94–100).⁴⁸ In both *Philosophy in a Time of Terror* and in *Rogues*, Derrida shows how the self and therefore also sovereignty is affected and infected by a cruel auto-immunity, which is another way of giving expression to Derrida's adaptation of Freud's death drive (*PTT* 94–100; *R* 45, 55, 109, 157).⁴⁹ Tying this notion to Derrida's earlier work, we could refer to auto-immunity as a kind of biological 'metaphoricity'.⁵⁰ Like the death drive, as Derrida conceives of it, auto-immunity is not simply evil, as it makes possible a relation to the self and the other (*R* 152). This auto-immunity of sovereignty is especially to be detected in democracy, which necessarily lacks a proper meaning, to the extent that it even allows for its own abolition (*R* 18–27, 36–7, 72–4). The events of September 11, 2001 with their roots in this auto-immune tendency, confirms Derrida's analysis which in 'DoI' appears to pass to a greater extent through language.⁵¹ Other indications of the erosion of state sovereignty in the world today (effects of this pre-originary auto-immunity) are the international obligation placed on states to secure fundamental rights (*R* 87–8), the movement towards the universal abolition of the death penalty, the institution of the International Criminal Court (*R* 87), the prosecution of heads of state (*CF* 57), and humanitarian actions by NGOs (*BS* 70).⁵² The aim here is of course not to discredit democracy, but to place in question democracy's link to sovereignty which itself is based on fantasy, a fantasy or fable of omnipotence (*PM* 105–6; *BS* 35), in favour of a 'democracy to come', a democracy without sovereignty, without autonomy.

48 One could add to this that especially since the Second World War, there has been a dissolving of both inner and outer state sovereignty. Democratic constitutionalism has developed such that in these states there is no single state organ that has the final decision-making power in all circumstances. Furthermore, whereas until the Second World War states were regarded as sovereign in international affairs – there were no limits as to what these states could do, this is no longer the case. This dissolution of sovereignty is seen most clearly in the European Union.

49 Auto-immunity, in brief, entails that immune cells 'mistake' the body's cells as invaders and attack them, which can lead to a variety of auto-immune diseases.

50 See in this regard *MP* 207–1 ('White mythology'), 'RM', Gasché (1986: 293–318). It should be noted though (in relation to the 'biological' metaphor at stake here), as Mitchell (2005: 917) points out, that the concept of immunity actually has its origin in the legal concept of exemption. See further the *Online Etymology Dictionary*.

51 In both Derrida's later and earlier work, texts in the broad sense are being analysed, so that the differences in the nature of analysis, if any, are minimal.

52 These actions of placing sovereignty in question, as Derrida points out, nevertheless often takes place in the name of another sovereignty – the sovereignty of man himself (*BS* 71), which is of course itself placed in question by Derrida; see further Chapter 1.

It is furthermore important to note that this is also not said to discredit sovereignty as simply a fable, but even more importantly to point to the pre-origin or law of this fable as was the case earlier with *The Madness of the Day*. Derrida moreover does not thereby seek to abolish sovereignty, as it can be used for example to fight against colonialism and imperialism, but rather to destabilise it as a secure origin (*BS* 76; *FWT* 92).

Beyond sovereignty

The implications of Derrida's analysis of writing as compared to the way in which language is viewed in metaphysics, has consequences which were hardly possible to anticipate in the 1960s and 1970s. From his later texts, we see that viewing language with writing as model has 'radical' implications not only for judicial decision-making (Chapter 6), but also for the transformation of (the institutions of) international law, the death penalty, the granting of pardons, citizenship, immigration law and man's relation to animals. In so far as our primary theme here is concerned, that is, constitutional democracy, this notion can no longer simply be viewed in terms of a return to the self – the people giving themselves a foundational document in order to rule themselves, giving themselves reason and rights in sovereign fashion, and subsequently enforcing these. Because of what Derrida refers to in his later texts as auto-immunity, the return to the self necessarily runs the risk of becoming a turn against the self. This means that the so-called counter-majoritarian difficulty so often invoked in liberal constitutional theory, between democracy and constitutionalism, self-rule versus law-rule⁵³ functions as little more than a fig leaf. In seeking to resolve this 'paradox' by privileging one or both of the ways in which law seeks to preserve itself⁵⁴ and by consequently failing to enquire into the origins of self-rule and law-rule, it effectively extols sovereignty without any contemplation of its problematical nature. Something similar can be said of theories which traditionally inform constitutional understanding, whether of an overt political or more methodical nature. In so far as the first-mentioned is concerned, these almost without exception posit a sovereign self (whether individual or collective) which necessarily and unproblematically returns to itself. It furthermore places the meaning of the document at the disposal of a sovereign, freely choosing subject, namely a judge or plurality of judges. In so far as theories of a more methodical nature are concerned, the analysis above shows that the notion of intention, as well as purpose and context, which are often said to determine the interpretation of founding documents, are suspect, at least if intention is viewed as fully determining such meaning. In so far as intention is concerned, it is traditionally

53 See e.g. Bickel (1986: 16–23).

54 See further Chapter 6.

tied to the idea of subjectivity, sovereignty, and thus self-presence and self-possession, which Derrida's analysis in 'DoI' and other texts, thoroughly places in question, by showing its necessary relation to auto-immunity, thereby introducing the notion of an auto-immune sovereignty or heterogeneous subjectivity. Intention is in other words overflowed by a radical alterity or as Derrida states elsewhere, 'intentionality ... does not necessarily belong to a consciousness' (*WD* 26).⁵⁵ The same applies, for similar reasons, to context and purpose. What is called for in constitutional theory today is a move away from these traditional theories which are all founded on sovereignty towards a contemplation of the hospitable exposure to the event, without the domination and neutralisation of performative mastery and sovereignty.

55 In *A* 48–50, which will be briefly analysed in Chapter 8, Derrida similarly explores through Levinas's texts, the notion of intentionality *as* hospitality.

Before the law

‘Before the law’, an essay of Derrida on Kafka’s text with the same title, and which will be the main focus of this chapter, also includes a reading of Freud’s *Totem and Taboo*. The latter book repeatedly makes its appearance in Derrida’s texts,¹ but in ‘Before the law’ we find the most detailed consideration thereof. Freud’s *Totem and Taboo* enquires into the origin of religion, morality, social institutions and law. He contends that this origin is to be found in a crime, the killing of the primal father by a band of brothers, followed by the institution of totemism and the prohibition of murder and incest. Freud’s psychoanalytical account of the origin of the totem and of the prohibition of murder and incest has been challenged from various quarters. If totemism thought of as a system is indeed an illusion, as Lévi-Strauss has perhaps most persuasively shown, should one for that reason dismiss Freud’s *Totem and Taboo* and its theory of the primal horde in relation to the origins of law, or is there still some insight to be gained from it? Through a reading of ‘Before the law’ as well as a number of other texts of Derrida, it will be contended that Freud’s thinking remains of great importance in understanding law’s origin, even though it may be necessary to somewhat revise the traditional reading of *Totem and Taboo*. Derrida’s texts point to the importance of reading Freud in a specific way, rather than the rejection of his thinking as a whole in this respect, and more specifically, to the need for a reconsideration of the originary nature of the Oedipus complex. In rethinking the origins of law, Freud’s study of the universality of the incest prohibition in archaic societies remains of importance, as has been confirmed by anthropological studies on this prohibition as well as on the gift by among others, Lévi-Strauss and Mauss. The focus of this chapter will be Derrida’s reading of these texts, in considering the origins of law. So as to enable us to understand fully Derrida’s reading, the chapter will start with a brief exposition and contextualisation of Freud’s contentions in *Totem and Taboo*. This will be followed by a consideration of Lévi-Strauss’s structuralist critique of totemism

1 See e.g. *R* 16–17, 57–60; *PF* 279–81; *FWT* 86–7, 188; *AF* 59, 88, 95.

as an institution as well as of the important role of incest in his thinking. We will then be in a position to understand Derrida's problematisation of structuralism and his deconstructive reading of Lévi-Strauss's texts as well as of Freud's *Totem and Taboo* and Kafka's *Before the Law*. In the final section we will briefly consider how Derrida's analysis in 'Before the law' ties in with his later deconstruction of concepts such as justice, hospitality, friendship and democracy, with reference to the notion of originary guilt.

Freud's *Totem and Taboo*

A number of Freud's later texts concern themselves with the origin of religion, morality, law and other social institutions. Following the evolutionary thinking in relation to social phenomena which was prevalent around the turn of the twentieth century, Freud shared the view of certain anthropologists and sociologists that this origin is to be found in an elementary form of religion, specifically as practised by some Australian aborigines. Freud's views in this regard are expressed primarily in *Totem and Taboo* (1913), where he enquires into the totem and its relation to the Oedipus complex. Freud in this respect finds a number of similarities between the beliefs in archaic communities, children (especially animal phobias), and neurotic patients as well as the symbolism in dreams. In the view which Freud (2001: XIII 103–7) adopts, the totem in its original form is an animal, which is peculiar to a specific clan and treated with superstitious respect. The totem may in general not be harmed, killed or eaten by members of that clan and they are believed to have descended from the totem. Originally the totem is inherited through the female line and restricts the sexual freedom of the younger generation – that is, sexual intercourse between brothers and sisters and between sons and their mothers (at 121–2). Freud as a consequence describes exogamy as the 'notorious and mysterious correlate of totemism' (at 105). At ceremonial occasions, identification of the clan with the totem is particularly emphasised, for example by dressing in the likeness of the totem and imitating it in sound and movement (at 140). At specific ceremonies the totem is furthermore killed and devoured by all the men of the clan (Freud 2001: XXIII 131).² After the consumption of the totem animal, its death is mourned, followed by licentious festivities (Freud 2001: XIII 140). In an attempt to explain totemism as well as the fact that many of the archaic communities still to be observed at the time consisted of bands of males in totemic clans while concerning themselves primarily with the prohibition of two crimes (murder and incest), Freud (at 141–6) posits an 'event' analogous to the 'crimes' of Oedipus as depicted by

2 Freud (2001: XIII 138–9) bases this characteristic on the observation of a festival in the Sinai desert where a camel is torn apart by all the male members of the clan and consumed raw.

Sophocles.³ In an early age, Freud contends, mankind lived in small hordes with a jealous, primal father in each instance ruling over such horde. The father had exclusive possession of all the women in the horde. If a son would invoke his father's jealousy, he would be killed, castrated or driven from the horde (Freud 2001: XXIII 81). The sons – fearing, admiring, loving and at the same time hating the primal father, because of being deprived by him from having their sexual desires fulfilled by their mother(s) and sisters – one day decided to rise against him, and then killed and consumed him, so as to gain his strength. Either because no single brother was strong enough to take the place of the primal father or because if one of them were, it led to new battles, they eventually realised that the previous position of a single leader is no longer tenable. For the sake of peace with one another, they therefore decided on the institution of a (totemic) community of brothers, a kind of 'social contract' through which incest and murder (of the totem animal) were prohibited.⁴ In this development lies the commencement of social, moral and religious obligations, according to Freud (2001: XXIII 82–3). The institution of the totem (the totem being a substitute for the father (Freud 2001: XIII 141)) as well as the totem prohibitions, served as a covenant between the sons and the totem: the totem granting them everything they could wish for, and they in turn respecting its life. It was also an attempt at self-justification: if the primal father had treated them the way the totem treats them, they would never have killed him, in this way making it possible to forget the event which lies at the origin of the totem (at 144–5).⁵ Totemism was thus instituted as an attempt at reconciliation with the father. Freud notes in this respect that immediately after the murder, the feelings of affection they had for him, turned into remorse (at 143–5), raising the question how this could have happened even before the institution of morality.⁶

Did Freud believe that the killing of a primal father actually occurred, and is he therefore, because of a belief in the phylogenetic inheritance of this 'event' to be associated with Lamarckism? On the face of it, Freud⁷ can certainly be read in this way, as commentators have argued,⁸ although, as Derrida (*AF* 34–6) has pointed out, things may be somewhat more complex.⁹

3 In *Moses and Monotheism* Freud (2001: XXIII 81) points out that this 'event' took place over thousands of years and were repeated numerous times.

4 Freud was aware of a number of exceptions which can be said to exist to the 'universality' of the incest prohibition, see Freud (2001: XXIII 120–1); and see further below.

5 Freud (2001: XXIII 82) comments that the introduction of an animal to represent the father must be understood in light of the fact that archaic communities (and the position is the same with children) do not draw the same rigid distinctions between man and animal as is drawn in Western society.

6 See also Lacan (2006: 95); Douzinas (2000: 301), and see further below.

7 See e.g. Freud (2001: XIII 157–9).

8 See e.g. Gay (1988: 333); van Haute and Verhaege (2006: 80–1); Fitzpatrick (2001: 19).

9 See further below.

The major difficulties with Freud's account perhaps lies in (1) its assumption concerning the universality of the Oedipus complex and tied closely to this (2) the assumption of the existence of something like 'totemism' from which other institutions subsequently evolved. The latter point was elaborated on by anthropologists such as Alexander Goldenweiser, Alfred Lowie, Franz Boas, Alfred Reginald Radcliffe-Brown and Claude Lévi-Strauss. Although Freud was aware of the various manifestations of the totem in different societies, he believed as noted earlier that certain clans of Australian aborigines give evidence of the most original form, totemism having at an earlier stage been a feature of all societies. The criticism of this evolutionary view of society, specifically in relation to the totem, as held by Freud and others around the turn of the twentieth century, by Lévi-Strauss, is for our purposes the most important and will be discussed next. The first point (totemism's relation to the Oedipus complex) will be enquired into below in our discussion of Derrida's 'Before the law'.

Lévi-Strauss on totemism and the prohibition of incest

Lévi-Strauss, in stark contrast to Freud, contends that the notion of 'totemism' is nothing but an illusion, the bringing together of different ideas under one name as a result of Western prejudice against people deemed 'primitives' or 'savages' (Lévi-Strauss 1991: 1–2). Anthropologists created the impression that there are vast differences between 'primitive' societies and Western civilisation, with only the latter being characterised by rational thinking. The 'phenomenon' of totemism, Lévi-Strauss argued, was a projection of the Western mind, and, aligning himself with Rousseau's thinking on human nature, an exorcism of the close relation that exists between man and nature. In the traditional Western view of 'primitives' and of 'totemism', the 'savage' was too close to nature, too close to animals, in comparison with the discontinuity evident in the relation which 'civilised' (that is, normal, white, adult) man has with nature (at 2–3). According to Lévi-Strauss, and in line with his structuralist views, totems function in heterogeneous ways in different clans, with the consequence that totemism cannot be viewed as a system. This is borne out by the fact that the reason for the adoption of a specific plant, animal or lifeless object as a totem differs greatly among different tribes and clans.¹⁰ Nonetheless, the different ways in which relations to a totem are structured (inter alia matrilineal/patrilineal hereditary transmission, as existing between the group/individual between a species of animal/plant or a specific animal/plant, as well as the different taboos related to a totem) are all different means to give expression to the relation between nature and culture

10 Lévi-Strauss points out that in Australia one also finds totems such as laughing, illnesses, vomiting and a corpse (at 63). Imaginary creatures elsewhere also serve as totems (at 78).

(at 16–17). The ‘irregularity’ which exists in this regard does not therefore necessarily mean the non-existence of a ‘structural principle’ (at 88). The theory which Freud (2001: XIII, 110–13) explicitly rejected – that the different totem animals are a way of distinguishing between different clans – finds an important place in Lévi-Strauss’s theory. According to Lévi-Strauss (at 77–8) it is precisely because of the resemblance in relation to the differences between animals and the differences between men that totemic representation takes place. In this respect the myths on which totems are based, reveal, as observed by Radcliffe-Brown, that they have a single theme:

The resemblances and differences of animal species are translated into terms of friendship and conflict, solidarity and opposition. In other words the world of animal life is represented in terms of social relations similar to those of human society.

(at 87)

Developing this idea further, Lévi-Strauss concludes that the choice of totem is simply one of the ways in which a structural principle – that of the union of opposites – finds application (at 88). The relation that is in this way posited between correlations and oppositions can of course take place in a variety of ways, which explains the wide array of totem representations throughout the world. Totemism is thus merely one of the ways in which opposition is made to serve the purpose of integration, rather than being an obstacle thereto (at 89). Through his analysis of totemism and myth, Lévi-Strauss in essence attempts to show that the ‘savage mind’ is as logical or coherent as the ‘Western mind’, the only difference being the nature of the things to which they are applied (Lévi-Strauss 1963: 230; 1966: ch. 1).¹¹ The study of the totem in archaic societies in particular shows the unconscious logical structures of the mind, which is a feature of all of humanity, and which remains beyond human control.¹² In different societies, both ‘primitive’ and ‘civilised’, one can thus observe the recurrence of the same patterns, as a consequence of the demand for order (Lévi-Strauss 1966: 10).

According to Lévi-Strauss, in *The Elementary Structures of Kinship* (1969: 24–5), the prohibition of incest nonetheless remains of importance as it provides the bridge between nature and culture, the latter being born only with the prohibition of incest.¹³ This prohibition nonetheless forms part of both nature and culture, seeing that it has the universality of an instinct and

11 One incidentally also finds the use of totems in Western society; see Lévi-Strauss (1991: 7–8).

12 Lévi-Strauss uses the notion of the unconscious in a different way than Freud. It involves a kind of Saussurean ‘deep grammar’ or structural unconscious of society.

13 Lévi-Strauss (1969: 24): ‘It is the fundamental step because of which, by which, but above all in which, the transition from nature to culture is accomplished.’

is thus part of nature (at 10) whereas it is at the same time subject to contingent rules and thus part of culture:

It is a rule which embraces that which in society is most foreign to it, but also a social rule which retains what in nature is most likely to go beyond it. The incest prohibition is at once on the threshold of culture, and in one sense, as we shall try to show, culture itself.

(at 12)¹⁴

The primary role of culture, as Lévi-Strauss contends, is to ensure the continuing existence of the group as a group, and as in other domains, to replace chance by organisation (at 32). The rules of exogamy are instituted, as with all classifications, because of the need for order, specifically for the purpose of the continuous existence of the group. It is thus an intervention, but not in any arbitrary sense: 'it is *the* intervention' (at 32). Formally, as Lévi-Strauss points out, the prohibition is an assertion by the group that in relation to sexual matters one cannot simply do as one pleases (at 43). The incest prohibition and its inverse, the rules of exogamy, are 'culture itself' because they aim at ensuring that the distribution or circulation of women takes place under the control of the group and are the same for everyone (at 42, 45). The incest prohibition, because of its implications (she who may not be taken is given up) in other words amounts to a rule of reciprocity similar to an exchange of gifts (at 51ff.), with women being the most highly prized category of goods (at 51, 61–3). The exchange of women, similar to the totem, but more fundamentally so, serves the purpose of integration (at 25):

Consequently, exogamy should be recognized as an important element – doubtless by far the most important element – in that solemn collection of manifestations which, continually or periodically, ensures the integration of partial units within the total group, and demands the collaboration of outside groups. Such are the banquets, feasts and ceremonies of various kinds which form the web of social life. But exogamy is not merely one manifestation among many others. The feasts and ceremonies are periodic, and for the most part have limited functions. The law of exogamy, by contrast, is omnipresent, acting permanently and continually; moreover it applies to valuables – viz., women – valuables *par excellence* from both the biological and the social points of view, without which life is impossible,

14 Like Freud, Lévi-Strauss was acutely aware of exceptions to the rule, but as he remarks, 'every society is an exception to the incest prohibition when seen by another society with a stricter rule' (Lévi-Strauss 1969: 24). The universality of the incest prohibition is not established by ignoring the 'exceptions' thereto, but by asking the question whether any society exists where no prohibitions on certain types of marriage exists. The answer to this question is 'completely in the negative' (at 9).

or, at best, is reduced to the worst forms of abjection. It is no exaggeration, then, to say that exogamy is the archetype of all other manifestations based on reciprocity, and that it provides the fundamental and immutable rule ensuring the existence of the group as group.

(at 480–1)

The prohibition of incest is therefore not in the first place about not being allowed to marry one's sister, mother or daughter because of some intrinsic quality, but about being obliged to give them to others (at 481). Marriage, Lévi-Strauss (at 483) concludes, is the archetype of exchange and 'the woman herself [is] the supreme gift among those that can only be obtained in the form of reciprocal gifts' (at 65). The rules of exogamy are furthermore not necessarily tied to the totem in a specific way. In the Inuit, for example, exogamy is practised only in relation to the immediate family, with the consequence that it is not related to totemism (Lévi-Strauss 1991: 11–12). The latter requires the formation of a system on the social level. Totemism cannot therefore be said to have been a feature of all societies and there cannot be said to be an original form of totemism from which all others derive as Freud believed.¹⁵ In some Australian groups the rules of exogamy moreover have no relation to totemic beliefs and customs (Lévi-Strauss 1991: 36). For Lévi-Strauss, the incest prohibition, rather than totemism therefore lies at the origin of culture, which (together with their ability of speech) place 'primitive' societies on the same level as modern societies (*OG* 108). Freud's contention in relation to exogamy and the existence of an intrinsic relation to the totem are thus rejected too. The prohibition against incest is moreover subject to different rules in different societies and one of these (matrilineal) cannot be said to be more originary than the others.¹⁶

15 Totems, where they are in use, can be said to play a secondary role in the system of exchange which can for now be said to be centred around the prohibition of incest.

16 Lévi-Strauss (1969: 490–1) believes that Freud's account of the primal horde gives expression to a dream, the magic and power of which 'arises precisely from the fact that the acts it evokes have never been committed, because culture has opposed them at all times and in all places. Symbolic gratifications in which the incest urge finds its expression, according to Freud, do not therefore commemorate an actual event. They are something else, and more, the permanent expression of a desire for disorder, or rather counter-order' (at 491). Lacan's reading of *Totem and Taboo* shows a number of similarities with the reading of Lévi-Strauss. Lacan (2007: 123; see also Lacan 1992: 216–18) reads the Freudian myth as a retroactive fantasy-like positing of a father who experiences unlimited *jouissance* in his enjoyment of all the women, in his being his own law, beyond the symbolic order with its accompanying castration or prohibition of *jouissance*. Lacan refers in this respect to the primal father as the 'real father' or 'father of the (impossible) real' whose killing leads to the institution of the order of symbolic exchange. With his death, his power of prohibition (of the *jouissance* of his sons, i.e. all men) is not limited, but actually increased. (Lacan 1999 incidentally distinguishes phallic *jouissance*, which women also share, as they are also at least partly subject to the symbolic order, from woman's or Other *jouissance*, which, he notes, may be possible); for commentary, see Verhaeghe (2007: 43–4); Grigg (2007: 58–67); Fink (1997: 110); Shephardson (2003: 137–47).

Derrida on Lévi-Strauss

The important contribution of structuralism according to Derrida lies in its placing in question of the concepts of metaphysics, such as the nature–culture opposition, its abandonment at times of a search for an absolute origin (*WD* 286), its rejection of an evolutionary approach, and its attempt to undermine the assumptions of Eurocentrism. As we will see, structuralism’s relation to metaphysics nonetheless remains ambivalent and at times it is not vigilant enough about its reliance on the concepts of metaphysics in its critique of metaphysics. In the case of Lévi-Strauss, this is because the full implications of the idea of a classificatory structure are not as yet grasped and also because of a residual nostalgia for origins and pure presence (*WD* 292). The notion of a structure, as Derrida points out, has operated since the inception of Western philosophy with the idea of a centre, point of presence or fixed origin, which keeps the structure in place (*WD* 278). This centre has in addition the role of limiting the ‘play’ of the structure, the ‘field of infinite substitutions’, as Derrida also refers to it (*WD* 278, 289).¹⁷ Within the traditional concept of structure, ‘play’ in this sense is allowed, but only within certain definable limits. The centre is therefore inside the structure, yet it is also ‘outside’ of the structure in the sense that it is not itself subject to the play of the structure (*WD* 278). In structuralism, and specifically in the work of Lévi-Strauss, we see the centre of the structure operating in this sense in relation to the prohibition against incest, which Lévi-Strauss posits at the origin of culture. Derrida here provides a minute analysis of what is at stake in the nature–culture distinction and the role of the prohibition of incest as origin in Lévi-Strauss. As noted earlier, Lévi-Strauss points out in this regard that the prohibition of incest finds itself in the peculiar position that it seems to (1) itself form part of the transparent system of (cultural) differences, and that (2) it at the same time provides the origin of the difference between nature and culture; it is therefore also located outside of the (cultural) system as its condition of possibility (*OG* 103–4).¹⁸ The difficulty Lévi-Strauss encounters here ties in with the traditional, metaphysical distinction which he adopts between nature and culture, and which he views as ‘two mutually exclusive orders’ (Lévi-Strauss 1969: 8). In accordance with this distinction, that which is universal and spontaneous, and which is not dependent on a particular culture or determinate norm, belongs to nature, whereas that which depends upon a determinate system of norms, which can vary in different societies, belongs to culture (*WD* 283). As we saw above, the prohibition against incest is universal and therefore must fall within nature, yet it is also determined by norms, subject to variation, and must therefore at the same time form part of culture

17 The notions of ‘play’, substitution/supplement and writing bear a quasi-psychoanalytical connotation; see Chapter 5 and see further de Ville (2011).

18 Something similar happens with Rousseau in relation to pity, modesty and reason in their relation to boundless passion; see *OG* 174–5, 179–80.

(*WD* 283, *OG* 104).¹⁹ Lévi-Strauss therefore refers to the prohibition of incest as a ‘scandal’ as it does not appear to fit neatly into the traditional metaphysical framework (Lévi-Strauss 1969: 8–9). As Derrida (*WD* 283) however notes, there is a ‘scandal’ here only because of the reliance on the concepts of metaphysics, here the nature–culture distinction. Lévi-Strauss, in spite of his awareness of the problem surrounding the nature–culture distinction, is nonetheless prepared to make use of this (metaphysical) distinction as a tool in his analysis or what he (Lévi-Strauss) refers to as *bricolage*. In this respect, Lévi-Strauss can be said to separate method from truth (*WD* 284). Both in relation to the concept of structure in general and here specifically with the incest prohibition in structuralism, a contradiction is at stake which as Derrida notes ‘expresses the force of a desire’ (*WD* 279). In other words, because of the ‘play’ of the structure, and in order to counter the anxiety that goes along with this, metaphysics responds with a desire for presence.²⁰ We can also express this in a different way: the incest prohibition does not simply produce a scandal to the concepts of metaphysics, but escapes these concepts, precedes them, perhaps as their condition of possibility (*WD* 283). How does the prohibition of incest relate to this pre-origin of play? Derrida accuses metaphysics of wanting us not to contemplate the origin of this prohibition:

It could perhaps be said that the whole of philosophical conceptualization, which is systematic with the nature–culture opposition, is designed to leave in the domain of the unthinkable the very thing that makes this conceptualization possible: the origin of the prohibition of incest.

(*WD* 283–4)

As appears from this passage, the ‘centre’ that is posited by structuralism (here the prohibition of incest) is already a substitute or a supplement, not of some pre-existing presence, or of an absence, but that which precedes the presence/absence distinction. The positing of an origin in other words always goes along with the suppression of its own pre-origin. The origin of this prohibition is explored further in *Of Grammatology* where Derrida discusses this prohibition in relation to the texts of Lévi-Strauss as well as of Rousseau.²¹

19 See also *OG* 263–5. The fact that incest is prohibited or at least avoided also in the ‘higher primates’ of course further complicates this distinction; see *FWT* 66.

20 See further below on the nature of this anxiety.

21 This text of course also concerns itself with the speech–writing opposition which ties in closely with the matter under discussion. For reasons of space, we will not analyse this aspect here (see Chapter 2), suffice to note that Lévi-Strauss’s nostalgia for a lost origin is tied to the perceived absence of writing in the communities living in seeming harmony with nature (*OG* 119, 136). If one views writing in the broad way as Derrida does (the trace left by the desire for death, as we will see just now), Lévi-Strauss’s view comes across as somewhat naïve, as does his depiction of these communities (in light of the seeming

Here we return to the notion of ‘desire’ raised above. The desire for presence follows, as we noted, from the absence or rather abyss of presence, namely the representational structure which structuralism has exposed and which makes full presence impossible (*OG* 163). This abyss, which is the pre-origin of representation, itself involves a form of desire. What is ‘desired’ is ultimately total enjoyment, absolute expenditure – that is, death, ‘our indestructible mortal desire’ (*OG* 152, 183–4, 266) or what Derrida also refers to as arche-writing (the trace left by this ‘desire’ for death).²² This means that the mother and the sister (the objects of incestuous desire) are always already supplements of what is ultimately desired (*OG* 156–7, 266).²³ The mother (and/or sister) as fundamental signified (in structuralism) is thus herself in the position of signifier and does not escape play (*OG* 266). This in turn means that the genealogical relation and social classification which Lévi-Strauss analyses in his texts are themselves what Derrida refers to as ‘the stitched seam of arche-writing’ (*OG* 125). They are in other words secondary attempts at bringing to an end, at arresting unlimited play. The relation between unlimited play and the gift is explored further by Derrida in *Given Time* (Chapter 5). The relation between the circular exchange of women (and goods) on the one hand, and the gift on the other, recognised by Lévi-Strauss and Mauss, is here repositioned, reinscribed in relation to the perfect gift.²⁴ As we will see in Chapter 5, the perfect gift does not involve exchange (as then it would no longer have the value of gift) and provides the condition of possibility of all circular exchange in accordance with the applicable rules of exogamy (in relation to women). The prohibition of incest which Lévi-Strauss posits at the origin of society is in other words itself made possible only by a restriction of absolute desire, of the perfect gift, of the pre-origin.²⁵ We will now see how all of the above feed into Derrida’s essay ‘Before the law’.

absence of writing) as innocent and non-violent, despite clear evidence to the contrary; see *OG* 110, 120.

- 22 In *Memo 77c–d* Socrates defines desire as ‘to secure for oneself’ so that ‘desire’ needs to be placed here in inverted commas.
- 23 Auto-eroticism and hetero-eroticism play a similar supplementary role; see *OG* 155.
- 24 In Lévi-Strauss’s critique of Mauss’s *The Gift*, as Derrida (*GT* 74–6) notes, Lévi-Strauss reduces the gift to exchange and thereby effectively annuls the very possibility of the gift. Derrida’s analysis ties in closely with that of Bataille (2006: 197–220), who investigates the link between the prohibition of incest in Lévi-Strauss and eroticism, the latter being intimately linked with death.
- 25 In *Glas* 136, 191–200 we find a similar type of analysis in the context of Hegel and Genet, of the relation between marriage, incest and absolute pleasure. In the case of blood-relations, the individuals, Hegel contends, do not have ‘any personality proper to themselves’ (199a); behind incest thus appears to hide a ‘bare self-hunger’, a desire for ‘an absolute self-having’ (198c).

Before the law²⁶

In Kafka's *Before the Law* (*Vor dem Gesetz*)²⁷ a man from the country comes to seek access to the law, but a doorkeeper indicates that at the moment, the man is prohibited from entering. The man, upon peering through the open gate, is told by the doorkeeper that should he manage to enter without his permission (i.e. that of the first doorkeeper) there are many other doorkeepers much more powerful than himself. The man waits for many years, but the doorkeeper, despite the man's repeated attempts to gain admission (also through bribery and later even by begging the fleas in the fur collar of the doorkeeper), never allows him in. The doorkeeper on a number of occasions asks him questions about his home and other things, but in an indifferent manner, like great lords ('grosse Herren') do. When he is about to die, the doorkeeper tells him in answer to his question that no one else sought to enter through this door as it was meant solely for him (the man from the country), and says that he will now shut it. How does Kafka's *Before the Law* tie in with the earlier discussion of totemism and the prohibition of incest? In Derrida's essay, dating from 1982, this relation is posited through a quasi-psychoanalytical reading of *Before the Law*.²⁸ Freud's originary tale is itself read by Derrida as 'literature' (understood here in its strict sense, as will be explained), in that an event is narrated which is actually an event of nothing and consequently cannot be said to speak of an 'origin' as is usually thought. We will in addition see in Derrida's reading of these two texts allusions to the notion of 'play' and to the perfect gift as discussed above.

Derrida alludes to the idea of the play of the structure in his discussion of the title of Kafka's *Before the Law*.²⁹ When deciding whether a text such as this is of the literary type, the text would effectively be brought 'before the law'. However, as Derrida points out, the text at stake here (Kafka's *Before the Law*) already stages this procedure, it enfolds it within its structure;

26 The word 'law' as it appears in the English version is in every instance a translation of the French 'la loi' which Derrida uses throughout the text. Where Derrida uses 'droit' it is consistently translated as 'right'. In the French original the text has the title 'Préjugés: devant la loi' and includes a reflection on the work of Lyotard. These parts do not appear in the English translation and have, as far as I am aware, not been translated into English.

27 Published for the first time in the journal *Selbstwehr* (Prague), IX, No. 34 (7 Sept. 1915). See Kafka (1997) for references to this and subsequent publications of *Vor dem Gesetz*; my thanks to Howard Cagill for alerting me to these versions. The text also forms part of Kafka's *The Trial*, where it does not appear under this title.

28 Derrida refers to his essay on Kafka in 'Force of law' (AR 235), to indicate that he has for a long time been concerned with the question of justice, and in associating the man from the country before the law with the revolutionary moment where the law (*la loi*) is still undetermined, yet to come (AR 270).

29 Later on (AL 212, 216) Derrida refers to 'the effect produced by the play of the title' and of literature as being able to 'play the law', 'playing at being the law' and 'deceiving the law'.

it questions the law itself which would arrogate to itself the power to question it (*AL* 188). Derrida's text, bearing the same title, can be said to repeat this gesture. As we will see, it lays down the law (or condition of possibility) of laws (as well as of literature (*AL* 36)). Usually we would assume from the title (here: *Before the Law*) that it refers to the subject-matter of the story. The title in other words heads the story and refers to what will be happening in the story. The title gives the story an identity and is important in the determination of property rights, more specifically, copyright. By making law (referring here to law or a legal system which traditionally accords a legal title to a story) part of the title of the story, the question is raised as to what gives law the right or what entitles the law to do so. It in other words questions whether literature is to be understood only in the sense in which it is defined and circumscribed by law, that is to say as having a certain identity (unity), an author and entailing the narration of events.³⁰ Kafka's text, a singularity which is 'before' the law, as Derrida shows in his reading, can indeed be said to not have a unity or an identity. Before exploring this further, it is necessary to first give attention to the meaning of the word 'before' in the title. The title names a space: *before* the law. Derrida refers in this regard to a singularity, but this should not be understood as positing an opposition between the singular (the individual(s) appearing before the law) and the general (the generality of law's rules).³¹ The latter does not only refer to someone appearing *before* or *in front of* a judge in a court, but also to that which *precedes* law, the condition of possibility of law (*AL* 216).³² At stake here is what Derrida will, with clear reference to Freud's topology of the mind, refer to as a 'differential atopy' (*AL* 208). Derrida notes in this respect that the man from country (as is the case with literature) is not only *before* the law, but also *prior* to the law in a certain sense (*AL* 216). He is both a subject of the law, and outside of the law, an outlaw (*AL* 204). As we will see below, this follows from the man's non-identity with himself. He furthermore gives himself the law and in that sense is outside of, *precedes* the law, apart from his being subject to the law. Kafka's text does something similar in so far as it can be said to be a 'pure story, or story without story' (*AL* 209). Kafka's

30 Derrida explores similar themes in *AL* 221–52 ('The law of genre') with reference to Blanchot's *The Madness of the Day*; see Chapter 2.

31 The introduction to the essay by the editor of the collection Derek Attridge, and specifically the assertion that Kafka's essay deals with the 'problematic relation between the singular and the general' (at 181) should be treated with circumspection. Beardsworth's analysis of the essay (1996: 25–45), which is excellent in many respects, unfortunately also leans in the direction of such an interpretation (at 25, 41–3). See Gasché (1999: 297–8) who shows an appreciation for the complexity that is at stake here. See further Chapter 6.

32 Derrida also refers in various places throughout the essay (*AL* 186, 218) to his own arraignment before the law in Prague, on a charge of drug trafficking, thereby including himself as one who is 'before the law' in the double sense that this phrase bears.

text can moreover be described as ‘literature’ in the strict sense, non-identical to itself, essentially unreadable, intangible, or as Derrida puts it, ‘[i]t is the law, makes the law and leaves the reader before the law [*Il est la loi, fait la loi et laisse le lecteur devant la loi.*]’ (AL 211).³³ It bears witness to and shows respect for the law before the law.³⁴

Derrida notes that of the law itself, apart from its name, nothing is said in *Before the Law*; it (the law) is silent (AL 208). The law, *das Gesetz*, is of course capitalised like a proper name in the original German (*Vor dem Gesetz*). We do not know what, who or where it is. We do not know whether it is ‘a thing, a person, a discourse, a voice, a document, or simply a nothing that incessantly defers access to itself, thus forbidding *itself* in order thereby to become something or someone’ (AL 208). *Das Gesetz* is furthermore neuter, annulling the opposition between masculine and feminine, indeterminate, leaving the man from the country to freely determine himself (AL 204, 206–7). This self-determination is nevertheless at the same time cancelled out through the prohibition of entering the law. We are again concerned here with the question of identity, both of the man from the country and of Kafka’s text. As Derrida notes, neither the identity nor the non-identity of a text is natural; it is the result of a juridical performative. Although this can be said of all texts, it is uniquely the case with Kafka’s *Before the Law*, as it:

poses before us, preposes and proposes a text that lays down the law, and in the first place with respect to itself. In its very act, the text produces and pronounces the law that protects it and renders it intangible. It does and says, saying what it does by doing what it says.

(AL 212)

Kant’s Second Critique (the *Critique of Practical Reason*) plays an important background role in Derrida’s analysis.³⁵ As Derrida points out, for law as such (pure morality) to have authority according to Kant, it is required that it not have a history. The law (as such) must present itself as ‘an absolutely emergent order, absolute and detached from any origin’ (AL 191, 194). The condition of possibility of laws, that which makes them laws, the law of laws, the law itself, thus remains concealed, and for this reason is enticing, or as Derrida puts it, involves letting ‘oneself be tempted by the impossible’ (AL 192). When one does tell stories about law’s origin, these at best deal with its modes of revelation. The law itself cannot be made present; one cannot

33 See also ‘WB’ 149–50. Gasché (1999: 294) refers to the law at stake here as a ‘quasi-transcendental (legal) fiction’.

34 See also Beardsworth (1996: 34, 37, 38).

35 For a more detailed consideration of Kant in the legal context, see Derrida’s ‘Privilege’ in *WAO* 1–66.

reach it or enter into a relation with it. Derrida suggests that the same can be said of Kafka's man from the country as well as of the characters in Freud's primal horde in so far as none of them gain entry into the law itself.³⁶ Freud's mythical tale, which as we know was preceded by self-analysis (a smelling out of the origins of law, as Derrida (*AL* 194) puts it), seeks to uncover law's origin through what appears to be a historical account. Freud can in broad terms be said to have believed that the origin of law is to be found in repression (*AL* 192). Yet as suggested above, Freud's narrative is an uncanny one, similar to Kafka's *Before the Law* (*AL* 210–11), as no event in the ordinary sense is related. Even though the father is killed by the brothers, the father now becomes more alive, more powerful than before. The crime is thus totally useless as nobody is actually killed (*AL* 198). Freud (2001: XIII 159) furthermore notes that the brothers felt remorse immediately after the deed and thus already *before* the institution of morality and law by them.³⁷ As Derrida points out, the events (a 'quasi-event' or a 'pure event') as recounted by Freud inaugurate nothing 'since repentance and morality had to be possible *before* the commission of the crime' (*AL* 198).³⁸ What Derrida is suggesting here is that Freud's account (a simulacrum of narration) implicitly points to a 'law' or condition of possibility that must have preceded and made possible the institution of law and morality, similar to Kafka's *Before the Law*.³⁹ This 'pre-origin' of morality and law is, as we will see, closely related to the 'desire' referred to earlier and of course to a Kantian 'pure morality' as well as the perfect gift.

There are clearly a number of similarities between Kafka's *Before the Law* and Freud's attempt to understand the psyche.⁴⁰ In relation to Kafka's text, Derrida for example remarks that it does not point to any actual experience (*AL* 191) and similarly, that it opens 'on nothing, before nothing, the object of no possible experience' (*AL* 212).⁴¹ Derrida furthermore refers to the abundance of hair – natural as well as artificial – in *Before the Law*, as well

36 See also *Psy* I 128.

37 Freud (2001: XIII 143 fn. 1) comments in this respect that 'failure is far more propitious for a moral reaction than satisfaction'.

38 Freud (2001: XXI 131–3) appears to acknowledge this to a certain extent when in 'Civilization and its discontents' he traces the feeling of guilt to 'the eternal struggle between Eros and the instinct of destruction or death', although he still views this relation in oppositional terms.

39 See also *BS* 245; and Beardsworth (1996: 31) who notes that for the brothers to have felt remorse, there should already have been in place a prior law which they breached (and not produced) by committing the murder.

40 Derrida (*AL* 192) notes that it is well known that Kafka read Freud. His subsequent remark (*AL* 192) that 'this relation is of little interest to us' and remarks to similar effect (e.g. *AL* 195) should clearly not be taken at face value, but as itself 'an attempt at 'deceiving the law'; see *AL* 216.

41 'Nothing' here refers to nothing that is present, something without essence, without truth, and is not to be simply equated with 'the nothing' in Heidegger; see 'TID' 246–7.

as to the nose of the doorman (symbolising the genital zone), itself adorned with hair on the inside. Freud's letters to Wilhelm Fliess, incidentally an ear, nose and throat specialist and Freud's close friend until around 1900, indicates that Freud was concerned not only with repression as origin, but with what he referred to as 'knowledge of the essential thing *lying behind it* [i.e. 'behind' repression]' (Freud 1985: 279; *AL* 193).⁴² Freud at the time expressed the idea that morality comes from man's uprightness, the distancing that this entails from the sexual zones. This uprightness ensures '[d]elay, difference, ennobling elevation, diversion of the olfactory sense from the sexual stench, repression' (*AL* 193). This turning away from the sexual zones, Derrida comments:

is an upward movement. The high (and therefore the great) and the pure, are what repression produces as origin of morality, they are what is better absolutely, they are the origin of value and of the judgment of value.
(*AL* 194)

This uprightness is clearly a feature of the doorkeeper who speaks to the countryman like a great lord and who becomes taller as the narrative progresses whilst the man from the country becomes smaller (*AL* 207–8).⁴³ As Derrida furthermore notes, it is at the sight of the doorman with his abundance of hair and his pointed nose that the man from the country decides rather to wait (*AL* 195). At stake here, as will appear from the discussion that follows, is an anxiety about absolute pleasure/death, alluded to above in relation to 'play'. As we will see, the doorkeeper can in a sense be said to be 'produced' by the countryman so as to defer entering the door of the law.⁴⁴ Although Derrida does not refer explicitly to Freud's *Beyond the Pleasure Principle*,⁴⁵ a text which he (Derrida) gave a detailed reading to in 1980 (Chapter 1) –

42 The letter in question is that of 14 Nov. 1897. See also *SM* 26 on the possibility of a step beyond repression.

43 With reference to Kafka's *Zur Frage der Gesetze* (*The Problem of Our Laws*), Derrida notes that the task of keeping this secret is delegated to the nobility, and they 'are nothing but this' (*AL* 205). It would be a great risk for the people to rid themselves of the nobility.

44 It needs to be noted at this point that according to Freud a door in dreams, together with windows and gates, stands for openings or orifices in the body (Freud 2001: V 346; XV 158, 159). In *Resistances*, Derrida notably refers with reference to Foucault, to Freud as a doorkeeper (*Res* 79).

45 There is nevertheless a reference to the fort/da game of Ernst which Freud recounts and which Derrida analyses in 'To speculate – on Freud' (see *AL* 208; Chapter 1). The accompanying description clearly corresponds with Derrida's analysis of Freud's death drive in that text: 'Guardian after guardian. This differential topology [*topique différentielle*] adjourns, guardian after guardian, within the polarity of high and low, far and near (*fort/da*), now and later. The same topology without its own place, the same atopyology [*atopique*], the same madness defers the law [*la loi*] as the nothing that forbids itself and the neuter that annuls oppositions. This atopyology annuls that which takes place, the event itself.'

that is, two years before the first presentation of ‘Before the law’ – we see in the present essay clear allusions to the conservative drives (the doorkeeper) as the guardians of life, protecting the man from the country from his own desire for death (the law of law) until death (*AL* 211).⁴⁶ As Derrida notes, the doorkeeper does not prevent by force the man from entering, although as noted earlier, he comments on his own powerfulness as well as that of the other doorkeepers. There is also no absolute prohibition from entering, but only a delay.⁴⁷ One could say that no obstacle or barrier exists; the door simply marks a limit (*AL* 203). The man from the country thus effectively prohibits himself from entering (*AL* 203), as Derrida puts it:

He must force himself, give himself an order, not to obey the law [*la loi*] but rather to *not gain access* to the law [*la loi*], which in fact tells him or lets him know: do not come to me. I order you not to come yet to me. It is there and in this that I am law [*la loi*] and that you will accede to my demand, without gaining access to me.

(*AL* 203, fn. omitted)

Derrida (*AL* 204) refers in this respect to the law of law as ‘itself prohibited, a prohibited place’ (*AL* 203). The law thus forbids itself, and in that sense contradicts itself and places the man from the country in this contradiction or double bind. One cannot enter into a relation (of respect)⁴⁸ with the law itself; one cannot reach it directly, but only by way of its examples,⁴⁹ its representatives, its guardians. These function at the same time as interrupters (*AL* 203–4). Of the law itself, how it presents itself and whence it comes, one must remain ignorant, without knowledge (*AL* 204). Read with Derrida’s *The Post Card* (*PC* 82, 351, 360–2) and Freud’s *Beyond the Pleasure Principle*

46 The link between death and the law is made inter alia with reference to Saint Paul (*AL* 219).

47 Derrida notes (*AL* 202) that with this delay, time appears, in the story of course, but also in a more general sense; see further Chapter 5.

48 Derrida clearly alludes here to Kant’s doctrine of practical reason which is discussed briefly as well as referred to elsewhere in this text (*AL* 190–1, 199, 209, 210). With reference to an earlier seminar, Derrida attempts a reading of pure reason which, as he notes, links it with ‘an unconscious fantastic’ (*AL* 199). This is tied to the strange relation Kant posits between the moral good on the one hand and the example, the symbol and the type. In respect of the example, Derrida notes that ‘although [respect is] never addressed to things, [it] is nevertheless aimed at persons only insofar as they offer an *example* of the moral law: this respect is due only to the moral law, which never shows itself but is the only cause of that respect’. The reading is furthermore tied to the second formulation of the categorical imperative (‘Act *as if* the maxim of your action were by your will to turn into a universal law of nature’, italics added) which as Derrida notes ‘almost introduces narrativity and fiction into the very core of legal thought’ (*AL* 190). The notion of respect is raised a number of times (e.g. *AL* 200: ‘standing before the law, the doorkeeper enforces respect for it’).

49 The allusion here is again to Kant.

(Freud 2001: XVIII 39), the doorkeeper functions, as noted, as guardian of life, but also as a satellite of death, as an indifferent zone of *différance*, seeking to ensure that the self dies its own proper death; that the countryman does not go directly towards death.⁵⁰ A desire for the proper dominates therefore, in spite of the fact that the guardians who seek to assure this, ultimately serve death, via a detour, a delay (Chapter 1). The later doorkeepers, that is, the satellites closest to the desire for death/absolute pleasure are, as the first doorkeeper remarks, even more prohibitive and have a greater power of deferral than the first one. This interminable *différance*, Derrida notes, lasts ‘up to the end of (the) man’ (*AL* 204).⁵¹ Clearly alluding to, but in an effort to undermine the originary nature of the Oedipus complex (as well as of the prohibition of incest) Derrida points out that what is delayed is not some experience, enjoyment or supreme good, and neither is it the possession or penetration of something or someone:

What is deferred forever till death is entry into the law itself [*la loi elle-même*], which is nothing other than that which dictates the delay. The law [*La loi*] prohibits by interfering with and deferring the ‘ference’ [*‘férance’*], the reference, the rapport, the relation. What *must not* and cannot be approached is the origin of *différance*: it must not be presented or represented and above all not penetrated. That is the law of the law [*Voilà la loi de la loi*] ... It is neither natural nor institutional.

(*AL* 205)⁵²

- 50 The sexual seductiveness of the law of law is also analysed by Derrida in ‘The law of genre’ with reference to Blanchot’s *The Madness of the Day*, see specifically *AL* 247–8.
- 51 Agamben (1998: 49–67; 1999: 169–71) reads Kafka’s *Before the Law* as portraying the idea of the sovereign exception – the being in force of the law without significance – which has become the rule in modernity. According to Agamben, law in this way becomes indistinguishable from (bare) life. He sees the man from the country as having ultimately succeeded in his aim – of having the door closed – that is, interrupting the law’s being in force without significance. This will allow him (as a messianic figure) to enter, as he can do so only after the law’s being in force without significance has come to an end. Agamben thus sees in the man from the country (as in homo sacer), whose life coincides with death, a figure of silent resistance. There are of course a number of differences, but also clear overlaps between this reading and that of Derrida, especially when one compares it with a text such as ‘Plato’s pharmacy’ and the figure of the *pharmakos* (*Dis* 130–5). A more detailed analysis of Agamben’s reading cannot be undertaken here. A comment is however required in relation to Agamben’s remark that Derrida/deconstruction simply exposes this being in force of law without significance and thereby remains inside nihilism (Agamben 1998: 54, 59, 60; 1999: 170–1). As should be clear from the present and other chapters, this accusation is based on a fundamental misunderstanding of Derrida’s work, specifically in relation to the ultra-ethical at stake there. For a response from Derrida to Agamben’s analysis, although not specifically in relation to this reading of ‘Before the law’, see *BS* 315–34.
- 52 The Oedipus complex is repositioned especially in *PC* 340–1 as only one of the possible, and more precisely, one of the most restrictive effects of *différance*. See also *OH* 93–121 where Derrida gives a reading to Oedipus at Colonus which ties in closely with the analysis here of Kafka’s *Before the Law*.

According to Derrida, the secret that is guarded is of nothing present or presentable,⁵³ and the doorkeeper thus guards nothing (*AL* 205, 206).⁵⁴ He compares this situation with Hegel's account of the story of Pompey (106BC–48BC) who enters the innermost part of the tabernacle, finding there however no image of any being as he expected, but only an empty space.⁵⁵ Hegel comments that Pompey 'concluded from this that the genuine secret was itself entirely extraneous to them, the Jews; it was unseen and unfelt (*ungesehen und ungefühlt*)' (*AL* 208). The relation of the secret with sexuality is further explored by Derrida in his analysis of the phrase 'ante portas' (before the gates), which refers to the place of premature ejaculation and which could also be said to be alluded to in the title of Kafka's text.⁵⁶ Derrida however seeks to loosen this expression somewhat from its common meaning and Freudian analysis. At stake here, he notes, is a non-penetration (and non-insemination), whether this is because of premature ejaculation or non-ejaculation. The result would be the same: 'The tabernacle remains empty and dissemination fatal. Relation to the law remains interrupted, a without-relation' (*AL* 209). The doorkeeper, Derrida furthermore notes, is not *ante portas*, but *ante portam*: he guards *the* door, insisting on the uniqueness and singularity of this door (*AL* 210). Derrida views this as one of Kant's most acute insights: that the law is always an idiom, and not a universal generality; it is meant for you alone. Nonetheless one cannot succeed in entering it. Like the law of law, the text 'guards itself, maintains itself ... speaking only of itself, that is to say, of its non-identity with itself' (*AL* 211). The text is ultimately ungraspable, incomprehensible, or impregnable. It is intangible, not only because we cannot, but because we also have no right to touch it (*AL* 212).⁵⁷

53 In his essay on Nelson Mandela, Derrida refers similarly to 'the law of laws' ('NM' 29) and a 'law beyond legality' ('NM' 34) – a law which has not as yet presented itself – in the name of which Mandela challenges the legal system; see Gasché (1994: 17–20); Bischof (2004: 208–9); Lawlor (2009: 9–14); Bernasconi (1993: 106–8).

54 The notion of the secret ties in with the question of inheritance referred to above. Derrida (*AF* 10–11, 35) suggests that the desire for death does not itself leave an archive – it is archive destroying – but it transits through an archive, a (ciphered) transgenerational memory or archive; see also *PC* 353; *FWT* 3–6. At stake is therefore an 'inheritance' that precedes the biology–culture, body–psyche distinction.

55 See also *Glas* 49a–50a. Note further that according to Hegel, as Derrida (*Glas* 49a) notes, 'space is death'.

56 Derrida also repeats this move in 'concluding' his text prematurely a number of times, see e.g. *AL* 209, 212, the text ending only on *AL* 220.

57 On the untouchability of the literary text, see further *PM* 141–2. The link between untouchability and sexuality is made at *AL* 194–5. See further *PC* 341–5 on the relation between 'literary fiction' and the (demonic) death drive.

Originary guilt and parricide

At this point we are in a position to appreciate the similarities between Derrida's reading of Freud's originary myth and Kafka's *Before the Law*, as well as to see how his analysis ties in with the notion of justice. In the latter respect, it will for now perhaps be sufficient to point out that in 'Force of law', the notion of justice takes the place of what is here referred to as 'the law of law' (*la loi de la loi*), and is furthermore distinguished from *le droit* (Chapter 6). As will be indicated in Chapter 6, the notion of justice in 'Force of Law' needs similarly to be understood in close relation to Freud's thinking. The same applies to the discussion of justice in *Specters of Marx* (Chapter 7). The question of guilt, which clearly plays a role in the texts referred to above, in a sense links all these texts.⁵⁸ Derrida elaborates on the notion of 'originary guilt' in a number of texts, specifically with reference to Nietzsche, Levinas, Blanchot, Freud and Heidegger.⁵⁹ Here one finds for example the idea expressed that a rigorous distinction can never be drawn between death and murder.⁶⁰ The survivors, namely all those living and delaying entering the door of the law, are always already guilty and required to ask forgiveness for their being-there which inevitably involves murder (*AR* 383–5).⁶¹ This originary guilt does not therefore wait for the commission of any particular crime, and gives rise to an infinite responsibility (*G&L* 52–3), a duty beyond all debt (*WM* 204–5; *A* 6). In the essay 'To forgive: the unforgivable and the imprescriptible', Derrida gives expression to this responsibility and duty, by tying together the notions of originary guilt, the gift, forgiveness and hospitality, by noting that 'I always have to be forgiven, to ask forgiveness for not giving, for never giving enough, for never offering or welcoming enough. One is always guilty,

58 In 'Préjugés' 95 Derrida explicitly makes the link between being before the law and originary guilt.

59 See specifically *Being and Time* where Heidegger (1962: 332) remarks as follows on the origin of morality: 'This essential Being-guilty is, equiprimordially, the existential condition for the possibility of the "morally" good and for that of the "morally" evil – that is, for morality in general and for the possible forms which this may take factually. The primordial "Being-guilty" cannot be defined by morality, since morality already presupposes it for itself.' Derrida reads this as a capacity to be responsible before any debt, fault or law in the ordinary sense, as well as beyond subjectivity, knowledge and consciousness (*PC* 264 fn. 10).

60 See further *PC* 363.

61 In a number of texts, including *Specters of Marx* and *Rogues*, Derrida derives from this a responsibility not only towards those presently alive, but also towards those who are dead and still to be born (*SM* xix; *R* 54–5). In *BS* 110, this responsibility is specifically linked to the guilt/shame of the sons in killing the primal father: '[I]t is not certain that even in the originary history or fiction of the murder of the primal father according to which the brother-sons subject themselves to the law because, says Freud, the shame of their crime compels them to do so, it is not certain that this shame does not signify, always already, in its possibility, the bond of obligation or debt with respect to the dead.'

one must always be forgiven the gift.’ (‘TF’ 22) At stake in this notion of originary guilt is thus something arche-ethical, ultra-ethical, or as Derrida also puts it with reference to Heidegger and Nietzsche, ‘a pre-ethical, pre-moral, pre-juridical conscience’ (*Neg* 223). Originary guilt could, with reference to the present context, be said to lie in the breach of the law itself, the law before the law, a breach which has always already occurred.⁶² Whereas Kafka’s text fairly easily lends itself to such a notion of originary guilt, as we saw, Freud’s text calls for a somewhat greater effort.⁶³

The above analysis is also important for understanding the notions of friendship and the democracy to come in their relation with sovereignty in Derrida’s thinking. From Derrida’s reading it appears that in Freud’s myth nothing really happens, as the father, after his murder, becomes even more powerful than before. In telling the myth, Freud furthermore continues the tradition of privileging the friendship between rival brothers in the construction of democratic equality, or, as Derrida puts it in *Rogues*, ‘the sharing of *kratos* in the *dēmos*’ (*R* 16–17). Sovereignty, defined by Schmitt (1985: 5) as the ability to decide on the exception, thus simply takes a slightly new form in this transition from the violence of one to the violence of the community, as also happens in politics with the transition from monarchy to democracy, both these forms of rule remaining tied to the idea of a sovereign God, a father (*FWT* 91–2). Even modern democracy is thus based on a monarchical principle (*WA* 260). As Derrida however shows in ‘Plato’s pharmacy’, and as Naas (2003: 12–13) elegantly puts it, the son is ‘the father of the father, the father already an effect of the son’.⁶⁴ This is of course because the father is invoked by the son in light of the fear of death (*Dis* 123–4). A more radical parricide (a different kind of revolution, as we will see in Chapter 7)

62 See also the first part of *PTT* 85–100 where Derrida analyses the reaction to the events of September 11, 2001, in terms of an originary trauma. This ties in closely with Freud’s analysis of anxiety. In the *New Introductory Lectures*, Freud (2001: XXII 59) e.g. asks, perhaps rhetorically: ‘How would it be if these insane people were right, if in each of us there is present in his ego an agency like this which observes and threatens to punish, and which in them has merely become sharply divided from their ego and mistakenly displaced into external reality.’ Derrida in *AL* 209–10 also seems to allude to a kind of originary anxiety in his discussion of *ante portas* (see above).

63 Derrida alludes to his own originary guilt with reference to his experience in Prague, similar to that of K in *The Trial* (*AL* 218). The notion of originary guilt raises interesting questions about criminal law. If ‘criminals’ commit crimes in acting upon this originary guilt, as Freud and Derrida seem to suggest, the attempt to make ‘guilt’ part of a system of exchange (in terms of which criminals are caught and punished) raises serious questions about the legitimacy of the criminal justice system as a whole; see *FWT* 176–80. This system could be said to inherently not be able to address ‘crime’ on the level where things actually ‘happen’.

64 See similarly *Glas* 56a.

would have to take place than what we find (explicitly) in Freud's myth if we are to displace sovereignty in relation to an originary guilt instead of viewing guilt as a consequence of the commission of some specific crime. This is indeed what happens in Derrida's reading where Freud's myth is placed in a *mise-en-abyme*, similar to the story of Kafka, without origin or foundation. These texts are effectively (made) unreadable, and in this way deprived of a father who would seek to assure meaning (*SQ* 146–7; *Dis* 82, 126). They leave us with a concept of law which does not have its origin in the Oedipus complex and which has no essence, but which is instead to be understood as a repetitive search for the proper as a counter-reaction to the desire for death/absolute pleasure, as a 'stricture' of this desire for the perfect gift.

Madness and the law

Not only the reason of millennia – the madness of millennia too breaks out in us. It is dangerous to be an heir.

Nietzsche *Thus Spoke Zarathustra* 102

The law is mad. The law is mad, is madness; but madness is not the predicate of law. There is no madness without the law; madness cannot be conceived before its relation to law. This is the law, the law is madness.

Derrida ‘The law of genre’ (*AL* 251)

In ‘Force of law’ Derrida describes justice as ‘without reason and without theoretical rationality, in the sense of regulating mastery’. He then notes that ‘one can recognize in it [i.e. in justice], even accuse in it a madness’, and adds that ‘deconstruction is mad about and from such justice, mad about and from this desire for justice’ (*AR* 254). Derrida furthermore refers to Kierkegaard who describes the instant of decision as madness (*AR* 255). The relation posited here between justice and madness stems at least partly from Derrida’s earlier debate with Foucault on the question of madness.¹ In Derrida’s 1963 lecture ‘Cogito and the history of madness’ (*WD* 31–63), which likewise includes a reference to the above-mentioned passage from Kierkegaard, he provides a detailed reading of Foucault’s *History of Madness*, published in 1961.² Foucault responded in 1972 in two texts (Foucault 2006: 550–90). The debate with Foucault is continued posthumously in Derrida’s 1991 lecture, “‘To do justice to Freud’: the history of madness in the age of psychoanalysis” which specifically traces the intersection between the thinking of Foucault and Freud (*Res* 70–118). Although the debate between Derrida and Foucault

1 Derrida deals with the question of madness elsewhere too, see *SA* and *Psy II* 87–103.

2 An abridged edition was published in English in 1967 as *Madness and Civilization: A History of Insanity in the Age of Reason*, based for the most part on an abridged French edition published in 1964.

has been the subject of much academic discussion,³ the relation between the Foucault–Derrida debate and law has not as yet been fully explored.⁴ This chapter will seek to do so through a reading of Derrida which will specifically concern itself with the ‘site’ from which Foucault launches his radical critique of the practices of modernity which we tend to view as ‘normal’.⁵ As will be seen, this does not lead to the rejection of Foucault’s project, but its further radicalisation.⁶ The chapter will start with a reading of ‘Cogito and the history of madness’. This will be followed by a reading of Derrida’s ‘To do justice to Freud’, which enquires into Foucault’s thinking on power and pleasure. The chapter will conclude by pointing to the implications of Derrida’s reading of Foucault for law.

Cogito and the history of madness

In his reading of Foucault’s *History of Madness*, Derrida focuses primarily on the Preface of the *History* as well as Foucault’s reading of Descartes’ *Meditations* (1641) in chapter II of part one of the *History*. Only a small part of Foucault’s *History of Madness* concerns itself explicitly with an interpretation of Descartes’ *Meditations*, but according to Derrida the whole of Foucault’s project is tied to this interpretation.⁷ Despite appearances to the contrary, Derrida does not seek to undermine Foucault’s project or place it in question, but rather to sharpen its edges ‘philosophically’.⁸ In analysing these two texts, and before engaging in a fairly detailed analysis of Derrida’s reading of Descartes’ *Meditations*, we will seek answers to the following questions:

- 3 Excellent commentaries on this debate are provided by inter alia Felman (1975); Flynn (1989); McNay (1994: 31–7); and Naas 2003: (57–75).
- 4 For a brief discussion of this debate, see Williams (1988: 377–9). The author however misunderstands Derrida’s notion of textuality as contending that there is no external reality (at 376). He consequently sides with Foucault in the debate with Derrida. For a brief mention of the debate, see also Eichner (2001: 17).
- 5 See e.g. Habermas (1990: 238–65); Fraser (1981); as well as Taylor (1984) who have raised this question in relation to Foucault.
- 6 In the early legal reception, Derrida and Foucault were both categorised as postmodern or poststructuralist thinkers whose arguments were essentially the same; see e.g. Peller (1985) and Hutchinson (1991), the latter contending that both Foucault and Derrida point to the historically situated character of truth and knowledge, and as emphasising the existence of many narratives rather than one meta-narrative.
- 7 This is borne out, at least superficially, by Descartes’ reappearance in various places throughout the *History of Madness*.
- 8 The quotation marks are required here because of Derrida’s relation to philosophy. As pointed out in Chapter 1, he is not simply in opposition to philosophy (a position which Foucault at times adopts and which as we will see below ultimately remains philosophical), but seeks to exceed philosophy in a rigorous manner.

- Can a history of madness in fact be written?
- From which 'site' does Foucault write his history of madness?
- When did the 'internment' of madness start?
- With which concept of madness does Foucault work?

The impossibility of a history of madness

Central to Derrida's concerns is Foucault's claim to write the archaeology of the silence imposed on madness through the division between madness and reason. In other words, Foucault attempts to write a history of madness itself, by letting madness itself speak (*WD* 33–4; Foucault 2006: xxviii, xxxii). Stated yet differently, Foucault does not want to write this history from within the language of reason, of madness interned, but of madness before its capture by knowledge. This history, as Derrida (*WD* 34) puts it, purports to be a history of untamed madness before being caught by classical reason, whilst using the language that was used to capture madness. The language of reason is however itself the language of order and of the system of objectivity which necessarily captures or objectifies madness. This raises the question whether a 'history' of silence can in fact be written, as all history, per definition, is of rationality and meaning in general (*WD* 308 fn 4). In his later discussion of Descartes' *Meditations*, Derrida (*WD* 53–4) phrases this principle thus:

[I]f discourse and philosophical communication (that is, language itself) are to have an intelligible meaning, that is to say, if they are to conform to their essence and vocation as discourse, they must simultaneously in fact and in principle escape madness ... By its essence the sentence is normal.⁹

The question this raises is whether one can, by elaborating on the ways in which psychiatry has excluded reason and by suspending the language of psychiatry (as Foucault does), return to innocence and end one's own complicity in the exclusion of madness by the rational and political order (*WD* 35; Flynn 1989: 203). The psychiatrist is after all only a delegate of this order, one of many. As Derrida points out, all European languages are implicit in the adventure of Western reason as well as in the delegations which have led to the capture of reason. It therefore seems to be impossible to put on trial this history (of the objectification of madness) as Foucault seeks to do, as the proceedings as well as the verdict are, due simply to their articulation, bound to repeat the crime. Even an archaeology of silence amounts to a logic, an organised language, an order and a work. Foucault's archaeology of silence therefore effectively amounts to a repetition of the act of excluding

9 In Derrida (*Res* 71) this dilemma is expressed in terms of witnessing: who can ultimately bear witness to a history of madness (or of sexuality)?

and objectifying madness, also at the moment when this exclusion is denounced (*WD* 35, 53–4). Derrida nevertheless reads Foucault as being aware of this, at least on a certain level, as Foucault at certain points acknowledges the impossibility of writing this archaeology of silence (*WD* 36–7). Foucault (2006: xxxii) acknowledges, for example, the necessity and impossibility of having to write his discourse without the support of the syntax of reason. Derrida comments that Foucault could perhaps be said to perform this feat (that is, his archaeology of silence) through his *practice* rather than his *formulation*. In other words, because the silence cannot be spoken without at the same time re-captivating it within *logos* – the language of objectification – Foucault gives expression to it through his pathos, by means of his new and radical silent praise of folly. Behind Foucault’s explicit project, another project can in other words be said to take place in silence.¹⁰ This raises the question of conditions of possibility. What makes possible Foucault’s feat? How does it happen that Foucault can at the point in time that he writes his *History of Madness*, understand and enunciate this breaking point in the classical age (spanning from approximately 1650 to 1800) between a determined reason and a determined madness (to be distinguished from reason and madness in general)? Foucault does not explicitly reflect on this in his *History*. Derrida’s contention is that this could happen only because of a certain liberation of or dislocation within madness (*WD* 38). Implicit in this statement is the importance of Freud’s thinking which Foucault at times denies (*Res* 73).¹¹ Derrida enquires into the relation between Foucault and Freud in his ‘To do justice to Freud’ which will be discussed below.

Behind Foucault’s projected archaeology of silence, another project is therefore engaged in. To understand what is at stake here, we need to enquire into the way in which these two projects proceed. Because the silence of madness is not an original silence but one which (according to Foucault) was imposed at a certain point in history, Foucault feels the need to find the origin of this imposition. He has to find the origin of the separation between reason and madness (unreason) in contrast with their free circulation and exchange up to that point (*WD* 38). Foucault (2006: xxxiii) refers to this origin as ‘the decision’. Derrida believes that a slight change in vocabulary is required here: the split between reason and madness should rather be referred to as a ‘dissension’, in order to point to the self-dividing action at stake here, namely what is made exterior, is the interior (*WD* 38–9). Madness is thus not exterior to philosophy, but at a certain ‘moment’ interior, and then cast out as if it was

10 These comments clearly show that a reading of Derrida’s ‘Cogito’ which is to the effect that he believes that there is no escape from or no space outside of reason (see Boyne 1990: 53–89) is on the wrong track.

11 For an analysis of the possible reasons behind Foucault’s reticence in this respect, see Whitebook 2003.

already exterior. Once one recognises the importance of this change in vocabulary, a number of questions are raised which require a rethinking of some aspects of Foucault's analysis. These relate specifically to the question referred to earlier as to when the internment of madness started. Foucault (2006: xxix) more particularly presents the Greek *logos* as having had no contrary. At the same time he refers to the 'reassuring dialectic of Socrates' in relation to the Greek notion of *hybris*, which as Derrida points out, shows (when read together with the texts of Greek philosophers) that the Greek *logos* had 'already expelled, excluded, objectified or (curiously amounting to the same thing) assimilated and mastered as one of its moments, "enveloped" the contrary of reason' (*WD* 40). This means, contrary to Foucault's assertion, that the separation between reason and its other had not taken place (for the first time) in the classical age, but long before then. The entire history of philosophy and of reason in fact bears witness to this struggle. Since the Greeks, reason has been divided against itself, and whatever happened afterwards (including the events as described by Foucault) are only socio-economic epiphenomena that take place on the surface. Madness therefore does not start being confined in the classical age; this internment already starts with the awakening of language. The risk Foucault runs in writing a history of madness in this way is to assume a unity of original presence followed by a subsequent event of division, thereby confirming metaphysics in its fundamental operation.¹²

This brings us to the question of the concept of madness in the *History*. Derrida points out that the concept of madness is never submitted to thematic scrutiny by Foucault. Nonetheless:

everything transpires as if Foucault knew what 'madness' means. Everything transpires as if, in a continuous and underlying way, an assured and rigorous precomprehension of the concept of madness, or at least its nominal definition, were possible and acquired. In fact, however, it could be demonstrated that as Foucault intends it, if not by the historical current he is studying, the concept of madness overlaps everything that can be put under the rubric of *negativity*.

(*WD* 41)

The allusion here is of course to Hegel, and the implication is that Foucault understands madness in a restricted sense, more specifically in terms of the popular and equivocal notion of madness (*WD* 41). Derrida's 'understanding' of madness as we will see below is much more 'radical' for the reason, as he points out, that reason's constitution of itself, lies at the origin of history; it is historicity itself. In other words, the exclusion of a certain madness is the

12 As Flynn (1989: 214–15) points out, the procedure of positing an inside and an outside (as Foucault does regarding reason and madness) is also a fundamental metaphysical move.

condition of possibility of meaning and of language. This at the same time implies that what happens in the classical age as described by Foucault ‘has neither absolute privilege nor archetypal exemplarity’ (*WD* 42). It is merely an example among others of the way in which a certain madness is dealt with in history. As we will see below, much of this ‘criticism’ is later implicitly accepted by Foucault.

Descartes’ Meditations

We next arrive at the important discussion of Descartes’ *Meditations*, which Foucault engages in at the beginning of chapter II of part one of the *History of Madness*. It goes to the heart of the question of the ‘meaning’ of madness and thus requires careful scrutiny. Foucault views these passages as the philosophical internment of madness (*WD* 44) and we can see clearly from his reading how he understands madness in a restricted sense (in line with Hegel’s negativity).¹³ Descartes in the First Meditation seeks to question all the opinions he has held up until then so as to ultimately arrive at a point where he holds onto only those opinions which are certain and indubitable. For this purpose he does not enquire into every opinion so held but only into its foundations. This is carried through in three successive stages. (1) He first enquires into the senses as a source of knowledge and points out that although our senses sometimes deceive us in relation to things that are not clearly perceptible and things at a great distance, it would be unreasonable to doubt certain things that are presented to our senses. The senses are in other words mostly trustworthy. For example, the fact that he is sitting by the fire, in his dressing gown, with a piece of paper in his hand of which he is aware through his senses, cannot reasonably be doubted. That is, unless he were a madman, who believes that he is a king when he is in fact poor; or who believes that he is wearing gold and purple when in fact he is naked; or who imagines that his head is made of earthenware, that he is a pumpkin or is made of glass. But, says Descartes, he himself is clearly not mad, and it would be foolish of him to follow their example and deny the truthfulness of the senses. (2) Let us then go further, says Descartes, and consider that I might be asleep and dreaming everything that my senses represent to me – that is, that I am sitting here in front of the fire, etc. In sleep we are after all often deceived into believing that what we experience is an experience in real life. Let us assume then that I am asleep, Descartes says, are there then not still certain things which remain indubitable?

13 See in this respect the confession of Foucault (1988: 312): ‘[W]hat remained of traditional philosophical discourse in the work that I had done on the subject of madness embarrassed me. There is a certain Hegelianism surviving there. It isn’t necessarily enough to deal with such menial things as police reports, measures taken for confinement, the cries of madmen to escape from philosophy. For me Nietzsche, Bataille, Blanchot, Klossowski were ways of escaping from philosophy.’

Indeed. It is like a painter who paints something which does not exist in reality. Even then the forms or at least the colours will be real. Similarly physics, astronomy, medicine, etc. may contain many doubtful things, but ultimately they are based on mathematics, geometry and other similar sciences which, despite the fact that they may not exist, are certain and indubitable. These are in other words truths of a non-sensory origin which are true, whether or not one is awake or asleep (*WD* 46). Even if I am asleep, Descartes concludes, ‘two and three together always make five, and a square never has more than four sides’ (Descartes 1968: 98). (3) Descartes then goes even further to place all his certainties in doubt, this time by going beyond both sensory and non-sensory foundations, and questions the metaphysical foundations of his knowledge. He now imagines that the God in whom he has always believed as being all-powerful may actually be an evil genius who has decided to deceive him so that all the certainties he has just established are only such because of deception. This places in doubt all his certainties, Descartes acknowledges.

For Foucault, the most important stage in the above process of questioning is the first one, and specifically the following sentence of Descartes (1968: 96): ‘But these are madmen, and I would not be less extravagant if I were to follow their example.’ Foucault focuses his analysis on the first two parts of the procedure ((1) and (2) above) and draws a distinction between three forms of doubt: (a) error of the senses (b) dreams and (c) madness. In the case of (a) and (b), truth does not slip away completely. There is still a residue of truth that remains in both instances. In the words of Foucault (2006: 45):

Thus neither sleep peopled with images nor the clear consciousness that the senses are deceived can lead doubt to its most universal point: we might admit that our eyes can deceive us, and ‘suppose we are asleep’, but the truth will never slip away entirely into darkness.

It is however different with madness. Here all truth dissolves, Foucault contends. Descartes consequently does not delve on madness as extensively as he does on dreams, but simply excludes it by decree as appears from the quotation from Descartes’ *Meditations* referred to above. This is because to think (*ego cogito ergo sum*) excludes the possibility of being mad. There can be little doubt about the originality of this reading by Foucault, which provides an excellent introduction to this chapter which will, following upon this ‘philosophical internment’, continue to trace the political decree of the great internment of madness. It however comes at a price. Apart from the fact that Descartes’ text needs to be distorted to arrive at this reading,¹⁴ it restricts the

14 Derrida’s contentions in this regard again show that he is not of the view that correctness in reading (including of his own texts) is no longer a requirement or possibility. Correctness and truth are displaced in Derrida’s thinking, not discarded. This said, Derrida’s reading of Descartes is by no means an orthodox one.

meaning of madness to something calculable and excludes from the reading Descartes' consideration of 'total madness' which exceeds metaphysics. This 'total madness' nonetheless corresponds with Foucault's definition of madness as 'the absence of a work' or 'the absence of an *œuvre*' (*WD* 54; Foucault 2006: xxxi).¹⁵

In his analysis of Descartes' First Meditation, Derrida (*WD* 48) points out that Descartes does not, as Foucault contends, 'sidestep the possibility of dream or error' and that it is furthermore not the case that '[d]reams and illusions are overcome by the very structure of truth' (Foucault 2006: 44 and 45). There is first no sidestepping or circumvention because Descartes follows a procedure in which first the senses are questioned and then radically or hyperbolically placed in doubt (steps (1) and (2) above), whereafter even mathematical truth (which is all that remains after raising these 'natural' reasons for doubt) does not escape from being placed in doubt. Mathematical truth will more specifically be placed in doubt by 'the artificial and metaphysical assault of the evil genius' (*WD* 46). According to Derrida, the reason why Descartes deals with dreams in greater detail (than with the other forms of sensory deception) is that what applies in the case of dreams applies a fortiori in the case of sensory perception: certainties and truths of a non-sensory and non-imaginative¹⁶ origin are the only ones that escape sensory error and oneiric composition (*WD* 48). Sensory and imaginative sources can thus not provide one with certainty. Dreams and illusions consequently also cannot, as Foucault contends, be overcome or surmounted by the structure of truth, because Descartes is prepared to posit the possibility of total error for all knowledge gained from the senses and imaginary constructions. The only certain things which remain at this point (before the arrival of the evil genius) are that which is simple (such as colour) and intelligible (*WD* 49). In so far as the purely intelligible (for example, two plus three equals five) still remains at this point (a provisional certainty which is no longer of a sensory or imaginative nature) it will, as said before, be placed radically in doubt in the next step. The 'exclusion' of madness at this point moreover does not occur for the reasons Foucault asserts, but simply because the madness that is invoked here (the popular and everyday idea of madness) is not wrong about everything, is not mad enough. Madness in this form does not provide the most serious form of sensory illusion. In this sense, the dreamer is more insane than the madman (*WD* 50) and the invocation of the evil genius will proceed further to posit the possibility of total madness.

Wherein lies the importance of Descartes' evil genius and the importance of taking account of it in writing a history of madness? We are of course at

15 Alan Bass, the translator of Derrida's 'Cogito' understands this as a work which is not governed by institutionalised rationalism; see *WD* 308 fn. 6.

16 As examples of products of the imagination, Descartes (1968: 97) refers to pictures and painting.

this point no longer concerned with natural doubt (stages (1) and (2)) but the fiction or hypothesis of the evil genius (stage 3). Derrida's description of the total madness that is at stake here clearly goes beyond the popular conception thereof and is of great importance for the rest of our discussion:

Now, the recourse to the fiction of the evil genius will evoke, conjure up, the possibility of a *total madness*, a total derangement over which I could have no control because it is inflicted upon me – hypothetically – leaving me no responsibility for it. Total derangement is the possibility of a madness that is no longer a disorder of the body, of the object, the body-object outside the boundaries of the *res cogitans*, outside the boundaries of the policed city, secure in its existence as thinking subjectivity, but is a madness that will bring subversion to pure thought and to its purely intelligible objects, to the field of its clear and distinct ideas, to the realm of the mathematical truths which escape natural doubt.

(*WD* 52–3)

Derrida at this point seeks to, at least partially, defend Descartes from Foucault's accusation to the effect that he (Descartes) was the first philosopher to intern madness through an act of force and exteriorise it from the cogito (I who think, I cannot be mad), upon which followed the political internment. Derrida's contention here, tying in with our discussion above, is first that the 'exclusion' of madness is not something that happens at a determinate point in history. If madness is indeed the absence of a work, as Foucault contends, then language by its nature excludes madness which is essentially silence, stifled speech (*WD* 54).¹⁷ This is not imposed at one determinate moment in history rather than another (for example with Descartes) but is linked to an act of force which opens up history and speech in general.¹⁸ This silence, like non-meaning, furthermore continues to haunt language as its resource. At stake here is not a determinate language, for example Latin or French (the languages of Descartes), but language in general. Through his own language (in general), Descartes reassures himself that he is not insane. Language, conceived in its essence (in other words, metaphysically) therefore entails the break with madness, and 'it adheres more thoroughly to its essence and vocation, makes a cleaner break with madness, if it pits itself against madness more freely and gets closer and closer to it' (*WD* 55). Foucault's *History*, Derrida contends, similar to Descartes' *Meditations*, seeks to in this way get closer to madness so as to protect itself against it and to intern it.

17 These passages should not be understood as an indication of essentialism on Derrida's part. What he describes here is the essence of language in metaphysics.

18 See also Flynn (1989: 209).

Madness is moreover not simply exterior to philosophy as Foucault contends, especially after Descartes. The certainty of the cogito is attained not by containing or interning madness, but by asserting itself in the midst of madness. Descartes' argument in other words amounts to the following: 'I think, even if I am completely mad'. Derrida reads Descartes here as going beyond a *determined* reason and a *determined* unreason to a 'zero point at which determined meaning and nonmeaning come together in their common origin' (*WD* 56).¹⁹ This is the 'moment', as Derrida later adds, 'when reason and madness have not as yet been separated' (*WD* 58). Derrida finds in this 'point' the condition of possibility of Foucault's narration of the history of madness.²⁰ It is from this point that determinate forms of the opposition between reason and unreason can appear as such and be stated. At this point, which is also the proper and inaugural moment of the cogito, there is as Derrida notes, still very little certainty attached to the cogito – it is not in the least reassuring (*WD* 56).²¹ Descartes' project is in this respect not dissimilar to that of Socrates who contemplates the good beyond being (*epekeina tes ousias*), which Glaucon in Plato's *Republic* refers to as a 'daemonic superiority' (Plato 1997: 1129–30 [509b–c]). The latter is as little reassuring and far exceeds the Greek notion of *hybris*, if we understand the latter as a pathological modification in man (*WD* 57). Foucault, by ignoring or not giving sufficient attention to Descartes' radical placing in question of all certainties through his invocation of the evil genius, excludes total madness from consideration and thus performs an even greater exclusionary act than he (unfairly) accuses Descartes of performing. Foucault in other words reduces Descartes' project and encloses it within a determined historical structure, whereas what is at stake here far exceeds this structure (*WD* 57). Derrida therefore provocatively refers to Foucault's discourse as being totalitarian in as far as it 'risks erasing the excess by which every philosophy (of meaning) is related, in some region of its discourse, to the nonfoundation of unmeaning' (*WD* 309 fn 26). The 'totalitarian' nature of Foucault's discourse also appears from his reading of Descartes to the extent that it involves a certain violence which reduces that which is hyperbolic (in Descartes) to what is intra-worldly. It is this violence which makes possible our conception of madness or what Derrida refers to as the 'making possible [of] all straitjackets' (*WD* 57).

After having reached this extreme point, Descartes however immediately seeks to reassure himself by certifying the cogito through God and by identifying

19 The notion of 'origin' should be placed in quotation marks, because what is at stake here is more precisely a pre-origin, the 'origin of origin'.

20 Derrida *WD* 309 fn. 24 also notes that it is less a question of 'point' than that of an original temporality, or what he elsewhere refers to as a 'past that has never been present'; see *Glas* 79b.

21 There is of course an allusion here to Foucault (2006: xxix), who as we saw earlier, refers to 'the reassuring dialectics of Socrates'.

the act of the cogito with a reasonable reason (*WD* 58).²² He does this when he needs to temporalise the cogito. Descartes contended earlier that the cogito is valid only at the point where thought is attentive to itself, which means that it needs to reassure itself through the positing of that which is stable and infinite (God and reason). In the end, as Derrida notes, it is God alone (that is reason) who protects Descartes from the madness which the cogito, left to itself, opens itself up to in the most hospitable way.²³ Tying in with what was said earlier about the relation between language and reason, when one (as Descartes does), contemplates and retains the cogito, communicates it as well as its meaning, one must not be mad. Viewed from the other side, to be mad is to not be able to make the cogito as such appear to any other – even to myself. The madman, even if he could repel the evil genius, would not be able to tell himself this. He thus cannot say it, cannot express it in reasonable language (*WD* 59). This is, as we saw above, because language in its essence is reason and logos and constitutes the break with madness (*WD* 55). From Descartes' *Meditations* it therefore appears that philosophy is 'the reassurance given against the anguish of being mad at the point of the greatest proximity to madness' (*WD* 59).

What happens in Derrida's reading of Descartes is that the cogito is divided into hyperbole which cannot be contained within a determined historical structure, on the one hand, and a finite structure – that which can be so contained, on the other. It is this division which according to Derrida defines the history of philosophy and makes historicity possible (*WD* 60). Philosophy can in other words only exist by constantly imprisoning and oppressing madness, the madman within us (*WD* 61). Foucault (2006: 343) notes something similar, stating that a power of unreason constantly keeps vigil over the cogito. There is moreover, Derrida adds, a continuing or unending dialogue in history between that which exceeds totality and that which is enclosed within totality (*WD* 60). This constant movement is referred to by Derrida as *différance*, and he describes its functioning in Descartes' *Meditations* as follows:

[T]o-attempt-to-say-the-demonic-hyperbole from whose heights thought is announced to itself, *frightens* itself, and *reassures* itself against being annihilated or wrecked in madness or in death. *At its height* hyperbole, the absolute opening, the uneconomic expenditure, is always reembraced by an *economy* and is overcome by economy. The relationship between reason, madness, and death is an economy, a structure of deferral whose irreducible originality must be respected.

(*WD* 61–2)

22 See also *OG* 97–8; *MP* 294–6.

23 This chance reference to hospitality will be taken up in Derrida's texts of the 1990s and thereafter; see e.g. *OH*, *A*, and see further below.

Derrida's contention in 'Cogito' could be summarised by saying that Foucault's archaeology of the silence of madness, which exposes the distinction between reason and its other (madness) which is excluded, finds itself positioned within a broader framework which operates on the basis of a more radical exclusion (of total madness). What Foucault describes is therefore a symptom of a broader phenomenon which characterises language and reason. Derrida can consequently be said to in large part agree with Foucault, whilst at the same time contending that what Foucault writes about in a determined age, applies to reason and language in general. In a sympathetic reading, Foucault can be shown to be aware of this, and to be engaging in such an analysis too. It is important to note that Derrida does not in any way cast doubt on the importance, necessity and legitimacy of Foucault's project (*Res* 113).²⁴ He simply repeats what Foucault says about the concept of madness with reference to a madness which breaches all limits.

Foucault (2006: 550–90) and others however understood Derrida's reading as an attack in relation to his whole project or at least as the expression of an opposition to (all of) Foucault's thinking. In his first response, published in the Japanese journal *Paideia* in February 1972 (now also included as an appendix in the *History*), Foucault (2006: 578) seeks to (further) distance himself from philosophy and furthermore to situate philosophy within the sphere of knowledge. Philosophy, Foucault asserts, does not provide a foundation for knowledge. Philosophical discourse in a given period is instead subject to conditions and rules for the formation of knowledge in the same way as any other form of discourse with rational pretension. The question which Foucault's stance raises is whether philosophy can indeed be escaped by historicising it and then simply stepping outside of it. Both questions must be answered in the negative. In the first place, reason or meaning in general, which as we saw can be equated with the idea and name of God, cannot be historicised in this way without deceiving oneself (*WD* 309–10 fns 27 and 28). This is because there is a 'oneness' to reason which leaves one with limited options in protesting against it (*WD* 36). Second, all our concepts and the way in which they are organised, in this case, the concepts of madness, of experience, and of the event as well as the inside–outside distinction which Foucault (2006: 589) again invokes, stem from the Greek dawn of Western philosophy and are consequently metaphysical in nature (*WD* 40). As we saw above, one of Derrida's main arguments in 'Cogito' and elsewhere is precisely that in believing that a simple escape from metaphysics is possible, one somewhat naively ends up repeating the gestures of metaphysics. The concept of history (archaeology) which Foucault employs here is, as we saw earlier, itself rational in nature (*WD* 36). The Hegelian dialectic, which is

24 As contended e.g. by Valverde (1999: 665); Saïd (1978); Boyne (1990); see also *FWT* 6, 10–12.

clearly at stake here, cannot in other words be successfully challenged from a position which believes itself to be simply exterior to philosophy. It can only be challenged from within (*WD* 36). In so far as the reading of Descartes is concerned, Foucault in both responses defends his earlier reading in relation to determined madness by relying on similar ‘structural’ arguments. Foucault (2006: 570–2) furthermore rejects Derrida’s argument, specifically in relation to the evil genius, for structural reasons. He contends that when Descartes speaks of the evil genius this is ‘a voluntary exercise, controlled, mastered and carried out from beginning to end by a meditating subject who never allows himself to be surprised’ (Foucault 2006: 571). Derrida is said to erase this from Descartes’ text. This indeed appears to be the case from Descartes’ text, and Foucault cannot be accused of an incorrect reading. The difficulty with this reading is nevertheless its (metaphysical) assumption that Descartes, or for that matter any author, including Foucault himself, is capable of such an exercise. The reason why Derrida finds specifically this part of Descartes’ *Meditation* attractive is that there madness as a concept is put into play. It shows the relation between thinking and madness, not only in the text of Descartes, but in that of all writers, because of the nature of writing.²⁵ For Foucault this is not important, because of the nature of his project – attempting to show how reason interns its other at a specific point in history. As we saw above, this is done at a cost. Foucault’s reading, also in his response to Derrida, has the consequence of excluding the (absolute) madness in ourselves from consideration.²⁶

Doing justice to Freud

In ‘To do justice to Freud’, Derrida gives an even more sympathetic reading to Foucault, repeating his admiration for Foucault’s thinking. Derrida notes in this text that it would perhaps, in retrospect, have been better had he invoked Freud and psychoanalysis in his reading of Foucault’s *History of Madness*. The reason why he chose to focus on Descartes was the centrality of Descartes in Foucault’s text. At the time of Derrida’s ‘Cogito’, Descartes

25 See also Flynn (1989: 216–18). Such a reading can therefore by no means be said to involve simply a “‘textualisation” of discursive practices’ or be said to give ‘to the voice of the masters that unlimited sovereignty that allows it indefinitely to re-say the text’ (Foucault 2006: 573) thereby ignoring the historical production of a text. As we saw, Derrida’s reading exceeds sovereignty/subjectivity and broadens Foucault’s assessment of Descartes’ project, to include the whole of metaphysics. The accusation of textual solipsism (see also Saïd 1978) is based on a grave misunderstanding; for a response to this accusation (by others), see *Ltd* 148.

26 This is what Derrida implicitly points out in ‘To do justice to Freud’, without directly responding to Foucault. Žižek (2007) interestingly sides with Derrida on most points in this debate.

was furthermore understood in a way very close to psychoanalysis and specifically in relation to Lacan.²⁷ Lacan in the *Écrits* for example remarks on ‘a certain unsurpassability of Descartes’ and also refers to Socrates, Descartes, Marx and Freud as having had a passion for unveiling, the object of which is the truth (*Res* 75; Lacan 2006: 157). Derrida’s reading of Foucault in ‘Cogito’ therefore at the same time amounts to a challenge to the psychoanalysis of Lacan, by placing in question the centrality of truth. By seeking the conditions of possibility of Foucault’s *History*, Derrida consequently at the same time enquires into the conditions of possibility of truth. Foucault’s *History* is ultimately made possible by the event of psychoanalysis, Derrida now points out (*Res* 75–8). In ‘Cogito’, Derrida can thus in retrospect be said to have attempted to overturn the order of things in Foucault who in some respects, although not completely, objectifies and reduces psychoanalysis as something one (simply) speaks of. That *of which* Foucault speaks, Derrida now more explicitly attempts to show, is actually that *in which* Foucault’s discourse is inscribed. This is not a reference to psychoanalysis in general, but to a particular psychoanalysis which precedes almost all psychoanalysis, Derrida notes.

Foucault, at certain points, is indeed sensitive to the importance of Freud in contemplating madness. At the end of the chapter on ‘Doctors and patients’, he for example emphasises the necessity of doing justice to Freud (Foucault 2006: 338–9). Freud, more specifically after the classical age, is said to have ‘restored, in medical thought, the possibility of a dialogue with unreason’ (Foucault 2006: 339). Foucault also mentions the *return* to a proximity with madness brought about by Freud and seeks to draw a distinction between psychology and psychoanalysis: ‘Psychoanalysis is not about psychology, but it is about an experience of unreason that psychology, in the modern world, was meant to disguise’ (Foucault 2006: 339). Derrida notes that in seeking to do justice to Freud, Foucault, in a nonetheless ambivalent fashion, places Freud side by side with Nietzsche, Artaud, Van Gogh, Nerval and Hölderlin, those deemed insane by society (*Res* 82–3). When these and other passages are read together, Foucault seems to acknowledge that Freud bore witness to madness and excess which calls us to account. Foucault’s *History* is then also written in light of and as a response to this summons before madness. In the words of Foucault (2006: 537):

Henceforth and through the mediation of madness, it is the world that becomes guilty (for the first time in the history of the West) in relation to the *œuvre*: it is now arraigned by the *œuvre*, constrained to speak its language, and obliged to take part in a process of recognition and

27 See Lacan (2006: 161–75) (‘Logical time and the assertion of anticipated certainty’) and 726–45 (‘Science and truth’).

reparation, to find an explanation *for* this unreason, and *explain itself* before it.²⁸

Just after closely associating Freud and Nietzsche, Foucault (2006: 157–8) moreover invokes the evil genius in a way which corresponds almost exactly with Derrida's reading of Descartes in 'Cogito', and which seems to stand in tension with Foucault's reading of Descartes in chapter 2 of part one, discussed earlier (*Res* 86–8).²⁹ Foucault (2006: 157) declares here that the evil genius is *anterior* to the cogito and that 'he is both the possibility of unreason and the sum of all its powers'. He furthermore notes that the evil genius places at risk the truth of the cogito through its perpetually threatening power. By acknowledging this perpetual haunting, Foucault himself destabilises the historical categories which he invokes in relation to knowledge and madness as well as the logic of exclusion which he relies on in this context (*Res* 87–8). Moreover, as Derrida points out, psychoanalysis has taught us that everything that is 'excluded' eventually returns, alluding to his analysis of the Freudian death drive in *The Post Card*, a 'drive' which as we will see ties in closely with madness (*PC* 257–409; *Res* 86, 88).³⁰

At other times Freud is however separated from Nietzsche by Foucault, treated as not being mad enough, with psychoanalysis placed on trial because it is too closely associated with the father, the family, authority and law (*Res* 90–2). Derrida in this context points to the interesting description which Foucault gives of Freud's powers as being of a secret, magical, esoteric and thaumaturgical nature.³¹ In describing this thaumaturgy, Foucault furthermore portrays the (psychoanalytical) doctor as both 'divine and satanic', which, as Derrida points out, are the exact traits of an evil genius (*Res* 95).³² Foucault thus does not place thaumaturgy in opposition to authority and law, but on the same side. This description of the authority of Freud in turn corresponds closely with the notion of Pascal and Montaigne of law having a mystical foundation.³³ As in the case of law, the authority of the psychoanalyst-doctor (that is, Freud) is in other words based on fiction, on the credit given to fiction

28 See in this respect also the discussion of originary guilt in Chapter 3.

29 Derrida expresses his regret that these passages did not form part of his earlier debate with Foucault (*Res* 86).

30 See also Chapter 1.

31 This is apparently a reference to transference (*Res* 108). See also earlier in *Resistances*, where Derrida discusses the important role of Eros and seduction in overcoming resistance in psychoanalysis (at 9–10).

32 Foucault (1998: 159) refers expressly to Freud (in a positive sense) as the bad genius (*mauvais génie*) because of his pan-sexualism. This reference to a bad genius is not reflected in the English translation.

33 See also *AR* 238–42, and see Chapter 6.

(*Res* 95).³⁴ Foucault then also proceeds to dismiss Freud in the same way as Descartes had dismissed the evil genius (at least on Foucault's reading in 'My body, this paper, this fire' (2006: 550–74)). Psychoanalysis becomes the *object* of the history Foucault is writing, rather than the space from out of which this history is written (*Res* 97). It is important to point out that Derrida does not analyse Foucault's remarks on Freud and psychoanalysis in order to show that Foucault contradicts himself. Neither does he disagree with Foucault in his indictment of Freud and of psychoanalysis because of his/its close association with the father, the law and the family (*Res* 98–9). The 'contradiction' that is at stake here, Derrida comments, is so to speak in the things themselves. The fort/da that is in question in Foucault's constantly repeated inclusion/exclusion of Freud is in other words tied to the lack of identity of both psychoanalysis and of Freud; their division from within.³⁵ Derrida is referring here, on the one hand, to the Freud of psychology, evolutionism and biologism, and on the other, to the Freud 'who shows himself *hospitable* to madness ... the tragic Freud who deserves hospitality in the great lineage of mad geniuses ... the Freud who talks it out with death' (*Res* 104). The latter is of course, as Derrida notes, the Freud of the death drive, of *Beyond the Pleasure Principle*. In *The Order of Things* Foucault (2002: 408–9), without explicit reference to the latter text, but seemingly alluding to it, then also ascribes the importance of psychoanalysis to the relation it has posited between death, desire and law or law-language. These are the three figures, Foucault (2002: 408) revealingly adds, 'by means of which life, with its function and norms, attains its foundation in the mute repetition of Death'.

Derrida ends his essay by seeking to link in a certain way what Foucault says about power and pleasure in the *History of Sexuality* with Freud's notion of the death drive. Here Derrida likewise concerns himself with the point from which Foucault's *History of Sexuality* is written rather than the *object* of the history itself (*Res* 114–15). Derrida notes that Foucault raises the same question here as in the *History of Madness*, that is whether a history of sexuality can strictly speaking be written. Foucault's notion of the essential dispersal or multiplicity of power is of great interest for Derrida in this respect (*Res* 116).³⁶ Derrida relates what Foucault (1998: 45) says about a dispersal of power as well as the 'perpetual spirals of power and pleasure' to Freud's attempt in *Beyond the Pleasure Principle* to explain Ernst's fort/da game. Freud in this text incidentally refers to himself as the devil's advocate and frequently refers to what he is enquiring into as 'demonic', a depiction of

34 The role attributed here to fiction ties in closely with the stance both Foucault and Derrida adopt in relation to literature; see de Ville 2010a.

35 The same would of course apply to Foucault.

36 See also *QE* 74–5; and Foucault and Blanchot (1990: 95–6). It is possible to link what Derrida says here about Foucault and power, to what he says elsewhere about dissemination (*Dis*), dis-jointure (*SM*), and an essential 'weakness' (*Neg* 226).

himself thus as an ‘evil genius’. At one point in the essay Freud asserts that Ernst’s actions ‘might be put down to an instinct for mastery that was acting independently of whether the memory was in itself pleasurable or not’ (Freud 2001: XVIII 16).³⁷ He also refers to this attempt at mastery as the expression of a ‘primary event ... independently of the pleasure principle’ and as yielding ‘pleasure of another sort’ (Freud 2001: XVIII 16). According to this thesis, a certain mastery thus precedes sex or sexual pleasure which would constitute a later, and a derived pleasure (*Res* 117). Derrida then attempts to link this notion of mastery, which he equates with death, to Foucault’s idea of a ‘spiral’ of power/pleasure: preceding power/pleasure, making it possible, would be death functioning as the master. Derrida in other words suggests that Foucault’s notion of a dispersal of power could be linked to Descartes’ evil genius as well as to the Freudian idea of a drive for power or mastery which goes beyond the pleasure principle. This is another way in which to state Freud’s notion of the death drive and the repetition compulsion (*Res* 117–18). Foucault and Freud could in other words be said to agree in a certain sense about the operation of the death drive, or what could be referred to as an orgiastic desire for death (*Dem* 68) – that is, total madness. It is from here or by virtue of this ‘desire’ that Foucault writes his profound archaeological and genealogical studies of madness, subjectivity, knowledge, discipline and punishment, power, sexuality and ethics.

Law and madness

The ‘projects’ of Foucault and Derrida have often been presented as in opposition to each other. When one however carefully scrutinises their relation to the texts of Descartes and Freud as was attempted above, it appears that they share a certain space. This shared space is not however situated ‘within’ metaphysics, but at a certain ‘remove’ from metaphysics.³⁸ A reading of Foucault and Derrida is in other words possible, which allows us to see them as at a certain point exceeding metaphysics, a complete escape nevertheless remaining impossible. Such a reading allows us to view madness, also in Foucault’s texts, in a transgressive ‘sense’ and at the same time to appreciate the point or site from which he launches his radical and necessary critique of modernity. This total madness is another name for Freud’s death drive, or what in Derrida will become a ‘desire’ for death, referring to an anachronous

37 For a more detailed discussion of the relation between mastery and the pleasure principle, see *PC* 395–405, and Chapter 1.

38 The recent *Foucault’s Law*, which attempts a reading of Foucault and Derrida that identifies a ‘responsive’ dimension to law, in contrast with its determinate dimension, on my reading, risks inscribing both thinkers into the metaphysics of presence. This is *inter alia* because the ‘responsive’ dimension is concerned only with possibility, and not with the impossible (Golder and Fitzpatrick 2009).

time, a past which has never been present and which always remains to come. Madness in this 'sense' calls on reason and language and therefore also on philosophy and law to account for themselves (Foucault 2006: 537–8; *Res* 82–3). Another name for this madness as we saw is justice. Justice in this sense stands in tension with all claims of identity and sovereignty, also via law. Law's confrontation with justice cannot be avoided. In the same way in which the self can relate to itself only by way of a passage through madness, law can be constituted only by way of justice. This justice, as will be pointed out in the chapters that follow, involves self-destruction; auto-immunity; a mad, impossible hospitality, without limitation, control or reciprocity. This mad hospitality furthermore enables us to see that behind the contingent and determined exclusion of 'marginalised others', which Foucault exposes, a more radical exclusion always takes place which makes these exclusions possible in the first place. These exclusions can never be fully justified, which opens up the law to transformation, not simply towards the possible or the potential, but the impossible which lies beyond social and historical contingency.

The gift beyond exchange

How is one to think the fact that everything that is only is insofar as it is given?

Jean-Luc Marion

Derrida's *Given Time: I. Counterfeit Money*, stemming from a seminar presented for the first time in 1977 to 1978, stands in close relation to his thinking on justice and law. This can clearly be seen from 'Force of law' where Derrida describes justice in terms of a 'gift without exchange, without circulation, without recognition or gratitude, without economic circularity, without calculation and without rules, without reason and without theoretical rationality, in the sense of regulating mastery' (AR 254).¹ The exploration of the notions of time and the gift in *Given Time* takes place with reference inter alia to Heidegger's well-known statement in his 1962 lecture in *On Time and Being*, 'es gibt Sein, es gibt Zeit' ('it gives Being, it gives time'; or 'there is Being, there is time') as well as Marcel Mauss's analysis in *The Gift* of the gift in archaic societies. *Given Time* has not as yet received much attention from legal scholars.² This is unfortunate, since, as the quotation above shows, justice in Derrida's texts clearly has to be understood with reference to his analysis of the gift. Derrida's analysis of the gift furthermore relates to an issue which is of central importance for legal thinking, namely the origins of law. This issue is of course also addressed in other texts such as 'Declarations of independence' (Chapter 2), 'Before the law' (Chapter 3) and 'Force of law' (Chapter 6). *Given Time* nevertheless explores the question of law's origin from a unique angle which in turn makes possible a better understanding of Derrida's other texts on law. *Given Time* in addition points to the necessity

1 See also Derrida (1994: 22–7).

2 For helpful 'non-legal' analyses of *Given Time*, see Bischof (2004: 354–63); Bennington (1993: 188–203); Caputo (1997: 140–51); Horner (2001); Marrati (2005: 190–7); Schrift (1997: 10–11). See also the interview with Derrida in 'OtG' 54–78.

of exploring the relation between the thinking of Derrida and Heidegger, specifically in relation to the ontico–ontological difference, as well as the way in which this ties in with the origins of law.

For reasons of space the analysis here will be restricted to the first two chapters of *Given Time*. The chapter will start with a brief exposition of Heidegger's evaluation of metaphysics. As Derrida notes in *Positions*, his own thinking would not have been possible without the 'attention to what Heidegger calls the difference between Being and beings, the ontico–ontological difference such as, in a way, it remains unthought by philosophy' (*Pos* 8).³ In *Given Time* Derrida then also specifically engages with Heidegger's thinking on Being as well as the difference between Being and beings, by contemplating that which precedes this difference, through the notions of the gift and of time.⁴ This will be followed by an outline of Mauss's *The Gift*, specifically with reference to the way in which Mauss views the gift in terms of a circular economic exchange, as well as a brief discussion of Derrida's analysis of Mauss's text. Here we will see the first signs of a development in terms of which the concept of the gift will be exceeded towards a certain ecstasy, or what Derrida elsewhere refers to as 'a *jouissance* of the concept to the point of overflowing' (*FWT* 5). In the next section, Derrida's own analysis of the gift will be enquired into in more detail. This will take place in three parts. In the first place, Derrida's analysis of Heidegger's thinking on the *es gibt* and its relation to the gift and time will be enquired into with reference to *On Time and Being*. Second, an analysis of the 'notion' of sexual difference and its relation to the gift will be undertaken. In analysing this relation, a detailed reading will be given of Derrida's *Geschlecht*. This in turn will be followed by an analysis of the relation Derrida posits in *Given Time* between the gift and mourning. The last section will consider the implications for law of the analysis of the gift, specifically with reference to 'Force of law'.

Heidegger and metaphysics

The question of Being

For Heidegger, all philosophy since Plato, including its derivatives, constitutes metaphysics. Heidegger points out in this regard that metaphysics concerns itself with the question of being by asking *ti to on* (what is being?). Heidegger wants us to return to this question and to think it through in a more fundamental way. He wants to, in a sense, get behind the guiding question

3 See also *SP* 153–4.

4 It is perhaps important to note here that Derrida does not distinguish strictly between Heidegger's thinking before and after the so-called turn (*Kehre*). The same approach will be followed in this chapter in elaborating on Heidegger's thinking.

metaphysics poses and to pose a more original question, that is: what sustains and directs the guiding question of metaphysics (Heidegger 1991: II 193)? Heidegger's thinking can be said to be motivated by the completion of metaphysics or idealism brought about by Hegel's thinking of the absolute Idea as well as its consummation in Nietzsche's thinking of the will to power. Relying on the metaphor of harvesting we can say that Hegel succeeded in bringing in the first great harvest. Metaphysics, according to Heidegger, now only involves the threshing of empty straw. He therefore seeks to go back to the source of metaphysics so as to, as he puts it, 'come to know the field and what it is capable of yielding' (Heidegger 2005: 34). Heidegger is more specifically of the view that Western philosophy has forgotten the question of Being (*das Sein*). Although it has concerned itself with Being throughout its history, metaphysics has not as yet adequately thought Being. The question Heidegger concerns himself with is the more fundamental question (as compared to what happens in metaphysics) of the Being of beings. Being for Heidegger is not 'a being' (*ein Seiende*). A being can be any thing, such as what we can grasp with our hands, as well as mountains, a river, the moon, a group of people, the Japanese, Bach's fugues, Hölderlin's hymns, day, night, heat, noise, law etcetera (Heidegger 2000: 81; 1984a: 40; 2005: 111). Why is the question of Being important? According to Heidegger, the question of Being determines the way in which we relate to the world around us. This can be explained with reference to the word 'is' in language. Even though 'is' can be said to drift about 'as the most threadbare word in language', it also sustains all our saying, Heidegger contends. We implicitly use the 'is' in every verb we employ. It is the same with all substantives and adjectives, all words and articulations of words. Even in our (silent) conduct towards beings, for example by walking in a forest or reading a book, their 'is' or Being is at stake. We also are in relation with the 'is' when we for example relate in our thinking to a thing that is no longer or not yet, and even a thing that simply is not (Heidegger 1991: IV 188–93). The question of Being is thus extremely important and it is something we already have a pre-understanding of, even though we tend never to think about it. We could say that because of the brightness of beings, the light of Being is obscured. Being in other words withdraws when it reveals itself in beings (Heidegger 1984a: 26). Our relation to Being is according to Heidegger made possible by man's essential nature prior to any philosophical undertaking, for otherwise man would not have been able to relate to himself as a being or to other beings at all (Heidegger 2005: 88; IJsseling 1986: 115). Philosophy itself, which, as we saw, primarily concerns itself with the question of Being (although it has done so in an inadequate way), is thus made possible by this essential nature of man. Philosophy is not simply thought up, but awakened in man through his relation with Being (Heidegger 2005: 32). As we will see in more detail below, philosophy has grasped the question of Being in different ways: Plato represented Being as Idea, Aristotle as *energeia*, Kant as position, Hegel as the absolute concept, Nietzsche as the will to power,

but consistently as constant presence, which is what Heidegger wishes to place in question (Heidegger 2002c: 9; 2005: 39). These were of course not choices exercised by the philosophers concerned, but a consequence of the sending of Being beyond (modern) subjectivity (Goosen 2007: 334–5).

The understanding of Being in metaphysics

Heidegger, as we saw above, regards Plato as the first metaphysical thinker and views Western philosophy as having been caught up in metaphysics ever since. The early Greeks were not as yet under the sway of metaphysics (Heidegger 1991: IV 165).⁵ Plato and Aristotle nonetheless, like all philosophers after them, still contemplated Being – that is, the arche (principle) or ground of beings (Heidegger 2005: 71). What then happened with Plato's thinking? Plato thought of Being in a way different from the early Greeks. He did not think Being as such, but thought it from the perspective of and with reference to (the essence of) beings (Heidegger 1991: IV 207–11). More specifically, for Plato Being is the idea or the universal – that in which the particular thing (a being) has its subsistence and from which it proceeds. Plato's interpretation of Being as idea has, according to Heidegger, shaped the whole history of Western philosophy. One could say that all philosophy since Plato is 'idealism': Being is thought in the idea, the idea-like and the ideal (Heidegger 1991: IV 162–4). The Christian understanding that all beings have a first cause in God as creator is similarly metaphysical (Heidegger 1991: III 7). It also proceeds by thinking Being with reference to beings. That which 'is' in the Christian understanding, is the *ens creatum*, in other words that which is created by the personal Creator-God as the highest cause (Heidegger 1977: 130). Christianity in other words states that the Being of a being is that it has been created by God (Heidegger 1991: IV 88). According to Christianity, beings have been thought out rationally beforehand. As soon as the link between Creator and creation is broken in modernity (Nietzsche's 'God is dead'), this idea is adapted and man now takes the place of God, so that the rationality and calculation of man becomes the measure of everything: that is, interpreted as Being (Heidegger 2000: 207; 1977: 148). This is the enlightenment idea of reason (Heidegger 1991: III 7). According to Heidegger (1991: III 51) this is the profound insight of Nietzsche in his reflections on the will to power:

Only what represents and secures rational thinking has a claim to the sanction of a being that is *in being*. The sole and highest court of appeal, in whose field of vision and speech is decided what is in being and what is not, is reason. We find in reason the most extreme pre-decision as to what Being means.

5 See further, Chapter 7.

What 'is' in metaphysics, is therefore necessarily determined by a specific understanding of Being (Heidegger 1977: 117, 127–8). The understanding of Being in modernity, Heidegger ascribes in the first place to Descartes' *Ego cogito, ergo sum*. This statement entails that '[a]ll consciousness of things and of beings as a whole is referred back to the self-consciousness of the human subject as the unshakable ground of all certainty' (Heidegger 1991: IV 86).⁶ In modernity, the idea (Being) in Plato has thus become that which man posits for himself (Heidegger 1991: IV 174). Accordingly only that 'is' which is correctly thought (Heidegger 2000: 207). Reason has become synonymous with the subjectivity of the human subject, entailing 'the self-certain representing of beings in their beingness, that is, *objectivity*' (Heidegger 1991: III 96). All beings are furthermore turned into objects (Heidegger 1993b: 251).

When Being is in the above-described ways turned into idea or 'whatness', the latter is promoted to the status of *the* Being of beings, to what really is or to what is most in being about beings, whereas beings are relegated to *me on* – that which really should not be and really is not. A disjoining in this way takes place between *on* and *phainomenon*. The idea furthermore becomes the *paradeigma*, the model and also the ideal (Heidegger 2000: 194–9). Heidegger (2000: 197) describes the consequences of the cleft that opens up between the idea and the imitation as follows:

Because the *idea* is what really is, and the *idea* is the prototype, all opening up of beings must be directed toward equalling the prototype, resembling the archetype, directing itself according to the idea. The truth of *phusis* – *alētheia* as the unconcealment that essentially unfolds in the emerging sway – now becomes *homoiōsis* and *mimēsis*: resemblance, directedness, the correctness of seeing, the correctness of apprehending as representing.

If Being becomes idea there is no longer any link between beings and Being or between beings and truth (understood here as unconcealment or the happening of beings) – only between beings and idea. The foundations upon which metaphysical thinking is built, are thus not foundations at all, as they are themselves derived (and falsified) (Heidegger 1991: IV 163).

One can summarise Heidegger's diagnosis of metaphysics by saying that metaphysics does not draw a clear distinction between beings and Being. Metaphysics regards Being as the most abstract and emptiest of concepts and in no need of being determined any further. Being is overshadowed by beings (Heidegger 1991: IV 157). This is not because of a mistake in thinking, but because in the appearance of beings, Being withdraws, conceals itself

6 See also Heidegger (1991: IV 179; 1977: 129). This is not to be understood in an individualistic sense as the random opinion of an individual 'I'; see Heidegger (1991: III 221).

(Heidegger 1991: IV 226–7). Being itself and consequently also the difference between Being and beings thus remains unexplored because metaphysics does not take account of the fact that there is a fundamental difference between Being and beings (Heidegger 1991: IV 195, 196). This difference between Being and beings is referred to by Heidegger as the ontological or onto-ontological difference. We already saw above that everywhere and continually, man stands in a relationship with Being when comporting himself towards beings. Man could thus also be said to ‘*stand in the differentiation of beings and Being*’ (Heidegger 1991: IV 153). It is this differentiation which makes possible ‘every naming, experiencing, and conceiving of a being as such’ (Heidegger 1991: IV 154). The ontological difference is thus the unknown and ungrounded ground and foundation of (the possibility of) ontology and of all metaphysics. The differentiation between Being and beings, we could also say, forms the basic structure of metaphysics even though it has remained unexamined as such (Heidegger 1991: IV 182).

A different understanding of Being, in relation to time

Heidegger reflected on the question of Being in a number of ways. In *Being and Time* (1962 [1927]) he explored the question of Being as a first step with reference to that being for whom its Being or existence is a question: man, or in Heidegger’s terminology, *Dasein* (literally: there-being). Being can furthermore be understood only when we understand the notion of time (Heidegger 2005: 88). According to Heidegger, one of the problems with the usual conception of time is that it is generally referred to in the same context as space. The reason for this approach lies in the metaphysical conception of Being – in terms of beings, which appear in space and in time. This conception fails to recognise that space and time are not the same (Heidegger 2005: 84). In terms of the metaphysical concept of time, also to be found in Kant, time furthermore gives expression to permanence (Heidegger 2005: 118). This involves viewing time as a calculable sequence of nows (the present as actual now, the past as no longer now and the future as not yet now (Heidegger 2002c: 11) and in terms of things that are present in time. This also informs the understanding of causality (Heidegger 2005: 109, 113). One of the limitations of the conception of time in Kant (time as a mode of comportment of the human subject) is that it does not address the question of Being. It more specifically involves an implicit understanding of Being as constant presence. Heidegger points out that Kant’s view of time simply involves that it occurs in man, instead of viewing time more fundamentally as ‘*the ground of the possibility of the understanding of [B]eing*’ (Heidegger 2005: 88). Kant in this respect fails to investigate adequately the finitude of man, despite the fact that man stands at the centre of his enquiry in the *Critique of Pure Reason* (Heidegger 2005: 119). Instead Kant implicitly views man’s way of being as being-present (Heidegger 2005: 134). Kant’s discussion

of time is nonetheless important as it tells us, as Aristotle and Augustine also do, that time is not something that can be found somewhere like a thing. Time can be found only in ourselves (Heidegger 2005: 85). To this 'vulgar' metaphysical concept of time, Heidegger opposes authentic temporality. He arrives at this notion of temporality through an enquiry into the way in which *Dasein* actually experiences time. Stated briefly, this notion of temporality according to Heidegger involves a unitary relation of *Dasein* to the present, the past and the future, stretched along 'ecstatically' (Heidegger 1962: 462).⁷ Ecstatic refers here to *Dasein's* being carried to or stretching toward a certain 'whither' (Kockelmans 1989: 283; Taminiaux 1994: 52). What Heidegger refers to as *Dasein's* ecstatico-horizonal temporality, involves awaiting (the future), retaining (having-been) and making things/beings present. These ecstases do not follow in succession upon each other as in the ordinary conception of time. The future is thus not later than the having-been and the having-been is not earlier than the present. Heidegger (1962: 401) expresses this idea as follows: '[t]emporality temporalizes itself as a future which makes present in the process of having been'. The present or making things present in authentic temporality is dependent on an understanding of one's own having-been thrown forth, which is in turn determined by an anticipation of one's ultimate and ownmost possibility (Kockelmans 1989: 32, 257; Taminiaux 1994: 51). The future furthermore has priority in authentic temporality as the future relates *Dasein* to his own Being-towards-death. Authentic temporality is therefore primordially finite (Heidegger 1962: 378–9). The awareness of its own Being-towards-death places *Dasein* in a relation to Being and makes resolve and authentic existence possible. Heidegger refers to death in this regard as the ownmost possibility of *Dasein*, which is at the same time *Dasein's* utter impossibility (Heidegger 1962: 354, 378). The awareness of *Dasein's* own death thus structures temporality as it entails an anticipation of the future which determines the way in which *Dasein* relates to what has been and in making present.

Heidegger (1962: 246–52) moreover contends that *Dasein* is already thrown into the world and 'is' thus Being-in-the-world. This means that there is no world or reality outside of *Dasein* the existence of which has to be proven (as Descartes attempted) or to which one has no access (Kant's 'thing in itself'). Both these (metaphysical) approaches assume a subject that is world-less and that seeks to assure itself of a world (Heidegger 1962: 250; Chapter 1). In this respect Heidegger's thinking is not very far removed from Hegel's critique of Kant regarding the noumenon. As mentioned in Chapter 1, things for Hegel are simply phenomena and there is no reason to go beyond the phenomena to the things-in-themselves (Hyppolite 1974: 125). Heidegger's thinking in

7 Greek ecstasis = standing outside. This word is used by Heidegger 'to emphasize a connotation of stretching towards or openness to'; see Taminiaux (1994: 52).

this regard can be better understood when we relate it to what was said above regarding temporality. According to Heidegger (1962: 429, 472), entities other than *Dasein* are strictly speaking non-temporal; they are nonetheless entities within-the-world that are encountered by *Dasein* 'in time' due to *Dasein*'s temporality. It is because of *Dasein*'s awareness of its own mortality that its existence is an issue for it, although it tends to hide this from itself by finding refuge in beings because of the security they seem to offer. Death is therefore for Heidegger not something that stands separate from life or beyond life, but is connected to the life of *Dasein* in a fundamental way. Heidegger believes that an authentic life (as compared to the inauthentic life of the 'they' – *das Man*) would entail being fully aware of one's mortality:

Death is a possibility-of-Being which *Dasein* itself has to take over in every case. With its death, *Dasein* stands before itself in its ownmost potentiality-for-Being. This is a possibility in which the issue is nothing less than *Dasein*'s Being-in-the-world. Its death is the possibility of no-longer-being-able-to-be-there.

(Heidegger 1962: 294)

In the above quotation we can see that the intricate relation between life and death is what for Heidegger defines Being. This comes out very clearly in another passage a few pages later in *Being and Time* (1962: 298): 'Dasein is always dying already; that is to say, it is in a Being-towards-its-end.' We see a similar kind of relation between life and death in Freud's thinking in relation to the death drive which, as we saw, Freud views as a 'desire' of all living beings (Chapter 1). Western philosophy, it appears from the reflection of these two thinkers, has 'hidden' the relation between life and death from itself, thereby turning itself into a metaphysics of presence. This is borne out by the way in which Being is implicitly viewed by metaphysics through all its epochs:

Of what do we say and has one said from times of old: This 'is'? What does one take as in being even when one has fallen away from the *primordial* Platonic way of perceiving? We say something *is* of that which we always and in advance encounter as always ready to hand; what is always present and has constant stability in this presence. What really is, is what already in advance can never be removed, what stands fast and resists any attack, survives any accident. The beingness of beings signifies permanent presence. What is *thus* in being is the true, the 'truth' one can always and truly hold on to as what is stable and does not withdraw, on the basis of which one can gain a foothold.

(Heidegger 1991: III 59–60)

This notion of constant presence is for example expressed by Kant when he describes appearances in the *Critique of Pure Reason*: 'All appearances

contain the permanent (substance) as the object itself, and the transitory as its mere determination – that is, as a way in which the object exists’ (Heidegger 2005: 116). Changes of appearance are in other words viewed simply as alteration and not as ‘rising up from nothing and disappearance into nothing’ (Heidegger 2005: 124). The reason for Being taking this form in metaphysics is related to the interest of life in constantly maintaining and securing itself. This is why the true world in metaphysics was taken to be the one that is constant and unchanging rather than one that is changing and transforming (Heidegger 1991: II 61–2). What was at first experienced as ‘presencing’ has due to metaphysics become ‘something present’ (Heidegger 1984a: 50). Heidegger’s discussion of chaos encountered by knowing (as compared to the commonsensical view that we encounter things or objects in an ordered way), in the context of a discussion of truth in Nietzsche, is revealing in this regard. Heidegger speaks in this respect of every living being, and especially man as ‘surrounded, oppressed and penetrated by chaos, the unmastered, overpowering element that tears everything away in its stream’ (Heidegger 1991: III 84). Heidegger contends, in words that cannot but remind one of Freud’s contemplation of the death drive, that Being (in metaphysics) entails an overcoming of this sheer dissolution and annihilation. It is however because of a denial of death as part of his life that man takes his refuge in a particular conception of Being as what is permanent and stable. Instead of viewing this chaos as on the outside whilst praxis or reason provides stability on the inside (as metaphysics does), the chaos must according to Heidegger (1991: III 88) be seen as what is inside:

Rather, the living being as praxis, that is, as the perspectival-horizonal securing of stability, is first installed in chaos as chaos. Chaos as the onrushing urge of living beings for its part makes the perspectival securing of stability necessary *for* the survival of the living being.

Derrida’s assessment

Although acknowledging the necessity of Heidegger’s questioning of the metaphysical tradition, Derrida’s assessment thereof (suspending for a moment the necessarily heterogeneous nature of Heidegger’s texts, which will be explored further below) is that it was not followed through to the end. What is called for according to Derrida is an even more rigorous thinking through of Being and of the metaphysical tradition. Heidegger’s enquiry into the truth of Being, although it involves a radical questioning of the tradition, according to Derrida, ultimately seeks in very metaphysical style a more fundamental truth and origin. Heidegger (2005: 71) in this respect for example describes Being as ‘the primary and ultimate ground of the possibility of every actual and conceivable being’. Derrida thus raises the question whether the ontological thinking of Being – or in Shakespeare’s words, ‘To be, or not to be’ – should

receive the precedence it is at times accorded by Heidegger.⁸ Heidegger furthermore retains in traditional metaphysical style, oppositions such as in his discussion of time and of *Dasein* between the authentic and the inauthentic (or fallen-ness), and of the proper and the improper, in spite of having suspended all ethical evaluation (*MP* 63–4). In respect of the ontological difference, Derrida asks whether the thinking of the difference between Being and beings does not still come from the metaphysical order and whether there is not a difference still more unthought than the difference between Being and beings, thereby alluding to *différance* (*SP* 153; *MP* 66–7). Heidegger's analysis of temporality raises a similar kind of question, that is, whether an alternative conception of time – here, authentic temporality – does not still remain within the metaphysics of presence, as any conception of time inevitably must (*MP* 63; Jsseling 1986: 123). Lastly, Heidegger's view of death as a possible impossibility of *Dasein* raises the question whether it does not risk inscribing death within a circular economy (*Ap* 29–30, 62–4). Viewing death and time in this way, as we will see below, has important implications for our conception of justice. Despite these reservations, Derrida's description of justice in terms of the gift and the invocation of justice in 'Force of law', as well as his distancing of this conception from the Kantian regulative idea, is clearly indebted to Heidegger's destruction of the metaphysical understanding of Being as idea (*AR* 254–5). This destruction is a necessary step should one ultimately attempt to think Being in terms of the gift. Marcel Mauss's study of the gift further opens this possibility, as we will see in the discussion that follows.

Mauss's *The Gift*

Mauss's exploration of the gift in archaic or ancient societies understandably has a prominent place in Derrida's analysis in thinking the gift and time in a way that exceeds metaphysics. Mauss shows that gifts in these societies have a structure of circular exchange and are motivated by economic self-interest. Gifts are in other words coupled with an obligation to give (generously), an obligation to receive, and an obligation to reciprocate with interest, taking due account of prescribed time limits (Mauss 1990: 46). A failure to participate in this reciprocal exchange could have fatal consequences as it would amount to an act of war (at 7). In the societies analysed, acts of destruction; the giving of alms to the poor; the giving of children in marriage; the invitation of others to share meals, drink and tobacco; and the exchange of presents, are all forms of obligatory gifts. According to Mauss (at 46, 60–1, 90), the exchange of gifts lies at the origin of law, morality and economy. Mauss

8 See *SM* 10 where Derrida introduces the notion of 'hauntology' in contemplating the ghosts of Shakespeare and Marx. The French 'hantologie' and 'ontologie' are homonyms, and can thus be distinguished only in writing.

specifically contends in this regard that the principle of justice in modern legal systems has taken the place of the gift: justice derives from the obligation resting upon those in 'primitive' societies who had in abundance; they had to show generosity in giving alms on certain occasions on pain of being punished by the gods in avenging the poor, and in expectation that they would be richly rewarded by the gods should they do so (at 23).⁹ This obligation furthermore relates to the belief that the gods and the dead are the true owners of things and possessions of this world (at 20). This at first required destruction in sacrifice to the gods (killing of slaves, burning of precious oil, casting of copper objects into the sea, and setting the houses of princes and blankets on fire), which of course also fulfilled the function of displaying power, wealth and lack of self-interest (at 20, 47–8, 95). The giving of alms to the poor and of gifts to children, instead of to the gods, amounts to an evolution in society, entailing that men act in a way as representatives of the gods and the dead (at 22). It is only relatively recently, Mauss furthermore contends, that a distinction has been drawn in legal systems between, on the one hand, obligations and services that are not given freely, and on the other, gifts (at 61). According to Mauss, the exchange of generous gifts in these societies served and still serves the important function of preventing war and establishing peace between families, clans and tribes (at 104–6). It brings about a certain degree of stability on the basis of which legal and economic systems can develop. That the exchange of gifts serve to *prevent* war is an interesting conclusion, in light of Mauss's own remarks concerning the destruction of wealth (in times of peace) as a kind of gift which he *equates* with war (at 8, 141–2 fn. 141, 147 fn. 166). The preference expressed for the exchange of gifts presumably lies in it being a war or defence of oneself without resort to arms (at 106). Mauss concludes his analysis by arguing for a return to the notion of generous giving, calculated but not excessive, found in ancient civilizations (thus effectively a return to nature, similar to what we found with Lévi-Strauss (Chapter 3)) in accordance with the principles of charity, social service and solidarity, and a movement away from cold-hearted, utilitarian, calculating laws and actions (Mauss 1990: 83–100; *GT* 66, 82).

Although in praise of Mauss's study and of his reintroduction of the word and category of the gift as lying at the origin of legal, economic and moral systems, as compared to other authors who seek to do without it, Derrida is of the view that Mauss is not sufficiently concerned with his own observation that all the gifts he analyses are caught within a circular exchange (*GT* 26, 37, 42). The same could be said of Mauss's conception of justice. An exchange of gifts, Derrida comments, surely amounts to the annulment of the gift (*GT* 24, 37). Another important comment of Derrida on Mauss's study deserves mention here. Derrida questions the unity of meaning, which Mauss ascribes

9 See similarly Nietzsche (1984: 64 para. 92) on justice as founded on exchange or barter.

to the many different cultural practices, namely that they all amount to the exchange of gifts (*GT* 25–6). Derrida does not do this in order to say that these practices cannot be described as gifts, but instead to contend and ultimately to show that the word ‘gift’ does not have a unitary meaning; that it instead ‘suffers’ from a loss of meaning. The different words in different cultures which Mauss in each instance translate as the exchange of gifts, similarly exceed the notion of the gift as circular exchange (*GT* 55–6). This questioning moreover ties in with Derrida’s later comments on Mauss’s description of a specific kind of gift – the potlatch. As we saw above, certain forms of ‘gift’, those involving the honour of a chief, are described by Mauss as going even beyond this still limited notion of generosity – they involve a ‘madly’ extravagant destruction and consumption, without limits, of all kinds of property. Derrida notes that Mauss has some difficulty in describing the actions of the destruction carried out here in terms of the gift, where there appear to be no giving and returning and also no desire of expecting a return (*GT* 46–7). This madness of a gift forgetting itself, of disbanding, of dissemination without return, ‘threatens *a priori* the closed circle of exchange rationality’, Derrida notes (*GT* 47).¹⁰ Mauss in other words wishes to describe the gift in terms of a system of circular exchange, but in the process of describing it, he shows that the concept of the gift exceeds this system.¹¹ This is of course not to say that these actions which Mauss describes ‘are’ or constitute gifts in the perfect sense. As we saw above, they can clearly also be inscribed within the system of circular exchange. Derrida is concerned here rather with the language Mauss uses in describing these gifts which seems to exceed his text on the gift as a system of circular exchange (*GT* 45–8). Mauss, in giving us a narrative on the gift of circular exchange, is himself overtaken by the gift without exchange. We will see why this happens, arguably also in the case of a constitution, in the discussion that follows. In his conclusion, Mauss furthermore acknowledges that the terms ‘present’ and ‘gift’ which he had been using throughout the text ‘are not themselves entirely exact’ (Mauss 1990: 93; *GT* 55). Derrida points out that Mauss here admits that the word ‘gift’ has no centre or identity; that its meaning is marked by dissemination and asymmetry.

10 The ‘madness’ of the gift, Derrida furthermore observes, operates by way of a differential force (of delay) in two directions, that is, in exceeding the system of economic exchange and in again inscribing itself within such an exchange (*GT* 39–40, 47).

11 See e.g. Mauss (1990: 47): ‘In certain kinds of potlatch one must expend all that one has, keeping nothing back. It is a competition to see who is the richest and also the most madly extravagant [*le plus follement dépensier*] ... In a certain number of cases, it is not even a question of giving and returning gifts, but of destroying, so as not to give the slightest hint of desiring your gift to be reciprocated.’

Derrida on the gift

The gift and Heidegger's es gibt

The first chapter of *Given Time* assists in a better understanding of Derrida's reading of Mauss. Derrida commences by setting out the usual conception of the gift. This entails that someone (A) wants, desires or intends to give something (B) to someone (C). As Derrida points out, this definition supposes a subject and a verb (*GT* 10–12). It supposes, more specifically, a subject identical to itself and conscious of its identity, seeking through the gesture of the gift, to have its own identity recognised so that that identity comes back to it. This definition – the condition of possibility of the gift – points also to the impossibility of the gift, to the destruction, annulment, and annihilation of the gift. The circular economy involved in this exchange in other words destroys the gift. Some 'thing' cannot strictly speaking be a gift if it involves a relationship of circular exchange. As Derrida notes, '[f]or there to be gift, there must be no reciprocity, return, exchange, countergift or debt' (*GT* 12). In every instance where something is given back, the gift is annulled. There can only be a gift if it does not lead to a debt, to a contract, to a circular exchange, either in consciousness or the unconscious (*GT* 15–16). As soon as the gift appears as gift, it annuls or destroys itself, namely even before it leads to gratitude. A gift can thus only be a gift if it does not appear as gift either to the donor or to the donee (*GT* 13–14). As soon as someone gives with the intention to give, a process of self-congratulation and self-approval and thus circular return to self takes place. As soon as the gift gets caught up in the temporalising synthesis, as soon as it is accepted, and even when it is refused, destruction of the gift takes place.

In metaphysics, as Derrida points out, the gift and the debt, the gift and the cycle of restitution, the gift and the loan, the gift and credit, the gift and the countergift, have been thought together as a system. Derrida seeks to depart from this tradition by pointing to that in the tradition which posits that there can only be gift if this does not involve return, if it interrupts the system and the symbol. This requires a gift-event that would not be caught up within a system of economic exchange, as happens, for example, in the text of Mauss, and, as we will see shortly, in that of Heidegger. In describing this impossible gift-event, Derrida notes that it would not be sufficient for the gift to be forgotten by the donor and the donee only consciously and still be kept in the memory of the unconscious. The latter would simply entail a displacing – not an annulling or destruction (*GT* 16). The gift would have to involve an 'absolute forgetting' and an 'absolute unbinding' as distinguished from repression or displacement to the unconscious. This forgetting would involve an instant that no longer belongs to the economy of time (*GT* 17). It may appear strange to refer to the gift in terms of forgetting, unbinding, repression and displacement. The initial strangeness disappears when we

realise that Derrida at this point is no longer simply concerned with the giving of gifts in the ordinary sense – that is, ‘someone giving something to someone other’. He had just mentioned (*GT* 15–16) the insights of psychoanalysis into the unconscious and the implications this has for the economy of the gift (the unconscious too can participate in the circle of economic exchange) and is on his way towards engaging with the Heideggerian phrases *es gibt Sein*, *es gibt Zeit* which could perhaps take us beyond this circle. Through these phrases Heidegger, in *On Time and Being*, attempts to speak about time and Being in a non-propositional manner, that is to say without referring to them as present-being/being-present and without speaking of them in terms of a subject–predicate relation (*GT* 19–20). Both Heidegger and Derrida can, on a certain reading,¹² be said to attempt to think Being and time as made possible or ‘given’ by ‘something’ else: *Ereignis* (event).¹³ This nevertheless happens in different ways.

In his exploration of the *es gibt* in *Given Time*, Derrida specifically focuses on the notion of ‘play’ which is mentioned by Heidegger in his discussion of time in *On Time and Being* (*GT* 22).¹⁴ Heidegger is contemplating here the *es* (it) of *es gibt*, and in this way can be said to seek to go beyond his previous analyses of Being. He asks specifically in this regard whence the

12 According to Stambaugh, in her ‘Introduction’ to *On Time and Being* (at ix–xi), Heidegger’s rethinking of Being and time is tied to the fact that metaphysics begins when Plato separates Being (the Ideas or forms) from the realm of time (becoming, existence). Being is thus thought as that which never changes, whereas time is thought as that which constantly changes. In *Time and Being* Heidegger, in an attempt to think the notions of time and Being in a non-metaphysical manner, enquires into the temporal character of Being itself. This at the same time requires that time be thought in a way different from the seriality of a string ofnows (present–past–future). A fourth dimension of time (the reciprocal play of past, present and future) is thus identified where no ‘thing’ in the ordinary sense occurs (as event/*Ereignis*), but only Being, which, like time, is not a thing, and which cannot appear as such (in a phenomenological sense). In this reading, *Ereignis* and Being are equated.

13 As Derrida indicates, *Ereignis* is a difficult word to translate (*GT* 19). It is often translated as event. However, as Krell points out in Heidegger’s *Basic Writings* (at 396), in introducing ‘The way to language’, *Ereignis* in Heidegger’s texts is used in a special sense, related to the Latin *proprius* or own-ness (see also Heidegger 1993b: 415–17). Krell therefore translates *Ereignis* as appropriation (In *Identity and Difference* and *On Time and Being* it is translated by Stambaugh as ‘Appropriation’). *Ereignis* is furthermore closely related to Heidegger’s thinking on death which is, as we saw earlier, in turn viewed as the most proper possibility of *Dasein*; see Heidegger (1962: 294; 1993b: 417). *Ereignis* could be said to draw *Dasein* into its own; into its mortal becoming in other words; see Sheehan (1998: 315). Elsewhere *Ereignis* is translated as ‘Enowning’.

14 In other texts Derrida has indicated how the *es gibt* can be thought in terms of a promise that makes language possible, and therefore as ‘preceding’ the ‘is’ which Heidegger has shown is a characteristic of all language as well as the ‘what is’ question of philosophy; see *MfPdM* 146–8; *OS* 129–36 fn. 5; *Spurs* 111; *AL* 302. Thinking of the *es gibt* in terms of a promise of course ties in closely with Heidegger’s thinking on the relation between language, Being and *Ereignis*.

‘extending reach’ or giving of presencing – that is, of Being – takes place (Heidegger 2002c: 12–13). According to Heidegger, and this ties in with what was said above concerning temporality in *Being and Time*, not only what is present presences, but also what ‘has been’ in so far as it still concerns us and ‘what comes towards us from the future’ as it already concerns us. Such presencing, Heidegger notes, ‘is given’ (*wird gereicht*) in all these temporal dimensions. This ‘giving’ (*dieses Reichen*), he contends, reaches us ‘because it is in itself a reaching’ (*ein Reichen*) (Heidegger 2002c: 13). Heidegger (2002c: 13) sees a reciprocal relation here between the past, present and future which he expresses as follows:

Approaching, being not yet present, at the same time gives [*reicht*] and brings about [*erbringt*] what is no longer present, the past, and conversely what has been offers future to itself [*reicht sich Zukunft zu*]. The reciprocal relation of both at the same time gives and brings about [*reicht und erbringt sich*] the present. We say ‘at the same time,’ and thus ascribe a time character to the mutual giving [*dem Sich-einander-Reichen*] to one another of future, past and present, that is, to their own unity.

Heidegger then asks about the ‘whence’ (*woher*) of the unity of this three-dimensionality of what he refers to as ‘true’ (*eigentlichen*, also ‘real’ or ‘original’) time. The unity of time’s three dimensions, Heidegger (2002c: 15) concludes, ‘consists in the interplay [*Zuspiel*] of each toward each’. This interplay of the three dimensions amounts to a fourth dimension of time which Heidegger refers to as ‘the true extending’, or perhaps rather ‘giving’ (*das Eigentliche, in Eigenen der Zeit spielende Reichen*). A fourth dimension of time thus gives and keeps together the dimensions of the past, present and future. It is this dimension which gives time as well as Being (*Es gibt die Zeit, Es gibt Sein*) (Heidegger 2002c: 16–17) and which Heidegger refers to as *das Ereignis* (the event of Appropriation). On Derrida’s reading, *Ereignis* does not simply belong to time or to Being, but gives Being and time. In commenting on Heidegger’s analysis, Derrida notes that this fourth dimension of time is not a figure, but is a reference to ‘the thing itself’ (*GT 22*). ‘This thing itself of time’, he furthermore comments, ‘implies the play of the four and the play of the gift’ (*GT 22*).

Heidegger’s *On Time and Being* thus appears to make possible a thinking of the gift in the strict sense indicated above: a gift which does not involve the giving of some thing by some one (a subject) to an other (subject). At the same time this traditional definition of the gift could actually be employed if we hear something different in the words ‘one’, ‘thing’ and ‘other’ (*GT 11–12*). In the giving of the *es gibt*, as Derrida points out, the *es* (it) is not a thing; it also entails a giving ‘without giving anything and without anyone giving anything – nothing but Being and time (which are nothing)’ (*GT 20*). The last phrase in parenthesis is to be understood within the context of Heidegger’s analysis

in *On Time and Being* which shows that time in itself is nothing temporal; it is also not a thing, and therefore in a certain sense, nothing. Time also does not properly belong to anyone (GT 28). Nothing however appears which does not need time or take time. Time is, in other words, the condition of possibility of phenomenality (GT 6). We could say that time, as determined by the revolution of the sun, daytime, makes phenomena appear. Similarly Being is not something, a thing or a being-present/present-being. This is why one cannot say 'time is' or 'Being is', but only *es gibt Sein* and *es gibt Zeit* (GT 20). If the gift, rigorously thought, entails exactly this – the giving of nothing that is and that appears as such, then time is what should be given as gift. In the words of Derrida '[w]hat there is to give, uniquely, would be called time' (GT 29). This also explains the first part of the title, *Given Time*. We could say regarding time and also regarding the gift that each of them 'is what it is without being (it) [*est sans l'être*]' (GT 28). Neither time nor the gift therefore exists as such. Nevertheless, there is gift and there is time.

Derrida points out that Heidegger's thinking in *On Time and Being* is clearly still ordered by a desire for the proper (GT 21–2). This can be seen, for example, in the attempt to think Being and time properly or in their own or proper element.¹⁵ *On Time and Being* all the same opens the way to a thinking of the gift which, although not completely unrelated to the proper, exceeds the proper and reciprocation. Such a reading is made possible by Heidegger's analysis of *Ereignis* which involves a self-withholding or self-withdrawal (*Sich-entziehen*) in sending, also referred to as an expropriation (*Enteignis*) of itself (Heidegger 2002c: 22–3).¹⁶ This thinking of *Ereignis* in terms of what Derrida refers to as ex-appropriation (*Points* 270, 321), tying in closely with the notion of 'play' analysed above, opens the way to a thinking of the gift as exceeding economy.¹⁷ Thinking of the event (*Ereignis*) in terms of a gift beyond exchange moreover allows for the gift to be thought as opening the 'history of Being' without belonging to it.¹⁸

The gift and sexual difference

Heidegger's contention, as we saw earlier, is that Western philosophical thinking has forgotten the question of Being, which was first posed by the early Greeks

15 Stambaugh's interpretation, referred to above, ties in with what is said here. Heidegger (2007b: 9) expresses himself as follows in this respect: 'Wir denken zuerst dem Sein nach, um es selbst in sein Eigenes zu denken. Wir denken sodann der Zeit nach, um sie selbst in ihr Eigenes zu denken.' See also Heidegger (2002c: 6 and 22): 'As the gift of this It gives, Being belongs [*gehört*] to giving'; 'The gift of presence is the property [*Eigentum*] of Appropriating [*des Ereignis*]'.

16 See further Chapter 7.

17 See also de Ville (2010b and 2011) on the notion of 'play' in Derrida's thinking; and see Chapter 3.

18 See also *Glas* 242a and Gasché (1994: 194–8). This of course ties in with *Dasein's* relation to death which was discussed earlier.

(Heidegger 1962: 2).¹⁹ We furthermore saw that a certain ‘forgetting’ plays an important role in Derrida’s analysis of the gift. The forgetting that Derrida refers to is undoubtedly tied to Heidegger’s notion of forgetting (of Being), but it also goes beyond a forgetting of Being; it is said to involve an ‘absolute forgetting’. For Heidegger, the forgetting of Being is not a psychological or psycho-analytical category. Absolute forgetting, as Derrida refers to it and as we will see shortly, is indeed related to psychoanalytic repression, but at the same time exceeds it. Forgetting in this sense is closely related to Derrida’s thinking on time. In associating forgetting and the gift, Derrida seeks to go not only beyond the Heideggerian notion of a forgetting of Being, but also beyond the psychoanalytical idea of repression or the unconscious (*GT* 16–18, 23). The radical forgetting that Derrida is referring to here is first of all required of the donor(s), whether individual or collective. Derrida underlines that even the intention to give on the part of the donor, already suffices to annul the gift:

The simple intention to give, insofar as it carries the intentional meaning of the gift, suffices to make a return payment to oneself. The simple consciousness of the gift right away sends itself back the gratifying image of goodness or generosity, of the giving-being who, knowing itself to be such, recognizes itself in a circular, specular fashion, in a sort of auto-recognition, self-approval, and narcissistic gratitude.

(*GT* 23)

The above happens immediately and automatically when a subject or subjects are involved. A gift cannot therefore come about between two subjects exchanging objects, things or symbols (*GT* 24). Heidegger’s thinking in *On Time and Being* is for this reason of great importance in attempting to think the gift beyond exchange. As we saw above, it seeks to go back beyond a construction of Being in terms of subjectivity and objectivity (*GT* 24). To understand the relation between absolute forgetting and the gift, as well as the reason for Derrida’s invocation in *Given Time* of numerous psychoanalytic notions, such as the unconscious, desire (beyond desire), repression, forgetting, mourning and sexual difference (*GT* 16–17, 25, 30, 118) a number of other texts of Derrida on Heidegger and on the gift need to be referred to.

In ‘Women in the beehive’ (at 150) Derrida is asked a question relating to an earlier remark of his in another interview concerning the relation between sexual difference and the impossible idea of the gift. Derrida raises the question here whether:

this extremely difficult, perhaps impossible, idea of the gift can still maintain an essential relationship to sexual difference. One wonders

19 See also Heidegger (1991: IV 193; *GT* 18).

whether sexual difference, femininity for example – however irreducible it may be – does not remain derived from and subordinated to either the question of destination or the thought of the gift ... I do not know. Must one think ‘difference’ ‘before’ sexual difference or taking off ‘from’ it? Has this question, if not a meaning (we are at the origin of meaning here, and the origin cannot ‘have meaning’) at least something of a chance of opening up anything at all, however im-pertinent it may appear.

(EO 172)

The answer to this question appears to depend on the ‘meaning’ attributed to ‘sexual difference’. It can on the one hand simply refer to a separation or the opposition of the traditional two sexes as in Hegel where ‘[i]n each sex the organic individuals form a totality’ and where sexual difference entails a hierarchical opposition of male activity/female passivity (*Glas* 110a, 112a–13a). In relating this traditional idea of sexual difference to the gift, one can here for example think of a (sexual) relation between a man and a woman (as subjects) where ‘gifts’ are exchanged or ‘destined’ (‘WB’ 150). As we saw above, and as Derrida confirms here yet again, where (sexually determined) subjects are involved there can be no gift (‘WB’ 150). There can likewise be no gift in the case of calculation, consciousness and experience. For there to be gift one has to think a sexuality which is ‘completely out of the frame, totally aleatory to what we are familiar with in the term “sexuality”’, Derrida notes here (‘WB’ 151).²⁰ A different ‘meaning’ must therefore be attributed to ‘sexual difference’ which goes beyond sexual duality.²¹

In invoking the second understanding of sexual difference, Derrida refers in ‘Women in the Beehive’ to his reading of Heidegger’s *Being and Time* in ‘*Geschlecht*: sexual difference, ontological difference’. In this essay Derrida mentions the seeming silence about sex in Heidegger’s texts (*Geschl I* 382). *Dasein* in *Being and Time*, and therefore also the meaning of Being, appear to bear no sexual mark. Derrida however refers to a lecture in 1928 at Marburg University, which was meant to clear up the many misunderstandings in the reception of *Being and Time*, where Heidegger explained the need to conceive of *Dasein* as sexually neuter, that is, as belonging to neither of the two sexes (*Geschl I* 385; Heidegger 1984b: 136). It is interesting to note, Derrida (*Geschl I* 386) comments, that Heidegger, in *Being and Time* (1927), makes no mention of the asexuality (*Geschlechtslosigkeit*) of *Dasein*, only *Dasein*’s neutrality, yet in the Marburg course this is one of the first traits he mentions: ‘This neutrality also indicates that *Dasein* is neither of the two sexes’ (Heidegger 1984b: 136). Derrida notes the strangeness of this observation or clarification,

20 See also *Psy I* 141 with reference to the work of Nicolas Abraham on sexuality in Freud thought of in an anamorphic way.

21 See also *Spurs* 121.

seeing that it appears commonsensical that if *Dasein* is neuter, it does not belong to either of the two sexes. How should this observation regarding the neutrality as to sexual difference therefore be understood? Rather than simply understand it as a subtraction or negativity in characterising *Dasein*, Derrida notes with reference to Heidegger's comments that this characterisation should be understood as a 'positivity', a 'richness', or a 'power' of *Dasein* (*Geschl I* 387).²² According to Derrida, Heidegger is thus not desexualising *Dasein*. Sexual duality is indeed subtracted, but sexuality itself is 'liberated' (*Geschl I* 387).²³ Heidegger, Derrida notes, invokes this specific terminology rather than using the term 'sexuality' in a different sense, because of the way in which sexuality is usually understood, that is, in terms of the binary logic of male or female (*Geschl I* 388–9). The sexual neutrality of *Dasein* does not therefore point to the absence of sexuality itself; not to the absence hence of libido, instinct or desire, Derrida contends, but simply to the absence of any mark belonging to one of the two sexes (*Geschl I* 387; *EO* 180). The meaning of the neutrality as to sexual difference that Heidegger refers to, Derrida summarises as follows:

If *Dasein* as such belongs to neither of the two sexes, that does not mean that its being is deprived of sex. On the contrary: here one must think of a predifferential, or rather a predual, sexuality – which does not necessarily mean unitary, homogeneous, or undifferentiated ... [I]t would indeed be a matter here of the positive and powerful source of every possible 'sexuality'.

(*Geschl I* 387–8)

A similar comment of Heidegger is to be found in 'On the essence of ground', dating from 1929. Heidegger (2007a: 122) points out here that *Dasein*'s existence for the sake of itself is not to be confused with egoism or narcissism, but is to be understood as a precondition for its being an 'I' and for relating to a 'you'.²⁴ Only because of this ipseity can a human being act in either an egoistic or altruistic way. Selfhood, Heidegger continues, 'is neutral with

22 Heidegger (1984b: 136–7): 'This neutrality also indicates that *Dasein* is neither of the two sexes. But here sexlessness is not the indifference of an empty void, the weak negativity of an indifferent ontic nothing. In its neutrality *Dasein* is not the indifferent nobody and everybody, but the primordial positivity and potency of the essence [*die ursprüngliche Positivität und Mächtigkeit des Wesens* (of Being)].'

23 Derrida links Heidegger's strategic move here to what he (Heidegger) says in 'Plato's doctrine of truth' about the private sense of *aletheia* (literally: unhiddenness). In the last paragraph Heidegger (2007a: 182) remarks that '[w]hat is first required is an appreciation of the "positive" essence of *aletheia*. The positive must first be experienced as the fundamental trait of being itself.' See also *Geschl I* 397–400.

24 See similarly the discussion in Chapter 1 on the 'instinct of mastery' in Freud.

respect to being an “I” and being a “you,” and above all with respect to such things as “sexuality” [*erst recht etwa gegen die “Geschlechtlichkeit”*]. The ‘above all’ in this sentence is for Derrida of primary importance as well as the fact that ‘sexuality’ appears in quotation marks, as if Heidegger is here too referring to sexuality in the usual sense, and keeping open the possibility that *Dasein*’s ipseity may in another sense be marked by sexuality (*Geschl I* 389–91).

The above reading is confirmed when Heidegger in the 1928 lecture proceeds to comment on the isolation (a certain originary isolation) associated with this original ipseity of *Dasein*. Heidegger links this isolation with the theme of sexual difference: ‘As such, *Dasein* harbours the intrinsic possibility for being dispersed into bodiliness and thus [or subsequently] into sexuality [*faktische Zerstreuung in die Leiblichkeit und damit in die Geschlechtlichkeit*]’ (Heidegger 1984b: 137). This furthermore leads to the disunity (*Zerspaltung*) of a determined sexuality. Heidegger notes that the dispersal and disunity (*Zersplitterung, Zerspaltung*) referred to here does not connote something negative in the ontic sense. At stake is the inmost isolation of *Dasein*, the not-yet of factual dispersion (*Zerstreuung*); in other words, the ‘intrinsic possibility of multiplication [*Mannigfaltigung*] which ... is present in every *Dasein* and for which embodiment presents an organizing factor’ (Heidegger 1984b: 138). This inherent possibility of multiplication (to be distinguished from simply multiplicity, diversity or plurality) furthermore precedes the (secondary) division into the sexes. This multiplication, or what can also be referred to as dissociation, unboundedness and de-socialisation, are not traits characterising the ‘fall’, accident or subsequent decline of *Dasein*, but are part of the originary structure of *Dasein* which affects it and its body (*Geschl I* 392). These ‘traits likewise belong to Being itself’, Heidegger (2004b: 138) notes. *Dasein* is in other words in its essence characterised by a primordial bestrewal or dissemination (*eine ursprüngliche Streuung*) (Heidegger 1984b: 138; *Geschl I* 393). As Derrida points out, it is this disseminating structure which makes possible *Dasein*’s relation to specific objects as well as its relation to itself (*Geschl I* 393–4). *Dasein*’s originary dispersion is furthermore closely linked to its thrownness (*Geworfenheit*), which Heidegger (1984b: 138) refers to as ‘a primordial feature of *Dasein*’. Thrownness, as Derrida notes, has to be understood as preceding any project on the part of *Dasein*, the categories of passivity and activity which are closely related to the subject, images of the fall, whether Platonic or Christian, as well as of spatiality. ‘The originary spatiality of *Dasein*’, Derrida notes, ‘depends on the throw’ (*Geschl I* 396).

To recap briefly before continuing the analysis: the ‘sexuality’ which Heidegger implicitly invokes here, is not to be understood as an allusion to some primitive or subsequent bisexuality (*EO* 180). Derrida could be said to read Heidegger as saying that ‘sexuality’ is an essential part of the structure of *Dasein* and therefore influences, or rather, necessarily determines the meaning of Being and

the ontological difference (*Geschl I* 390, 393).²⁵ The word ‘sexuality’ should not be understood here in its usual sense. We saw above that Heidegger explicitly relates sexuality to the internal possibility which *Dasein* harbours within itself of dispersal, dissemination, destruction, shattering and fragmentation (*Geschl I* 391–2; Heidegger 1984b: 137–8). This dissemination, as we likewise saw, is not an ontic structure, but an originary structure of *Dasein* that affects it with lack-of-binding. This originary dissemination likewise belongs to the Being of *Dasein* (*Geschl I* 393). To continue the analysis: this ‘theme’ of dissemination in *Dasein*’s relation to objects and to itself is already to be found in *Being and Time* (Heidegger 1962: 439–44). Although Heidegger sometimes refers to the dispersion of *Dasein* as a mode of inauthenticity (*Uneigentlichkeit*) or as the falling (*Verfallen*) of *Dasein* in its everyday-being, this is not always the case. At times, it is used to describe the general structure of *Dasein* (*Geschl I* 399, 400). Inauthenticity is furthermore not a moralising critique, a philosophy of culture, a dogmatic religious account of the fall from an original condition or a corruption of human nature (*Geschl I* 400; Minkinen 1999: 59 fn. 36). Nevertheless, Heidegger does sometimes in metaphysical fashion make use of the distinction between the authentic/proper and the inauthentic/improper and imposes a hierarchical opposition in this respect (*MP* 63–4). Derrida explores further the structure of *Dasein* in *Being and Time*, with reference to what Heidegger (1984b: 138) calls in the 1928 lecture, ‘*Dasein*’s stretching along in time [*sofern Dasein als Erstreckung geschieht*]. This stretching along, it appears from *Being and Time*, involves a ‘stretching along between birth and death [*Erstreckung des Daseins zwischen Geburt und Tod*]’ (Heidegger 1962: 426). Heidegger observes in this respect that *Dasein*’s birth is not simply something in its past and that its death is not something that is still outstanding. ‘Factual *Dasein*’, according to Heidegger (1962: 426), ‘exists as born; and as born, it is already dying, in the sense of Being-towards-death’. Derrida, following Heidegger, links this *Erstreckung* or *Ausdehnung* (stretching, expansion, elongation, prolongation) to *Dasein*’s dispersion and remarks that this stretching along:

names a spacing which, ‘before’ the determination of space as *extension* [as one finds e.g. in Descartes], comes to extend or stretch out being-there, the *there* of Being, *between* birth and death. As an essential dimension of *Dasein*, the *Erstreckung* opens up the *between* that links it at once to its birth and to its death, the movement of suspense by which it itself *tends* and extends itself *between* birth and death, these two receiving their meaning only from that intervallic movement. *Dasein* affects itself with this movement, and that auto-affection belongs to the ontological structure of its historicity.

(*Geschl I* 394)²⁶

25 See also Heidegger (1991: I 194).

26 See also Heidegger (1962: 424–9).

This possibility of ‘stretching along’, Heidegger (1962: 426) moreover points out, is made possible by the Being of *Dasein*. In light of what has been said above, Derrida concludes that *Dasein*’s essential dispersion makes possible this ‘stretching along’ between birth and death (*Geschl I* 394). It would not have been possible for the link between birth and death to take place (that is, time) without this dispersion, dissociation, or unbinding (394). The same applies to space or *Dasein*’s originary spatiality (*Geschl I* 395).²⁷ This brings us back to the gift which as we saw cannot be located in space, but must be thought of in terms of ‘spacing’. Spacing is referred to by Aristotle as ‘ama’, the ‘together of time and space’, which allows for what Derrida refers to as the ‘becoming-space of time and the becoming-time of space’ or what could also be referred to as the difference between time and space, to appear or to be experienced.²⁸ In *On the Name* and with reference to *khora* in Plato’s *Timaeus*, this is referred to as a ‘site’ ‘where the law of the proper no longer has any meaning’ (*ON* 105).

Dasein’s ‘sexuality’ in this pre-originary sense can in other words be said to be intrinsically linked with dissemination which stands in a close relation with death, and with the perfect gift. This link has already been made in previous chapters. At this point it may perhaps be helpful if we turn back to Chapter 3 where a link was made between the gift and sexuality. We saw there that the prohibition of incest is coupled with the giving of gifts and that, according to Lévi-Strauss (1969: 65, 483), marriage is the archetype of exchange and that ‘the woman herself [is] the supreme gift’. It was pointed out that according to Derrida, the mother and the sister – the objects of incestuous desire – are always already supplements of what is ultimately desired (*OG* 156–7, 266). This makes of the prohibition of incest, which Lévi-Strauss posits at the origin of society, a secondary effect of what can be termed ‘absolute desire’. This ‘theme’ and the notion of ‘sexual difference’ are taken up also in *Adieu*, where Derrida in a discussion of Levinas’s notion of the welcome, refers to the feminine as a welcoming par excellence (at 39).²⁹ At stake here is feminine alterity or (the feminine side of) sexual difference, which, as Derrida notes with reference to Levinas, is not simply one difference amongst others (*A* 40). From Levinas’s analysis, and thereby raising the ‘political’ stakes of this analysis, it appears that the host is actually first of all a guest in his own home or country, and this takes place by virtue of the

27 The pre-spatial dispersion of *Dasein* (in relation to death) is manifested inter alia in language (*Geschl I* 395; Heidegger 1984b: 138). In writing, which as we saw has been ‘repressed’ by metaphysics because of its relation to death (Chapter 1), this dispersion is e.g. expressed by the spacing of signs, punctuation, intervals, and differences between signs (*OG* 68, 167; *Pos* 27). All graphemes, Derrida moreover notes, are of a testamentary essence (*OG* 69). See in this respect again *SQ* 53, as quoted in Chapter 1.

28 See in this respect *OG* 65–6, 69; *SP* 143; Heidegger (2002c: 14–15); Harvey (1986: 121).

29 See further Chapter 1.

feminine welcome. At stake here is an originary dispossession by means of which ‘the “owner” is expropriated from what is most his own, the *ipse* from its ipseity, thus making of one’s home a place or location one is simply passing through’ (A 42).³⁰ Levinas’s perhaps traditional and androcentric description of woman is thus read by Derrida in a way which makes it possible to think a pre-originary hospitality on the basis of femininity or the feminine side of sexual difference (to be distinguished from the empirical presence of a human being of the feminine sex), which ties in very closely with the notion of the gift beyond exchange (A 43–4). It appears that something similar is at stake in Derrida’s reading of Heidegger’s analysis of the originary ‘(sexual) dispersion’ ‘or dissemination’ of *Dasein*.³¹ Sexual difference in this transgressive ‘sense’ thus has little to do with the opposition between the male and female sexes. The ‘difference’ lies in a sexuality which exceeds what is usually understood under that term. At stake here is a ‘desire’ for absolute pleasure or the death drive. In *Given Time* it is referred to as the gift beyond exchange and in *Glas* as the putting in play or to fire of all, which must nonetheless, in order to make possible an economy of self-relation and a dialectic of meaning, engage in a constriction or binding (*Glas* 242a).³²

The ‘structure’ appearing from the above analysis corresponds with the stricture of *différance* in terms of which dissemination or unbinding would ‘precede’ any form of gathering or binding (Chapter 1). We can therefore perhaps speak here, with Kamuf (2001: 99), of ‘(sexual) differe/ance’.³³ *Différance*, as we saw earlier, goes beyond the ontological difference, or the distinction between Being and beings, to the difference between the gift or self-destruction on the one hand, and economy, law, politics, reason, meaning, experience, science, knowledge and philosophy which are ‘in time’, on the other (GT 30). (Sexual) *Différance*, in other words, structures the relation between the desire for presence (which we also find in Heidegger’s analysis of Being) and the ‘desire’ for absolute pleasure, which remains continuously deferred. *Différance* could also be said to be ‘situated’ between Being/beings

30 Derrida’s *The Beast and the Sovereign* opens with the same theme: ‘Feminine ... masculine [La ... le]. Let me recall the title proposed for this year’s seminar: the beast [feminine: la bête] and the sovereign [masculine le souverain]. La, le.’

31 The reason for choosing the ‘feminine’ figure simply ties together with the text Derrida is analysing, here that of Levinas. Something similar happens when Derrida reads Blanchot’s *The Madness of the Day* (AL 244–5), although a slight difference creeps in when Blanchot adds a qualification in invoking the feminine figure (of law [la loi]): ‘usually women’, he says. Because of this mixing of genders (not only women, Blanchot implies), Derrida speaks here of ‘the madness of sexual difference’ (AL 245). See further Derrida *Spurs* on the ‘figure’ of woman in Nietzsche.

32 See also PC 338–409; and Freud (2001: XXI 90 fn. 1).

33 See also *Points* 164–5 where Derrida comments on the problematic nature of the word ‘desire’ in this context, and also speaks of ‘a bliss greater than my bliss, it exceeds both myself and my sex, it is sublime, but without sublimation’.

and an other which is not ‘their’ other (*ON* 104). As soon as there is, as Derrida points out, there is *différance* (*PC* 66). ‘Prior’ to this stricture of the for-(it)self, although one is no longer reckoning with time here, but with an absolute past or the trace, one can, as Derrida points out in *Glas*, speak of a pure play of difference, of a difference without subject, of indifference, of a seminal effusion without return (*Glas* 239a–41a).³⁴ In binding itself, the gift puts a supplement or substitute in the place of that which the structure inhibits or forbids (*PC* 393). It is nonetheless the only way in which the gift can appear or show itself as gift.

The gift and mourning

In *Given Time* a relation is furthermore posited between the gift and mourning, which need to be briefly explored, also in preparation for the discussion in Chapter 7. It is for example said in *Given Time* that ‘the question of the gift will never be separated from mourning’ (*GT* 129, fn. 13). To understand this relation it is necessary to refer to a number of other texts of Derrida where he, following the analyses of Nicolas Abraham and Maria Torok, draws a distinction between the work of mourning on the one hand and mourning which does not take place in the normal way (*Fors* 125–38). The latter form of ‘mourning’, it appears from these texts, are analogous to the non-work or the play of the gift.³⁵ Briefly stated, the work of mourning or ‘normal mourning’ according to Freud would entail the total digestion, assimilation, introjection and idealisation of the dead person in order to withdraw the libidinal investment in that person and to reconstitute the self.³⁶ Although introjection is inevitable, being a desire for presence as counter-reaction to identification with the dead, total assimilation is strictly speaking impossible (‘M&S’ 235). This is because death makes clear the distinction between self and other, seeing that it requires of a self to bear some one outside of them that absolutely exceeds them within them (*MfPdM* 33–4; *WM* 159). ‘Abnormal mourning’, on the other hand, would involve the incorporation of the dead person in a crypt in the ego (*Fors* xvi–xvii). The dead person would thus not be internalised or become a part of the self as in the work of mourning, but would nonetheless be taken inside the self, inhabiting the ego as a stranger, a persecutor, having been granted absolute hospitality and left in his/her alterity. The ‘living-dead’ person can in this way haunt our body, look at us and speak through us, become our law, *the* law, stronger and more forceful

34 See also *OG* 66.

35 See inter alia *GT* 36; *EO* 57–9; *MfPdM* 3–43; *Points* 320–2; *Fors* xvi.

36 In Chapter 7, we will see how this form of mourning plays itself out in relation to Marx.

than us (*WM* 160).³⁷ Even before their death, it appears, we already carry those we love in us as well as outside us in anticipating their death, which constitutes the self and the relation to the self:

Even before the death of the other, the inscription in me of her or his mortality constitutes me. I mourn therefore I am, I am – dead with the death of the other, my relation to myself is first of all plunged into mourning, a mourning that is moreover impossible. This is what I call ex-appropriation, appropriation caught in a double bind: I must and I must not take the other into myself; mourning is an unfaithful fidelity if it succeeds in interiorizing the other ideally in me, that is, in not respecting his or his infinite exteriority.

(*Points* 321)³⁸

In *Given Time* as well as in other texts, Derrida seeks to extend the structure of mourning, noting that all work is actually a work of mourning, that is, linking mourning to our earlier discussion, we are always attempting to re-appropriate ourselves as a reaction to our thrown-ness or loss of autonomy.³⁹ This motivates his call for a mourning of mourning or an end of mourning work, a beyond of the mourning principle (*Points* 48–52; *OH* 111–19). This is not the same as the successful completion of mourning, but the giving of affirmation ‘to an other end’, which Derrida brings into relation with Freud’s speculation on the death drive in *Beyond the Pleasure Principle* (*Points* 52). In abnormal mourning the boundaries between self and other are breached to the ‘point’ of dissolution of the self.

37 Within the notion of mourning a further distinction has to be drawn, following Abraham and Torok, between ‘the foreigner incorporated in the crypt of the Self’ as described in the text above and ‘the ghost that comes haunting out of the Unconscious of the other’ (*Fors* 118–19 fn. 21; Abraham and Torok 1994: 140–1 fn. 1, 171–205). This ‘ghost’ or ‘phantom’ also has a place in the unconscious, but ‘is not an effect of repression “belonging” to the subject he comes to haunt with all kinds of ventriloquism; he is rather “proper” to a parental unconscious’ (at 119). The ghost coming back to haunt is therefore not a return of the repressed (*Fors* 118–19 fn. 21; *EO* 59). Derrida relies on both of these structures in his extension of the notion of mourning to the field of the political. This can be seen e.g. in his discussion of the consequences of the encounter in Baudelaire’s ‘Counterfeit money’ of the two friends with a beggar (or at least with the beggar insofar as he represents a purely receptive, expending and consuming agency within this particular culture) (*GT* 134–45). The beggar could be said to function here as a ‘hetero-cryptic ghost’ (*Fors*: xxxi). As Derrida notes, the poor, ‘[a]s marginal people excluded from the process of production and circulation of wealth ... come to represent the gods or the dead. They occupy the place of the dead man or the spirit, the return of the ghost, that is, of an always imminent threat’ (*GT* 138).

38 See also *MfPdM* 28–9.

39 See also *Glas* 86b; *WM* 161.

The gift, time and law

Our analysis up to this point can be recapped as follows: Derrida can be said to take a step back from Heidegger's analysis, to ask about the source of the distinction Heidegger draws in *Being and Time* between authenticity and inauthenticity. According to Heidegger, Being itself calls for authenticity (in relation to *Dasein's* own death), and the inauthenticity that can be observed in *das Mann* (for example, a denial of death, and, as we will see in Chapter 7, also representation, technology and writing), indicates a 'fall'. If we however completely suspend such metaphysical (moral) hierarchies, as Heidegger himself proposes we do, it becomes clear that an analysis is required which to a certain extent goes beyond that of Heidegger. This requires an enquiry into that which 'precedes' or gives Being and time, and of which Heidegger again recognised the importance. Derrida's analysis of this 'gift' of Being and of time, and which departs in important respects from that of Heidegger, thus enables us to go beyond metaphysical oppositionality. This gift, or what Heidegger refers to as a fourth dimension of time, it furthermore appears, needs to be understood with reference to Freud's insights in relation to unconscious processes, yet again, while at the same time transforming these insights.

In extending the notion of the gift and its relation to sexual difference and mourning to law, caution is advised. First, it is clear from the above account that Derrida's analysis of the gift should not be understood as proceeding from the (Levinasian) face-to-face encounter with the other, with the perfect gift becoming impossible, as some readings suggest.⁴⁰ An analysis of the gift has to proceed by way of the giving of Being and of time.⁴¹ A relation to the other as other is possible only as a consequence of such giving. Second, the giving of the perfect gift should not be understood as a personal (ethical) responsibility of the judge or as applying to the parties in dispute.⁴² As a number of Derrida's texts make clear, the position analogous to the I, the self or the subject as described above is that of a 'we', for example a people, nation or community, namely a collective subject, who relies on the law in general in an attempt to protect or safeguard itself in its own interest from

40 See Bernasconi (1997: 260–1).

41 Law has an essential relation to time, as has been recognised by a number of legal scholars in recent times; see inter alia Rubinfeld (1998, 2001); Douzinas and Warrington (1994: 211–41); Douzinas (2007: 34–50); Cornell (1992: 116–54); van der Walt (2005: 191–231); Fitzpatrick (2001: 84–90); Kirste (2002: 23–44). As the analysis above indirectly showed, this law–time couple and the circularity of economic exchange which it necessarily entails, are nevertheless unlikely to be interrupted or exceeded when one seeks to think of time in terms of an Oedipal past, a time of reconciliation, a time of repetition, a diachronic relation between the actual other and the system, as an extension over time, or as a synchronisation of social time.

42 See also Chapter 1.

its 'desire' for self-destruction' or from absolute hospitality.⁴³ Derrida's analysis of the gift therefore raises questions concerning the traditional model of decision-making in terms of which a collective subject identical to itself simply re-appropriates its identity through the decision (*GT* 10–11). This model of decision-making forms part of all legal discourses of self-legitimation, but can perhaps most clearly be seen in the recent debates in some jurisdictions concerning the seeking of the common good as the primary function of law, whether viewed communally, nationally, regionally or internationally.⁴⁴

The founders of a state as well as legal decision-makers, as should be clear from the above discussion, are always already situated within the movement of *différance* and therefore also within the disseminal or thrown 'spacing' or 'a-temporality' of the gift. It is from this non-localisable abyss, beyond space and time, and therefore without meaning, without property, without law, without right and without reason, that responsibility in decision-making, a responsibility necessarily without limit and before memory must be thought (*Glas* 49a–53a; *AR* 247–8). Such responsibility would necessarily require a negotiation with the impossible, even though this must be followed by a binding, which, as Derrida points out, 'is immediately to supplement, to substitute, and therefore to represent, to replace, to put an *Ersatz* in the place of that which the structure inhibits or forbids' (*PC* 393).⁴⁵ The gift, in other words, is unlikely ever to be 'pure', as a circulation of exchange will always again be instituted. The re-appropriation which therefore necessarily follows upon this exposition to the 'perhaps' of the pure gift, nevertheless cannot in the case of law be absolutely stabilised in the form of a collective subject. As Derrida puts it:

The subject assumes presence, that is to say sub-stance, stasis, stance. Not to be able to stabilize itself absolutely would mean to be able only to be stabilizing itself: relative stabilization of what remains unstable, or rather non-stable. Ex-appropriation no longer closes itself; it never totalizes itself.

(*Points* 270)

This is why, in 'Force of law', and as we will see in the chapter that follows, Derrida insists that there is the possibility of 'general strike', or what we could refer to here as 'the perfect gift', in every interpretive reading (*AR* 271). A written text such as a constitution opens itself to such a reading, as such a text, like the gift, does not return to the author. This is because a constitution

43 See *Rel* 51; *PTT* 94–100.

44 See Schuppert (2003: 215–60) for a summary. See in this regard Nietzsche's comment on the 'common good' in *Beyond Good and Evil* (Nietzsche 1989: 53 [Part II para. 43]).

45 See also *AR* 251.

ultimately amounts to a perfect gift, in a similar way as does Mauss's *The Gift* and Heidegger's *On Time and Being*, the gift-giving character of which Derrida explores in *Given Time*. This gift-characteristic of a constitution is of course not the result of the intentions of its authors, but because of the gift 'itself' which as we saw sets law in motion through the giving of time and Being (*GT* 101). The gift, because of the stricture of *différance*, inevitably forms a part of the structure of every text.⁴⁶

The possibility of the impossible gift in every interpretive reading entails also the 'right', granted by the gift, to suspend all norms of reading which ultimately also stand in the service of the preservation of law (*AR* 271, 272). Judicial decision-making cannot therefore, thought rigorously, consist simply of calculation or the application of norms of reading in an attempt to find, establish or create meaning. Set in motion by the gift, it should, it *must* affirm the gift. A legal reading affirming the gift has to defy the circularity of economic exchange; it has to involve a certain madness which 'allows' itself to be 'taken' by the gift.⁴⁷ At the same time, because of the inevitable calculation and re-appropriation which is provoked by the unbearable demand of the gift; because of the necessity therefore of time becoming space and space becoming time, judicial decision-making also requires the taking account of or negotiation with law and rules (*GT* 142; *AR* 252). The gift, as we saw, inevitably erases, effaces itself in this negotiation and thus in the giving, so that we can never say, 'this is/was a gift or a just decision'.⁴⁸ Without this thinking of the gift, the meaning-giving subject would be forever simply caught in the circle of economic exchange.

46 See also Horner (2001: 202).

47 See also *AR* 252, 255; *G&L* 95.

48 See also *AR* 251.

Force of law

'Force of law' is one of Derrida's most commented-on essays and more than any other, it has been dominated by a liberal reading. This reading will be contested in the present chapter. As indicated in Chapter 1, an appreciation of Derrida's broader project is essential should one wish to understand what is at stake in his texts on law. This applies a fortiori here. 'Force of law' cannot be understood without an appreciation of Derrida's relation to the thinking of especially Husserl, Heidegger, Freud and Levinas. Chapters 1 to 5 of *Law as Absolute Hospitality* have attempted to lay the basis, so to speak, for the reading of 'Force of law' that will follow. A close relation will appear here between Derrida's analysis of writing, and specifically the notion of iterability with reference to Husserl, and the origin of law; Derrida's analysis of the gift which gives Being with reference to Heidegger, and justice; the stricture of *différance* in the analysis of the Freudian death drive, and justice; Derrida's analysis of the preconditions for a relation with the other in Levinas, and justice; as well as Foucault's tracing of the history of madness and Derrida's deconstructive 'implosion' of this concept, and justice. If 'Force of law' is understood within this context, as Derrida himself advises (*AR* 235), a number of important, but difficult issues in this essay can be clarified. These include the relation between justice and singularity, the notion of the event, the notion of undecidability, the idea of the 'mystical' foundation of law, as well as the problem of good and evil. It may at first sight appear that this chapter is engaged in a hair-splitting exercise. The distinctions drawn here are however essential to enable us to move away from the dominant liberal reading of 'Force of law'. The analysis undertaken here will not attempt to provide a close reading and explanation of the whole essay, but will rather focus on specific issues which have thus far plagued commentaries.

Justice, singularity and the event

In line with the predominant liberal reading, in seeking to spell out the implications of 'Force of law' (and even preceding that text), great importance has been attached to the notion of singularity in Derrida's thinking, and

especially in this text, by (legal) scholars, both by those sympathetic to and those critical of his thinking. In these readings singularity is often placed in opposition to the generality of law (and of language).¹ Such readings tie in closely with and in some instances are informed explicitly by traditional readings of the relation posited by Levinas between the other and the third.² Translated into the context of judicial decision-making, 'Force of law' has as a consequence been said to require what is impossible: simultaneous compliance with the universal rule *and* its pertinent individualised exceptions (Rosenfeld 2005: 818–21). In readings which place greater emphasis on singularity, every party in a court case has been said to be a potential other to the legal system (Thurschwell 1994: 1636–7; Cornell 1992: 143). In the introductory chapter to a recent collection of essays on Derrida and legal philosophy, the editors similarly state that the thesis in 'Force of law' is:

that each judgment presents the call of the other; it literally brings the party accused or defended, before the judge. It is the face, the unique and irreducible image of the other, to which the judge must attend and respond. The face has been seen, the voice heard, the pain felt, if pain there be.

(Goodrich *et al.* 2008: 12)³

In yet other versions, not everyone, but only those who are marginalised or in a position of suffering are viewed as the (singular) other to whom a responsibility is owed (Caputo 1993: 85–92; 1997: 131). In some of these and related approaches, law has, in line with the above readings, been denounced for its generality and (representational) violence and therefore its inability to do justice to the singular other(s).⁴ This denouncement has then in some instances been followed by calls for a model of decision-making which would concern itself with the singular other(s), that is to say the parties in a court case, rather than the legal system (Cornell 1992: 143). In similar vein, 'Force of law' has been read as requiring of decision-makers to take personal responsibility

1 For some examples, see Rosenfeld (1991; 2005: 819–21); Beardsworth (1996: 25, 41–5); Caputo (1987: 179–83, 189–90; 1993: 85–122; 1997: 135–7); Honneth (2007: 116–17); Borradori (2003: 168); Davies (1994: 272–4); Gehring (2008: 58); Mahlmann (2003: 31); Kellogg (2003: 362–6); Manderson (2006: 194); Belay (1996: 124–350); Malan and Cilliers (2001: 442–4, 446); Balkin (1994: 1157–80); Sheehan (2000: 136–8, 141–2); Douzinas and Warrington (1994: 231–2); Douzinas and Gearey (2005: 75–6); Goosen (1998: 35–7; 2007: 374–5); du Toit (1998: 45, 50–1, 53); van der Walt (1998: 94–6).

2 See in this regard Levinas (2004: 157); and the readings by Cornell (1988: 1624–6; 1990: 1703); Douzinas and Warrington (1994: 18–20, 163–6, 231–2); Critchley (1999a: 99–101); and see Chapter 1.

3 See likewise Critchley (1992: 273; 1996: 34–5; 2008: 29).

4 See e.g. van der Walt (2005a: 11); Thurschwell (1994: 1636–8; 2003: 1200–02); Cornell (1992: 80, 84); Motha (1998: 89–90); Davies (1994: 272); Kellogg (2010: 108–10).

for their decisions, rather than hiding behind or seeking to justify their decisions solely with reference to the law (Thurschwell 1994: 1636–9). In some versions the emphasis on singularity (recast as a plurality of interests) has furthermore been accompanied by a call for a reconciliation of the different interests in a legal dispute; and in light of the impossibility thereof, an acknowledgement of sacrifice (van der Walt 2005a: 11–12).⁵ The brief analysis of ‘Violence and metaphysics’ and of *Adieu* in Chapter 1, as well as the analysis of the preceding chapters, should already have shown that these claims are all to a greater or lesser extent problematic. They oversimplify and moderate the radical claims made by Derrida in ‘Force of law’. There is simply no room in Derrida’s texts for an interpretation which would oppose the generality of law or of representational systems to the concrete other (person(s)), with a privilege now accorded to the latter. Such a reading would imply that Derrida, like all metaphysicians, privileges presence (the actual parties and their claims) as opposed to representation (law as a representative system).⁶ Such a reading takes no account of Derrida’s broader project of deconstructing the metaphysics of presence. As specifically shown in Chapter 1, Derrida also does not simply adopt the Levinasian approach to the other (ethics) and the third (justice). He radically transforms Levinas’s thinking in this respect. The readings of ‘Force of law’ referred to above fail to see that the notion of justice which Derrida invokes here exceeds Being, rather than being focused directly on (human) beings.⁷ As we saw in Chapter 5, justice, like the perfect gift, ‘is’ Being’s other without belonging to it.⁸

A close scrutiny of ‘Force of law’ itself is nonetheless required to ascertain whether there is authority for the above claims. The passages which seem to come closest to supporting these readings provide the following:

An address is always singular, idiomatic, and justice, as law [*droit*], seems always to suppose the generality of a rule, a norm or a universal imperative. How to reconcile the act of justice that must always concern singularity, individuals, groups, irreplaceable existences, the other or

- 5 See similarly van Marle (2009: 38) who contends, by invoking Derrida, that the protection of the freedom of speech of one person will inevitably lead to the violation of that of another. She extends the same argument to the right to equality.
- 6 Litowitz (1995: 345–6), despite the otherwise highly problematic nature of his reading, makes this point well; here he, like others, nonetheless misreads Derrida as in the first place positing such a presence.
- 7 See in this respect also Chapters 1 and 7. Derrida’s discussion of the man–animal relation in this and other texts, likewise makes clear that he is not simply following Levinas here, who generally focuses only on the human face.
- 8 The complexity of Derrida’s thinking in relation to the other is admirably explored by Saghafi (2010), an exploration which, on my reading, corresponds closely with the reading attempted here.

myself *as* other,⁹ in a unique situation, with rule, norm, value, or the imperative of justice that necessarily have a general form, even if this generality prescribes a singular application in each case?

...

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

(AR 245)

These passages indeed seem to oppose law's generality to the singular other. The multiple appearance of the word 'seems' in these passage as well as the question mark at the end of the one passage, however indicate that one should tread carefully here. To understand what is involved in this ostensible 'opposition', we should moreover not stop reading here. If we accept that this is Derrida's understanding of justice, how should we then understand later passages which refer to justice as a 'demand of gift without exchange' (AR 254), as madness (AR 254), as an experience of absolute alterity (AR 257), to say nothing of the analysis of Benjamin's *Critique* in the second part of the essay, more specifically the figure of the general strike, the notions of the ruin and of the spectral nature of law, and divine violence? If the gift is owed to the (singular) other, to which other or others exactly is this gift then owed? Especially towards the end of the second part of 'Force of law', it becomes clear that Derrida is, in the above-quoted passages, still slowly, patiently on the way towards the deconstruction of the metaphysical concept of justice. He is raising a difficulty here, asking a question, posing possibilities tied to his opening remark ('This is for me a duty, I must *address* myself to you in English' (AR 231)). He is by no means, in typical metaphysical style, positing a definition of justice in oppositional terms. He is instead alluding here to a Benjaminian and/or Levinasian-type distinction between singularity on the one hand and generality or representation on the other (AR 295; Chapter 1). In so far as Levinas is concerned, Derrida will note a little later, just before elaborating on the different forms of aporia in the relation between justice and law, that he 'would be tempted, up to a certain point, to bring the concept of justice ... closer to Levinas's' (AR 250). After pointing to attractive features of Levinas's discourse on justice and the other, he however

9 Other possible translations of the phrase 'moi *comme* l'autre' are 'the self as other', 'I, like the other' or 'me as other'.

stops himself short because of certain ‘other difficult questions’ he has ‘about Levinas’s discourse’ so that he ‘cannot be content to borrow a conceptual trait without risking confusions or analogies’ (*AR* 250). As appears also from the analysis in Chapter 1, although there are clear correspondences between the thinking of Derrida and Levinas, the differences are considerable too, and Derrida cannot be said to simply take over Levinas’s thinking, specifically not in so far as the relation to the other and the third, which is alluded to in the above passages, is concerned.¹⁰

In so far as Benjamin is concerned, in *Critique of Violence* he in fact attempts to ‘apply’ his earlier theorisation of language to law (*AR* 259; Staikou 2008: 270). The distinction between singularity and generality/representation accordingly corresponds with Benjamin’s view that the originary destination of language was appellation, nomination, the giving or the appeal or presence of the name, that is that language is originally (as expression) not a means to an end (*AR* 259, 297).¹¹ Benjamin’s thinking about singularity, as Derrida points out, clearly privileges presence, as opposed to representation (*AR* 259–60). At the same time, Benjamin acknowledges that the language of communication and representation cannot be clearly distinguished from that of expression (*AR* 297; Staikou 2008: 269). Benjamin likewise acknowledges in applying his theory of language to law, as we will see below, that the (pure) founding of law cannot be clearly distinguished from its conservation. That is because the founding violence finds itself repeated and ‘represented’ in every act of conservation (*AR* 260). Pointing to this kind of ‘contamination’ between presence and representation has been part of Derrida’s deconstructive ‘strategy’ since his first texts on Husserl’s phenomenological reflections on language.¹² The strategy employed here involves pointing to a paradox. In the case of the deconstruction of the hierarchical opposition between speech and writing, Derrida likewise points to a paradox: writing is devalued by metaphysics, but speech, which is privileged, is shown to include the same features as writing.¹³ This strategy does not however come to a rest at this

10 Another indication that Levinas is alluded to in the quoted passages, is the notion of ‘the rectitude of address’ which is referred to by Derrida just before these passages (*AR* 245) and which is again invoked in the brief discussion of Levinas (*AR* 250). In *A* 1–3 Derrida will give this Levinasian notion a radically new twist: in the language of Chapter 2, the performative speech act (I address myself to you) becomes an absolute performative, perperformative, or an overflowing of the performative; see *AR* 256. See also *SM* 13 where the notion of ‘address’ is taken up again in the context of spectrality, Derrida noting that ‘such an address [i.e. to spirits] is not only already possible, but that it will have at all times conditioned, as such, address in general’ and at *SM* 221: ‘Could one *address oneself in general* if already some ghost did not come back?’

11 For Benjamin, as Derrida points out, ‘[l]anguage is not a means to an end (a thing or signified, even an addressee) to which it would have to make itself correctly adequate’ (*AR* 286).

12 See also *AR* 297.

13 See e.g. *OG* 42–3.

point, but proceeds further towards what he in earlier texts referred to as the emergence of a new ‘concept’ (*Pos* 42).¹⁴ In ‘Force of law’, the paradox opens the way towards an aporia in a similar way in which in *Specters of Marx*, the contradictions in liberal-capitalism (the disjointedness in time) opens the possibility of justice (Chapter 7). The above quoted passages in ‘Force of law’ cannot therefore be read or invoked as the ‘final outcome’ of a strategy of deconstruction, but instead bears a resemblance to what in his earlier texts were the first ‘phases’ of such a strategy.¹⁵ Derrida is thus contending in these passages of ‘Force of law’ that there is a seeming tension between the requirement of justice of relating to someone as other in a purely idiomatic way (for example through the proper name), and the other requirement of justice – generality or universality as characteristic of law and language. As in other contexts (for example, the event, the date, the invention, a performative speech act), Derrida is ultimately concerned here with showing that there can be no pure event, pure idiom, pure invention, pure performative, as there is always already, from the first moment, representation, repetition, mechanisation and technology.¹⁶ This idea of repetition at the origin is of course expressed by the Derridean notion of ‘iterability’ (*AR* 272, 277–8).¹⁷

This seemingly paradoxical situation, as noted above, requires another strategic ‘phase’, namely thinking of justice in terms of an aporia, that is, ‘something that does not allow passage ... a nonpath’ (*AR* 244).¹⁸ With reference to the section on Freud in Chapter 1, we can say that the ‘concept’ of justice, after its deconstruction, is no longer a concept in the traditional sense. It now incorporates the contradictory operation of ‘desire’, and as a result exceeds economy.¹⁹ Derrida speaks in this regard of justice in the sense of ‘a responsibility without limits, and so necessarily excessive, incalculable, before memory’, an experience of inadequation or an incalculable disproportion, as a

14 One can certainly agree with Bennington (2009: 8–9) that there has been a shift in the strategy Derrida employs in his early texts (e.g. in deconstructing the speech–writing hierarchical opposition) compared to his later texts where ‘ethical’ concepts such as justice, hospitality, the gift, etc. (which have in general not been marginalised by metaphysics) are analysed. Nonetheless, as will be argued, the strategy as set out in *Positions* is still employed to some extent.

15 To point to such a strategy in Derrida’s texts is of course not to be confused with an approach that would turn deconstruction into a method or technique as proposed e.g. by Balkin (1986–7, 1994); see further Chapter 1.

16 See also Derrida *OG* 163 on presence and representation in Rousseau; and *AR* 252 where Derrida refers to the mechanics or the technology introduced by the necessary iterability of judgements.

17 See also Weber (2008: 178–9); and see Chapter 2.

18 See also *Ap* 23 where Derrida refers to aporia as ‘the impossible, the impossibility, as what cannot pass [*passer*] or come to pass [*se passer*]: it is not even the *non-pas*, the non-step, but rather the deprivation of the *pas* (the privative form would be a kind of *a-pas*)’.

19 On the ‘notion’ of a general economy, see *WD* 251–77; and *PC* 389.

gift without exchange, and with reference to Levinas, as absolute dissymmetry (AR 247–51). The discussion in Chapters 1 to 5 already made clear that the formulation of this new ‘concept’ of justice cannot be viewed in isolation from Derrida’s broader project – that is, the deconstruction of the metaphysics of presence. The readings referred to above, take little account of this broader project or of the context of Derrida’s remarks on singularity/generality. It is at this stage necessary to determine the implications for singularity of this re-inscription. What Derrida’s analysis of law and justice shows (and the above-quoted passage already indicate this) is that the technicality or generality of law is not a negative accident, something that happens by mistake to law. Instead, it is a necessary part of its structure. This structure, as we will again see below with reference to law-founding and law-preserving violence, furthermore points to that which makes law possible – (unconditional) justice, or as Derrida also refers to it: the law (*la loi*) of law (*le droit*), alluding therewith to the analysis of Kafka’s *Before the Law* (AR 233; Chapter 3). When we take account of some of Derrida’s other texts on the concept or notion of singularity we can see that singularity is, similar to law, but almost imperceptibly, deconstructed in ‘Force of law’, in a movement away from presence towards a thinking of unconditional, incommensurable or immeasurable singularity.²⁰ The relation between justice/the unconditional and singularity for example comes to the fore in Derrida’s discussion of unlimited hospitality, which he refers to as the ‘unique and singular and absolutely only great Law of hospitality’ requiring an unconditional welcome (OH 81).²¹ This thinking of singularity is of course still related to law, but requires a new relation between itself, justice and law. This does not consist in opposing a specific party or even all the parties in a court case to the law, but in a relation – a *differential* relation (or *aporia*) we could say – beyond this opposition. Derrida makes this clear also when he discusses the three examples of the impossible experience of *aporia* in ‘Force of law’ and when he says that a judge cannot, if she wants to do justice, simply apply a rule to a case; there has to be a suspension or destruction of law, and a reinvention in each case. This is because ‘[e]ach case is other, each decision is different and requires an absolutely unique interpretation which no existing, coded rule can or ought to guarantee absolutely’ (AR 251). There is no opposition at stake here between the singular case or singular others on the one hand, and the generality of law on the other. The tension, differential relation or *aporia* lies between incalculable justice or singularity ‘reconceptualised’ as a general economy on the one hand and law as a restricted economy on the other.

20 See in this regard especially TS 12–13, 61; R 52–3, 150–1; SM 37; ET 77–81; Neg 180; FWT 51–3, read with AR 297 where this ‘different sense’ of singularity is explored.

21 See ‘VR’ 22 where Derrida in response to a question from Caputo, points out that attention to singularity is not opposed to universality.

As appears *inter alia* from Derrida's analysis of Benjamin's *Critique of Violence*, every act of conservation (of law) and therefore every act of interpretation evokes the possibility of a general strike. In other words, justice, which as we saw, entails incalculable disproportion and a loss or an expropriation of the proper, lies at the 'origin' of every interpretation, which also has to take account of the law (*AR* 252). This understanding of justice corresponds closely with the analysis in Chapter 1 of the 'stricture' of *différance* as involving both a disseminating unbinding and a conserving binding (*AR* 234–5). Derrida's analysis by way of Kant as well as of Pascal of the inherent force of law (*AR* 233, 238–9)²² likewise ties in closely with the notion of a differential relation of forces. At stake in the relation between justice in itself (if it exists) and justice as law, is on the one hand an absolute astricture, a powerless, impotent force (*AR* 238) or the greatest/an essential weakness (*AR* 235; *Neg* 226), namely justice as the perfect gift, beyond reason and law; and on the other, a binding, stricture or mastery of forces.²³ The forces at stake here are like the German word *Gewalt*, neither legal nor illegal, or both at the same time, in the same way in which the foundation of a state (and ultimately every self-conserving act of law) goes beyond this opposition (*AR* 234).²⁴

It may still be contended that there are many passages in 'Force of law' where Derrida refers to the other and that these passages indicate the importance of understanding justice in terms of singularity.²⁵ There can be little

22 See also *R* 92–3; and *BS* 207.

23 Derrida's opening remarks clearly 'perform' this intricate relation between justice and law, both transgressing the law imposed on him (that is, addressing the audience in English and not in French) and at the same time submits to the 'law' imposed by the majority (*AR* 231; see also Jacobson 2005: 794; McCormick 2000: 1706). In doing the latter he is speaking the language of the 'other', which he describes as the condition of all possible justice (*AR* 254). This does not refer only to the fact that he is speaking a language that is foreign to him (English), but he will, perhaps more importantly, be taking the language of law to its limit, that is, deconstructing it, which will enable an encounter with the other as other, thereby exposing or giving himself up to the other (*AR* 244; also McCormick 2000: 1709). Derrida's remark that speaking English is always an ordeal, test, trial, hardship (*épreuve*) for him and possibly also for his listeners (*AR* 245) can be understood in a similar sense. Lastly, his comments about 'address' being a transitive verb in English, and thus the possibility to say in English that one addresses 'someone' or that one addresses 'a problem' (with the implication of directness), as compared to French where one addresses oneself to someone (*AR* 243–4), similarly allude to the notion of justice as deconstructed which, although it cannot be thematised or spoken of directly (*AR* 237), requires an experience of aporia (which Derrida *AR* 244–5 equates with the 'mystical'), or analogously 'an exposure to death, without defense' (*A* 1–3, at 3) and thus with no return to the self (as happens with a direct address).

24 The foundation of a state is always 'illegal' in the sense that there is no law that authorises it, but also legal, because the new law to be established will retrospectively legitimise it (see Chapter 2).

25 Reliance is also sometimes placed on *The Gift of Death* where Derrida appears to say that in responding to the call of a specific person, I will be sacrificing the interests of another; e.g. Thurschwell (2003: 1200–1). This is based on an a-contextual reading of the passages

doubt as to the importance of singularity within this context. The question is how to understand these references to the other. In discussing the second aporia, Derrida for example notes that the infinite idea of justice is ‘irreducible, irreducible because owed to the other, owed to the other, before any contract, because it has *come*, it is a *coming* [*parce qu'elle est venue*], the coming of the other as always other singularity’ (AR 254). This passage, and others that may be referred to, should similarly not be read out of context, and especially in light of what was said in Chapter 1 about the relation between Derrida and Levinas as well as the role of language and conceptuality in Derrida’s thinking. This passage in ‘Force of law’, it is important to note, is immediately followed in the same paragraph by a reflection on justice in terms of the gift without exchange and the ‘desire’ for justice. At stake is thus no longer the traditional concept of justice, but a concept which has been ‘auto-deconstructed’ (AR 362–4), and by way of which it becomes possible to encounter the other (Naas 2003: 93–114). Derrida is thus not positing here that a direct relation to the other as other is possible in the context of law; he is speaking of the other in another ‘sense’, of absolute alterity. The passage in question where the coming of the other is invoked can be further clarified when we take account of Derrida’s reflections elsewhere on the concept of the event, which is often used to describe the coming of the other (FWT 58). When Derrida speaks of the third aporia (urgency) in ‘Force of law’, he for example invokes the notion of justice that remains to come. He continues as follows:

‘Perhaps’ – one must [*il faut*] always say *perhaps* for justice. There is an *avenir* for justice and there is no justice except to the degree that some event is possible which, as event, exceeds calculation, rules, programs, anticipations and so forth. Justice, as the experience of absolute alterity, is unrepresentable, but it is the chance of the event and the condition of history.

(AR 257)

Derrida’s other texts on the concept of the event show that the event has a similar ‘structure’ as was described above in respect of singularity (FWT 58).

involved. At stake here is not a simple choice between ‘others’ (leading inevitably to the sacrifice of some other), but as in the case of Abraham, between my own and thus myself (family, friends, nation, ‘pets’) and others (in whom I am generally less invested); see ‘OF’ 69. On Derrida’s reading (of Kierkegaard’s *Fear and Trembling*) Abraham is faced with this dilemma in the *akedah*, and he decides to forsake ethics (the law of the family, the community, the nation – G&L 60) to respond to God’s call to sacrifice Isaac. He is prepared to sacrifice his son, and thus also himself (what God promised him through his son) without expecting any return (G&L 73). The phrase ‘every other is every bit other (*tout autre est tout autre*)’ which Derrida repeats here, challenges *inter alia* the justifiability of such a (selfish) preference. It is nonetheless a complex expression which ‘can barely be translated and is perhaps perverse’ (‘AO’ 13), and points furthermore to the structure which makes possible a relation to the other as other; see Saghafi (2010: 7–28, 58–9); see further Chapter 1.

The incalculability of justice (as well as of other concepts such as friendship, democracy and the gift) is what allows for a new thinking of the event, and of the future. It is in other words only when we are 'prepared' by way of a deconstructed concept of justice, hospitality, friendship, democracy and the gift, to encounter that which comes with a certain defenselessness or exposure, without mastery and without sovereignty, without horizon of expectation, that the future has a chance.²⁶ This is to be compared with a situation where the future is approached from the perspective of determinate concepts (also of justice) which have been constructed from within a thinking which privileges presence and which through its totalising horizon closes one off from that which comes. Responsibility, Derrida says elsewhere, requires that the other (which is not, or at least not without qualification, to be understood as another person) take the decision in me.²⁷ Derrida's thinking about the event moreover and very importantly goes beyond humanism as it involves an openness to whatever or whoever comes. As should be clear, this openness and exposure still involves singularity, but without being tied to presence.²⁸

Undecidability

It should be evident that the above structure does not leave us without any criterion to choose between the interests of the different parties to a dispute, and thus only with the task of a reconciliation of interests, or a personal, ethical responsibility for the outcome. It also does not mean that a court should simply always decide in favour of those who can be regarded as 'suffering others'. Much more is clearly required if a judge is to be responsible in this hyperbolic sense. In elaborating on the second aporia in 'Force of law', Derrida likewise makes clear that 'undecidability' does not, as is sometimes contended²⁹ mean relativism. Undecidability is in other words not merely about an oscillation or tension between two different approaches to a matter, two different (calculable) interpretations of the same rule or between the universality of law and the singularity of a unique situation. The 'undecidable' rather corresponds with the notion of justice as elaborated on above:

26 Derrida's notion of the future must of course not be understood in terms of a future presence but with reference to the Freudian notion of belatedness (*Nachträglichkeit*) or the return of the repressed which disrupts the idea of a distinction between the past and the future; see e.g. *AF* 80. See further Chapter 8.

27 See *FWT* 53; *PF* 68–9; *AR* 255. This is also to be compared with the mention in the quotation at the beginning of this section of justice in terms of 'the other or myself as other [l'autre ou moi *comme* l'autre]' which must clearly be understood with reference to death (see Saghafi 2010: 87, 90, in the context of photography), and thus by taking account of Heidegger, Freud and Marx; see *SM* 219–21, and see further Chapter 7.

28 See in this respect *AR* 297; *ET* 77–81; *FWT* 51; *TP* 47; *R* 52–3.

29 See e.g. Hurst (2004: 258); Hägglund (2008: 182, 185, 203).

Undecidable – this is the experience of that which, though foreign and heterogeneous to the order of the calculable and the rule, must [*doit*] nonetheless – it is of duty [*devoir*] that one must speak – deliver itself over to the impossible decision³⁰ while taking account of law and rules.
(AR 252)

Undecidability thus entails going beyond calculation as well as beyond a simple opposition between universality and singularity. Both of these ways of understanding undecidability would imply retaining the metaphysical notion of subjectivity (both in an individual and in a collective sense), which Derrida clearly dislocates in ‘Force of law’, noting that ‘a subject can never decide anything’ (AR 253). As Derrida also points out in *Politics of Friendship*, the traditional, metaphysical concept of *decision* entails the decision of a sovereign subject, autonomous, fully conscious, identical to himself and unaffected by the decision. This also happens in the decisionism of Carl Schmitt (PF 68). Such a view of the decision, neutralises the event, and has the consequence that nothing actually happens. For a decision to bring about an event (which is not foreseeable, programmable, calculated), Derrida argues, it has to be passive and unconscious (PF 68–9). Tying the decision to his thinking on hospitality, Derrida furthermore notes that this involves the ‘recalling’ of ‘an old forgotten decision’ (PF 68)³¹ and continues as follows: ‘The passive decision, condition of the event, is always in me, structurally, another event, a rending decision as the decision of the other. Of the absolute other in me, the other as the absolute that decides on me in me’ (PF 68). It should be clear that Derrida’s relation to Freud’s unconscious as explored in Chapter 1 is at stake here, rather than a duty of the decision-maker to decide in favour of (one of) the parties to a dispute. As Derrida also indicates elsewhere, there is no identity (whether of the self or the nation) which is only afterwards confronted by the arrival of the other. There is no such thing as a subject with the ability (and free choice whether or not) to welcome the other. Identity is always already dissolved in and through the welcome, which does not entail a return to the self, but instead the violation and expropriation of the self (AR 361). At stake is thus a rethinking of the concept of subjectivity as well as the idea of the other as an actual person with determinable attributes. As pointed out earlier, Levinas in *Totality and Infinity* refers to

30 Commentators tend not to distinguish carefully between justice (as well as the gift, hospitality, forgiveness, etc.) as *the* impossible and simple impossibility; see e.g. Rosenfeld (2005: 819–20); Gehring (2008: 61); van der Walt (1998: 93–6; 2005b: 249–50); Balkin (2005: 737); Hägglund (2008: 37, 43, 140–1). Justice according to Derrida is not simply impossible, but a ‘desire’ for *the* impossible which haunts us; see e.g. ‘TID’ 246–7; *Neg* 343–70. This distinction has very important implications for the relation between justice and law; see de Ville (2007b).

31 See also *PTT* 134.

the subject as host, and in *Otherwise than Being* as hostage. Derrida analyses this strange paradox as follows (*A* 111):

As host or hostage, as other, as pure alterity, a subjectivity analyzed in this way must be stripped of every ontological predicate, a bit like the pure I that Pascal said is stripped of every quality that could be attributed to it, of every property that, as pure I, as properly pure, it would have to transcend or exceed. And the other is not reducible to its actual predicates, to what one might define or thematize about it, any more than the I is. It is naked, bared of every property, and this nudity is also its infinitely exposed vulnerability: its skin. This absence of determinable properties, of concrete predicates, of empirical visibility, is no doubt what gives to the face of the other a spectral aura, especially if the subjectivity of the *hôte* also lets itself be announced as the visitation of a face, of a visage. *Host* or *guest* ... *Gastgeber* or *Gast*, the *hôte* would be not only a hostage. It would have, according to a profound necessity, at least the face or figure of a spirit or phantom (*Geist*, *ghost*).

The above passage speaks of the absence of a ‘decision’ by a ‘subject’. The notion of undecidability again comes to the fore, in a very complex manner, in Derrida’s analysis of Benjamin’s *Critique of Violence* (*AR* 289–92). Here reference is made to divine violence (in Judaism) beyond law and the state as ‘decidable’ (pointing in this way inter alia to the destruction of mythic law by divine violence), yet as without decidable knowledge. In other words, divine violence does not lend itself to human determination or knowledge or decidable certainty. The undecidable in this sense, as Derrida points out in the Prolegomena, is often associated with the demonic or with what is demonically ambiguous (*AR* 259). On the other hand, law founding and conservation – that is, the mythical violence of the Greek world – although it is itself paralysed by undecidability (it being impossible to distinguish between true and false, correct and incorrect) is the place of decidable knowledge. It is in other words subject to human determination. Derrida does not oppose these forms of violence or power like Benjamin at some point does, but instead emphasises the need to participate in both.³² This is because there is no pure moment of undecidable justice, but always, confirming the earlier analysis, a *differential* relation between (undecidable) justice and (decidable) law, a relation which needs to be ‘negotiated’ in singular instances (*AR* 257).

32 See also Derrida *Glas* 209a on the undecidable concept which is no longer strictly speaking a concept.

The 'mystical foundation of authority'

Derrida's analysis in 'Force of law' of law's positing as resting solely on itself, such positing thus being a violence without ground, has often been pointed to by commentators. The 'mystical' nature of this non-foundation has not however as yet been adequately explored. Derrida enquires into the phrase, the 'mystical foundation of authority' here with reference to its appearance in the writings of Montaigne and Pascal, and later also in Benjamin (*AR* 238–41).³³ The 'meaning' he will give to it, if one can call it such, will however differ from its conventional meaning. From Pascal we have a *Pensée* which as Derrida notes, cites Montaigne without naming him in referring to the mystical foundation of law's authority. The passage from Montaigne reads as follows:

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

(*AR* 239–40)

Derrida first notes the distinction drawn here by Montaigne between law and justice. He furthermore points to the notion of 'credit' in the quotation, noting that the authority of laws rests simply on the credit extended to them. In other words, their only foundation, and this is what makes the foundation 'mystical', is that one believes in them (*AR* 240). Here we already start moving beyond the idea found in many commentaries that Derrida is simply saying that 'Law is grounded only on itself, based on an arbitrary violence without ground' or that it is 'a giant construct without ground'.³⁴ Montaigne interestingly compares what he refers to as 'law's legitimate fictions' to the trickery which women employ in compensating for the lack in their own natural beauty. The absence of natural law, Derrida glosses, thus calls for 'the supplement of historical or positive (that is to say, an addition of fictional) law' (*AR* 240). The invocation of faith and fiction in this context has already been partly explored in Chapters 2 and 3. At stake here is a typical metaphysical opposition between knowledge–faith and fact–fiction. Derrida will again not simply seek to overturn this violent hierarchy, namely by showing that (modern) law, despite its attempt to anchor itself in the existence of the autonomous, reasonable subject, actually finds its foundation

33 Gasché (2002: 981) remarks on the influence of Kafka on Benjamin's *Critique of Violence*, which underlines the link between 'Force of law' and 'Before the law'.

34 See e.g. Teubner (1997: 764); and Litowitz (1995: 330).

in faith and fiction at work within knowledge and fact. This step of overturning in turn (again) calls for the emergence of a new ‘concept’, in this case an originary or pure faith which makes possible the distinction between faith and knowledge (as well as of subjectivity) in the first place.³⁵ The same happens with the fact–fiction opposition, which subsequent to its overturning,³⁶ is repositioned through the invocation of a fictional, heteronomous law or obligation, which precedes law understood as autonomy (Chapter 3). One of the most illuminating examples of this originary faith or fictional law is to be found in Abraham’s sacrifice of Isaac, which Derrida explores in *The Gift of Death*. In an interview Derrida refers to the *akedah* as an ‘absolute religious experience, if there is such a thing: the pure act of faith, the asymmetrical obedience to an absurd order, an unintelligible order, an order that is beyond ethics and knowledge’ (‘E&F’ 35). This pure or elementary act of faith can also be referred to as an absolute performative (Staikou 2008: 281–2) as well as the experience of non-relationship, absolute interruption or absolute dissymmetry (*Rel* 64–5).³⁷ The pure faith at stake here is thus irreducibly tied to responsibility, a responsibility which involves ‘absolute risk, beyond knowledge and certainty’ as well as beyond debt and duty (*G&L* 7–8, 64, 80).³⁸ The notion of the ‘mystical’ employed in ‘Force of law’ is thus clearly another name for the notion of justice, which Derrida similarly describes as unrepresentable and incalculable (*AR* 257). He can therefore also invoke Wittgenstein’s notion of the ‘mystical’ here (*AR* 242),³⁹ which, at least on a

35 See also Naas (2008: 62–80); Bischof (2004: 222–3).

36 See in this respect *BS* 217–18 where Derrida notes that in all instances where power makes law, where it gives itself right and thereby legitimises its own violence this takes place by way of the fable, ‘i.e. speech that is both fictional and performative, speech that consists in saying: well, I’m right because, yes, I’m right because, yes, I’m called Lion and, you will listen to me, I’m talking to you, be afraid, I am the most valiant and I’ll strangle you if you object’.

37 See further Chapters 2 and 7.

38 See also *Psy* I 394 (‘No apocalypse, not now’) on the ‘fable’ of nuclear war; and for analysis, Klein (2008).

39 This seems to be a reference to the *Tractatus Logico-Philosophicus* where Wittgenstein remarks the following (6.522): ‘There are, indeed, things that cannot be put into words. *They make themselves manifest*. They are what is mystical.’ This passage is specifically referred to and briefly analysed by Derrida in his reflections on negative theology in ‘How to avoid speaking: denials’ (*Psy* II 150). There is also a reference in this text, which ties in closely with the above analysis, to the last proposition in the *Tractatus*: ‘What we cannot speak of we must pass over in silence.’ Negative or Apophatic theology in brief adopts the view that the mode of being of God is infinitely beyond what can be expressed in human language. Human language can give expression only to that which is finite, to that which has an essence and existence, and thus cannot capture the super-essentiality of God. It is therefore more appropriate, when one is compelled to rely on finite language, to speak of God in terms of what he is not, than describing his attributes in positive terms. In distinguishing deconstruction from negative theology, Derrida has pointed out that negative theology ultimately believes in a superior and transcendent being (and thus a presence) beyond

certain reading, can be said to correspond with the notion of an originary faith.⁴⁰

There is a clear correlation between the above analysis, specifically the notion of the unrepresentable, and Derrida's 'To speculate – on Freud' where he incidentally refers to Freud's speculations on a beyond to the pleasure principle as 'mystical' in nature (*PC* 354) as well as Derrida's reflections in *Fors* on the psychoanalytical theorisation of Abraham and Torok on *cryptonymy*. As appears from the discussion in Chapter 1 (Freud) and Chapter 5 (on mourning), in both instances something is at stake which goes beyond the Freudian unconscious and which is in a radical sense unrepresentable and unknowable. According to Abraham and Torok (1994: 130), the notion of the crypt involves erecting a secret tomb in the ego as well as within language, that comes back to haunt the ego which has become a cemetery guard. In *Fors* Derrida generalises this structure of the crypt, taking it beyond its therapeutic context, and ties it to the Freudian death drive.⁴¹ He refers there to the crypt as a kind of false unconscious or artificial unconscious within the divided self (*Fors* xiii), elucidating thereby the 'locality' of the law of fiction referred to above. In 'Force of law' he applies this structure to law which is said to have encrypted its own forces of self-destruction, and which continue to haunt it.⁴² The crypt is specifically alluded to by Derrida when he notes in 'Force of law' that in the 'violent structure of the founding act' of law or of a state, there is a silence 'walled up, walled in because this silence is not exterior to language', which, he adds, is what he means by the mystical foundation of authority (*AR* 242).⁴³ In the founding of law, Derrida notes somewhat later on in words which clearly allude to the analysis in *Fors*, the 'problem of justice will have been posed and violently resolved, that is to say buried, dissimulated, repressed' (*AR* 252; *WAP* 5). The moment of law's suspension, he also notes, alluding to Freud and Heidegger, is always full of anxiety, anguish, distress, Angst (*angoissant*) (*AR* 249).

language, even though this being is so incomprehensible that his being cannot find expression in language. Although Derrida acknowledges a certain resemblance in relation to the language used, compared to negative theology about the existence of a Supreme Being, *différance* does not exist, is not a present-being in any form, and has neither existence nor essence. The latter 'notion' claims to exceed and thereby at the same time to inscribe the being at stake in negative theology (that is, God) within its operation. Deconstruction is therefore not concerned, as negative theology is, with naming an unnameable being, but to explore the other of being, its condition of possibility.

40 For more detailed considerations of Wittgenstein's relation to the mystical, see Glock (1996); and Atkinson (2009), although these do not correspond with the reading proposed here.

41 The death drive in Derrida's texts is clearly not to be viewed as something negative which needs to be avoided, as some authors, e.g. van Marle (2004: 609–12) have suggested; see Chapter 1.

42 See e.g. the invocation of the ghost or haunting (*la hantise*) of the undecidable (*AR* 252–5).

43 This passage should be read with 'A number of yes' (*Psy II* 231–40).

In the second part of 'Force of law', when Derrida continues with his analysis of the 'mystical foundation of authority' via Benjamin's *Critique of Violence*, the correlation with his analysis of the Freudian death drive as well as of the crypt can also clearly be seen. In spite of other differences between Derrida and Benjamin that will be referred to below, Derrida expresses his agreement with Benjamin's contention that law is inherently violent and that the state seeks to have a monopoly on violence (*AR* 266–7). The primary interest of law consequently lies in laying itself down and preserving itself. The state thus fears fundamental, founding violence most of all as this kind of violence could ultimately present itself as having the right to found new law (*AR* 268). The violence that founds law is not alien to law, Derrida notes, following Benjamin, but that in law which suspends law; an instance of non-law in law (*AR* 268–70, 275). This is related to Benjamin's interpretation of the right to strike, which is a right that modern legal systems grant to workers and which can be relied on in a general strike, Benjamin contends, to abolish law and to found a new law. Derrida extends this idea by contending that by means of modern technology something similar to a general strike can be brought about without having to mobilise great numbers of people (*AR* 271). With reference to Derrida's other texts, it could moreover be said that this right to law or the right to found new law is not restricted to the right to strike, but to be implied also in other fundamental rights guaranteed in a constitution such as the right to equality, which potentially comes into play in every interpretive reading (*R* 52).⁴⁴ The founding of law or of a state is terrifying, Derrida notes, *inter alia* because these moments of founding are in themselves and in their violence uninterpretable or indecipherable – that is, an ungraspable revolutionary instant (*AR* 269, 274). He explicitly links the nature of these founding moments, which corresponds with the analysis above

44 I disagree with the reading of van Marle (2008: 136), referred to briefly above, of Derrida's notion of equality as being paradoxical in the sense that in order to ensure equality between two parties one necessarily excludes others. Ensuring equality would in other words lead to the 'destruction' of equality. The structure of equality explored by Derrida in *Rogues* (48–55) is different: it includes (apart from equality in its traditional forms) an incalculable equality which is so radical that it destroys the sovereignty of the state and therefore also democracy as traditionally conceived. The self-destruction or auto-immunity of democracy and friendship, by analogy of which van Marle (134–7) bases her reading of equality, likewise entails something different in Derrida's *Rogues* and *Politics of Friendship*: it is not in the exclusion of non-citizens (van Marle does not say specifically who is excluded in the case of democracy, but see Thomson 2005: 26 on whom she relies) and of friends that democracy and friendship destroy themselves (this instead shows reliance on the restricted notion of the traditional concept of democracy and friendship), but in the desire for its own abolition or self-destruction (a friendship and democracy which show no concern for the self in an individual/collective sense) which underlies these concepts in the same way in which the desire for justice underlies law as outlined above. This desire for self-destruction (which would indeed entail the absence of exclusion) furthermore calls as we saw for affirmation, not mere notification or avoidance.

of the crypt, with the notion of ‘mystique’ (AR 269). This is to be understood further with reference to the way in which the violence that is used in order to found a new state is justified in revolution: by relying on the future anterior. The in-progress or to-come founding of a new law, revolutionaries as a rule (implicitly) contend, now already justifies the ‘illegal’ violence that is taking place (AR 269). The ‘mystical’ can with reference to Benjamin thus be said to be that instance of non-law in law which suspends established law in order to found another law (AR 269–70). This moment, Derrida says:

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

(AR 269–70)

The use of ‘la loi’ as compared to ‘le droit’ as well as the clear allusion (and reference immediately after) to Kafka’s *Before the Law* are to be noted here. The founding of law (*le droit*), even though it involves a suspension of law, is ‘based’ on what Derrida refers to as an ‘anterior law’ and which finds expression in the figure of the general strike (as well as of war and the ‘great’ criminal) in Benjamin’s text. These figures all challenge radically the legal order itself and in the process lay bare the inherent violence of the legal order (AR 267–8, 273–5). Benjamin expresses a somewhat similar idea through the notion of divine violence mentioned earlier, which is without means that look to an end, and which Derrida likewise refers to in terms of the ‘mystical foundation of authority’ (AR 285). What Derrida admires about this thinking of Benjamin, he says, is its acknowledgement that there can be no justice and no responsibility without an exposure to all risks, beyond certitude and good conscience (AR 287). Derrida however distances himself from the (bloodless) divine violence which Benjamin ascribes to justice, its complete separation from law, the notion of the divine as sovereign, as well as Benjamin’s anti-parliamentary and anti-Enlightenment stance (AR 259, 285–98).⁴⁵ The stricture

45 This clearly does not entail a rejection of the whole of Benjamin’s analysis. At AR 259 Derrida refers e.g. to the ‘[t]he profound logic of this essay’, although it is ‘still too Heideggerian, too messianic-Marxist or archeo-eschatological’ for his liking. In TS 56, Derrida likewise comments that reading Benjamin’s text helped him in formulating his own position on law and justice. For an excellent analysis of these Heideggerian aspects of Benjamin’s thinking, see Staikou (2008).

of *différance* which Derrida insists on should be clear from this objection as well as from Derrida's description of the relation between law and justice. For Derrida, justice is, as it is for Benjamin, an 'anterior law' and not of the order of knowledge.⁴⁶ Differing from Benjamin, however, justice for Derrida is indissociable from law and yet without sovereignty (*R* 150).

Repetition and law-enforcing violence

The notion of the 'mystical', in its relation to repetition, comes to the fore especially in Derrida's analysis of law-conserving violence in Benjamin's text. It ties in closely with the above discussion of the notion of the crypt as well as the Freudian death drive coupled with the repetition compulsion (Chapter 1). In the first part, and as discussed above, Derrida had already contended that justice in the incalculable sense comes into play in every act of judicial interpretation. The structure in terms of which this takes place is analysed in more detail in the second part of 'Force of law'. Here Derrida seeks to complicate the Benjaminian distinction initially drawn between law-making, law-enacting or law-founding violence–power (*rechtsetzende Gewalt*) on the one hand and law-preserving violence–power (*rechtserhaltende Gewalt*) on the other (*AR* 264–5, 272). Benjamin himself later acknowledges in his discussion of the police, that this distinction is not a rigid one (*AR* 276–81). Law-founding violence–power, Derrida notes, is already enveloped by the need for its conservation, in other words, because of the need for repetition (*AR* 272, 274–5). In the first part of 'Force of law', he likewise pointed out that law always necessarily includes its enforceability, and that the latter is therefore not something secondary to law (*AR* 233).⁴⁷ Law founding in other words entails the positing of what is believed should be conserved; it therefore entails the promise of its own repetition in future, the sharing of a

46 See also 'Préjugés' 94 where Derrida notes something similar in reflecting on Lyotard and judgement. This needs to be understood in close relation to Derrida's reflections on Heidegger's thinking of Being and the Freudian death drive: that is, beyond subjectivity, see e.g. *PC* 264, 287–8, 321, 379.

47 According to Agamben (2005: 37–9), the expression 'force of law' (with reference to Derrida's essay) refers not to the law, but to decrees of the executive, particularly in a state of exception, which would not formally qualify as law but which would nevertheless have the force of law. The issue of executive decrees in such circumstances would lead to the non-application of law. Derrida does not use the expression in the strict legalistic sense in which Agamben seeks to use it. Derrida's reliance on it is tied to the English idiomatic expression 'to enforce the law' which cannot be directly translated into French, as well as the German word 'Gewalt', which can be translated as power, violence and force. Derrida furthermore uses this expression in light of his discussion of the Benjaminian distinction referred to above which he will show deconstructs itself. As we will see below, all law enforcement according to Derrida destroys law, and not only executive action in the case of a state of exception.

heritage and a tradition.⁴⁸ There can thus be no purity in the founding of law, Derrida concludes (*AR* 272, 277–8). The same applies to conservation: the conservation of law cannot be strictly distinguished from the founding of law as it re-founds and conserves. Whereas Benjamin seeks to return to a pure origin, a presence without representation (*AR* 281), Derrida seeks to draw the consequences of this structure of contamination.⁴⁹

This structure of contamination is shown implicitly in Benjamin's analysis of the police (understood here in a wide sense, that is, including all enforcement of law (*AR* 278)), who, as he points out, is supposed to only conserve law, but actually also founds, enacts or produces law. Because of this mixing of functions and also because of their ubiquity, the power or violence of the police is described by Derrida, following Benjamin, as phantom-like or spectral (*AR* 279; *CF* 14).⁵⁰ In spite of the institution of democracy and the principle of separation of powers, the police make regulations themselves and in doing this, set new goals which are not provided for in law (*CF* 14).⁵¹ This is to be compared, Benjamin says, with the position in an absolute monarchy where the police represent a ruler in whom legislative and executive powers are united. The police in modern states also act in situations where no legal basis exists for doing so. The police therefore, strictly speaking, completely or absolutely (literally, 'throughout') [*durchaus*] act outside the law.⁵² Derrida elaborates on this with reference specifically to modern technology and the consequent ubiquity of the police, their ability and authority to intrude in every sphere.⁵³ This constitutes an internal degeneration of the democratic principle: police power is intended to protect democracy, but is essentially uncontrollable in its technological autonomy.⁵⁴ Law and democracy through the need for police powers thus destroy themselves. The police, we could also

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

49 See also de Vries (1992).

50 Benjamin (1996: 243): 'Unlike law ... a consideration of the police institution encounters nothing essential at all. Its power is formless, like its nowhere-tangible, all-pervasive, ghostly presence in the life of civilized states.'

51 See also *AR* 295 on the police force that becomes the true legislative power; and see Schuppert (2003: 563–5) on the dominant or at least very important role of the executive in the enactment of legislation by parliaments in constitutional democracies.

52 Benjamin (1977: 189).

53 *AR* 279–80; see also Schuppert (2003: 578–81) on the extension of state powers through the notion of a state function of ensuring inner security.

54 The 'theme' of democracy destroying itself, or auto-immunity, will be taken up again more extensively in Derrida's *Rogues*.

say, deprive law of its strength and its authority, its force, 'dooming it to a sort of self-persecuting disidentification' (*OS* 61–2). The concept of law must therefore be understood as being 'double', because if it consisted only in force and authority, it would not have been possible for it to *lose* its force and authority (*OS* 62).⁵⁵ The ghostly double or spectral duplicity that Derrida invokes here refers to his analysis in *Of Spirit: Heidegger and the Question*, where in a reading of Heidegger he shows that the concept of spirit is double, both preserving and destroying itself, in a *differential* relation with its 'self' and its 'other', we could add (*AR* 279–80).⁵⁶ Spirit, in respect of destroying itself, is closely associated with fire, not of the hearth, but of burning itself, setting fire to itself, conflagrating itself (*OS* 83–98). When Derrida refers to the *Fort-Dasein* of the police he therefore points not only to his analysis of the game of Ernst – Freud's grandson – in *Beyond the Pleasure Principle*, which involves a dispersal as well as mastery of the self,⁵⁷ but also to the fact that even though the police destroy law, the polis nevertheless has to rely on the police for the conservation of law (*AR* 280). Derrida's statement, following Benjamin, that '[t]here is something decayed or rotten in law, which condemns it or ruins it in advance', must be understood in the above context (*AR* 273).⁵⁸

Derrida furthermore seeks to generalise the above structure, contending that the same can be said in relation to the consequences of all law enforcement whether or not it belongs to the institution of the police (*AR* 278). This can be understood as a reference to the broad discretionary or interpretive powers granted to officials in modern legal systems which is usually justified with reference to the inability of legislative assemblies to regulate everything in detail, the unpredictability of future situations, as well as the need for flexibility in the taking of decisions.⁵⁹ This nevertheless means that those who enforce the law (and ultimately the constitution) make what purport to be legal rules or decisions but which are not authorised by 'law', or are authorised only in so far as the authorisation 'perverts' law. They in other words found, create or produce 'law' and therefore also violence which can only be said to be authorised by law in so far as law at the same time authorises its own abolition.⁶⁰ Administrative law (as well as criminal procedure), which through

55 See also *OG* 39–40 for a similar argument concerning speech and writing.

56 The footnote reference to *Of Spirit* in Cornell *et al.* (1992: 66), appearing there as note 12, does not appear in the *Cardozo Law Review* version and likewise not in *Acts of Religion*. It is likewise absent from the 1994 French version.

57 See Chapter 1.

58 See also *PTT* 99 where Derrida draws a comparison between repression in the psychoanalytical and the political sense – in the latter instance through the police, the military and the economy – which 'ends up producing, reproducing, and regenerating the very thing it seeks to disarm'.

59 See e.g. Schuppert (2003: 562).

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

the laying down of requirements of legality or grounds of review, inter alia seeks to ensure that officials act within their powers or according to certain procedures, can from this perspective be seen as a modern response to this 'degeneration' of law. Administrative-law cases however show that the purpose(s) of a law, as well as the scope of the powers and duties laid down in legislation, are hardly ever easily determinable. Judges furthermore often defer in varying degrees to the substantive and procedural decisions taken by administrators which leave further scope for the creation of 'law' by the administration.⁶¹ More recently, privatisation, deregulation and attempts at achieving the ends of government through state contracts, public procurement, public-private partnerships, self-regulation and public participation, have given a new dimension to this 'degradation' of law.⁶²

The above brief analysis is of course not meant as criticism of the grant of discretionary powers in modern legal systems or of constitutional and administrative law in general, or to suggest that there should be a return to some 'pure' state of law. Modern states can hardly function without these institutions. Derrida can also not be read as saying that administrative and constitutional law, also in their other attempts to structure discretion or to ensure 'good' decision-making, do (and should) not place more or less effective limits on the exercise of discretionary powers.⁶³ His analysis would also not deny that limits are often (and should be) imposed in constitutional democracies as to the permissible extent of parliamentary delegation of powers (*CF* 14–15).⁶⁴ Derrida, reading Benjamin, seeks to show and to draw consequences from the fact that the state cannot any longer, or perhaps never could, achieve its purposes through the legal order itself; a 'supplement' is always required. This supplement, however, as we saw above, necessarily leads to the abolition or degeneration of law because of the indeterminacy that is involved in interpretation and enforcement.⁶⁵ Because of the co-implication of law founding/making and law enforcement, the (legal) validity of both is undermined. The abyss of this destruction points to an 'origin' of law which precedes the idea of origin as auto-institution. This 'destruction' would in other words not have been possible if it was not already inscribed within the origin of law. Any 'conception' of law must consequently also make provision for its perversion, its auto-deconstruction or auto-immunity through repetition,

61 See e.g. Craig (2008).

62 For an excellent overview of this trend in administrative law, see Schuppert (2003: 440–627).

63 Foucault (2004) is very critical of the ability of such measures to control the disciplinary and bio-power of our age. Derrida is likely to have shared this view, although their analyses and strategies differ in a number of respects.

64 See in this respect Schuppert (2003: 553–7).

65 See also Schuppert (2003: 559–65) on the independence of the administration in enforcing legislation and the important role of the executive in the enactment of legislation.

not only as an accident, but as its condition of possibility, its pre-origin (*AR* 290) which continues to haunt it.

Law therefore remains haunted by the ‘desire’ for self-destruction. The founding of law, one could also say, following Benjamin, is made possible by that which threatens its ruin (*AR* 278). In the conservation of law and therefore in every act of interpretation, there is moreover a return of the mystical, of justice, of what Benjamin would refer to as the general strike. This is the case even though there is a performative violence at the heart of every interpretive reading and even though interpretation is never neutral and never non-violent as it depends on the established order that it interprets (*AR* 270–1).

‘Applying’ justice

In thinking of the practical consequences of Derrida’s analysis, one is reminded of Derrida’s remark in an interview that ‘[d]econstruction cannot be applied and cannot *not* be applied’ (‘Ai’ 218). In the above discussion we saw that the same can be said of justice: it is always at stake, yet it always withdraws from law; justice cannot find application in a legal system. We furthermore saw that justice requires that the legal system itself be exposed to the impossible revolutionary decision – that is, a loss of property, of rights,⁶⁶ of economy, of meaning, of reason, of sovereignty, of citizenship.⁶⁷ Derrida’s notion of justice thus stands in clear tension with law, to be understood here in terms of a restricted economy, benefiting in violent and calculative fashion a community, both from those on the ‘inside’ who, because of their (economic and/or political) marginalisation might want to abolish the rights and privileges granted by the legal system to its (main) beneficiaries,⁶⁸ as well as from those on the ‘outside’ who might want to ‘unfairly’ benefit from the economic and other forms of wealth of the state by entering and residing there illegally.

66 The need for this a-temporal ‘loss’ of rights is tied to the relation between the concept of right and the power as well as sovereignty of the state; *AR* 242; *BS* 207, and see also Foucault (2004: 1–40).

67 This ‘loss’ ties in closely with Derrida’s reading of Hegel’s analysis of ‘the Jew’ in *Glas* 47a–53a. A reinterpretation of justice in Derrida’s thinking as an obligation towards the parties to a dispute (see above), as an opening of law to responsiveness in relation to the singularity of the other (Fitzpatrick 2001; Golder and Fitzpatrick 2009: 53–97), or as plurality (van der Walt 2005a) may make it more palatable to lawyers, but clearly involve a moderation which has important consequences for what can be expected of law.

68 In *The Beast and the Sovereign* Derrida in the same vein repeats like a refrain the opening statement of La Fontaine’s *The Wolf and the Lamb*: ‘The reason of the strongest is always the best’; also mentioned in *AR* 241. See also *ET* 63 where Derrida defines the state institution as ‘a system of powers which in fact always represents, in the name of the state – and history has taught us to think this – a fraction of the nation, if not a class, then at least something which is not the “integral will” nor often the “general will” of all the citizens of this state, past, present and future’. See also de Ville (2011).

Modern law understood thus is moreover enforced by a calculation which takes place not only through the use of strict legalistic methods of constitutional interpretation, but also procedural and value-oriented approaches with reference to open-ended concepts such as human dignity or the common good. These calculations are inherently without (legal) foundation, as they are (conserving) repetitions of a self-founding act, which as a rule is in itself neither legal nor illegal and can only retrospectively lay claim to legality (*AR* 269; *CF* 57). This abyssal foundation of law does not open on to nihilism, but to the chance (and threat) of a justice without and beyond law.

Justice thus requires a suspension of and resistance to such (economic) calculation and finds expression for example in the notions of the perfect gift as well as absolute hospitality, both of which expect no return (of law and community) to the self. Justice, as expounded by Derrida, seeks to undermine the *rule* of law as well as the rule of *law*. Liberal legal theory, which dominates in the world today, sees only ‘cases’, which must be dealt with in terms of existing rules and legal principles. There is no space, possibility or allowance here for going beyond law, resisting law, in deciding a ‘case’, even a ‘hard case’. Derrida’s analysis of the structure of law, on the other hand, allows for the ‘suspension’ of the *rule of law*. In other words, in an actual case that comes to court, the judge (especially in an apex court), representing the community, has to, in revolutionary fashion, ‘abolish’ law and the state (that is, sovereignty) as mechanisms which institute and maintain a restricted economy. As we saw above, this does not entail a form of decisionism. The subject, understood here in a collective sense, is radically displaced. Judging for Derrida is furthermore not simply or in the first instance about the (interests of the) parties to the dispute, parties who will often seek to keep in place law’s restricted economy. Justice goes far beyond their actual claims, which will already have sought to reduce justice to (potential and possible) law. The parties and their claims can be judged only because of and by way of the differential tension between law’s binding and self-destructive tendencies. A negotiation, an unbearably risky negotiation, is therefore necessarily required with the impossible decision, which can also be referred to as a general economy (*WD* 251–77), a madness in other words (*AR* 254).⁶⁹ Only in this ‘exposure’ is there a chance for decision, for responsibility, which would not simply involve a return of the community to itself. This follows necessarily from the structure or perhaps rather ‘stricture’ (Chapter 1) of law explored above – that is, law’s ruin is inherently part of its structure. The excessive responsibility ‘before memory’ which justice demands (*AR* 247)⁷⁰ is likewise

69 See Chapter 4.

70 In the first version of ‘Force of law’, ‘devant la mémoire’ was translated as ‘toward memory’, from which Cornell (1992) drew some interesting, albeit very restricted consequences for the relation between justice and law; for commentary, see de Ville (2007a).

not to be understood simply in terms of a genealogy of actual denials of justice, but much more radically with reference to the erased and 'cryptic' memory of self-destruction. While justice does not therefore simply demand a concern for suffering or marginalised others, this structure of law and justice should, depending on whether the decision-maker indeed 'gives' herself over to the impossible decision, in most instances lead to an invention of law which favours those who are 'marginalised'. The qualification 'most' is added, because justice is not to be confused with the claims of those who have nationalist, ethnic, racist, linguistic, xenophobic, religious-fundamentalist and other similar aspirations, even though those who propagate these views often view themselves as 'marginalised'. These aspirations are expressions of the desire for presence, whereas justice as we saw, stands in a *differential* relation to this desire. As appears from *Rogues*, justice calls for the thinking of a radical equality, without reference to borders, class, gender, race, species, generation etc.

The haunting of justice

Heidegger's reading of the Anaximander fragment in *Der Spruch des Anaximander*,¹ and Derrida's brief and very dense analysis thereof in *Specters of Marx*² are indispensable in understanding the notion of law as absolute hospitality, specifically its spectral and hyper-political dimensions.³ Through a close reading of these two texts a further attempt will be made in this chapter to understand Derrida's rethinking of the concept of justice, and how it ties in with Marxism, with Heidegger's thinking on Being, as well as, to some extent, Levinas's thinking on the other. We start in this introduction with a few brief remarks about Anaximander and the fragment remaining of his thinking as well as of the readings thereof by Heidegger and Derrida. Anaximander (c.610–547 BC) is usually referred to as a pre-Socratic thinker. Like Thales, Anaximander reflected on the origin or principle (*arche*) of that which exists. Whereas Thales thought that everything which exists derives from water, Anaximander regarded the *apeiron*, the limitless, indeterminate or indefinite as that from which all things derive. Simplicius, in his book *On Aristotle's Physics*, drawing from Theophrastus, reports the saying of Anaximander as follows:

Anaximander of Miletos, son of Praxiades, a fellow-citizen and associate of Thales, said that the material cause [*arche*] and first element of things was the Infinite [*apeiron*], he being the first to introduce this name of the material cause. He says it is neither water nor any other of the so-called elements, but a substance different from them which is infinite [*apeiron*], from which arise all the heavens and the worlds within them. And into

- 1 The essay was first published in 1950 in *Holzwege*. The German version of the essay will be referred to in cases where it requires our specific attention.
- 2 I will be relying on the Routledge Classics 2006 version, the page numbers of which differ from the earlier English version (1994).
- 3 This further reflection on justice seems to be anticipated by Derrida in a footnote in earlier versions of 'Force of law', said there to be 'only a preliminary version' and his thinking on justice as 'work in progress' (Cornell *et al.* 1992: 3). See also R 88; and Bischof (2004: 200).

that from which things take their rise [*genesis*] they pass away [*phthoran*] once more, ‘as is meet [*kata to chreon*]; for they make reparation and satisfaction [*didonai diken kai tisin*] to one another for their injustice [*allēlois tes adikias*] according to the ordering of time,’ as he says in these somewhat poetical terms.⁴

The ancient Greeks did not use quotation marks, so that it is not perfectly clear where the actual words of Anaximander start and where they end. The quotation marks in the above passage were introduced later on. The translations of Nietzsche in a treatise completed in 1873 and published posthumously in 1903 and of Diels, also from 1903, referred to by Heidegger, are similar in most respects to that of Burnet. For our purposes the most important differences lie in Nietzsche’s translation of the phrase *didonai ... diken kai tisin allelois tes adikias* as ‘they must pay penalty and be judged for their injustice’ and Diels as ‘they pay recompense and penalty to one another for their recklessness’ (Heidegger 1984a: 13). In *Der Spruch* Heidegger will challenge these traditional translations and readings of the fragment which are to the effect that it simply contemplates the laws of nature. As we will see in the second part of this chapter, Derrida in *Specters* commends Heidegger’s reading, although he raises certain concerns, which will inform his own reading of the fragment within the broader context of a contemplation of the legacy of Marx.⁵

Heidegger’s reading

Prologue

Before enquiring in more detail into Heidegger’s reading of the Anaximander fragment, it is necessary to place his reading in a broader context. A somewhat more detailed description of Heidegger’s thinking and its relation to law was provided in Chapters 1 and 5. Only a brief outline, in so far as it is required for the further discussion, will be given here. As also appears from his other texts, and as already indicated earlier, Heidegger is of the view that metaphysics started with Platonism, when Being or the ‘is’ of beings is interpreted as the most universal of beings and as idea (Heidegger 1991: IV 164). Being is therefore interpreted on the basis of beings and with reference to (the essence of) beings. Being itself is not thought by metaphysics (Heidegger 1991: IV 207–9). Being is instead turned into a being, for example the Supreme Being as first cause or the subject of subjectivity. Metaphysics, as

4 Footnotes omitted. Burnet (1920: ch. 1, s. 12).

5 See also R 86 where Derrida indicates that his reading of *Der Spruch* ‘plays a discreet but decisive role throughout the book [i.e. *Specters of Marx*]’.

Heidegger points out, has a fundamentally onto-theological character. A further feature of metaphysics is its conceptuality which starts when with Plato, Being is understood as the essence of beings. The writings of the early Greek thinkers, including Anaximander, are according to Heidegger not as yet under the influence of metaphysics and that is why he attaches such importance to them.⁶ Their importance furthermore lies in the intimation they had of, as Heidegger (2000: 174–5) puts it, the ‘suddenness and uniqueness of Dasein, an intimation into which they were urged by Being itself’. This passage makes clear the close relation in Heidegger’s thinking, also after *Being and Time*, between Being and *Dasein*, without however making of Being a product of man.⁷ The early Greek thinkers, as Heidegger also points out elsewhere, were exposed to Being, which disclosed itself to them as *physis*, *logos*, *dikē*, *moira* and *chreon* (Heidegger 1984a: 55; 2000: 175). Heidegger’s reading is therefore an attempt to read the fragment in a non-conceptual way, an attempt to ‘think like the early Greeks’.

Heidegger sees metaphysics as finding its ultimate expression in Nietzsche’s interpretation of Being as will to power. Because the metaphysics of subjectivity here attains the peak of its development, the most extreme withdrawal of Being takes place (Heidegger 1991: IV 237, 241). The consequence of this is a profound uncertainty in man. Because man is in a covert way the abode of Being itself in its advent, the withdrawal of Being leads to uncertainty without man being able to discover the source and essence of this uncertainty. This leads to man seeking self-assurance in beings which are ‘surveyed with regard to what they can offer by way of new and continuous possibilities of surety’ (Heidegger 1991: IV 235, 238). This search for certainty finds its ultimate expression in modern technology as an attempt to secure permanence, but which instead points to man’s homelessness (Heidegger 1991: IV 248).⁸ The greater the danger that technology will slip away from human control, the more urgent the will to mastery becomes (Heidegger 1977: 5). The usual definitions of technology are that it is a means to an end or that it is an activity of man, both definitions being instrumental and anthropological in nature (Heidegger 1977: 4, 5). Heidegger seeks a definition of modern technology which brings it into relation with Being. For Heidegger (1977: 20), the essence of technology consists in enframing (*Ge-stell*) which refers to the challenging forth of man ‘to reveal the real, in the mode of ordering, as standing reserve’. Objective reality is in other words experienced as a kind of storeroom from which the subject can take and use without limitation to satisfy his endless needs (Goosen 2007: 336). Man himself is even treated in

6 See also de Boer (2000: 177).

7 See e.g. Heidegger (1993b: 240, ‘Letter on humanism’).

8 For an analysis of Heidegger’s views on technology in the legal context, see e.g. Wolcher (2004); and Tranter (2007).

this way. Enframing is not however here to be understood as the essence of technology in the traditional way (Heidegger 1977: 30). Heidegger in other words seeks to give a non-metaphysical definition of technology. According to Heidegger (1977: 22), modern machine-power technology, although it only developed in the second half of the eighteenth century, is a result of representational or calculative thinking which has its origin in the seventeenth century. Enframing is in other words a result of the sending or destining of Being as objectifying representation (Heidegger 1977: 24, 29–30). Even in its concealment and precisely in its being concealed, Being nevertheless remains as promise of itself (Heidegger 1991: IV 226–7). Heidegger's reflection on the early Greeks could be read as in part an attempt to address the question of modern technology. Heidegger does not, as is often thought, view technology simply negatively. He nevertheless sees an extreme danger in its essence. This danger, he notes, does not lie in the potentially lethal machines and apparatus of technology, but in its preventing man from entering 'into a more original revealing and hence to experience the call of a more primal truth' (Heidegger 1977: 28). Technology, we could say in somewhat simpler terms, points to the rule of subjectivism, both individual and collective, in modernity, and at the same time, shows that subjectivity as well as the certainty and security that seemingly goes with it, are an illusion (Heidegger 1977: 152). In the danger of technology therefore also lies a saving power, according to Heidegger (1977: 32–3), as it may reveal to man his essential belonging to and responsibility in relation to what grants, preserves or safeguards (*das Gewährende*). Technology can in other words show a way beyond subjectivity.

In so far as Heidegger's reading of the fragment is concerned, it is important to note that he is not engaging in a philological or psychological exposition, seeking to determine what was present to the thought of Anaximander (Heidegger 1984a: 18, 57). Such a reading would amount to a calculation and to the loss of thinking (Scott 1994: 131). Heidegger also does not seek to come to a more accurate formulation in his translation of Anaximander as compared to the standard translations (Scott 1994: 132). This does not however mean that his is an arbitrary translation. The question Heidegger seeks to answer is what comes to language in the fragment (Heidegger 1984a: 20). Heidegger's 'problem' with traditional translations and interpretations of the fragment lies in their relation to Platonism. As he points out, Nietzsche categorises Anaximander as a pre-Platonic philosopher, and Diels refers to him as a pre-Socratic. Hegel, although he does not refer to the Anaximander fragment, regards the early Greek thinkers as pre-Aristotelian (Heidegger 1984a: 14–15). The philosophies of Plato and Aristotle are in this way used as a standard to consider and judge the early Greek thinkers. Platonic and Aristotelian concepts and representations are furthermore used to guide the interpretation of these thinkers. It is also mistaken, according to Heidegger, to believe that logical thinking can guide us in interpreting the fragment, as logic

was developed only later in the Platonic and Aristotelian schools. Theophrastus, who lived until about 286 BC, as Heidegger furthermore points out, was a contemporary of Aristotle and the latter's student. Both Aristotle and Theophrastus regarded the early thinkers as having contemplated the things of nature and as looking for the origins of beings in nature. This is also how these thinkers are thought of by Hegel and those after him. The word generally used for 'nature' – that is, *physis* – at the time of Aristotle however took on a different meaning than it had for the early Greek thinkers – the broad sense of the totality of being. *Physis* in Platonic/Aristotelian thinking designated a special region of beings separated from *ethos* and *logos*. These so-called reflections on nature of the early Greek thinkers are furthermore after Hegel thought of as inadequate in comparison with the thinking on nature developed in the Platonic and Aristotelian schools, the school of Stoicism and the schools of medicine (Heidegger 1984a: 16).

As already noted, the Anaximander fragment was copied by Simplicius in his commentary on Aristotle's *Physics*, the commentary having been written in AD 530. Simplicius was a Neoplatonist, and the copy of the fragment derived from Theophrastus (c.371–286 BC) (Heidegger 1984a: 16). As Heidegger points out, from the time that Anaximander had pronounced his saying to the time that it was written down by Simplicius, more than 1,000 years had gone by. Heidegger at this juncture raises the question whether the fragment can still tell us something after 2,500 years. It being the oldest one left to us by the Western tradition in itself of course does not give it any more weight. If the thinking expressed in it however surpasses all that came after it, the fragment would have a claim to our attention (Heidegger 1984a: 18). As we saw above, according to Heidegger, the early Greek thinkers thought Being as such, whereas since Plato, Being has become the name for the essence of beings or the Supreme Being. Being is thought as constant presence, as presence at hand (Heidegger 2000: 206–8, 216, 220). The early thinkers however thought of Being as presencing and of truth as unconcealment (Heidegger 1977: 146).⁹ At this stage of Greek thinking, as Heidegger/Krell eloquently puts it, the 'Being of beings is gathered (*légesthai*, *logos*) in the ultimacy of its destiny ... The history of Being is gathered in this departure' (Heidegger 1984a: 18). This destiny, as we saw above, finds its ultimate expression in Nietzsche's will to power, according to Heidegger. In addition to its other concerns, Heidegger's reading of the Anaximander fragment is an attempt to think the future in a way different from how it is done by historiography: predicting the future with reference to the past as determined by the present (Heidegger 1984a: 17). This, according to Heidegger, effectively amounts to

9 Heidegger would later note, and this will be important for our discussion of Derrida's reading, that the early Greeks nevertheless did not think the 'it gives' (*es gibt*) of Being as such; see Heidegger (2002c: 8), and see further Chapter 5.

the destruction of the future. Derrida's thinking, as we will see below, closely ties in with that of Heidegger in this respect.¹⁰

The fragment as giving expression to the onto-ontological difference

Heidegger (1984a: 19–20) acknowledges that his translation will appear violent. However, such 'violence' is necessary if one is to attempt to understand what comes to language in the fragment, that is to say if one reads it as a thinking of (the truth of) Being. The traditional interpretations of the Anaximander fragment are to the effect that it refers to the origin and decay of things and that it describes the process thereof. In these interpretations the fragment describes a kind of economy of exchange in nature. It would thus be a vague statement about an exchange of constructive and destructive moments, but without as yet an understanding of the laws of motion. It would furthermore be a kind of primitive natural science, a description of nature in human terms of a moral and juridical nature, by referring to justice and injustice, recompense and penalty, sin and retribution. Theophrastus's final words in the paragraph cited above would then be understood as rightful criticism of Anaximander for his use of poetic terms to describe the processes of nature. Grammatically, Heidegger points out, the fragment consists of two clauses. For easy reference, the Greek version of the fragment is set out here:

ex on de he genesis esti tois ousi kai ten phthoran eis tauta ginesthai
kata to chreon. didonai gar auta diken kai tisin allelois tes adikias kata
ten tou chronou taxin.

The matter of *ta onta* which is at stake in the first clause ('into that from which things take their rise they pass away once more') literally refers to 'things' or 'beings' in their multiplicity. This is according to Heidegger not a reference to an arbitrary multiplicity, but to the multiplicity of beings in their totality (at 20–1). 'Beings' is furthermore not to be understood here as referring only to things or to the things of nature as the traditional translations seem to suggest. It refers also to '[m]an, things produced by man ... the situation or environment effected and realized by the deeds and omissions of men ... [as well as] daimonic and divine things' (at 21). These are not simply *also* in being (or beings), as Heidegger notes, but are even more so in being (*seiender*) than are things of nature (at 21; Heidegger 2003: 305). Heidegger is here clearly alluding to his existential analysis in *Being and Time* of *Dasein* as the only being open to Being. The Aristotelian–Theophrastian assumption that *ta onta* is to be understood as a reference to the things of

10 See *Neg* 219.

nature in a narrow sense is therefore groundless. This is also the case with the criticism that what Anaximander says here about nature and which should therefore have been expressed in scientific terms is imperfectly expressed by him in moral–juridical language. In interpreting the fragment one must furthermore abandon the idea that Anaximander is speaking here with reference to the traditional disciplines of ethics and jurisprudence. This does not however mean that Anaximander did not as yet have an understanding of law and ethics (*Sittlichkeit*) (at 21; Heidegger 2003: 305). The distinctions we currently draw between disciplines such as ethics, jurisprudence, physics, biology and psychology, were however not as yet made at the time of Anaximander. This does not mean that what is expressed in Anaximander's saying is simply some vague indeterminacy. The words *dike*, *adikia* and *tisis* in the fragment, Heidegger furthermore notes, do not have a limited disciplinary meaning, but rather a broad or rich signification which cannot simply be confined to the traditional disciplines. They are specifically used 'to bring to language the manifold totality in its essential unity' (at 22). What Anaximander says is therefore anything but primitive, a confusion between disciplines, or simply an anthropomorphic interpretation of the world.

We can only enter into dialogue with the Greek thinkers when listening occurs, Heidegger notes. This requires that the words which are usually understood as referring to 'beings' and 'to be' are heard in a different way. These words include '*ta onta*' (beings), '*einai*' (to be), '*estin*' (is) and '*on*' (being) (at 23). Heidegger emphasises that he does not wish to question the correctness of the traditional way in which these words are translated. He however asks whether we have really thought what the words 'being' and 'to be' mean in our own languages and furthermore whether these translations are sufficient in order to understand what the Greeks were addressing with these words (at 24). According to Heidegger, in early Greek thinking, Being still illuminates itself in beings which makes a claim to a certain essence of man (at 25). This essence of man unfolds historically as a sending of Being. Being at the same time grants or safeguards (*wahren*) this essence and releases it without the essence separating itself from Being (at 25). The reason for the forgetting of Being in Western thinking lies in the fateful withdrawal of Being as it reveals itself in beings or in Being's holding on to its truth (at 26). In its illumination of beings, Being sets them adrift in errancy. The inability of man to see himself, Heidegger notes, 'corresponds to the self-concealing of the lighting of Being' (at 26). World history could be said to be a result of this keeping to itself or *epoche* of Being (at 26–7). Moreover, as the beginning of the epoch of Being is 'Greek', the important question in translating the fragment is whether it speaks to us of *onta* in their Being (at 27). Should this be so, the fragment would of course have a claim to our attention. Heidegger clearly believes that this question should be answered in the affirmative. We have to look at *ta onta* not simply in terms of what it expresses, Heidegger points out, but in terms of its source which is also the source from

which the fragment speaks (at 28). It is therefore necessary to at first remain outside the fragment so as to, as Heidegger puts it, ‘experience what *ta onta*, thought in Greek, says’ (at 28).

Remaining for that reason for the moment ‘outside’ the fragment, Heidegger first considers the question of its authenticity. He notes that it is not clear from Simplicius’s quotation of the Anaximander fragment where it starts or where it ends (at 28). Based on the words used, some of which according to Heidegger are Aristotelian in structure and tone rather than archaic, as well as the practice of quotation of the Greeks, he concludes that only the following can be regarded as an actual quotation from Anaximander: ‘*kata to chreon. didonai gar auta diken kai tisin allelois tes adikias*’ (at 28–9).¹¹ It is also precisely this part, as Heidegger points out, which is regarded as ‘rather poetic’ by Theophrastus, which therefore hints at their ‘original’ nature (at 30). This does not however mean that the rest of the paragraph of Simplicius has to be completely disregarded: it can still serve as secondary testimony concerning Anaximander’s thinking (at 30). This brings us to the question of how the words *genesis* (originating) and *phthora* (passing away) in the part left out are to be understood. Must they in other words be understood as pre-conceptual words (taking account of the fact that conceptuality is possible only from the moment that Being is interpreted as idea, and from then on is unavoidable (at 29)) or as Platonic–Aristotelian conceptual terms (at 30)? In light of the above, the answer to this question is evident. Heidegger thus takes the view that *genesis* and *phthora* are not to be understood in the modern sense of development and decline, but in the light of *physis* (Being) ‘as ways of luminous rising and decline’ (at 30). Although *genesis* can be interpreted as originating, it should therefore be understood here as ‘a movement which lets every emerging being abandon concealment and go forward into unconcealment’ (at 30). Similarly *phthora* must be understood as a going which ‘abandons unconcealment, departing and withdrawing into concealment’ (at 30).

In light of the reasons for the exclusion of the first section of what is traditionally thought as making out part of the fragment, Heidegger notes that we cannot be sure whether Anaximander used the words *on* or *ta onta*, although there are no indications against this (at 30–1). In so far as the word *auta* in the second clause is concerned, because of what it says and also because of its reference back to *kata to chreon*, it must necessarily be understood as a reference to ‘being-in-totality experienced in a pre-conceptual way’, or to beings. A more difficult question is what *ta onta* refers to when account is taken of the above (at 31). Heidegger points out that *ta onta*, with all its modifications (*estin, en, estai, einai*), speaks everywhere in the Greek language.

11 In Heidegger’s earlier reading of the fragment, in 1941 (Heidegger 1981; 1993a), the first and last parts, which are left out in the later version, are still analysed as part of the fragment.

In terms of its subject matter, its time and the realm to which it belongs, it provides us with an opportunity to consider something which lies outside philosophy (at 31–2). In Plato and Aristotle, *on* and *onta* become conceptual terms, from which the terms ontic and ontological are derived (at 32). The word *on* however has a double function: it refers both to the ‘to be’ of a being and to a ‘being’ which is (at 32). The ontico–ontological difference, or the distinction between ‘to be’ and ‘a being’ lies concealed in *on*, Heidegger notes (at 32). The words *on* and *onta* are presumably truncated forms of the original words *eon* and *eonta* which are used inter alia by Parmenides and Heraclitus (at 32–3). The ‘e’ which relates *on* and *onta* to *estin* and *einai* are thus only to be found in these original words (at 32). The word *eon* (usually translated as ‘being’) is not only the singular form of *eonta* (usually translated as ‘beings’) but refers to Being or as Heidegger expresses it, to ‘what is singular as such, what is singular in its numerical unity and what is singularly and unifyingly one before all number’ (at 33).

The word *eonta* is explored further by Heidegger with reference to a passage in Homer’s *Iliad* where the seer Kalchas is called on to explain the reasons for the plague sent by Apollo to the Greek camp. It reads as follows:

And among them stood up
 Kalchas, Thestor’s son, far the best of the bird interpreters,
 who knew all that is, is to be, or once was [*ta t’ eonta, ta t’ essomena,*
pro t’ eonta]
 who guided into the land of Ilion the ships of the Achaeans
 through that seercraft of his own that Phoibos Apollo gave him.

(at 33)

What appears from this passage is first that a distinction is drawn between *ta t’ eonta* (that which is in being), *ta t’ essomena* (that which will be) and *pro t’ eonta* (the being that once was) (at 34). The *ta eonta* thus refers to being in the sense of the present. The ‘present’ (*gegenwärtig*) is however not here to be understood in the modern sense of a ‘now’ as a moment in time, or in the sense of an object which is ‘present’ to a subject. ‘Present’ must be understood in terms of the essence of *eonta*, and not vice versa. Of importance in this respect is that the word *eonta* refers also to the past and the future, namely to beings that are not presently present. This is borne out by the reference the Greeks made to that which is presently present as *ta pareonta*, meaning ‘alongside’, in the sense of coming alongside into unconcealment. That which is present (*gegenwärtig*) is therefore not to be understood in the sense of *gegen* (a subject vis-à-vis an object) but rather in the sense of *Gegend*, that is ‘an open expanse ... of unconcealment, into which and within which whatever comes along lingers’ (at 34). That which is presently present (*ta eonta*) cannot therefore be understood in isolation from what is absent. As Heidegger puts it, ‘[e]ven what is absent is something present, for *as* absent

from the expanse, it presents itself in unconcealment' (at 35). What is presently present is also only such in its lingering awhile – that is, in its arriving in-between a double absence. This of course differs from the metaphysical understanding of Being which excludes any absence from Being (de Boer 1997: 155). The experience of the seer Kalchas, as Heidegger points out, consists in a gathering of all things present and absent (at 35–6). He in other words has an understanding of Being as presencing rather than as constant presence – that is, the metaphysical understanding.

Being, as the presencing of what is present, Heidegger contends, must be understood as already truth in itself (at 37). Truth must not however here be understood in the metaphysical sense as a property of beings or of Being. Truth in other words does not refer to a characteristic of divine or human cognition or a property in the sense of a quality. Instead, truth must in light of the above be understood as the gathering that clears and shelters. Heidegger spells out the following implications of this understanding of Being for that which presences:

What is presently present in unconcealment lingers in unconcealment as in an open expanse. Whatever lingers (or whiles) in the expanse proceeds to it from unconcealment and arrives in unconcealment. But what is present *is* arriving or lingering insofar as it is also already departing from unconcealment toward concealment. What is presently present lingers awhile. It endures in approach and withdrawal. Lingering is the transition from coming to going: what is present is what in each case lingers. Lingering in transition, it lingers still in approach and lingers already in departure.
(at 37)

The (excluded) section directly preceding the fragment should therefore be understood not as expressing simply the passing away or inevitable destruction of things as appears at first sight, but rather as giving expression to their transitional structure (de Boer 2000: 178). Underlying and pervading the lingering of things in presence is their arising out of and returning to absence or unconcealment and is again to be compared with the metaphysical approach of excluding from what is present all absence (Heidegger 1984a: 37; de Boer 2000: 178). This clearly assists with an understanding of Being itself, namely as a presence which is thoroughly pervaded by absence (Heidegger 1984a: 37; de Boer 2000: 178). We could also say that Being must be understood as presencing embedded in a twofold absence (Heidegger 1984a: 41). This amounts to a jointure (*Fuge*) between presencing and its twofold absence (Heidegger 1984a: 41; 2003: 327). In the words of Heidegger: 'What is present emerges by approaching and passes away by departing; it does both at the same time, indeed because it lingers' (at 41–2). This analysis also informs Heidegger's translation of *dikē*: not as justice as is usually the case, but as joint or juncture (*Fug* or *Fuge*) or as another name for Being (Heidegger 2000: 177, 179).

Heidegger continues his analysis by pointing out that also in Homer, *ta eonta* does not refer exclusively to the things in nature or to objects of human representation (at 38). This of course ties in with his (Heidegger's) reading of the reference to 'beings' in the Anaximander fragment as referring not only to the things in nature. Homer applies the term *eonta* inter alia to 'the Achaean's encampment before Troy, the god's wrath, the plague's fury, funeral pyres, [and] the perplexity of the leaders'. Man too belongs to *eonta*, Heidegger points out: '[H]e is that present being which, illuminating, apprehending, and thus gathering, lets what is present as such become present in unconcealment' (at 38). After this analysis of that which lies 'outside' and which at the same time serves as the source of the fragment, Heidegger returns to the fragment itself by commenting on its second clause. The word *auta*, he points out, refers back to what was named in the first clause: *ta onta*, which as we saw, refers to everything presently and un-presently present in unconcealment (at 40). The word *auta* likewise refers to everything that presences by lingering awhile: 'gods and men, temples and cities, sea and land, eagle and snake, tree and shrub, wind and light, stone and sand, day and night' (at 40).

Dike and adikia

The question Heidegger poses next is what at bottom runs through whatever is present, or stated differently, what is the basic trait of what is present (at 41)? The answer: *adikia*. For the reasons stated above, Heidegger however wants to depart from the traditional translation of this word as 'injustice'. He then asks three questions which necessarily take us back to the question of technology addressed earlier, as well as the ontological (which is at the same time an 'ethical') question of respecting others as others:

How is what lingers awhile in presence unjust? What is unjust about it?
Is it not the right of whatever is present that in each case it linger awhile,
endure and so fulfil its presencing?

(at 41)

In seeking an answer to these questions, Heidegger notes that the word *a-dikia* suggests that *dike* is absent (at 41). *Dike* is often translated as 'right' and even as 'penalty'. Heidegger however contends that to really understand what comes to language in the fragment we must resist our moral-juridical notions. The fragment can then be heard to say that wherever *adikia* rules, all is not right with things – that is, something is out of joint. This raises the question whether the traditional translations of *dike* fit here. Heidegger points out that the fragment does not say that what is present is only occasionally out of joint. It says that what is present as such is out of joint. What presences can however only possibly be out of joint, Heidegger contends, if presencing at the same time consists of jointure. The joining or jointure that is at

stake here relates to the discussion above of ‘whiling’. As we saw, whiling is necessarily related to a twofold absence: approaching and withdrawal. It is in this ‘between’ where the jointure is to be found. Heidegger phrases this as follows:

In both directions presencing is conjointly disposed toward absence. Presencing comes about in such a jointure. What is present emerges by approaching and passes away by departing; it does both at the same time, indeed because it lingers. The ‘while’ occurs essentially in the jointure.
(at 41–2)

How are we to understand the fragment when it says that *adikia*, understood now as disjointure, is the fundamental trait of *eonta*? Heidegger understands *adikia* here as the attempt of what is present to endure, or to insist upon its while (at 42, 43). This seems to tie in directly with his analysis of modern technology as briefly set out above, as well as with the ethico-ontological question of the respect to be accorded to others as others. As we saw, Heidegger contends that modern technology’s ‘essence’ lies in subjectivism or the self-assertion of man as an attempt to ensure security and certainty (Heidegger 1993b: 244). Man in other words abandons his relation to Being in Platonism, and even more so in modernity, the age which is most characterised by *adikia* (Scott 1994: 140). Heidegger (1984a: 42) however points out that the fragment does not only say that what is present consists in disjunction. It says this *and* something else. In spite of the attempt of man to maintain himself in disjuncture, he still remains in a relation with Being (‘whatever lingers awhile ... gives jointure’ (at 43)).

This brings us to the translation of the word *didonai*. Heidegger seeks to relate *didonai* in the fragment to *diken* and reads it as saying that ‘whatever lingers awhile with a view to disjunction *didonai diken*, gives jointure’. Heidegger then asks what ‘give’ means here. He continues as follows:

How should whatever lingers awhile, whatever comes to presence in disjunction, be able to give jointure? Can it give what it doesn’t have? If it gives anything at all, doesn’t it give jointure away? Where and how does that which is present for the time being give jointure?
(at 43)

In other words, how can man, for example, who insists on sheer continuation and who is thus characterised by disjointure (*adikia*), give jointure (*dike*)? According to Heidegger, ‘giving’ here must be understood in terms of the (essence of the) manner of presencing (at 43). Giving in this context does not entail giving away, but more primordially, as acceding or giving-to (*Zugeben*), giving what properly belongs to another (at 43; Heidegger 2003: 329). As we saw above, what belongs to that which is present is the jointure of its while.

In the jointure, whatever lingers keeps to its while. It does not insist upon sheer persistence. Jointure therefore belongs to whatever lingers awhile, which in turn belongs in the jointure. Heidegger at this point equates jointure with order. *Dike* is thus to be understood as enjoining order. *Adikia*, on the other hand, is disjunction or disorder. Whatever comes to presence does not therefore simply fall into disjunction (and insist on its while at the expense of others), but instead surmounts disorder (at 44). The word *didonai* is consequently to be understood as designating this 'letting belong to' (at 44). This amounts also to an acceptance by that which comes to presence that it belongs to the non-present, in other words, to death (Arendt 1977: II 193), which as we learn from *Being and Time*, belongs to man as his ownmost possibility, 'the possibility of the absolute impossibility of Dasein' (Heidegger 1962: 294).¹²

The next question Heidegger considers is to whom *didonai diken* or the giving of order is directed (at 44). On his reading, present beings only become present when they let enjoining order belong *allelois*, namely to one another (at 44–5). The word *allelois* in the fragment, according to Heidegger, is not related to *diken* and to *tisin* as the translation of Diels has it, but only to *tisin*. The latter word, Heidegger points out, is usually translated as penalty. This translation is not wrong, but this is not the original and essential significance of the word (at 45). Heidegger instead relates *tisin/tisis* to esteem and to heed, to taking care of something. This stands in contrast with what was said above regarding *adikia*. In seeking to persist, as we saw, that which lingers awhile does not pay attention to the others that linger, to the order of the while (at 45–6).¹³ They instead strike 'a haughty pose toward every other of its kind. None heeds the lingering presence of the other' (at 45–6).¹⁴ In order to bring *tisis* in line with its more original meaning as well as in relating it to what was said above regarding *adikia*, Heidegger translates *tisis* as *Ruch* or *reck* (care), which consists in letting something remain in its essence or as itself.¹⁵ This part of the fragment can therefore be understood as saying

12 See also Heidegger (1984a: 101).

13 See also Ben-Dor (2007: 148–9); Staikou (2008: 278).

14 Wolf (1950: 231–3) gives a detailed analysis of *adikia* in this respect. According to Wolf the (human) beings who act in this way should necessarily bear the consequences of their actions; see also Wolf (1972: 140–59) ('Maß und Gerechtigkeit bei Solon'). The privilege accorded in this reading to a close-knit community (see 230–1), in attempting to translate Heidegger's thinking of Being into Being-with-others-in-law, is noteworthy; see further Minkinen (1999: 75–82) for an excellent analysis of Wolf's fundamental ontology of law.

15 Oppermann (2003: 45–69) reads the fragment as entailing a view of justice as a rhythmic process where *tisis* (understood as care) complements justice/law as restitution. This is no doubt a commendable proposal in principle. Unfortunately little account is taken in this article of Heidegger's questioning of the metaphysical tradition by enquiring into Being and the ontological difference between Being and beings – apparent *inter alia* in the equation of Being in Heidegger's thinking with 'what is' in the article (at 59). A conception of justice is thus developed which would clearly be metaphysical on Heidegger's terms.

that beings which linger awhile let order (*Fug*) belong, *didonai diken*, in so far as they do not disperse themselves by arrogantly persisting and not leaving room for each other among what is present (at 47).¹⁶ Beings in other words give order by allowing *reck* to pervade their relation with others, *didonai ... kai tisis allelois* (at 47). We must therefore understand *allelois* in close relation with *tisis* and within the context of the manifold of what lingers awhile (*ta eonta*) in the open expanse of unconcealment and not simply as indeterminate reciprocity in a chaotic manifold, as the translations of the fragment usually have it. The word *kai* between *diken* and *tisis* is consequently also not simply to be understood in its usual sense as ‘and’, but as describing the manner in which beings grant order: by giving *reck* to one another (at 47).

The word *adikia* is according to Heidegger in light of the above to be understood as referring to the disorder of the reckless. Beings in other words let order belong, and thereby also *reck* to one another, in the surmounting of disorder (*adikia*) (at 47). The questions Heidegger seeks to answer then are to whom the order of jointure belongs and what brings about this order (at 48–9). This is essentially about the relation between the first and the second clauses and about establishing which clause is the determining clause.¹⁷ To answer these questions, Heidegger shifts his attention to the word *gar* (‘for they make reparation’), translated as ‘for’ or ‘namely’. This word serves as a reference back to the first clause, Heidegger points out. The second clause, one could say in light of the discussion above, comments on the manner of the presencing of what is present (at 48). It in other words speaks of the release of whatever is present into reckless disorder as well as the way in which ‘present beings surmount disorder by letting order and *reck* belong to one another’ (at 48). The only remaining words of the first clause, *kata to chreon*, usually translated as ‘according to necessity’, must therefore speak of presencing itself, that is to say of the Being of beings, as well as the extent to which presencing determines what is present as such. Only in this way can the second clause, by commenting on the manner of presencing of the present (that is, beings), refer back to the first clause by means of *gar*. The question this raises is whether presencing (Being) is to be understood in terms of what is present (beings), or the other way around. Which clause, in other words, dominates? The word *kata*, usually translated as ‘according to’, here means, Heidegger contends, ‘from up there’ or ‘from over there’. The word thus ‘refers back to something from which something lower comes to presence, as from something higher and its consequent’ (at 49). Beings should clearly

16 See also Wolf (1950: 231).

17 Richardson (2003: 517) understands Heidegger as saying that the focus of the first clause of the fragment is on Being, and that of the second on beings, whereas ‘the theme of both is identical: the process by which beings come-to-presence in non-concealment’. The relation between the two clauses in turn reflects the ontological difference.

be understood in terms of Being. As Heidegger points out, that which is present can only become present as such in consequence of presencing. *Chreon* is therefore that which ‘enjoins matters in such a way that whatever is present lets order and *reck* belong’ (at 49).

Heidegger next proceeds to consider the meaning of *to chreon*. As already indicated, ever since Being becomes the idea in Plato, a distinction is no longer drawn between presencing and what is present. Presencing itself becomes something present and is now understood as the most universal or the highest of present beings, in this way also becoming a being among other beings (at 50). The essence of presencing, and thus also the distinction between presencing (Being) and what is present (beings), in this way remains forgotten. According to Heidegger this forgetting of the ontological difference is not a result of some inadequacy in thinking. It instead belongs to the self-veiling essence or the destiny of Being, since Being keeps to itself. Because of this, the ontological difference collapses and remains forgotten. In this forgetting of Being the history of the Western world, that is metaphysics, comes to the fore (at 51). That which ‘is’, or is regarded to exist, stands in the shadow of the oblivion of Being. The importance of the early Greek thinkers, as indicated above, lies in the fact that they precede this history. Even though these thinkers did not think the ontological difference as such, its trace can still be detected in their language. The word *chreon*, Heidegger points out, originally has nothing to do with necessity or what must be, as one finds in traditional translations. It derives from *chrao*, *chraomai* and alludes to the hand (*he cheir*); it suggests getting involved with something, reaching for it, extending one’s hand to it. The word *chrao* also bears the connotation of placing something in someone’s hands or of handing over, delivering, or letting something belong to someone (at 51–2). This delivery nonetheless keeps the transfer in hand as well as that which is transferred. *To chreon* must consequently be understood as ‘the handing over of presence which presencing delivers to what is present, and which thus keeps in hand, i.e. preserves in presencing, what is present as such’ (at 52).

Heidegger thus translates *to chreon* as *der Brauch*, which Krell renders as ‘usage’ (at 52). Usage as a translation of *to chreon* is not to be understood here in the usual and ‘modern’ sense of ‘utilizing and benefiting from what we have a right to use’ (at 52). It should be understood in the sense of to brook [*bruchen*], Latin *frui*, German *fruchten*, *Frucht*, Heidegger contends. The original sense of ‘usage’, as Heidegger points out, is to enjoy and to be pleased with something. Only in its derived sense does it refer to consuming or gobbling up (at 53). ‘Along the lines of usage’ is thus to be thought as letting something present come to presence as such or in light of the above, as ‘to hand something over to its own essence and to keep it in hand, preserving it as something present’ (at 53). Enjoyment is therefore not to be identified with some form of human behaviour, and thus with some being, not even of the highest being. It rather refers to ‘the manner in which Being

itself presences as the relation to what is present, approaching and becoming involved with what is present as present: *to chreon*' (at 53).¹⁸ Heidegger summarises as follows this understanding of *to chreon* and its relation to *tisis* and *dike*:

As dispenser of the portions of the jointure [of what is present in the transition between twofold absence (arrival and departure)], usage is the fateful joining: the enjoining of order and thereby of reck. Usage distributes order and reck in such manner that it reserves for itself what is meted out, gathers it to itself, and secures it as what is present in presencing.

(at 54)

The enjoining of order necessarily involves the limitation of what is present and thus also the imposition of boundaries (at 54). This brings us to the question of the *apeiron*, the boundless, limitless, infinite or indefinite in the thinking of Anaximander as the origin of everything that is present.¹⁹ The *apeiron* is mentioned by Simplicius in the first part of his exposition of Anaximander's thinking quoted above. *To chreon* is at the same time *apeiron*, Heidegger contends (at 54). As we saw earlier, accompanying the process of presencing as jointure, there is the constant danger of disjointure. Usage (*to chreon*), in so far as it is also the boundless, is responsible for 'sending the boundary of the while to that which presences awhile' (Heidegger 2002b: 277; 1984a: 54). Being (*to chreon*) can thus be said to presence 'without bounds, not joined by order and reck' (at 54).²⁰

Heidegger's translation of the fragment finally reads as follows: '*entlang dem Brauch; gehören nämlich lassen sie Fug somit auch Ruch eines dem Anderen [im Verwinden] des Un-Fugs*' (Heidegger 2003: 342). Krell translates this as follows in English: 'along the lines of usage [or 'letting something present come to presence as such' (at 53)]; for they let order [*dike*] and thereby reck [care] belong to one another (in the surmounting) of disorder' (at 57).²¹

18 This translation can also be understood in light of the relation between Being and man which Heidegger spells out elsewhere. Being is 'needful' of an abode, which is only to be found in man. Being itself is need (*das Brauchen*) and man, as we saw above, is in need of Being (Heidegger 1991: IV 244, 248).

19 Much more attention is given to the *apeiron* in Heidegger's earlier reading of the fragment; see Heidegger (1993a: 94–101).

20 See further Heidegger (1993a: 95): '*To apeiron* is the *arche* of being' [*ist die arche des Seins*]. Heidegger reads the *arche* here as 'enjoinment' and *apeiron* as repelling or hindrance (*Verwehrung*). *To apeiron* consequently entails the repelling of limit, where limit means 'the closing off of presencing into a final presence, into the permanence of a mere presence' (at 98).

21 Diels and Kranz (1951: 487–8), responding to Heidegger's translation, declare in this respect that in the language of the sixth century bc the concepts *dike*, *adikia*, *diken*, *didonai* and *tisis*, already belonged to the specific sphere of the law and that *to chreon* can never mean 'der Brauch'.

Heidegger's acknowledgement that this translation cannot be proved scientifically and that it is not based on a philological and historical analysis, is of course no reason for derision, but is based on the realisation that the whole notion of 'proof' is a product of metaphysics which poses man as subject (as against an object), as the ultimate measure of things (Heidegger 1991: IV 238). Heidegger's reflection on the Anaximander fragment does not stop with the translation, but is ultimately an attempt to think through the crisis of the modern age. This crisis, Heidegger notes towards the end of his analysis, cannot be understood by applying the modes of thought of the current age:

Curiously enough, the saying first resonates when we set aside the claims of our familiar ways of representing things, as we ask ourselves in what the confusion of the contemporary world's fate consists.

Man has already begun to overwhelm the entire earth and its atmosphere, to arrogate to himself in forms of energy the concealed powers of nature, and to submit future history to the planning and ordering of a world government. This same defiant man is utterly at a loss simply to say what *is*; to say *what this is* – that a thing *is*.

(Heidegger 1984a: 57)

Derrida's reading

Prologue

The differences in the respective readings of the fragment offered by Heidegger and Derrida are, to put it simply, determined by the different ways in which they view death, with consequences for the way in which they view technology.²² For Heidegger, as we saw in the above analysis, death should be recognised as an essential part of life²³ and as the ownmost possibility of *Dasein* (Heidegger 1962: 294; 1984a: 101), with consequences for its mode of being, for example in creating technology as well as in relation to the concepts it employs. Viewing death as a possibility of *Dasein* is according to Derrida

22 Derrida also explores briefly certain aspects of Heidegger's *Der Spruch* elsewhere, e.g. in *Psy II* 49 ('Heidegger's Hand'), where he refers to *to chreon* which as we saw Heidegger wishes to understand as 'keeping in hand'. In brief, Derrida analyses the opposition Heidegger institutes between the hand and technics, and points the way towards a thinking of the hand which would relate it more closely to the gift without exchange; see Chapter 5. Of further importance in this regard (alluded to by Derrida in 'Heidegger's hand') is the opposition Heidegger generally posits between man and the animal, which necessarily has implications for determining the potential receivers of the gift. In *SQ* 84–5, and *Rel* 60, he refers briefly to the distinction Heidegger (1984a: 57) draws between faith and thinking. See also *MP* 64–7; and *Geschl IV* 195.

23 See Heidegger (2000: 139), as quoted in Chapter 1.

tied too closely to a capability, ability, power, and potentiality and therefore to presence (*Ap* 74–5; *PC* 356).²⁴ For Derrida, neither *Dasein* nor any other being has a relation with death as such, which means that death cannot be ‘possible’ for, or ‘proper’ to *Dasein* or to other beings (*Ap* 76; *Dem* 50–1, 65).²⁵ Coming to the relation between death and technology, Heidegger, as we saw above, views technology as an expression of the will to power. Being itself or *physis* according to Heidegger, precedes and cannot as yet be associated with *tekhne* (*ET* 133). In Derrida’s thinking, as is shown for example in his analysis of speech and writing, and the development of the notion of arche-writing, there is of course no space for such originary purity (Chapters 1 and 2). Furthermore, and tying in with the above, as Derrida has pointed out elsewhere (*ET* 39, 58, 79–80), technology evokes the spectre of our own death.²⁶ Technology in other words dislocates, expropriates, delocalises, deracinates, dis-idiomatise, de-territorialises and dispossesses (*Rel* 45). This is something we both desire and are repulsed by. Technology consequently, simultaneously and violently, summons the desire for the home, the family, the nation; territory, native soil and blood; language, culture and humanity (*ET* 115, *Rel* 45–6, 56–8). In announcing our own death, technology thus gives rise to a (metaphysical) desire for rootedness, for presence, to some extent also in the thinking of Heidegger.

To understand Derrida’s reading of the fragment and the concerns he raises about Heidegger’s reading, it is important to understand the broader ‘theme’ of *Specters of Marx*, which, as we will see, ties in very closely with the analysis above of death and of course with the notion of *différance*. As Roudinesco remarks in an interview with Derrida, ‘I am convinced that *Specters of Marx* is a profoundly Freudian book’ (*FWT* 175).²⁷ This indeed seems to be the case. Apart from the obvious, that is the frequent invocation of Freud’s name, of the work of mourning, of Oedipus, of ghosts, of the uncanny, and of fetishism, other comments which illustrate the Freudian connection, and more specifically the Freudian death drive and repetition compulsion at the heart of *Specters*,²⁸ include the mention of ‘a beyond the economy of repression’ (at 26), the ‘most ancient ancientness’ (at 87), the

24 See further Chapter 1.

25 A reading of Heidegger to the same effect is of course not excluded; see *Ap* 77.

26 Critchley (1999a: 172–6) comes close to such a reading of *Specters* by way of Stiegler, but his (i.e. Critchley’s) understanding of the notion of an ‘originary technicity’, although insightful (and even though to be found in *SM* 115), risks simply overturning the hierarchical opposition between the proper and the technological.

27 See also *FWT* 78–80 and ‘M&S’ 259 where Derrida comments that in *Specters* he attempts to analyse ‘the paradoxical symptoms of a geopolitical mourning ... [and] to articulate them with a new logic of the relations between the unconscious and politics’.

28 This is specifically discussed in *SM* 217–18 (with a reference in fn. 39 to *PC*; see also ‘M&S’ 224). See further *PC* 268–9, where a connection is already made between Marx and phantoms in the consideration of Freud’s death drive.

fear of oneself (at 143), ‘the death and expropriation at the heart of the living’ (at 164), being possessed by the spectre (at 165), being haunted by oneself (at 164) (the comment that) ‘life does not go without death, and that death is not beyond, outside of life’ (at 176–7), the auto-immunity of the living ego (at 177),²⁹ the occupation of man by what is most strange, distant, threatening (at 181), and the ghost being there ‘*before its first apparition*’ (at 204). Marx, Derrida notes in the same vein, was someone haunted, persecuted, harassed and obsessed more than others by and with ghosts (at 126, 132).³⁰ He not only loved, but detested ghosts (at 141). It was as if Marx and Marxism in general, Derrida comments, were frightened by someone within themselves (at 130–2). He and others therefore attempted to ontologise this ghost/spectre of communism, attempted to make it a present, living reality, in the form of the Communist Party (at 114, 126–30).³¹ At stake in this haunting is a terrifying messianic promise, appeal, injunction, urgent demand of justice and permanent revolution (at 36–40). In *Ghostly Demarcations*, Derrida likewise refers to this messianic experience as an ‘apprehension’ as it involves an ‘exposure without horizon, and therefore an irreducible amalgam of desire and anguish, affirmation and fear, promise and threat’ (‘M&S’ 248–9). Because of its frightening message, the self, when confronted by this ghost or spectre, which Marx conjured for us and which cannot now but haunt us, is filled with anxiety and repulsed thereby, attempting to conjure it away, restrict and appropriate it (*SM* 132–3). Derrida, likewise haunted, seeks not to exorcise, but instead to affirm the spectre, to retain and welcome it as spectre (at 220). This is for the sake of the future, for which, as Derrida notes, we need Marx:

no future without Marx, without the memory and the inheritance of Marx: in any case of a certain Marx, of his genius, of at least one of his spirits.

(at 14)

The fragment as giving expression to différance

Derrida understands and commends Heidegger’s *Der Spruch* as an attempt to read the Anaximander fragment and to think justice in a way which goes beyond juridical–moral considerations. This is specifically clear from Heidegger’s translation of *dike* as jointure and of *adikia* as disjointure, rather than injustice (*TS* 7). Derrida’s question is however whether Heidegger in

29 See further *Rel* 51; *OS* 96–113; and *TOH* 33–4.

30 See also *ET* 25.

31 See also *ET* 127–8; and de Boer (2002: 25–6). Derrida *SM* 9 ascribes this attempt at ontologising to the work of mourning; see further Chapter 5.

fact fully succeeds in moving away from such considerations, in light of the privilege he accords here, as he also does elsewhere, to the gathering or joining of Being, rather than its disjoining or dissemination (*SM* 34).³² With reference specifically to Heidegger's analysis of *didonai diken* (the giving of jointure) in *Der Spruch*, and tying in closely with our discussion in Chapter 5, Derrida raises the question whether Heidegger does not skew the asymmetry between the gift and what is given ('the accorded favour'), in favour of the given (at 32). This seems to happen in spite of the fact that Heidegger himself posits 'what is given' as the accorded favour, in this case 'of the accord that gathers or collects while harmonizing' (at 32). Derrida is in other words suggesting that through Heidegger's privileging of *dike* rather than that which gives *dike*, Heidegger risks again inscribing the gift and thereby justice within a system of exchange.³³ This happens despite the fact that Heidegger realises that one should think justice in terms of the gift, that is to say as beyond right, calculation and commerce (at 30–2). This move likewise carries the risk of re-inscribing 'this whole movement of justice under the sign of presence' (at 32). This is not to deny the profundity of the shift to be found in Heidegger, specifically in his reading of *didonai diken* in the fragment. As Heidegger notes, this is an attempt to think *dike* on 'the basis of Being as presencing' (*aus dem Sein als Anwesen gedacht*) and as 'the ordering and enjoining Order' (*der fugendfügende Fug*) (Heidegger 1984a: 43; 2003: 329). Although this presence is thus a received or unveiled presence (rather than a constant presence), Derrida notes that it remains appropriable and gathered together (*SM* 32).

A further difficulty in Heidegger's reading lies in his invocation, here as well as elsewhere, of more 'original meanings'. This invocation is based on the assumption that there is some fixed sense, object or referent anterior (some being or Being itself) and exterior to 'the word' or to language understood as representation (in other words, technology) and is according to Derrida provoked by a (or rather *the* metaphysical) desire for presence (*Psy I* 102). Derrida contends, as we saw in Chapters 1 and 2, that meaning (and this would include the meaning of Being) is always derived, the consequence of an economy of *différance*, and thus not originary in nature. This of course does not make Heidegger's reading 'wrong', but it does show the difficulty of escaping from metaphysics and calls for a reading of the fragment which exceeds the focus on Being. Derrida therefore asks whether it is not rather in the *Un-Fug*, disjuncture or dislocation of Being (and of time), in other words, in *adikia*, that 'justice as relation to the other (*la justice comme rapport*

32 See also 'VR' 14; *FWT* 80–1.

33 See also Bischof (2004: 211) who reads Heidegger's analysis of *Dike* in terms of harmony as implying that the other should be given only that which already belongs to him, although he does not have it as yet. Justice with Heidegger thus remains of an economic, distributive nature, marked by restoration.

à l'autre)' is possible (SM 32). This passage should again not be understood as if Derrida is simply adopting Levinas's view on the other, as Critchley (1999: 151, 157–8) for example contends. Such a 'Levinasian' reading would seem to be supported by the English translation of a subsequent passage. In the passage concerned, Derrida (formalising, as he notes, in the extreme and too quickly what is at stake here) points to the relation between deconstruction and disjointure from which it (deconstruction) draws its inspiration and injunction:

to what must (without debt and without duty) be rendered to the singularity of the other, to his or her absolute *precedence* or to his or her absolute *previousness* [*à sa précédente ou à sa prévenance*³⁴ *absolues*], to the heterogeneity of a *pre-*, which, to be sure, means what comes before me, before any present, thus before any past present, but also what, for that very reason, comes from the future or as future: as the very coming of the event.

(SM 33)

The possessive adjective 'sa' (with the English equivalents, 'his, her, its') is here twice translated as 'his or her'. The (unfortunate) impression created is that Derrida is speaking here of 'the other' in the sense of a masculine or feminine human being, which is not however borne out by the rest of the passage. At stake here, as the context makes clear, is not in the first place the other as a human being, but the other as the other of Being, as the gift of Being, as the revolutionary messianic event (SM 211–2). Only this disjointure in Being, and not its gathering, as Heidegger would contend, opens up the ability 'to *do justice* or to *render justice* to the other as other (*faire justice* ou *rendre justice* à l'autre comme autre)' (SM 32).³⁵

To say that Heidegger privileges gathering of course does not mean that he disregards disjointure completely. Heidegger's text, due to its heterogeneity, necessarily stands open to a different reading and in the first part of his short commentary, Derrida emphasises specifically those sections of the text where Heidegger notes, but does not thematise, the splitting, division or dissension in Being.³⁶ One could say that Derrida's reading of the fragment entails a

34 A footnote of the translator (n. 28) here explains that the word *prévenance* 'ordinarily has the same sense of thoughtfulness, consideration, kindness', but that it is here 'being taken also in its etymological sense of "coming before"'.

35 See also 'VR' 14; R 150. The same applies to SM 81–2 where the democracy to come and absolute hospitality are invoked with reference to the call 'for the infinite respect of the singularity and infinite alterity of the other'; see further Chapter 6 on singularity.

36 See also *Geschl I*; and see further *Psy I* 114–5 on the words *Anwesen* (being or becoming present, or presencing) and *Anwesenheit* (presence) in Heidegger (1977: 115–54). In Derrida's close reading, *Anwesenheit* in Heidegger's texts 'is not simple, it is already divided and differing, it marks the place of a splitting, a division, a dissension [*Zwiespalt*]. Engaged in the

different way of ‘listening’ than Heidegger’s.³⁷ This ‘notion’ of a division or split in Being can easily be misunderstood. First, this dislocation in Being (the *Un-Fug*) does not for Derrida have the negative connotation that Heidegger accords to it (resisting in the while). This appears clearly from Derrida’s ‘Retrait of metaphor’. For Heidegger the withdrawal or the self-concealing revealing of Being in metaphysics entails that Being gets spoken of as if it is a being. As we saw above, Heidegger sees this withdrawal ‘negatively’, as a ‘fall’ or ‘errancy’. For Derrida however this ‘withdrawal’ is instead what gives rise to metaphysics. He in other words reads Heidegger as exposing a ‘structure’ that precedes the ontological difference. This ‘structure’ (which is of course not to be understood in the metaphysical sense) of a split in Being, involves a differential relation between the withdrawal of Being, which can also be referred to as the erasure of the trace, on the one hand, and the relation between Being and beings (the ontological difference) on the other. The *Un-Fug* in *Der Spruch*, in Derrida’s reading thus becomes what requires affirmation as the condition of possibility of the joining (*Fug*).³⁸ Second, and as already noted earlier, to speak of the split in Being or of the ‘other’ of Being, does not amount simply to a falling back onto beings, and more specifically on the human being as ‘other’.³⁹

Dike and adikia

Heidegger, as we saw, translates *dike* as *Fug*, as joining, as articulation of accord or harmony and *adikia* as what is disjointed, twisted and out of line, in the wrong, or in error. In his commentary, Derrida points out that the phrase *mit Fug und Recht*, mostly translated as ‘within rights’, ‘rightfully’, or ‘rightly’, stands opposed to what is ‘wrong’ (*SM 27*). The German equivalent for disjointure is the phrase *aus den Fugen, aus den Fugen gehen*. As we further

opening up of this dissension, and above all by it, under its assignation, man is watched by what-is, Heidegger says, and such would be the essence of man “during the great Greek epoch.” Man thus seeks to gather in saying (*legein*) and to save, to keep (*sozein, bewahren*), while at the same time remaining exposed to the chaos of dissension.’ See also *MP 65* where Derrida similarly speaks of making thought tremble by means of a *Wesen* preceding *Anwesen* (Being as presencing) in the context of the Anaximander fragment, as well as *Geschl IV 206–7* on the tension of a double movement in *An-wesen*. For commentary, see Marrati (2005: 94–5).

37 See in this respect *MP ix–xxix*; and *Geschl IV*.

38 The dissension in Being which must be overcome is also addressed by Heidegger in a number of other texts. Especially illuminating is Heidegger (2000: 141–2) where he notes that in order to open itself to unconcealment, Being has to gather itself, in other words it has to ‘have rank and maintain it’. He continues as follows: ‘Gathering is never just driving together and piling up. It maintains in a belonging-together and piling up. It maintains in a belonging-together that which contends and strives in confrontation. It does not allow it to decay into mere dispersion and what is simply cast down.’

39 See Chapter 1.

saw above, Heidegger evaluates the state of the world of his day in terms of the withdrawal of Being, which has led to subjectivism and finds expression in modern technology and other forms of calculation. A more authentic relation with Being is thus relied on by Heidegger to evaluate the present. Derrida's evaluation of the 'ten plagues' of the new world order is also 'guided', not however by Being, but by *différance*, which as we saw, takes on board (tele-technic) dislocation (*adikia*) as part of its 'structure', beyond the onto-ontological difference. Understanding Derrida's assessment of the state of the world (at 96–117) poses a specific challenge. At first sight Derrida is simply pointing here to the absurdity of Fukuyama's claims that liberal-democratic capitalism has achieved a global victory. By pointing to the 'ten plagues' (including new forms of unemployment; exclusion of certain citizens from political participation and the expulsion of others; the waging of economic war; contradictions in the concept of the 'free market'; the aggravation of foreign debt; the close link between the arms industry and trade with the economy of many countries; the spread of nuclear weapons; the waging of inter-ethnic wars; the growing power of drug cartels; and the problems faced by international law), Derrida shows that this 'victory' is instead fragile, threatened, and in some respects catastrophic (at 85).⁴⁰ There however appears to be another dimension to this assessment as Derrida also sees something 'positive' in these 'plagues'. This can perhaps be understood as follows: Fukuyama's claim is at the same time a philosophical (quasi-Hegelian) claim of the attainment of full (and just) presence by liberal-economic capitalism. In Kojévian terms, what Fukuyama is claiming is that 'the cancellation of the gap between desire and need suspends any excess, any disadjustment' (at 90). The claim is therefore of an end in disadjustment, in the 'out of joint', pre-figuring an eternal (just) present (at 90).⁴¹ In his analysis, Derrida seeks to show that liberal-economic capitalism is not contemporaneous with itself, that it has no closed identity, and that it is actually disjointed (at 94). This disjointedness appears also from the ten plagues, understood as a dislocation that is taking place in our time in traditional conceptuality, relating specifically to economic and social matters, in close connection with nation-state sovereignty. Like Marx (and Anaximander), we thus live in a time of disjunction which allows for a thinking of justice, the gift and hospitality as always remaining to come (at 139–40). As Derrida puts it:

[Marx] belongs to a time of disjunction, to that 'time out of joint' in which is inaugurated, laboriously, painfully, tragically, a new thinking of borders, a new experience of the house, the home, and the economy.
(at 219)

40 See also R 86.

41 See also R 86.

There thus appears to be a close link between the two meanings of the ‘out-of-joint’. As Derrida moreover indicates in the essay ‘The time is out of joint’, the French *disjoncter* means disjunction, but also *délirer*, ‘to become mad or deranged (‘TOJ’ 14–15).⁴² Similarly, to be ‘hors de ses gonds’ – that is, to be off one’s hinges – can be translated as ‘out of joint’. Hamlet, Derrida furthermore suggests here with reference to Nietzsche, saw some Thing beyond the ghost of his father; he saw too much, namely absolute disorder, monstrosity, a terrifying thing, what is beyond measure, absolute injustice, the Thing itself, death, which renders him silent (about this secret thing he saw) (‘TOJ’ 34–6). As in Chapter 4, madness is thus the background ‘theme’ in *Specters*, the ‘madness’ of communism which needs to be affirmed in view of the out of jointness of our time. In Derrida’s reading (*SM* 85), Fukuyama’s claims (and the media attention he received at the time) are exactly attempts at denying the injustices/out of jointness of liberal–economic capitalism and at ‘conjuring away one more time in a jubilatory and manic fashion’ Marx’s spectre, the spectre of communism, which, like democracy, remains to come:

[C]ommunism has always been and will remain spectral: it is always still to come and is distinguished, like democracy itself, from every living present understood as plenitude of a presence-to-itself, as totality of a presence effectively identical to itself. Capitalist societies can always heave a sigh of relief and say to themselves: communism is finished since the collapse of the totalitarianisms of the twentieth century and not only is it finished, but it did not take place, it was only a ghost. They do no more than disavow the undeniable itself: a ghost never dies, it remains to come and to come-back.

(*SM* 123)⁴³

Returning to Heidegger, Derrida in *Specters* in other words attempts to think the ‘out-of-joint’ in a way which in some sense ‘precedes’ the originary sending of Being (Staikou 2008: 279). As Derrida puts it in ‘The time is out of joint’: deconstruction is about ‘dislocating, displacing, disarticulating, disjoining, putting “out of joint” the authority of the “is”’. The assurance that lies in the original gathering, sending and epochality of Being (Heidegger 1984a: 18) is in other words placed in question by *adikia*.⁴⁴ There would then no longer be any guarantee of destiny gathering itself up, identifying itself, or determining itself (*Psy I* 128). In relation to the inter-ethnic wars plaguing the world, Derrida specifically notes that ‘[a]ll national rootedness, for example,

42 Heidegger EGT 35 likewise refers to the seer Kalchas as a madman because of what he sees.

43 See also ‘NM’ 23–6.

44 See *Psy I* 104, 120–2, 404–5; and see further Marrati (2005: 93–4).

is rooted first of all in the memory or the anxiety of a displaced – or displaceable – population. It is not only time that is “out of joint,” but space in time, spacing’ (*SM* 103). This is a consequence of ‘tele–technic dis-location’ or what Derrida elsewhere refers to as ‘the techno-scientific and techno-economic transformation of the global field’ (*FWT* 97). The ‘ten plagues’, are thus viewed in terms of a ‘structure’ of disjointedness which is not only negative, but allows us to see the acceleration in what we referred to in Chapter 1 as the ‘implosion’ of traditional conceptuality. Measurelessness (the *apeiron* in the Anaximander fragment)⁴⁵ in other words, ‘becomes the law’ (‘TOJ’ 34). In this way it allows us, for example, to think beyond the concepts of state and nation, towards what Derrida calls a ‘new International’, an attempt to think an alliance without party, state and private property (*SM* 35, 105–7). From the structure of disjointedness or the ‘other of Being’ thus also comes an appeal or demand for justice beyond law, or a messianic promise (*SM* 110–12). Heidegger’s *Der Spruch* however also stands open to such a reading. Derrida notes in this regard that Heidegger’s understanding of the present as *je-weilig* (lingering awhile) and of the word *weilen* (lingering), are related to the notion of transition or passage. The future, he points out in an attentive reading of a passage to be cited in a moment, is however dominant in this transition. The transition comes from the future towards the past, from that which has not yet come, and which therefore remains to come. Heidegger (2003: 323) puts it as follows: ‘*Das Weilen ist der Übergang auskunft zu Gang. Das Anwesende ist das Je-weilige*’. Krell translates this passage as follows: ‘Lingering is the transition from coming to going: what is present is what in each case lingers’ (Heidegger 1984a: 37).⁴⁶ This coming from the future causes a disjuncture in the present and therefore in time (*SM* 28). Heidegger’s text thus opens the possibility of thinking about justice in terms of a disjuncture in time, as that which has not yet come, and which therefore remains to come.

Another question, also posed by Heidegger, and which ties in with a different thinking of justice, would be whether one could say that the fragment, in stating that *adikia* belongs to the *eon* of the *eonta*, betrays a pessimism or nihilism in the Greek experience of Being (*SM* 29). Heidegger (1984a: 44) does not think so. He rather sees in this expression a ‘trace’ of the tragic which cannot be explained in aesthetic or psychological, and by implication also not in psychoanalytical fashion (*SM* 29; Heidegger 1984a: 44). This trace of the tragic according to Heidegger calls on us to think Being on the basis

45 See also *PC* 398 on the relation between the *apeiron* and limitless pleasure; and *Dis* 160 on the relation between the limitless and dialectics. The *apeiron* is thus not read as another name for Being as in Heidegger (1993a: 94–6), but as that which gives Being.

46 Julian Young, in Heidegger (2002b: 263), translates the passage as follows: ‘The stay is the transition from coming to going. What is present is what, in each case, lingers awhile.’

of *didonai diken*, the gift of jointure, or justice beyond right (*SM* 29). The question for Derrida is what this justice entails and how it is related to the reparation of injustice (*SM* 29). Does justice simply entail equivalence, the righting or compensation of a wrong, the restitution of something due, as has been the case throughout the history of law (*SM* 24–5, 29)?⁴⁷ Derrida asks whether justice does not rather entail giving beyond the due, the debt, the crime or the fault (*SM* 29). In answering this rhetorical question he points to Heidegger's statement that the fragment does, and also does not speak of the disjointedness of the present time to itself (*SM* 29). On the one hand, Heidegger states that the fragment unequivocally says that the present is *adikia*, out of joint. This is a reference to the transitory passage which the present 'is', by being related to or joined to its coming and going. Presence, as we also saw above, is *enjoined* in this way – a matter therefore of injunction. The fragment on the other hand also refers to *didonai diken*. As Heidegger (1984a: 42) points out, this is not to be translated as justice in the sense of vengeance, that is to say as payment, recompense or penalty. Heidegger, as we saw, refers to 'giving' here in order to link *adikia*, which he interprets as disjointure, with *diken*, which he wants to read as jointure or order. *Diken* thus gives order by surpassing disorder. *Diken* is furthermore enjoined in this regard by *chreon* which Heidegger (1984a: 52) understands as 'the handing over of presence'. At this point (*SM* 26), Derrida draws our attention to Heidegger's three questions on giving, which were quoted above. To this is to be added Heidegger's question in the next paragraph (Heidegger 1984a: 43) which reads as follows: 'How should what is present as such give the jointure of its presencing?' We saw that Heidegger does not simply want to understand giving here as giving away, but in the more original sense of 'acceding or giving-to'. This is Krell's translation of the word 'Zugeben' (Heidegger 1984a: 43; 2003: 329).⁴⁸ Derrida however points out that *Zugeben* most often carries the meaning of 'addition, even excess, in any case that which is offered in supplement, over and above the market, off trade, without exchange, and it is said sometimes of a musical or poetic work' (*SM* 31).⁴⁹ Heidegger's understanding of *didonai diken* as giving to an other what properly belongs to him (*was als Gehörige ihm eignet*) (Heidegger 1984a: 43; 2003: 329) is therefore not necessarily restrictive,

47 For an illuminating discussion of justice as simply un-injustice, see Hofmann (2006: 72–6). It would not be far off the mark to say that this is a characteristic of most modern legal systems as has also been commented on by Kelsen (1973: 14): 'The principle of retaliation expresses only the specific technique of positive law, which adjoins to the evil of wrongdoing the evil of a penalty. But that is a principle underlying all positive legal norms, and thus every legal order can be justified as a realisation of the retaliation-principle.'

48 Young, in Heidegger (2002b: 269), translates it as 'conceding'.

49 The *Collins German Dictionary* elaborates on the word *zugeben* as follows: '(zusätzlich geben) to give as an extra or bonus; (bei Verkauf auch) to throw in (inf). Jdm etw ~ to give sb sth extra or as a bonus, to throw sth in for sb (inf)'.

as this giving what is due appears to escape the dimension of the contracted debt.⁵⁰ Heidegger's text thus opens a reading to the effect that the giving which is at stake here involves 'a gift without restitution, without calculation, without accountability' (*SM* 30).⁵¹ Justice, which is related to the gift, would furthermore be removed from the fatality of vengeance, and more than this: infinitely foreign, heterogeneous at its source (*SM* 25). It yearns for a day no longer belonging to history, a day that is both before us, namely to come, as well as more ancient than memory itself (*SM* 25). This statement clearly ties in with the 'main theme' of Derrida's book here under discussion, as analysed above.

The revolution

Specters of Marx makes it clear that Derrida is a thinker of the revolution, together with Marx and Benjamin. Derrida's thinking in this respect is clearly informed by Freud's analysis of the death drive, although the influence of Heidegger cannot be discounted. Heidegger's reflection on Being and the ontological difference has made it possible to see the closure of metaphysics. Freud makes possible the exceeding of metaphysics. In *Specters* and elsewhere Derrida engages in a quasi-psychoanalytical analysis of the interrelation between life and death, of death as already part of life. This stands in sharp contrast to Marx's statement (also to be found in Luke 9:60) that the dead must bury their own dead. In Derrida's reading, this statement, which we also find implicitly in Fukuyama, seeks to bring about an absolute and fully present life that 'does not know about death and does not want to hear about it' (*SM* 219–20).⁵² Acknowledging death in life amounts in turn to an acknowledgement of a disjunction in time. This disjunction, which Anaximander, Shakespeare, Marx and Heidegger each in their own way bear testimony to, opens the possibility of a notion of justice which exceeds the circularity of economic exchange. This moreover allows for the radicalisation of Marx's thinking on the revolution, separating it from ontology. The spectre of communism, and with that the abolition of law, of the state, of sovereignty, of property, of rights, of citizenship, of meaning, haunts every legal–political act. This spectre cannot however be made present; it always remains to come. The revolution thus no longer involves the attempt to seize power in an Oedipal manner. It is a 'desire' for powerlessness rather than for power ('TL' 11). It seeks to do the impossible. At stake is a permanent revolution which involves 'an interruption, a radical caesura in the ordinary course of History' (*FWT* 83).

50 See also *Geschl IV* 195.

51 Derrida already develops the outlines of this reading in *Geschl IV*, specifically at 195.

52 See also *ET* 126–8.

Hospitality towards the future

Law as Absolute Hospitality has attempted to show something of the complexity of Derrida's thinking whilst at the same time seeking to open certain texts to a different reading than they have predominantly been subjected to in the legal context. Whereas the methodical, the postmodern, the ethical-liberal, and the cosmopolitan readings analysed in Chapter 1, arguably inscribe Derrida's texts and the legal theory which is derived from his texts within the metaphysics of presence, the reading contended for here seeks to leave open Derrida's texts to the future.¹ The sense of the 'future' employed here has to be understood in a specific sense, as was made clear especially in Chapters 1, 2 and 7, which touched upon the concept of time. The metaphysical concept of time, as we saw there, is of time as a sequence of 'now' moments, with its anchor in the 'living present' ('PTF' xix). At stake in the deconstruction of the concept of time is not the future present, a future that is foreseeable, predictable or anticipated.² The 'futuristic' reading of Derrida in *Law as Absolute Hospitality* as well as his own invocation of the future (*l'avenir*) involves something very different. According to Derrida, the future as such, if it exists, is the condition of possibility of history and overflows history and the present ('PTF' xiii; *TS* 19–21). At the same time, the future in this sense would stand no chance if there was not also a historical link, tradition, memory and synthesis ('PTF' xiii). As appears from a number of Derrida's texts,³ the notion of the future as employed here is to be understood in a similar way as the 'to come', the event, the promise and the impossible, and furthermore does not involve a utopian ideal as is sometimes thought. As Derrida puts it in a 1998 interview in response to a question on the notion of 'monstrosity' in his texts:

1 See also *TS* 30–2.

2 Compare the assertion of Rosenfeld (2008: 84–6); and Mitchell (2005: 922) who contest somewhat too quickly Derrida's statement that religious fundamentalisms 'open onto no future and, in my view, have no future' (*PTT* 113), assuming that Derrida refers to the 'future' in the usual sense.

3 See e.g. *Psy* I 1–47 ('Psyche: inventions of the other'); and *Neg* 225–6.

At the end of the foreword to *Of Grammatology* I say that ‘monstrosity’ is the only word that we can use to describe the future ... I describe monstrosity simply as the future, that is, that which has no recognizable form. The future, if there is such a thing, is monstrous. I use the word rhetorically to refer to an event that has no recognizable form. The future is the non-identifiable ... Monstrosity should ... be viewed as that which overtakes us. It does not approach us head on. That which approaches from ahead, which is in front of me, can be seen. It constitutes a horizon of expectation. I see it coming ... The future often comes from the back. The future comes back.

(‘TID’ 261)

The ‘monstrosity’ of the future again comes to the fore in Derrida’s discussion with Borradori in *Philosophy in a Time of Terror*. Here he argues that the trauma of September 11, 2001 does not lie simply in the events or the memory thereof as they unfolded in the past or present. What is more traumatic is the ‘irresistible foreboding’ of the return of a terror ‘worse than anything that has ever taken place’ (PTT 97). The traumatism thus comes from ‘the unrepresentable future, from the open threat of an aggression capable one day of striking’, which our unconscious is already aware of (PTT 98, 102). Derrida is with this discussion of an auto-immunitary suicide clearly alluding to his own earlier readings of Freud’s death drive. The (monstrous) future that comes back, the past that is more ancient than memory, refers to a ‘desire’ for death, or to what we have elsewhere in this book referred to as the promise/threat of madness, auto-immunity, the democracy to come, the law before the law, the perfect gift, unconditional justice and absolute hospitality.⁴

There is a necessary (differential) relation between this ‘future’ and law as we experience it in time. However, for as long as the concept of subjectivity remains firmly in place, this ‘future’ has almost no chance of coming. According to Derrida, the future in this radical sense stands a chance only through the affirmation of the absolute threat/promise, which translates into a deconstruction of the conceptuality that we take for granted in law. Without such an affirmation, coupled with a rethinking of conceptuality (including of the concepts of time and of the subject), there will only be the implementation of a calculable and foreseeable programme. The advantage of ‘coming to grips’ with Derrida’s thinking, through a close reading of his texts that relate to law, is that it enables the radical opening of law, not only towards what is possible, but towards the impossible.

4 For an excellent analysis of Derrida’s thinking in relation to monstrosity, see Saghabi (2010: 29–49).

Rethinking conceptuality

We saw in the first seven chapters of *Law as Absolute Hospitality*, how Derrida seeks in a sense to ‘implode’ or ‘dissolve’ philosophical concepts, or perhaps rather to point to their self-implosion or dissolution.⁵ Conceptuality is etymologically related to seizing and grasping. To know, to understand or to comprehend is ‘to grasp’, from Latin *comprehendere*, ‘to take together, to unite; include; seize’; also ‘to comprehend, perceive’ (to seize or take in the mind), from *com-* ‘completely’ + *prehendere* ‘to catch hold of, seize’ (*Online Etymology Dictionary*). The German *Begriff* (concept), *begreifen* (to understand), *greifen* (to grasp, to seize) gives expression to the same idea (*AR* 362). Derrida’s rethinking of conceptuality which resists such (conscious) grasping is of course not done in order to return to some form of empiricism, pragmatism or realism (*PTT* 88). It is by way of the ‘new concepts’, which he in a sense invents, that we are required to and enabled to rethink the future. The focus in Chapters 1 to 7 was mainly on the concept of law/justice, but also touched on the concepts of sovereignty, the subject, the decision, responsibility, democracy, the gift and hospitality. In Chapter 2 we saw how Derrida’s thinking on subjectivity and the relation to language subverts the notion of the people as constituent power. In this way, the concept of sovereignty is shown to be inhabited by a certain auto-immunity. In Chapter 3, the origin of law is enquired into via Freud’s *Totem and Taboo*, Kafka’s *Before the Law*, and Lévi-Strauss’s reflections on totemism and incest. In all these readings we find a ‘desire’ for absolute pleasure which is suppressed in the constitution of an origin in the metaphysical sense. The concept of law is in other words inhabited by a ‘desire’ for its own destruction. In Chapter 4, Derrida’s reading of Foucault assisted us in rethinking the concept of reason in law. Reason structures language, although it appears that reason itself is inhabited by a total madness which ‘forgets’ about the interests of the self. In Chapter 5, we saw that the gift is not merely an object of interest in law – that is, something to be regulated – but in a sense similar to the discussion in Chapter 3, lies at the origin of law. The concept of the gift, when rigorously analysed, furthermore cannot be viewed as an institution of circular return. For a gift to qualify as gift it must exceed economic circularity. In Chapter 6 we reflected on ‘Force of law’ where Derrida contends in line with what has been said thus far, that justice needs to be thought in terms of madness, the gift and the ‘desire’ for absolute pleasure. The concept of law is thus inhabited by unconditional justice, expecting no return to the (collective) self. In Chapter 7 the concept of law was again reflected on, this time via Heidegger’s reflections on the *Anaximander Fragment*. Whereas Heidegger, in going beyond the

5 See also *AR* 362; ‘Host’ 211; *PF* 142.

traditional conception of law/justice, associates law/justice here with binding and thus with *dike*, Derrida links law/justice with disjointure and thus with *adikia*. Justice would be possible only through a disjointure in time. This does not simply involve the realisation that every now-moment is itself connected to the past and the future.⁶ At stake is the Freudian insight in relation to death: an absolute past, which has never been present, and which doubles as the absolute future, which remains to come, always haunts and disrupts the present.

Derrida's deconstruction of concepts leads in each instance to their 'implosion', their becoming meaningless, in other words. Whereas all our (meta-physical) concepts are understood as identical to themselves, because of their being tied to origin, truth, presence and meaning, and furthermore give expression to a restricted economy involving a circular return to the self, these 'new concepts' no longer are and no longer do. The need for rethinking conceptuality of course ties in closely with Derrida's analysis of language and the 'mediating' role which language always plays. There is no getting away from language, but at the same time traces have been left in language of the 'desire' which exceeds language and makes it possible in the first place. In analysing Malabou's *The Future of Hegel*, and specifically the phrase *voir venir*, which she understands as 'being sure of what is coming' *as well as* 'not knowing what is coming', Derrida, in line with what was said above, remarks:

This 'interplay' of necessity and of surprise does not only happen once in language, as if by chance, as if it resulted from a simple accident of and in the idiom. Language must be able to play, there must be within it the very display of its aptitude to play, the habit of conjugating, and of holding in itself and for itself, in the very body of its syntax and of its lexicon, the constant mark of this transformation, something like the permanent habitus of this alteration.

(‘PTF’ xii–xiii)

As we saw in Chapter 1, concepts have, because of the way in which philosophy has approached death (as something to be defeated by life), been viewed from the position of the living present. What Derrida says about the concept of hospitality – ‘It is to death that hospitality destines itself’ (*AR* 360) – is ‘true’ of every concept, including the concepts of sovereignty, subjectivity and law.⁷ Every concept registers an auto-deconstruction in itself. It shows hospitality

6 See e.g. Häggglund (2008: 40–1).

7 See e.g. Derrida's deconstruction of the concepts of freedom and equality in *R* 19–62 and *FWT* 47–61.

towards and contains within itself an other, which is no longer *its* other (*AR* 362).

Law, politics and hospitality

The reception of Derrida in the legal context has not as yet taken on board the need for a radical rethinking of conceptuality, and more specifically of subjectivity. In the twentieth century, legal realism sought to destroy the remaining vestiges of a transcendent notion of justice by attempting, in a scientific way, to reduce law to the factual conduct of judges (Maris and Jacobs 1997: 304–5). CLS followed in the footsteps of realism by revealing the lie behind law's claims to neutrality with the refrain that law is simply politics in disguise (van der Walt 2005a: 146). In doing so, deconstruction was appropriated by CLS, shaping it into a kind of Sartrean subjectivist mould. Commendable efforts have been made to distinguish Derrida's thinking from its appropriation by CLS.⁸ These readings have nonetheless, as was pointed out in Chapter 1 and elsewhere, fallen claim to a similar kind of relativism and subjectivism which characterise legal realism and CLS. The above analysis sought to show that in Derrida's thinking, a more 'radical' disruption of subjectivity takes place so that there always is a 'negotiation' at stake with the demands of the impossible. This is not a negotiation by a subject who remains in control, and it does not involve a compromise, but instead a very risky movement ('E&F' 32).

We see the re-inscription of subjectivity perhaps best in the concept of hospitality. As noted in Chapter 1, at stake are two equally imperative laws which form part of the 'concept' of hospitality and which are not in opposition to each other, but in a differential relation. Hospitality involves, as is generally thought, preparation for the coming of the guest, the extension of a welcome and the provision of food and shelter (*AR* 360–1). As Derrida notes, hospitality however also entails more:

[T]o be hospitable is to let oneself be overtaken [*surprendre*], to be ready to not be ready, if such is possible, to let oneself be overtaken, to not even let oneself be overtaken, to be surprised, in a fashion almost violent, violated and raped [*violée*], stolen [*volée*] ... precisely where one is not ready to receive – and not only *not yet ready* but *not ready, unprepared* in a mode that is not even that of the 'not yet'.

(*AR* 361)

8 See e.g. Cornell (1992: 100–3); van der Walt (2005a: 6–7, 146–7).

Hospitality thus involves the subject being both host *and* hostage (*A* 54–5). There is consequently no ‘I’, in an individual or collective sense, having the ability or power to make room for the other. The ‘I’ is already in its structure inhabited by an alterity (*TS* 84). It is from this non-place of absolute hospitality that the restricted economy of law and politics needs to be rethought. As was indicated in Chapter 1, deconstruction does not involve a neutral method, which is appropriable by both the left and the right. One could term deconstruction ‘radically leftist’, although such a description still domesticates deconstruction’s transgressivity. It would perhaps, with certain precautions, be more accurate to say that Derrida’s thinking could serve as a ‘basis’ for critical left thinking in the politico-legal field, and moreover, in a consistent and radical manner. This is shown by his own reflections on inter alia the death penalty (*FWT* 139–65), immigration/citizenship (*OH*, *PF*), stem-cell research (*R* 141–59), the notion of the family (*FWT* 33–46), man’s relation to ‘animals’ (*AIA*), terrorism (*PTT*), the punishment of ‘criminals’ (*FWT* 139–96), dealing with ‘rogue’ states (*R*), addressing poverty (*G&L* 86; *GT* 134–45), the concepts of equality and freedom (*R* 19–62; *FWT* 47–61), freedom of speech (‘Pas’ 23–4), testimony (*WA* 28–70), the idea of self-government, the concept of democracy and the issue of the sovereignty of the nation-state (*PF*, *R*), reason (*R*), the pardon (*CF*) and even something as seemingly unimportant as the signature (Chapter 2). Derrida also radically destabilises all assumptions we may have about meaning in legal interpretation; and could perhaps help us to rethink a notion such as the rule of law.⁹ In addition, Derrida’s thinking in general, concerning, for example, subjectivity and time, enables a rethinking of politico-legal conceptuality as a whole, beyond the circle of economic exchange.

Legal philosophers of a new species

In an effort to contemplate the task of the legal philosopher in the twenty-first century and beyond, as well as to understand what is at stake in the re-conceptualisation of the politico-legal field alluded to above, Nietzsche, and Derrida’s reading of Nietzsche, can be of assistance. In *Politics of Friendship*, Derrida attempts to rethink the concept of friendship, and with that of politics and democracy, inter alia along with Nietzsche. Derrida’s reading of Nietzsche ties in closely with his (Derrida’s) other texts on the event and the *arrivant*. The absolute *arrivant*, Derrida notes in *Aporias*, ‘surprises the host ... enough to call into question, to the point of annihilating or rendering indeterminate, all the distinctive signs of a prior identity’ (*Ap* 34). In *For What Tomorrow* Derrida makes a similar comment on the event:

9 See de Ville (2006).

That is what an event worthy of the name can and ought to be, an *arrivance* that would surprise me absolutely and to whom or for whom, to which or for which I could not, and may no longer, *not respond* – in a way that is as responsible as possible: what happens, what arrives and comes down upon me, that to which I am exposed, beyond all mastery. Heteronomy, then – the other is my law.

(*FWT* 52)

At stake in the *Politics of Friendship* is likewise a thinking of the dangerous perhaps, which Derrida ties explicitly to the notions of the *arrivant*, the event and the decision (*PF* 28–9). Closely related to this, Nietzsche (1989: 10–11) speaks in *Beyond Good and Evil* of a new species of philosopher whom he sees coming: philosophers of the future, of the dangerous perhaps. As Derrida points out, Nietzsche calls on them to come, yet they can in a way be said to have already arrived (*PF* 34–7). These new philosophers will not be friends of the truth, like the philosophers who have preceded them. They will be free, very free spirits, Nietzsche (1989: 53) notes. At stake in this (promised) coming, on Derrida's reading, is a thinking of the future as well as a 'carrying and sustaining [of] the future', that is 'capable of enduring the intolerable, the undecidable and the terrifying' (*PF* 37–8). Ronell (2008: 164), with reference to Nietzsche and Derrida, views these new, or 'genuine' philosophers, as she calls them, as:

powered by the self-threatening wheelworks of performativity. Rather than describing and merely computing, the genuine philosopher tests the limits of intelligibility, making things happen with decisive positings that are by no means enslaved to what is.

Nietzsche (1989: 10) then also accuses the metaphysicians of not being capable of going beyond their faith in antithetical values, which he refers to as a frog-perspective.¹⁰ The dangerous perhaps, the event, similarly calls on us to not simply reverse,¹¹ but to go beyond the opposition between antithetical values as well as beyond a good conscience (*PF* 31). This involves a certain madness, as we saw in Chapter 4, and the philosophers of the perhaps must thus not fear being referred to as 'fools' by the metaphysicians (*PF* 34). It is this madness that the legal philosophers of the future, the philosophers of the dangerous perhaps, the *arrivant* thinkers, need to explore and watch over (*PF* 39–41). Switching to the language of hospitality, with which we are still engaged here, we can speak of hospitality to the impossible,

¹⁰ See also *PF* 30.

¹¹ As we find in some way or another in CLS (Chapter 1), van der Walt (2005a) and Hågglund (2008).

or even, as Derrida puts it, tying in with our discussion on Freud, being 'hospitable to the death instinct' (*PF* 68, 113). These new philosophers are in terms of the logic of *différance* both desired and undesired, called and repressed, friends and enemies, and their coming thus deferred (*PF* 37, 42, 173–4). Their task, thought of as specifically *legal* philosophers, would be to bring to the fore the aporia within every legal concept, to move law beyond what is simply possible. In their reading of legal sources they would similarly expose that which makes these texts possible in the first place. At stake is thus a movement away from essence, consistency and truth towards the (dangerous) logic of the perhaps (*PF* 29). From Nietzsche and Derrida we hear the call: 'Kommen Sie!' 'Venez!' 'Come!'

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