JUSTICE AND THE LAW: A PERSPECTIVE FROM CONTEMPORARY JURISPRUDENCE
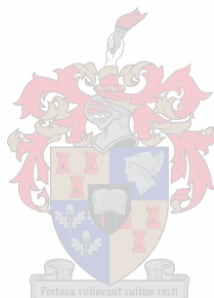
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"*Declaration*

I, the undersigned, hereby declare that the work contained in this thesis is my own original work and that I have not previously in its entirety or in part submitted it at any university for a degree.

ABSTRACT

This thesis examines the relationship between law and justice. Firstly, it is argued that the concept of justice tends to be defined too narrowly as distributive justice or as a mechanism to maintain social order. It is argued that Jacques Derrida's understanding of justice not only gives a richer and broader understanding of the concept, but also on its complex relationship with the law. Lastly, some of the possible implications for jurisprudence (with specific reference to Critical Legal Studies, Critical Race Theory and Drucilla Cornell) are examined.

ABSTRAK

Hierdie tesis ondersoek die verhouding tussen geregtigheid en die reg. Daar word eerstens geargumenteer dat geregtigheid te maklik gedefinieer word as distributiewe geregtigheid of as 'n meganisme om sosiale orde te bewerkstellig. Daar word geargumenteer dat Jacques Derrida se verstaan van die konsep nie alleen 'n breër en ryker verstaan moontlik maak nie, maar dat dit ook fokus op die komplekse verhouding met die reg. Laastens word sommige van die moontlike implikasies vir regsfilosofie (met spesifieke verwysing na Critical Legal Studies, Critical Race Theory en Drucilla Cornell) ondesoek,

For HPM and HM

ACKNOWLEDGEMENTS

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"I am not going to start my argument in the old-fashioned way of making a clearing, constructing a claim, and defending this claim against the outside threat of nonsense, illogic and ambiguity, and the like. Rather, I shall simply ask readers to admit that this romantic way of proceeding in now passé, if not embarrassing. Readers should join me in admitting that the clearing within which I will do my work is infested with chance, accident, chaos; and in realizing that these silent nonsensical forces help constitute, by virtue of their difference, the sense one can make."

William Corlett[1]

" 'This is a world that had been civilized for centuries, had a thousand paths and roads' - wrote Michael Ondaantje in *The English Patient*, meaning that one can recognize a civilization by travelers following laid tracks rather than blazing their own trails, and by tracks having been laid for them to follow."

Zygmunt Bauman[2]

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[1] (1989: 37)
[2] (1995:34)

INTRODUCTION

"We have it from Aristotle himself that life is hard...[t]his new hermeneutics would try not to make things look easy, to put the best face on life, but rather recapture the hardness of life before metaphysics showed us fast way out the back door of flux."

John D. Caputo [1]

The relationship between justice and the law is a problematic one. Does one guarantee the other? Should law remain independent? How should we go about applying the law, and in what way are we responsible for the effects of our judgments? These are the kinds of questions that will be investigated in this thesis. The approach will be two-fold. In the first place, some of the challenges posed by Jacques Derrida's understanding of justice to more traditional theories of justice, specifically in "The Force of Law" (1992), will be examined. I will argue that it challenges a narrow definition of justice as distributive justice and as a mechanism to maintain social order. This will lead to an investigation of the possible implications for jurisprudence.

The relationship between law and justice has always between disputed. Some schools of thought (for example positivism) give preference to law. Laws, they argue, are set by rulers/god to the benefit and security of a society. The implementation and following of laws are of primary concern; justice is secondary. The strength of this argument is that laws do indeed have the potential to make a complex world more digestable. They provide a way to distribute benefits and burdens, and protect members of society by enforcing certain constraints against domination and explotation. The obvious weakness of this approach is that it leaves very little space for the notion of justice. The question whether something is a law is valid becomes more important than whether it is just or unjust.

Another way to approach the problem would be to place the emphasis on the the concept of justice. Laws, one would then argue, are only valid and to be followed if they are just. The strength of this approach as that it does leave

space for justice and the possibility to criticize and even reject laws. The weakness, however, is this: What is understood under justice? Where does it come from? How do we know it? Is justice based on/found in human rationality, intuition, the community or divine inspiration? None of these 'sources' of justice are unproblematic. If one looks at the history of justice, no matter what it is based on, it usually also carries with it a history of exclusion. The 'we' included and protected under justice, Derrida (1992:18) points out, until recently meant white christian males.

Where does this leave us? Do we choose for law, and against justice, or *vice versa*? Do we abandon one of the concepts, or both? And what do we do in the context of South African where the law, via the new constitution, has tried to rehabilitate itself, and where justice is still sorely needed? In this thesis I am going to argue that both law and justice are important. We need law because we cannot reinvent the world every morning. Law can also be good measure to protect individuals from domination and exploitation. We need justice because it can provide the impulse and space for transformation. We need both law and justice because society is complex. In other words, laws are important because they draw certain boundaries and give some stability; justice is important because it challenges these boundaries and can prevent them from becoming rigid and exclusionary. What is needed then is an understanding of law and justice that takes both concepts seriously.

Derrida (1992) argues, in "The Force of Law: The 'Mystical Foundation of Authority'" (hereafter "The Force of Law"), that justice is experienced as an aporia, in other words, as the absence of universal guidelines, as an impasse. He identifies three aporias of justice, namely the suspension of the rule, the ghost of the undecidable and the urgency of justice (this will be the focus of Chapter Two). This gives a whole new dimension to the problem of justice. Traditionally the idea of justice is tied to the dream of order or viewed narrowly as the mechanism with which benefits and burdens are distributed in society, and this is problematic. Distributive and retributive justice function to ensure that the members of a society receive their just desert, thereby keeping society on an even keel. This understanding of justice not only

underestimates important aspects such as power and complexity, it also narrows the gap between justice and the law, a gap, argues Derrida (1992), that must remain because the two concepts are radically different. Law is the structure of a judicial system; justice defies being captured in a system. Law wants to calculate results; justice can never be the result of calculation. Law focuses on the universal; justice favours the singular. However, law and justice are also interwoven, otherwise there would be no aporia.

Derrida, like Drucilla Cornell (1992), is also concerned by the violent nature of law. Law is violent not only because of its effects, such as punishment, but because, like any system, it excludes. It draws boundaries between right and wrong, acceptable and unacceptable, insiders and outsiders. These boundaries, however, do not absolve their makers from responsibility for its violence. On the contrary, argues Cornell (1992: 157), "those who enact and enforce law are [left] with an *inescapable responsibility* for the violence [of law], precisely because violence can never be fully rationalized and therefore justified in advance...law, in other words, can never catch up with its projected justification" [Cornell's emphasis].

In order to get a grasp on Derrida's understanding of law and justice in "The Force of Law" the notion of deconstruction needs to be understood clearly. Derrida (1988a: 4) writes statements "of the type 'deconstruction. is X' or 'deconstruction is not X'...miss the point". However, the following can be said: Deconstruction is a 'strategy' or 'method' to seek out and disrupt (not destroy) contradictions and hierarchies. Or, as Cornell (1992:155) puts it "to expose the nakedness of power struggles and, indeed, of violence masquerading as the rule of law". I will focus more specifically on the concept deconstruction and its importance in Chapter Two and Chapter Four. I will now, however, single out two concepts that are important for the understanding of deconstruction. The two concepts I want to refer to specifically are the metaphysics of presence and iterability.

The metaphysics of presence assumes that there is a (self-certifying) point of reference outside language. In other words it assumes that there are

fundamental notions that provides guarantees and certainty. Culler (1982: 93-94) writes, "[a]mong the familiar concepts that depend on the value of presence are...the presence of ultimate truth to a divine consciousness, the effective presence of an origin in a historical development...truth as what subsists behind appearances". It is assumed that meaning is known and that our understanding of the world can be guided by essentials. Derrida (1976), on the hand, argues that things are more complex; communication is always mediated by context and interpretation. In his critique of Saussure's philosophy of language he argues that language is an open rather than a closed system. The assumption that there is an place 'outside' language that guarantees meaning and fundamentals is problematised. This does not mean that there is no meaning but rather that is result of rich, dynamic and even playful interaction between the elements in a(n) (open) system.

What are the implications of this for the way in which that justice is understood? One possible implication it can no longer be assumed that justice can be guaranteed from 'outside' a society or legal system. This does not mean that one can no longer talk about justice, but that is becomes a more complex. It is no longer is simply matter of applying principles of justice from 'outside'. Context and interpretation becomes important. So too does the concept of law and its relationship with justice (This will be discussed in Chapter Two and Four).

Another concept that Derrida makes use of and that could have potentially interesting implications for theories of justice is that of iterability. Derrida (1988b: 7) argues that an important aspect of the production of meaning is iterability, in other words, whether a sign or word is repeatable. He writes, "[t]he possibility of repeating and thus identifying the marks is implicit in every code, making it into a network...that is communicable" (8). Yet, he also argues that even when repeated the meaning does shift; iterability does not mean identical repetition since no context can enclose the sign (9). A sign has a history which plays a role in interpretation, yet at the same time it also interacts with other signs in a dynamic way.

What are the possible implications of this for the concept of justice? Procedure, even-handedness and precedent are traditionally important concepts when discussing this concept, specifically when referring to justice's relationship with law. They have a characteristic in common, namely, the assumption that procedures must be applied/repeated in similar situations in order to ensure justice. The idea of iterability problematises this since even though a communication or action can be repeated it will not be identical, since ease case deals with "singularity, individuals...[and] irreplaceable groups and lives" (Derrida 1992: 17).

In Chapter One I will examine some of the assumptions of traditional theories of justice and the problems surrounding them. In Chapter Two I will examine Derrida's understanding of justice and the challenges it poses to traditional theories of justice and jurisprudence. I will then, in Chapter Three, contrast it with two radical movements in contemporary jurisprudence, namely, Critical Legal Studies (CLS) and Critical Race Theory (CRT). Lastly, I will examine the arguments of Drucilla Cornell as a jurisprudence that takes both Derrida's understanding of justice and the challenges posed to law seriously.

To summarize: I will examine, first, the concept of justice and the way in which it is challenged by Derrida's arguments in "The Force of Law". I will, secondly, examine the possible implications for jurisprudence, and the relationship between law and justice.

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[1] (1987: 1) Notes are found at the end of each chapter.

CHAPTER ONE
THE PROBLEM OF (IN)JUSTICE

1. Introduction

> *"I find philosophy which attempts to make the world or any part of it into a static system or structure very depressing, and I think it ought to be avoided for that reason."*
>
> Margaret Davies[1]

The notion of justice is powerful. It can be used to challenge or to justify a *status quo*. According to Derrida (Derrida/Caputo: 15) it is so powerful that "it shatters every calculus". But how is justice understood? Is it those procedures that maintain (an) order, or that which challenges it? Can the 'functions' of justice be split into retributive, corrective and distributive justice? Is there only one 'form' of justice or does it apply in all spheres of society? These are the type of questions I will examine in Chapter One. In the Introduction I stated that the focus of this thesis will fall on the complex relationship between law and justice. In this chapter I hope to point out some of the problems and complexities surrounding the concept of justice.

The purpose of this chapter is to examine the concept of justice and specifically the assumptions made by traditional theories of justice. Some these assumptions are problematic and reflected in recent, prominent theories of justice such as that proposed by John Rawls and Robert Nozick. It is not my intention to give an exhaustive study of theories of justice; I merely wish to argue that there are problematic assumptions made by traditional theories of justice which are also reflected, among others, in the work of philosophers such as Rawls and Nozick. Some of the problems are highlighted by Iris Marion Young and Carol Gilligan who challenge, for example, the narrow focus on distributive justice, and seeing the concept only in terms of rules, rights and procedures. In the second section of this chapter I will argue that traditional theories of justice are also challegend by injustice, a concept that is often ignored by these theories.

To summarize: The concept of justice is one of the two key concepts that will be examined in this thesis. In this chapter I will question some of the assumptions that traditional theories of justice seem to make, specifically, the emphasis that is placed on order, the narrow focus on distributive justice and the way in which the concept of injustice is ignored. These aspects will then be taken further in Chapter Two where I will focus on Derrida's arguments on justice in "The Force of Law".

2. Theories of Justice

2.1 Premises and Assumptions

Thousands upon thousands of pages have been written on the concept of justice. It is important to note that most of these discussions and debates are usually carried out under the heading of political philosophy - in other words, the branch of philosophy that is most interested in how best to govern a state and organize society. Political philosophy, i.e. statecraft, writes John Caputo (1991: 4), is an exercise in building walls. It treats the *polis* as a made object - implying that boundaries are set and the status quo is assumed and protected (4).

The notion of justice is associated with law and social morality. When spoken of in the realm of law, it traditionally refers to the principles and procedures that ought to be followed (Raphael 1990: 113). This is the domain of rights and duties, of contracts between individuals, and between the individual and the state. It is also associated with just desert - be it distributive or retributive. In other words, justice is what people deserve and, therefore, it is possible to know it and, perhaps, even to calculate it. This also implies reciprocity and impartiality.

The common theme is, therefore, order. Raphael (1990: 114) writes, "[t]he idea of justice in both legal and moral thought is plainly concerned with the general ordering of society...a breach of that order is called a breach of justice". The status quo and its boundaries are to be kept in check.

There is more than one way to categorize or classify the idea of justice. First, distributive justice seeks a just distribution of goods, benefits and burdens. Second, retributive justice focuses on punishment and restoration. Third, procedural justice states the rules of agreements and contracts. These 'forms' of justice have a common theme, namely, it is tied to the idea of order and maintaining an equilibrium in society. If the world needs fixing and what better idea to tie this dream of order to than that of justice? It describes the correct procedures to be follows for society to be ordered.

Secondly, justice could be discussed or understood under the headings of different ideologies and the different contents that each give to it[2]. Libertarian justice, of which Robert Nozick is a proponent, places the emphasis on the freedom of choice of the individual, the right to private property, and a minimalist state. Anything that encroaches on these rights - for example, an interventionist state - is perceived as injustice. This understanding of justice carries with it an atomistic anthropological view. It further assumes that some rights - for example, the right to private property - is more fundamental than other rights (for example, equality through interventionist means). Nozick's theory of justice is that of a principled libertarian (1974). He begins *Anarchy, State and Utopia* by stating that individuals have certain rights that the state may never override (ix). He argues in favour of a "nightwatchman state" where the only function the state is just-ified in fulfilling is "protection against force, theft, fraud, enforcement of contents, and so on" (ix). According to Nozick (1974: 149) only a minimalist state can be justified, since any other system would violate people's rights.

Nozick's conception of justice focuses on arguing for justice as entitlement - in other words, rights that protect the (atomistic) individual against state intervention and leaves him/her free to engage in capitalist acts - and as a result, an emphasis is on distributive justice. An individual is assumed to be the "antecedent unity existing prior to its desires and goals, whole unto the self, separated and bounded" (Young 1990a: 228). The result is not only a simplistic conception of both individuals and the relationships between them, but also a formalistic understanding of rights (229).

Welfare liberal justice - of which John Rawls's *A Theory of Justice* (1971) is an example - argues for greater powers to the state and freedom tempered by some notion of equality. Rawls's *A Theory of Justice* remains one of the most influential books ever written on justice.[3] Rawls (1971: 3-4) defines justice as fairness and the search for a "well-ordered society". A well-ordered society is one which advances the good of all of its members and is regulated by a public conception of justice, i.e. a conception of justice that everyone both knows and accepts and which also marks social institutions (4-5). To achieve this, Rawls argues that two principles of justice are to be applied "to the basic structure of society" (61).

According to Rawls, parties - which he describes as heads of families - will decide on these principles when placed behind a "veil of ignorance" - i.e. they do not know their social position in society (136). The rationale is that the "contingencies which put men at odds" must be eliminated (136). In other words, according to Rawls, principles of justice can only be conceptualized once contingencies are eliminated[4].

He argues that these individuals behind the "veil of ignorance" will chose two principles (60). The first principle states that "each person is to have an equal right to the most extensive basic liberty compatible with similar liberty for others" (60). The second principle states that, "social and economic inequalities are to be arranged so that they are, (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all" (60). Therefore, the only difference that Rawls allows for is a 'reasonable difference' between the wealthy and poor to a degree that is benefits the latter. Rawls - following Kant - makes use of a narrow conception of the individual. Not only is the individual disconnected from concreteness, for the purposes of justice, but Rawls also makes some generous assumptions concerning the self-interestedness and the impartiality of the individual; who will choose Rawls's two principles. He assumes that everyone will choose conservatively.

Socialist justice - on which CB Macpherson (1985) is a prominent representative thinker - takes equality as the premise for any discussion of justice. It also gives the greatest prominence to the role of the state and its interventionist role. In other words, in contrast to Nozick, the supporters of this understanding of justice will argue that it can only be achieved if the state intervenes in social relationships and distributive patterns.

To summarize: Traditional theories of justice, including those of Rawls and Nozick, place the emphasis on one of the most important aspects of justice-as-order, namely, distributive justice. Or, put differently, justice seems to deal with possessive relations (Galston 1980: 109). The consequence is that justice becomes defined narrowly as the way in which society ought to distribute benefits and burdens, both material (wealth, etc.) and non material (human rights, power, etc.). This of course is an important aspect in any society, yet the assumption of these theories is that "all situations in which justice is at issue are analogous to the situation of persons dividing stock of goods and comparing the size of portions individuals have" (Young 1990a: 18). Furthermore, rights, opportunity and power cannot be allocated as simply as material benefits and burdens. Power, especially, is elusive. Foucault (1980: 98) writes that "[p]ower must be analyzed as something that circulates...[i]t is never localized here or there, never in anybody's hands, never appropriated as a commodity or pieces of wealth...[p]ower is employed and exercised through a net-like organization". Power cannot simply be "taken" from those in superior positions in society and "given" to those in inferior positions. Power and institutions / positions are not synonyms nor is power restricted to institutions, meaning that power is not static but that it is multidirectional. Power, according to Foucault, is "not a commodity, a position, a prize, or a plot; it is the operation of political ideologies throughout the social body" (Dreyfus et al. 1982: 142). It is not simple domination, but a web of unequal relationships (185). Furthermore, it is exercised upon the dominant as well as the dominated (186). It is located in the relationships between groups and institutions, as well as in the micropractices of everyday life.

Relationships of power, therefore, can not simply be calculated, added and subtracted to make society more just. It is - as Foucault illustrates in, for example, *Discipline and Punish: The Birth of the Prison* (1977) - a far more complex phenomenon. Furthermore, because power is ritualized in everyday practices, it is "continuous, disciplinary and anonymous" (189). It is difficult to pinpoint, and impossible to add and subtract in the manner of distributive justice.

This understanding of power links with the notion that individuals stand in complex networks of relationships, far more than merely the sphere of transactions that distributive justice takes into account. Justice also requires us to reconsider and disrupt relationships of power since justice is not solely a fair distribution of benefits and burdens, but also requires that each individual shall have the institutionalized means to participate effectively in actions, and the conditions of that action, that effects her (Young 1990a : 251). Justice as solely distributive justice does not take this into account fully. Also, rights have more to do with relationships between people than with the calculation of benefits and burdens. Giving rights to people is not enough. The context in which these rights will operate needs to be critically considered. Justice requires more than the simple granting of rights. In this regard Bauman's (1991: xxi) definition of tolerance could serve as an analogy to a certain understanding of justice. He writes,

> "[t]olerance reaches its full potential only when it offers more than the acceptance of diversity and coexistence; when it calls for the emphatic admission of the *equivalence* of knowledge-producing discourses...when it acknowledges not just the *otherness* of the other, but the legitimacy of the other's interests and the other's right to have such interests respected and, if possible, gratified" (xxi).

Justice, therefore, requires more than the granting of abstract rights or insuring fair contractual dealings between individuals. It also requires an emphasis on the singularity of the situation and of the complexity of both individuals and society.

In other words, if these points above are not taken into account, then it is possible that justice comes dangerously close to becoming nothing more than a calculation. Secondly, it reduces the relationship between individuals to transactions about goods (Young 1990a:18). Thirdly, this understanding of justice ignores the institutional context the determine material distributions (18). Lastly, it also closes the gap between law and justice - a point that will be explored in the next chapter. This narrow view implies a static social ontology that ignores the complexity of society and view the concept of power as good that can be traded and exchanged, thereby ignoring the issue of domination (28-29). Young writes, "[t]he distributive paradigm of justice so ensnares philosophical thinking that even critics of the dominant liberal framework continue to formulate the focus of justice in exclusively distributive terms" (17).

To summarize, traditional theories of justice tend to focus on distributive justice, in other words, justice as a mechanism to establish social order and equilibrium. If the emphasis or point of departure is boundaries and their maintenance, then the boundaries between what counts as justice and injustice become set - and attempts to change this threaten the existence of the status quo. Furthermore, as Cilliers (1999: 12) points out, "we live in times where there is such an emphasis on *results* that we tend to loose sight of the principle of the matter" (emphasis in original). In other words, practical constraints are considered first and are used to justify action before the principle of the matter is considered, before it is established what is just or fair. This is the second consequence of conceiving of justice as distributive justice.

2.2 The Problem with Order

Apart from a narrow focus on distributive justice, these theories are problematic for two sets of reasons. First, they place the emphasis on order – an approach which is problematised by 'postmodernism'. Secondly, they underestimate the complexity of both justice and society. .

Lyotard (1984: xxiv), famously, defines postmodernism as "an incredulity toward metanarratives", in other words, a disbelief in "those foundational interpretive schemes that have constituted the ultimate and unquestioned sources of justification of scientific-technological and political projects in the modern world" (White 1991:5) or "anything that indicates essences beyond the context of a particular language game" (Haber 1994: 4) . At this point it is necessary to make an important distinction. Cornell (1990:100-101) makes a crucial distinction between weak and strong postmodernism. According to the weak version, there is no justice, no Good and, therefore, anything goes. Strong postmodernism refuses to abandon the *ideal* of justice.

Returning to postmodernism's reaction to metanarratives: modernism and metanarratives imply a desperate search for structure coupled with the realisation that the utopia that these metanarratives proposed has no time or place for left overs, dissidents or rebels . They have to fit in, made to fit in or be done away with (Bauman 1992: xiv). Modern culture, writes Bauman, is a garden culture, meaning it defines itself as the design for an ideal life and a perfect arrangement of human conditions, implying that "weeding out is a creative, not a destructive activity" (91-92).

Postmodernism raises certain important problems regarding the idea of order. Modernity - the search for order, or "desperately seeking structure" (Bauman 1992: xi) - is a (desperate) and resolute attempt at ordering the world, and it lies at the heart of many theories of justice, especially those with distributive justice at the core. Contingency was feared and therefore it needed to be ordered and/or excluded. Those differences that did not fit the Scheme/the metanarrative were done away with. In contrast, the philosophy of the limit - Cornell's (1992: 1) definition of deconstruction - is concerned precisely with those elements which are excluded in an order. Modernism's dream of Utopia also implies that it could not exist without the Police. Bauman (1992: xvi) writes, "[t]o create order means neither to cultivate nor to extirpate the differences...[i]t means *licensing* them...[i]t means *licensing authority*...[order] must remain forever a belligerent camp, surrounded by enemies waging wars

on all frontiers...[t]he unlicensed difference is the main enemy" [Bauman's emphasis].

The dream of order de-legitimizes difference that does not "fit". Bauman states bluntly that modernity - the dream of order - was a long march to prison; "it never arrived there...albeit not for lack of trying" (xviii). Lyotard (1984: 81) makes a similar point when he writes, "[t]he nineteenth and twentieth centuries have given us as much terror as we can take...we paid a high price for the nostalgia of the whole and the one".

Bauman (1991) shows the unethical implications of the dream of order by arguing that the Holocaust was not the handiwork of monsters or the result of the Germans' inherent anti-Semitism, "[it] was a legitimate resident in the house of modernity...indeed, one who would not be at home in any other home" (17)[5]. The "civilization process" that humanity holds so dear comes at a price. It needs considerable violence to be successful[6] . The pursuit of order is also equipped with mechanisms to ensure the production of moral indifference (18)[7].

For order and the division of labour to be maintained the focus should be on protecting the status quo and the task at hand, not the context of the action (if it was even visible from hierarchy of labour) nor the consequences to concrete individuals. The link between the 'actor' and her action is vague or nonexistent, that they are unable to have knowledge of it, nor pass judgment (90). This process substitutes technical responsibility for ethical responsibility, i.e. the fact that the action means more than itself is ignored (101). Ethics becomes less important than a job well done (or ethics becomes a job well done). The objects of this bureaucratic process is exactly that: objects, dehumanized. This exclusion of consequences and concreteness produces moral exclusion. Moral exclusion could be described as follows: "when individuals or groups are perceived as outside the boundary in which moral values, rules, and considerations of fairness apply...[t]hose who are excluded are perceived as nonentities, expendable, or undeserving...[c]onsequently, harming them or exploiting them appears to be appropriate, acceptable or

just" (Opotow 1990: 1). She lists mechanisms that produce this moral exclusion (see Table 1)[8]. Opotow focuses on the more extreme effect of moral exclusion, for example, genocide and xenophobia; so too does Bauman with his focus on the Holocaust. However, a general point could be drawn from both these authors, namely that any exclusion, no matter how seemingly 'innocent', carries with it serious ethical implications. Any school of thought that does not make an effort to critically re-examine its boundaries could contain these implications.

Table 1: Mechanisms of Moral Exclusion

Process	Manifestation in Moral Exclusion
Biased evaluation of groups	Making unflattering comparisons between one's own group and another group; believing in the superiority of one's own group
Derogation	Disparaging and denigrating others by regarding them as lower / inferior life forms
Dehumanization	Repudiating others' humanity and dignity, entitlement to compassion
Fear of contamination	Perceiving contact with others as posing a threat to one's own well-being
Groupthink	Striving for group unanimity by maintaining isolation from dissenting opinion that would challenge assumptions
Transcendent ideologies	Experiencing oneself or one's group as exalted and extraordinary, and possessed of a higher wisdom
Deindividuation	Feeling anonymous in a group setting, weakening one's capacity to behave in accordance with personal standards
Moral engulfment	Replacing one's own ethical standards with those of the group

(cont.)

Psychological distance	Perceiving others as objects or as non existent
Displacing responsibility	Behaving in ways one would normally repudiate because a higher authority explicitly or implicitly assumes responsibility for the consequences
Diffusing responsibility	Fragmenting the implementation of harmful tasks through collective action
Concealing the facts of harmful behaviour	Disregarding, ignoring, disbelieving, distorting, minimizing injurious effects to others
Glorifying violence	Viewing violence as a sublime activity and a legitimate form of human existence
Normalizing violence	Accepting violence as a sublime activity and a legitimate human expression
Temporal containment of harm doing	Perceiving one's injurious behavior as an isolated event - 'just this time'

from: Opotow (1990: 11-12)

Perhaps the most important finding from the research of Stanley Milgram (1974) is that the potential to be an executioner or to play a part in genocide, lies in every individual. A context where there is a chain of command and hierarchy, and where the boundaries of a system are not challenged, carries with it murderous potential. Milgram conducted an experiment in which he asked the volunteers to administer "electric shocks" to "victims" as part of a supposed study of memory ability. He found that by far the majority of participants were willing to administer extreme electric shocks, even when the "victim" appeared to be in a great deal of "pain". They were not sadists or murders, but ordinary members of society.

Bauman's and Milgram's arguments are also powerfully illustrated by Christopher Browning (1992) in *Ordinary Men: Reserve Battalion 101 and the Final Solution in Poland*. It documents the role that this battalion played in the Holocaust. They were indeed ordinary men: middle-aged family men from Hamburg (which also means that they grew up and were socialized in pre-

Nazi Germany). They were not SS members. In fact they were deemed unfit to serve in the SS and too old to serve in the German army. Furthermore, these men were not gradually desensitized to the violence; they immediately took part in the genocide.

Even if the "desk murderers" - genocide via the division of labour - send millions to their death, the fact remains that an estimated 25 percent of all victims of the Holocaust were shot. By this I do not in any way wish to imply that killing millions by herding them into gas chambers is a more 'humane' way of killing, but rather that shooting implies close contact with the victim as well as being confronted with the results of the murderous action. And even then, writes Browning (1992: 184), "[t]o break ranks and step out, to adopt overtly nonconformist behavior was simply beyond most men...[i]t was easier for them to shoot"[9].

There is, however, research on those people who *did* break rank, the so-called rescuers. These were individuals who, in spite of the 'ethic' of their society and the consequences of breaking with it, nonetheless saved the lives of Jews during the Holocaust[10]. Both Jewish organisations, such as Yad Vashem, as well as authors such as, for example, London (1970) Monroe et al. (1990) and Fogelman (1995) have done research on rescuers. They found that it was not a specific "type" of person that performed these actions; they came from all age groups, genders, classes and educational backgrounds. A high percentage of them, however, did not subscribe to any religion or ideology, and large numbers had experienced some form of marginalization in their youth. It is not my intention to argue that there is a certain type of 'rugged individual' who will 'do the right thing'. I am simply trying to argue that, in the context of the Holocaust, it was people who were more willing to redescribe the boundary between self and other, and the boundaries of the "ethic" of their community (or those who "failed" to see such boundaries), who were able to be rescuers. Among these individuals there was (as with Gilligan's Amy, a point to which I will return shortly) a refusal to see the world as a "maths problem with humans in", who, to quote Levinas (quoted by Llewelyn 1995: 142), made no difference between "those close by and those far off". Otto

Springer, a rescuer, sums up this point by saying, "[t]he hand of compassion is faster than the calculus of reason" (quoted by Fogelman 1995: 57).

This links with what Bauman (1991: 206-207) argues are the two (most important) lessons of the Holocaust. Firstly, evil does not need monsters; rationality and an emphasis on self-preservation are enough. The second lesson, writes Bauman (1991: 207), is that "[i]t does not matter how many people chose moral duty [read responsibility] over the rationality of self-preservation - what does matter is that some did. Evil is not all powerful. It can be resisted."

The reason I make use of the arguments of Bauman and Milgram, as well as those of Fogolman et al., is to show the extremes that an emphasis on order in any society that is not vigilant about the boundaries it draws and the individuals or groups it excludes, could possibly lead to. Boundaries are not to be taken lightly. Underestimating an emphasis on order and a disregard for complexity can have serious consequences.

In contrast, "postmodernism" could be understood as a realization that the complexity of society cannot be justly accounted for with grand narratives, and that even the boundaries that seem just, need to redescribed constantly. Cornell (1992:1) reformulates deconstruction as "the philosophy of the limit", which could also serve as a "definition" of postmodernism. It is the realisation that society is immensely complex and that no system can accurately or fully describe it, yet at the same time also a realization that we cannot abandon the ideals of justice. Cornell writes that there is an unerasable moment of utopianism is inherent in deconstruction, something which Derrida too has never abandoned (8). The importance of postmodernism lies in the realisation of the limits of our system *and* the need to constantly reconsider the boundaries of systems. Why? Because the limits of our systems always exclude something.

Perhaps a few words need to be said about the notion of postmodern ethics since this concept links closely to the idea of justice that Derrida 's proposes.

Bauman (1992: xxii) argues that postmodernism makes ethics possible for the first time since it returns the concept of individual responsibility to ethics. Unlike the case in modernist ethics, the authorship of and obedience to moral rules can no longer be shifted to a supra-individual level - be it the rules, a god or simply a division of labour that allows responsibility to float around (and if one takes Milgram's research seriously, then this realization becomes crucial). Modernist ethics defines ethics in terms of universal principles and the following of rules. Cilliers (1999: 4) writes that under a modernist understanding of ethics "[t]he moral agent has to apply the relevant rule and from that *calculate* the appropriate response". The implication is that the moral agent cannot be held responsible beyond calculation and rule-following. Following a rule, however, does not save us from responsibility. Postmodern ethics places the responsibility for ethical behaviour on the individual. The individual must make a choice and stand in for that choice. She cannot measure the situation against universal principles, but must give each contingent situation its own consideration. Cilliers (1999: 5) also points out that in postmodern ethics, ethical behaviour is not simple another activity among many others: "The ethical dimension is prior to everything else since the subject is *constituted* by its ethical behaviour". Therefore, ethics is no longer simply a code of conduct; it is more far-reaching than that. Levinas (1989) calls it "the first philosophy"; Cornell (1992:13) defines it as the search for a non-violative relationship with the other.

Postmodern ethics is a rejection of coercive moral regulation, absolutes and universal foundations (Bauman 1993: 4). Modernism distrusted not only the contingency of nature and society, but also that of the moral agent. Therefore, the argument went, morality needs to be designed, injected and taught (Bauman 1993: 6). And with that, modernism robbed individuals of choice and ethical behaviour, reducing them to rule-following calculators.

To summarize: postmodernism highlights the problems that arise from an emphasis on order and thereby problematises an important aspect of theories of justice. A second aspect that also highlights similar problems is the idea of complexity.

2.3 Justice and Complexity

Cilliers (1995; 1998a) points out the similarities between society and complex systems. The nature of a complex system is determined by a large number of elements that interact in a non-linear fashion (Cilliers, 1995: 124). There are patterns, yet the whole system cannot be described without running into difficulties: "a complex system cannot be replaced with an equivalent system that is simpler...complexity is incompressible" (Cilliers 1999: 7). There are many dynamic interactions. Cilliers (1995: 125; 1998a: 3-5) identifies ten characteristics of complex systems. They have a large number of elements that interact in a dynamic way. This interaction is rich and elements influence each other. Furthermore, these interactions are non-linear, meaning that they cannot be collapsed into a smaller system and, also, small causes can have large effects and vice versa. Although these interactions have a short range, there are loops in the interaction. Complex systems are open systems, meaning that their boundaries are not clear and there is no equilibrium. These systems also have a history. Elements of the system respond to local formation.

These characteristics are also reflected in society (Cilliers 1995: 129-130 ; 1998a: 119-123). A society consists of an enormous number of individuals who interact constantly, as well as in many difference capacities; there is constant activity; both information and history is interpreted differently by different groups. In short, society is therefore an open system where there are layers of meaning and where interpretation is inescapable (Cilliers 1998a: 42-43). Interaction is rich and meaning is never a given, but is produced through differences. The importance of seeing society as a complex system - instead of chaos that needs to be ordered - is that it recognizes and gives importance to the multitude of relationships that exist in society. Therefore, there is a move from an over emphasis on the universal to a 'appreciation' of the singular. Secondly, it leaves us with an inescapable responsibility *since* there are no rules that can accurately describe a complex system nor is there a god's eye view. Instead, every person taking part in interactions takes on responsibility since it cannot be shifted to any universal rules or institutions

(Cilliers 1995: 131). To underestimate or disregard complexity is not simply a technical error, but an ethical mistake. One way to way to view complexity would be to argue that it dissolves the world into chaos, that without rules and a clear picture we are lost - in other words, a position similar to Cornell's first version of postmodernism. But, argues Cilliers, it leaves us with responsibility since there is no god's eye view.

2.4 Justice and the Concept of Community

The idea of seeing society as a complex system links with another problematic aspect of theories of justice. Theories of justice often overlook the complexity of a concept that forms an integral part of these theories, especially in distributive justice, namely, community. They uncritically assume this concept as a component; others (for example, Nozick) ignore it, focusing on the dealings between individuals.

Young (1990a; 1990b) attacks the way in which this concept is used in theories of justice. She (1990b: 300) argues that the ideal of community privileges unity over difference. She acknowledges that it is an understandable ideal, yet it is philosophically and ethically problematic since the desire for unity is at the core of concepts such as racism and ethnic chauvinism (Young 1990b: 302, 311). According to Young (1990b : 302) this dream of unity is based on the metaphysics of presence and the logic of identity. It is this desire for social wholeness and identification that creates a hierarchy. This unity or identity depends on excluding certain elements, by designating some as pure and others as impure, normal and abnormal (303). It seeks essence that "classifies concrete particulars as inside or outside a category" (303). This formation of hierarchies with firm boundaries is reflected in the history of western metaphysics by the opposition that is created, for example, between subject and object, mind and body, culture and nature, male and female. This links with Jane Flax's (1992: 193) definition of domination as "[the] inability to recognize, appreciate and nurture differences, not out of failure to see everybody as the same...indeed, the need to see everyone the same in order to accord them dignity and respect is an expression of the problem, not a cure for it". In order to achieve this, the

particularity and singularity of events are repressed. Individuals are reduced to one subjectivity robbed of situational particulars that individualize them (Young, 1990a: 106)[11]. This reduction is precisely what Rawls attempts with his idea of the original position were individuals not only exist, but are able to make decisions, as well as Nozick with his atomistic view of the individual.

A community's desire for unity, argues Young, can only be achieved by repressing difference (302). She (1990b: 304) defines difference as "the irreducible particularity of entities, which makes it impossible to reduce them to commonness or bring them into unity without remainder" (303). Community, argues Young, denies difference in two ways (305). First, it denies difference by denying the difference within and between subjects. Second, it privileges face-to-face relations in opposition to social change.

Young argues that even if community is defined as a unification of particular persons through the sharing of subjectivities - i.e. concrete individuals, not generalized others, whose differences complement and do not exclude one another - it is still problematic, for two reasons (309-311). First, each person's perspective remains unique and can be never fully understood by others (309). Second, the moment of sharing is never a complete mutual understanding and reciprocity. It is fragile, there are misunderstandings and unintended consequences.

Young offers as an ideal that of the "unoppressive city", meaning not so much the huge metropolises but a kind of relationship (317-319). She defines the "unoppressive city" as an openness to unassimilated otherness (319). A city is characterized by its complexity, the multitude of subcultures, the multiplicity of its activities and the availability of public places to anyone. City life, she writes (318), is "the 'being-together' of strangers...[they] encounter one another...often remaining strangers and yet acknowledging their contiguity in living and the contributions each makes to the others".

Does this mean that the ideal of the community, an important aspect in the discussion of justice, should be abandoned? Cornell (1992: 39 - 61) argues

that it should not. She does take Young's position seriously, yet argues that philosophers such as Derrida and Adorno, who are 'inherently' sensitive to the ideal of difference and particularity, do not totally reject the aspiration to the ideal of community (40). There is still a need for some form of sameness - not totalising unity - otherwise we are left with the idea of the absolute other that simply reinstates absolute identity (54). Reducing the other/difference to an absolute mystifies the other, banishing her to a realm where no communication is possible. If difference is totalised with this result, then the Other is once again doomed to silence (Haber 1994: 124). Mystifying the other could also become a handy way to side-step responsibility (i.e. the other is so other that I can only leave her alone). Moody-Adams (1994: 308-309) writes, "[t]o view those who accept another culture as fundamentally 'other'...is ultimately to view them as less than human". Young (1997a: 357) makes a similar point when she argues that the idea of wonder, which is often used in relation to the other, is dangerous. She writes, "[t]his concept of wonder is dangerous. It would not be difficult to use it to imagine the other person as exotic. One can interpret wonder as a kind of distant awe before the Other that turns their transcendence into an inhuman inscrutability" (357). Respect for the other is replaced by 'zookeeper ethics', i.e. being interested in strange creatures.

Difference can, in other words, turn into domination[12]. We must not only be willing to (constantly) redefine and redescribe the boundaries of systems, but *also* of difference. (The understanding of difference is never entirely free of stereotypes.) The difference that Derrida describes is playful, not legislated. To view difference as legislated is to, once again, underestimate complexity. There is also a second aspect: the self is also the other's other. Therefore, between self and other there remains a "strange symmetry" (Cornell 1992: 54). Cornell writes, "[t]he strangeness of the other is that the other is an 'I'...[b]ut, as an 'I', the Other is the same as 'me'...[w]ithout this moment of universality the otherness of the Other can be only too easily reduced to mythical projection" (55). What Cornell - and Derrida - is trying to prevent is the enslavement of the self by the other. A third aspect of the problem is that we are never merely alone with the other; there are also other parties. In other

words, it is never the simple matter of being alone with one other; there are always many others and therefore some form of structure is needed.

The ideal, argues Cornell, is to respect the difference of the other, yet at the same time not to mystify the other nor reduce the self to the other's slave (60). The ideal is a belonging together without violence, "[a] recognition of the sameness that makes each of us an individual and thus both different and the same...[a] belonging together without some overriding spirit on and through which we are connected" (60)[13]. Furthermore, a disregard for the connectedness of the individual could bring Young dangerously close to a return of the atomistic individual. She, perhaps, comes too close to posing respect for the individual and difference on the one hand, and the concept of community on the other, as an either/or question (Haber 1994: 126). Perhaps Haber summarizes the problem best when she writes, "[t[here is no politics without sameness and unity, even if that unity always has a remainder" (128).

One could, however, disagree with Cornell's argument in one respect, namely her use of Derrida's criticisms of Levinas. Perhaps the purpose of his argument is more a strategy against the idea of an absolute other, and all of the implications, than it is an approval of the concept of community. Also, even if Derrida is in favour of the aspiration towards community, it is on the basis of a qualified understanding of this concept. In other words, Derrida's plea for a moment of sameness is not a blanket approval of the idea of community. Derrida has a "bottomless dislike" for the word "community" (Caputo 1996: 25). The understanding of community that Derrida argues for is a community of singularities. Derrida (1992b: 351) declares, "a community is always to come, it has an essential relation to the singularity of the event, of that which is coming but therefore 'has not happened' ".

Young's arguments on the importance of difference for the possibly unethical implications of unity are important, yet - as Cornell warns - in turn difference should not be totalized or universalized. Haber (1994), who examines the phenomena of "postmodern politics" is, like Cornell, wary of making difference an imperative. By totalizing difference, she argues, we foreclose on

possibilities for both the idea of individual and community (114). Even if we understand both these concepts as provisional, and not written in stone, it does not imply that we do not take them seriously. Furthermore, making an imperative out of difference is sometimes a move in the direction of being overwhelmed by it and, as a result, giving up on the idea of structure (115). Instead of giving up on the idea of structure, we should rather conceive of a structure that, firstly, "gives up on the possibility of discerning essences or of identifying structures which are timeless and unchanging" (115), and, secondly, a structure that is always open to redescription and deconstruction.

To summarize: traditional theories of justice seem to accept the idea of community uncritically. Although distributive justice operates in this sphere, little attention is paid to the complexity of community. It is not, as Nozick sees it, the sum total of a number of atomistic individuals, nor is it simple a group of similar individuals bound by some overriding spirit. Rather, individuals stand in a complex network of dynamic relations that are changing and interacting.

2.5 The Logic of Justice versus the Ethic of Care

At this point, I want to pay some attention to the work of Carol Gilligan and the arguments she poses in her influential book *In A Different Voice: Psychological Theory and Women's Development* (1982). The reason for this is that I believe that Gilligan makes an important (disruptive) move concerning the idea of justice. Her work has been criticized, sometimes severely, for being both essentialist, and for naturalizing differences between men and women - and I will return to some of these criticisms (although the reaction to Gilligan has produced a body of literature on its own that, of course, deserves far more detailed attention). However, I do believe that Gilligan's focus on relationships and the connectedness between people is valuable and an important contribution in the debate on justice, because it is move in the direction of complexity and responsibility. It played - and stills plays - an important part in the "redefinition of social vocabulary" (Kerber 1986: 306). It is, of course, not the only reflection of unease with traditional theories of justice, but I find it particularly useful because of the focus on connectedness.

This 'unease' is also reflected in jurisprudence, an important aspect which will be discussed in Chapter Three.

In *In A Different Voice* Gilligan (1982) challenges "the logic of justice" , in other words, an abstract and universal idea of justice. Gilligan proposes an alternative, namely, the ethic of care - i.e. an understanding of justice that takes concrete aspects and singularity seriously (see Table 2). In other words, in terms of feminist theory, Gilligan belongs to the second phase of feminism. First-phase feminism argued simple for the equal treatment of men and women, in other words, formal equality. Second phase feminism argued that there are differences between genders and these should be taken seriously. There are two schools in this phase, namely, dominance theory, of which Catherine MacKinnon is the main advocate, and relational feminism, in which Gilligan is an important figure (Van Blerk 1996: 177-179).

Gilligan's aim is to refute the claims by Kohlberg, namely that women's moral development is insufficient. Kohlberg (1981) identifies six moral judgments that gradually moves from an egocentric to a (more) universal understanding of ethical conception where the principles used to make moral judgments are universal in nature. According to Kohlberg, the highest level of moral development is achieved once morality and moral judgment are freed from historical and psychological constraints, i.e. concreteness and particularity

Table 2: The Ethic of Care versus the Logic of Justice

	Ethic of Care	Logic of Justice
Aims of Punishment	Rehabilitation,special deterrence	Retribution,general deterrence
Decision Criteria	Forward-looking	Backward-looking
Ideological Elements	Equity, fairness, rationality (formal and substantive)	Equality, fairness, rationality (formal equality)
Prescriptive Practices	Tailor the sentence to the crime and to the offender characteristics; personalize sentencing	Equal treatment for those convicted of the same offence depersonalizing sentencing
Social Unit of Punishment	Person in relation to others	Person not connected to others
Consequence	Variable punishment of individuals depending on their potential for reform.	Equal punishment based on crime and prior record
Concept of Justice	Procedural and substantive equality, through greater emphasis on the latter	Emphasis on procedural equality
Sentencing Scheme	Individualized	Just deserts

from: Daly (1994: 231)

Gilligan illustrates the difference between the male and female approach to moral problems with her famous "Heinz example" (which was also used by Kohlberg) . The following story is told to two eleven year olds, Jake and Amy : A man, Heinz, has a wife who has a life-threatening illness. He cannot afford the medicine to save her and is confronted with the choice of whether or not to steal the drug from the pharmacist (Gilligan 1982: 25-26).

Jake argues as follows: A human life is worth more than the financial loss that the pharmacist will suffer; Heinz's wife will die unless she gets the drug; whereas the pharmacist can always make more money, Heinz's wife can never be replaced. Therefore he is justified in stealing the drug (26). Jake makes a logical argument that there is no doubt about the fact that Heinz should steal the drugs; the "solution" to the dilemma is obvious to him: It involves a calculation of competing rights, and of placing these rights in a

particular hierarchy. He reduces the problem to terms of rights and property. He then ranks the values at stake (the right to life versus the right to property) and selects the ranking value.

In contrast to Jake's quick answer, Amy is not convinced that there is an easy solution the dilemma (27-29). She argues that, even given Heinz's situation, stealing remains wrong. She is very concerned with the pharmacist's failure to respond to Heinz's dilemma. She places some hope in the fact that "if [they] talked long enough, they could reach something besides stealing" (29). Her focus is, therefore, not the competing rights, but the concrete situation of the dilemma and the relationships between the people described in it. To her the pharmacist's right to property and transaction is less important, not only because the life of Heinz's wife is at stake (i.e. the importance of her right to life) but also, and more importantly, because the pharmacist is also standing in a relationship to the ill woman and a recognition of his responsibility (33). Furthermore, Amy is also concerned with unforeseen consequences, even when doing "the right thing", that Heinz's actions might have. He might be arrested for the theft and go to jail, thereby leaving his wife with no one to care for her (28). In other words, Amy sees the world as comprised of relationships between people rather than as a system of rules, competing rights and hierarchical values.

Gilligan summarizes the difference between Jake's and Amy's interpretation of the dilemma as follows: Jake, who according to Kohlberg's model, is morally more developed than Amy, sees the dilemma as a "math problem with humans in" (28). Amy, on the other hand, places the emphasis on the relationships. She sees the world as "comprised of relationships rather than of people standing alone, a world that coheres through human connection rather than through systems of rules" (29). Individuals are defined not as atomistic and separate, but "delineated through connection" (33). Whereas Jake sees the problem as an impersonal conflict of claims to be mediated by systems of rules and law, Amy places her hopes in relationships and communication (32, 33).

Gilligan's conclusion is that there is more than one "voice" when it comes to moral problems. That which Kohlberg discards as "under-development" is in fact a "different voice"; in what Kohlberg labels a weakness, Gilligan finds a new and richer understanding of morality - or, in Derrida and Cornell's perspective, a richer understanding of ethics. The "different voice" , in contrast with the logic of justice, moves the emphasis from the abstract values of universality, logic and detachment, to a emphasis on relationships, care and responsibility. Gilligan (1983: 40) writes, "[w]hereas justice emphasizes the autonomy of the person, care underlies the primacy of relationship...[t]hus justice gives rise to an ethic of rights, and care engenders an ethic of responsibility".

The ethic of care develops from an emphasis on relationships and the interdependence between human beings. It values these connections and contextual thinking, whereas justice emphasizes the autonomous individual (46). The logic of justice (as in the case of distributive justice) places the emphasis on rights and formal equality; the ethic of care focuses on responsibility and respect (Gilligan 1982: 164-5). This voice speaks of the "ethic of care". Both these words ('ethic' and 'care'), however, need to be considered. Firstly, ethic/s should not imply a set of rules that must be followed - the problems with this approach have been discussed earlier and will be explored again in the next chapter. Cornell (1992:13; 1995: 78) argues that ethics is the quest for a non-violent relationship with the other and otherness in general. It assumes, argues Cornell (1995: 78), "responsibility to struggle against the appropriation of the Other into any system of meaning that would deny her difference and singularity". Any understanding of care should take into account, very seriously, that control of the other is a dangerous for ethical reasons. Care should rather imply a play of nearness and distance; a relationships where participation is not a declaration of mastery (White 1991: 101). Care can be a very problematic concept since it carries with it connotations of the sugar-coated cruelties that Nietzsche speaks of[14]. It is here that another aspect understanding of ethics becomes important, as proposed by Halie (1984: 37) who writes, "If ethics is about *ethos*, the character of a particular person, why shouldn't it be deeply involved

in using the particular names of people in the context of their particular doings and sufferings ? And why shouldn't we use the verbs of narratives in these contexts instead of using only the empty, timeless verbs that connect high abstractions with each other?"[15].

In an article written after the publication of *In a Different Voice*, Gilligan (1987: 24-25) argues that care should be understood within the framework of justice, as something that tempers justice and emphasizes respect for people on their own terms. In an even earlier article she states that "through the tension between the universality of rights and particularity of responsibility, between the abstract concept of justice and as fairness and the more contextual understanding of care in relationships, these ethics keep one another alive and inform each other on critical points...[i]n this sense, the concept of morality sustains a dialectical tension between justice and care, aspiring always toward the ideal of a world more caring and more just" (Gilligan 1983: 47). It is a realisation of the complexity of context, meaning a realization that individuals are not atomistic units, but stand in relation to others and also that decisions and judgments can have far-reaching consequences - some of which are not intended, but for which one still needs to take responsibility. It is a realization that matters of justice are not merely calculations in a sphere of competing demands and rights, but involve concrete individuals and singular situations. As Gilligan (1993: 367) points out, "[t]he blind willingness to sacrifice people to truth...has always been the danger of an ethics abstracted from life...[t]his willingness links Gandhi to Abraham". The absolute nature of the principles of the logic of justice coexist with feelings of intolerance, argues Gilligan (1980: 241), since they do not take concreteness or consequences into account.

The ethic of care emphasis that society consists of complex relationships between individuals, and, therefore, it is too complex to be thought of solely in terms of rights and procedures - for not only do they (rights and procedures) assume universalism and abstract individuals, but they are also not neutral concepts. As Baier (1987: 49-50) points out, "the moral tradition that developed the concept of rights...is the same tradition that provided the

justifications of the oppression of those whom the primary right-holders depended on to do the sort of work they themselves preferred not to do". In other words, the genealogy of rights should not be ignored. Baier points to one aspect of the problems surrounding an emphasis on rights, namely the 'generosity' that accompanies the 'granting' of rights of marginalised groups (blacks, women, etc.). These groups are 'granted' (*de iure*) rights by groups / individuals in the superior position not to empower the marginalised, but to strengthen their own power positions by a moment of benevolence (This scepticism is reflected in jurisprudence, which will be the focus of Chapter Three).

Gilligan's plea for an ethic of care also highlights many of the problems with rights. They are abstract and do not necessarily change institutional contexts; there is a gap between *de iure* rights and *de facto* injustice. Gabel and Harris (1989: 304), two Critical Legal Studies scholars, make an important point when they write, "the great weakness of a rights-oriented legal practice is that it does not address itself to a central precondition for building a sustained political movement - that of overcoming the psychological conditions upon which both the power of the legal system and the social hierarchy in general rest...in the long run it tends to reinforce alienation and powerlessness, because the appeal to rights inherently affirms that the source of social power resides in the state rather than in the people themselves".

Furthermore, those schools of thought who argue passionately for rights - and here Nozick is a good example - regards some rights (e.g. right to private property, etc.) as more fundamental than others.

Gilligan (1980: 225) argues that the ethic of care highlights responsibility instead of over-emphasizing abstract rights and is, therefore, also sensitive to context and consequences. The ethic of care "allows for fine-grained judgments and discretionary responses to particular persons in actual situations with distinctive histories" (Walker 1997: 64).

Gilligan's argument is, however, not without its problems. First, the way in which she proclaims the different voice to be a distinctly feminine attribute is problematic. She not only naturalizes differences between men and women, thereby preaching a new essentialism, but she also undermines the sensitivity and openness to complexity she develops with her richer understanding of morality (read ethics). Catharine MacKinnon (1987), a proponent of radical feminism, accuses Gilligan of merely reinforcing gender stereotypes and warns that emphasizing difference (at all costs) could foreclose some possibilities. MacKinnon argues that sexuality is socially constructed in order to keep the gender hierarchy intact and Gilligan is doing much to aid this. To MacKinnon the only difference that requires serious attention is difference in power. In a later work MacKinnon (1989: 219) proclaims, indirectly referring to Gilligan, "[d]ifference is the velvet glove on the iron fist of domination...[t]he problem then is not that differences are not valued; the problem is that they are defined by power". (This links with arguments, for example by Cornell, stated earlier in this chapter on the necessity for some form of symmetry and the need for some form of structure.)

Secondly, Gilligan seems to assume, too quickly, that the logic of justice and the ethic of care are irreconcilable, that they are necessarily opposite poles. But perhaps these two 'poles' can instead form a dynamic interaction in that they, together, continually force a redescription of justice and law. A more 'generous' reading of Gilligan could propose that she does not reject the ideas of the "logic of justice" altogether, but only an understanding of justice that *privileges* such an understanding of justice (in other words, an understanding of justice that ignores the importance of relationships and context).

Derrida (1992: 10-11) also makes an important point that can be linked to the problem of care. He writes that justice without the teeth of law is useless, meaning - to put it rather bluntly - that good intentions are never enough, that part of the difficulty (of the aporia) of justice is that we need the violence of law to implement it (10-11). Therefore, care alone can never be enough. It can alert us to the complexity of justice and emphasize that the logic of justice can never be enough, but care alone cannot answer the call to justice - nor can it

do much about injustice. Derrida quotes Pascal, who wrote, "force without justice is tyrannical...[j]ustice without force is contradictory, as there are always the wicked" (11).

Gilligan can also be criticized for underestimating difference. Carol B. Stack (1986) argues that Gilligan's argument does not hold for the black community in the USA. In this community men too place a greater emphasis on relationships with others[16]. She argues that this understanding is not the result of gender, but rather of economic deprivation. The category of women, to which Gilligan ascribes the different voice, is itself a diverse group, something she does not recognize. Diprose (1994) is concerned that Gilligan does not take the complexity of (sexual) difference seriously enough. Are these differences natural or socially constituted, and can they be generalized? Furthermore, Diprose is concerned that Gilligan is too quick to surrender the logic of justice as 'male'.

Gilligan comes close to esentializing the voice of care, attributing it solely to women. But, as Kerber (1986: 308-309) points out, women fail - as often as men - to challenge a calculated ethic of justice with the ethic of care. She gives two examples. First, American women, after being 'granted' the vote, voted according to race and class, not gender. They did not unify into a different voice or highlight new interests. Secondly, in oppressive societies, such as Nazi Germany, women failed to disrupt the dominant ethic of their society - they were as militant Nazis as their male counterparts; for example, they were in favour of eugenics and the German Women Doctors organisation expelled Jews from their ranks.

MacKinnon argues vehemently that the idea of caring can not only entrench gender stereotypes, but also, as Noddings (1993) points out, that caring can lead to self-sacrifice (by women). This could be countered by two arguments. First, as Noddings (1993: 387-388) says, the ethic of care is not intended as an ethic for women only; it should be used exactly to undermine the ethic of dominance. Secondly, Derrida's criticism of Levinas could also be useful here. Just as the self should not become the slave of the other, in the same manner

care should swallow the 'care giver' whole. There is still a moment of sameness.

I believe, however, that Gilligan's work represents an important move in the debate on justice. Gilligan (1986: 326) defends herself against the accusation that she attributes to women, in an essentialist manner, the characteristic of a Different Voice by saying "I saw in women's thinking the lines of a different conception, grounded in different images of relationships and implying a different interpretive framework". Also: "[t]he title of my book was deliberate; it reads, 'in a different *voice* , not 'in a woman's *voice*'...this voice is identified not by gender but by theme" (Gilligan 1986: 327; Gilligan's emphasis). Gilligan points out that the different perspective that Amy has on the Heinz example is rendered not only incomprehensible by Kohlberg's framework, but also devalued as "under-development" (329)[17]. One of Gilligan's most important contributions, writes Cornell (1991: 136), "was not that the form of moral reasoning correlated with women's emphasis on care as opposed to rights thinking should be hailed as inherently better, but only that a woman's different voice should not be *inherently* inferior". In other words, by valuing the different voice, Gilligan breaks a silence and forces a redescription of the norm and of boundaries.

The idea of an ethic of care, furthermore, carries with it a greater willingness to be open to particularity. It is not without its problems, but it is, at the very least, a move in the direction of complexity and responsibility - an aspect that is lacking in 'the logic of justice', or put differently, a sole focus on distributive justice. It should also be pointed out that Gilligan argues that the logic of justice and the ethic of care need not be mutually exclusive; they can inform each other in a powerful way. Gilligan (1982: 173-4) writes, "[j]ust as the language of responsibilities provides a weblike imagery of relationships to replace a hierarchical ordering that dissolves with the coming of equality, so the language of rights underlines the importance of including in the network of care not only the other but also the self...by positing instead two different modes, we arrive at a more complex rendition of human experience". The disruptive force of the ethic of care - as a "redefinition of the social

vocabulary" - should not be underestimated. It should not be understood as merely emotions or 'nice warm feelings', but as a move away from seeing problems of justice as a math problem with humans in, a move away from calculation and towards an 'inherent' sensitivity to the complexity of society and the relationships between people in society. An important part of Gilligan's work, which Diprose (1994: 11) acknowledges, is that it is a move away from the atomized individual and towards a renewed understanding of responsibility and care as well as of the importance of social context and singularity.

To summarize: in the first section of this chapter I tried to argue that traditional theories of justice place too much emphasis on justice as an ordering principle and this is reflected by the emphasis that is placed on distributive justice. This, I argued, is problematic for reasons that are highlighted by postmodernism, namely the problem of order and its possible unethical implications, and of underestimating complexity. This is again reflected in the way which a 'core' concept of theories of justice – i.e. "community" - is also underestimated. I then argued that Gilligan makes an important move in taking seriously some of these concerns by arguing for an ethic of care. Her shortcomings are also illuminating since they highlight the complexity of the idea of justice.

I will now move on to another aspect of traditional theories of justice that is problematic, namely, the concept of injustice. This is an important aspect that has received little attention in these theories apart from being regarded simple as the flipside of justice. I will argue, referring to the work of Judith Shklar and HPP Lötter, that injustice is a more "substantial" phenomena than this and that it is a major failure on the part of traditional theories of justice to ignore it.

3. The Problem of Injustice

> *"Every person counts...that any person anywhere suffered uncompensated and hitherto unrecognized injustice matters to humanity".*
> Robert Ginsburg[18]

> *"To leave the fact of injustice unmarked is to abandon the cause of justice itself."*
> Donald W. Shriver[19]

In this section of the chapter, I will focus on the concept of injustice. It poses a serious challenge to the idea of justice, precisely because theories of justice pay so little attention to the concept.

I will first look at the arguments of three philosophers on the concept of injustice. I will then list the general problems that injustice poses for theories of justice.

Traditionally theories of justice have little to say about injustice except that is to be avoided. It is something that occurs in the absence of rules and procedures of justice or when these are not properly applied. But injustice is far more than simply the flipside of justice and must be taken seriously. To illustrate this I will, in the following paragraphs, focus on three authors who have made important contributions to the debate on injustice, namely Judith Shklar (1989; 1990), HPP Lötter (1993) and Iris Marion Young (1990).

Judith Shklar, a Yale law professor, makes a number of important points on the subject of injustice. Shklar argues that seeing injustice as a 'by-product' and by focusing only on justice, a great deal is ignored, specifically, "the sense of injustice, the difficulties of identifying both the unjust person and the victim of injustice, and the many ways in which we learn to live with each other's injustices" (Shklar 1989: 1135; 1990: 15). The experience of injustice is very real, even if theories of justice do not conceptualize it. Injustice is not simply the absence of rules or justice; there is a 'blindness' on the part of the theories, rules and people that plays a significant role. The problem lies with

an understanding of justice that focuses on rules and ignores the particular, the context of injustice. This "blindness" is also reflected, for Shklar, in the broader context of politics and which she links to the concept of passive injustice, a concept which she borrows from Cicero. Passive injustice, according to Cicero, is failing to prevent or oppose a wrong (Shklar 1989: 1142; 1990: 40)[20]. It means looking the other way when injustice occurs, not only in dramatic examples, such as the murder of Kitty Genovese[21], but in 'small', daily occurrences of injustice when one closes one's eyes "for such harmless motives as not wanting to make a fuss" (Shklar 1989: 1143 ; 1990: 43). By focusing on passive injustice, Shklar not only brings the concept of responsibility to the fore, but also shows that injustice is amore than simply breaking a law. It is also be the result of passivity, an easy acceptance of the status quo, of that which is considered both normal and just. On the other hand, opposing passive injustice is not some form of charity; it is a responsibility. Shklar (1989, 1142-3; 1990 : 40-2), following Cicero, links this to responsible citizenship. This could be problematic. It could imply that we do it simply because it features on the checklist of how-to-be-a-good-citizen. Or we do it, because others must then return the favour. In other words, injustice must be combated by eternal vigilance.

The problem that Shklar (1989: 1136) identifies is the following: because these theories of justice view injustice as simply that which must be avoided, and because there is then no adequate theory or description of what injustice is, the result is that injustice is very easily branded as misfortune. And because such theories tend to focus on abstract rules (of distribution) they lose sight of context and the very real injustices that takes place there. They are simply not 'geared' to focus on the concrete occurrences of injustice. They prefer to deal with it after it has occurred - and then mostly in terms of distributive or retributive justice.

Shklar (1989: 1136) displays an unease with both theories of justice and ethics because of the gap between abstract theories of justice and concrete experiences of injustice. The problem with theories of justice is that their basis is a set of rules that are abstract and universal and too concerned with solving

problems. Such theories cannot be engaged in the time-consuming job of paying attention to what Shklar calls an individual's "sense of injustice". The important point that Shklar makes is that theories of justice, instead of fighting injustice, could aid it. Such theories, writes Shklar, "limits itself to matching their [victims'] situation against the rules, which is inadequate...for 'victim' has an irreducible subjective component that the normal system of justice cannot simply absorb" (1149)[22] . Or, to put it in 'Derridaean terms', theories of justice cannot do justice to the singularity of the victim's experience of injustice. The result is that these theories too easily brand experiences of injustice, when they do not fit the scheme of universal ideas of justice, as misfortune. We must therefore be very attentive to what we call misfortune or injustice, argues. Shklar (1990: 5) urges that the line between the two concepts, i.e. injustice and misfortune, must constantly be redrawn in order to enhance responsibility.

Shklar has been criticized on a number of points, namely she does not give a clear framework for how one should distinguish between misfortune and injustice; the concept 'victim' is too vague (everyone is a victim, according to her 'definition'); and she is unfair to theories of justice because she dismisses them too easily (Murphy 1991: 433-439).

Even if points one and two are granted, Shklar still makes an important contribution to the debate on (in)justice. Firstly, by focusing on passive injustice and misfortune, she shows that there are crucial issues that theories of justice ignore, or rather let slip through the grids that distributive justice places on society. Secondly, she places the emphasis on the voices of victims and our responsibility to take the sense of injustice seriously - a theme taken further in both Critical Race Theory and restorative justice. Thirdly, her unease with traditional theories of justice, and (a certain understanding of) ethics is significant. This is evident when Shklar (1989: 1136) writes, "[i]njustice is mentioned to tell us what must be avoided, and once this preliminary task has been quickly accomplished, we can turn with relief to the real business ethics: justice". Injustice must, of course be avoided, but society is far too complex for this to ever be successful. We must not only try to avoid

it, but also find some way to talk about it and deal with it as best we can. Shklar's unease is with a theory of justice and ethics that is concerned not with concrete experiences of injustice but with abstract rules. Shklar urges a renewed sense of responsibility and an attentiveness to the singularity of injustice.

Her dissatisfaction with justice and ethics as rule-bound is shared by "postmodern" philosophers, who argue for an understanding of these concepts (justice and ethics) that is 'centred' not on rules but relationships and responsibility. Shklar's plea for responsible citizenship perhaps is not that far removed from Cornell's definition of ethics as the search for a non-violative relationship with the Other, a relationship that assumes a sense of responsibility towards the Other (Cornell 1992: 13; 62).

HPP Lötter (1993) also focuses on the concept of injustice. He argues that, when talking about injustice, theories of justice are exactly the problem since they are assumed to apply to nearly just societies (Lötter, 1993: 11-2). Following Rawls, Lötter defines a nearly just society as follows: "A society with a legitimately established democratic government that is well-ordered for the most part but in which some serious violations of justice nevertheless do occur" (11). This is contrasted to what Lötter calls radically unjust societies, namely societies where there is no regard for human rights and no democratically elected government.

Lötter identifies four deficiencies in theories of justice, regarded from the perspective of these radically unjust societies. Firstly, the problem of identifying injustice. Lötter, like Shklar, argues that theories of justice provide little guidance in this regard (14). And guidance is needed. It is not uncommon for people to endure oppression passively, because they have internalized a set of ideas legitimating their situation or, they see it as natural. Lötter writes that two transitions need to be made (14). Firstly, injustice must be recognized as having a social cause, - in other words, following Shklar, injustice is not simply misfortune - and not as being an inevitable fate. Therefore, injustice can be criticized and fought; action is both possible and necessary. The

second transition that is needed in order to identify injustice, is that the experience of injustice must be theoretically articulated[23]. In other words, a way must be found to express these concrete experiences of injustice - and this, according to Lötter, is exactly where theories of justice fail.

The second problem is whether theories of justice are universally applicable (18). Most theories assume they are - with Walzer (1983), who argues for pluralism and the idea of complex equality, as perhaps the lone exception. The risk in emphasizing universality lies in losing sight of the particularity and differences within a particular society. According to Lötter the problem of emphasizing particularity is that "key features of our shared humanity" will be ignored (24).

Thirdly, there is the problem of methods for devising theories of justice (24). In other words, how does one prevent the idea of justice from merely being what those in power or the majority say it is, how does justice retain its critical force?

Lastly, evaluating strategies for change in a radically unjust society is problematic (31). Theories of justice 'designed' from the perspective of nearly just societies do not provide guidance since radical changes in these societies is seldom needed - or seen to be needed. This links with arguments by Paulo Freire (see footnote 23). In other words, theories of justice cannot simply be applied - like a mathematical formula - to radically unjust societies.

To summarize Lötter's argument and his contribution to the debate: theories of justice are inadequate for identifying - and acting against - injustice, because they assume that the theories apply in nearly just societies. Furthermore, because of this, those who suffer injustice find it very problematic to conceptualize their experiences and to call it injustice. This links with Shklar's argument that injustice is very often called misfortune and, secondly, concrete experiences of injustice are very often ignored because theories of justice have no way of conceptualizing such experiences.

Another philosopher who pays attention to the idea of injustice is Young (1990a), whose arguments of the concept of community I have already mentioned. She defines injustice as consisting of two forms of disabling constraints, namely oppression and domination (39). Young then identifies "five faces of oppression": exploitation, marginalization, powerlessness, cultural imperialism and violence, hereby highlighting the structural nature of injustice (48-62).

First, exploitation occurs when one group is subjected to another and the latter reaps the benefits from this relationship. There is, in other words, an unequal distribution of benefits and burdens. Young uses the examples of the working class and women (49-50). The injustice lies not only in unjust distribution, but also in the structural relation between those who are exploited and those who benefit from the exploitation. The position of those at the bottom of the hierarchy are entrenched by social rules.

Second, marginalization - of women, blacks, the aged, for example - is an important feature of injustice (53-55) Categories of people are excluded from consideration and participation in social life. This can lead to anything from "severe material deprivation" and even to "extermination" (54). This also links with the earlier arguments about moral exclusion. Young makes an important point when she argues that merely providing the marginalized with necessities such as food and shelter does not end the marginalization since it also involves "the deprivation of cultural, practical, and institutionalized conditions for exercising capacities in a context of recognition and interaction" (55). Therefore, to fight marginalization includes a critical reassessment of structural issues, specifically the right to participate in productive activities of social co-operation (55).

Thirdly, she identifies powerlessness as an aspect of injustice (56-57). Excluded groups have little or no power in decision-making processes. They lack both authority or status to have an impact on these processes. Therefore, they cannot adequately challenge their inferior position in society.

Fourthly, cultural imperialism plays a role in injustice (58-60). This means that the dominant group's experiences are assumed to be and advocated as the norm and as universal. Any difference is declared inferior and deviant. Young writes about "how the dominant meanings of a society render the particular perspective of one's own group invisible at the same time as they stereotype one's group and mark it out as the other" (58-59). The Other is at the same time both marked as different and rendered invisible (60).

Lastly, there is violence (61-62). Systemic violence is directed at people simply because they are a member of that group. Again, this links with moral exclusion. The excluded individual, or group, is regarded as less than human, therefore, violence is justified. Furthermore, they are liable to be the victims of violence for the sole reason of being a member of the Other.

To summarize Young's argument: Injustice occurs when one or more of the following elements are present: exploitation, marginalization, powerlessness, cultural imperialism and violence. Injustice excludes and disables individuals. This exclusion and disempowerment are manifested in the exploitation of their labour; in marginalisation, both morally and economically; they are regarded as abnormal since the dominant group's ideas and experiences are portrayed as both normal and universal; as a result of these instances of injustice, violence against these individuals are justified. Perhaps the most important point of Young's argument is that injustice is very closely connected to institutional factors that are simply and uncritically assumed.

To conclude: injustice is a significant concept. Three main reasons could be singled out. Firstly, if (a) society conforms to some checklist of justice (or justice as an ordering principle) this does not necessarily say something about *injustice*. It may even, as Lötter (1993) points out, hamper efforts to identify injustice. Injustice forces us to review seriously 'phenomena' we consider to be normal, legal or just practice. Or as Minow (1998:24) writes, "the voices of individual victims can puncture and prevent flight from the concreteness of despair, pain and death". Secondly, 'theories' of injustice place the emphasis on the concrete experiences and sufferings of individuals. Theories of justice,

on the other hand, are far more concerned with rules and procedures, in other words, ordering principles – as Young (1990b) pointed out, the emphasis in theories of justice falls especially on distributive justice.

Traditional theories of justice, where the emphasis is on distributive justice, does not does not really take injustice seriously. Injustice can not be "dealt with" merely by advocating a more just distribution of benefits and burdens - although this still remains important. What is also needed is a critical reassessment of the boundaries of the concept of justice, as well as the boundaries between the concepts of justice and injustice. A great deal of injustice, as Shklar, Lötter and Young pointed out, is linked with rules and practices which most members of society consider normal and rarely challenge. Shklar illustrates this by showing the blindness of justice in how they disregard the concrete experiences of injustice; Lötter does so by pointing out that theories of justice mostly assume a nearly just society and does not help victims of injustice to identify and conceptualize their experiences as unjust; Young names five elements of injustice and argues that the fact that they are "accepted as normal" plays an important role in all five aspects.

How does one then talk about injustice? First, one needs to reconsider the boundaries of 'justice' and 'injustice'. Second, apart from reconceptualizing these concepts, one also needs to look at ways of to dealing with injustice. Earlier I quoted Derrida (1991: 10-11), who wrote that justice without the teeth of law is not worth that much - even if the relation between law and justice remains problematic. Cilliers (1999: 11) makes a similar point when he argues that "although we know that Law cannot be just under all circumstances, we also know that things would be even worse without the Law". This links with the paragraphs on Gilligan's ethic of care: good intentions are never enough. The call of justice, the call to action demands more.

In other words, we need a 'broader' understanding of the idea of justice, one that focuses on more aspects, such as injustice, than the just distribution of benefits and burden. If justice and injustice are taken seriously, the

institutional context, the complexity of community and the elusive nature of power also need to be examined. This will need to include a reconsideration of the relation between justice and law. This is where Derrida's understanding of the concept of justice becomes important. Firstly, he moves from justice as an ordering/distribution principle to justice as an ethical concept. Secondly, he emphasis that justice is both a re-examination of boundaries and a call to action. Thirdly, he takes the relationship between law and justice very seriously.

Contemporary movements in jurisprudence, particularly those labeled 'radical', such Critical Legal Studies and Critical Race Theory (which will be the focus of Chapter Three), also display a move in the direction of placing a greater emphasis on injustice and the problems in conceptualizing it.

4. Conclusion

In this chapter I have tried to argue that traditional theories of justice - including important recent contributions such as those of Rawls and Nozick - place their emphasis on order and distributive justice.

I argued that justice is spoken of in the realm of political philosophy, where the emphasis is on order and the maintenance of order. In theories of justice the emphasis is placed on distributive justice. Hereby, justice becomes narrowly defined as the way in which society ought to distribute benefits and burdens. This is problematic for many reasons. First, it assumes that "all situations in which justice is at issue are analogous to the situation of persons dividing the stock of goods and comparing the size of portions individuals have" (Young, 1990a: 18). Second, nonmaterial benefits (such as power and human rights) cannot be calculated and distributed and thereby make society more just. By referring to the work of Foucault I have tried to show that power is a complex notion. Thirdly, I argued that an emphasis on order - which forms an inherent part of distributive justice - is problematic. In this regard, I made use of the arguments of Bauman and Milgram. The fourth point is linked to the third, namely, the importance of complexity. Here I referred to Cilliers's notion of the

similarities between society and complex systems. Fifthly, I linked to this Young's criticism of the idea of community, arguing that theories of justice ignore or underestimate this concept. I then moved on to discuss the Gilligan's arguments on an ethic of care as opposed to the logic of justice. I argued that her position represents is an important move in the direction of casting the net of justice wider that simply distributive calculations. Lastly, in the second section of the chapter, I argued that theories of justice both neglect and underestimate the concept of injustice. The challenges posed by the concept of injustice highlight the problems surrounding a narrow understanding of justice. A focus on injustice also illustrates that justice cannot be 'done' by granting rights; the institutional context needs to be examined and redefined.

I have tried to highlight some problems of justice as distribution and justice as the maintenance of 'good order'. An emphasis on order underestimates complexity and power, defines justice too narrowly as distributive justice. Above all an uncritical emphasis on order could have serious unethical consequences. Furthermore, traditional theories of justice ignore - or (re)defines as misfortune - injustice; it narrows the scope of justice and become unable to redefine the boundaries between what counts as justice and injustice. Justice becomes dangerously close to merely entailing the calculation of benefits and burdens and protecting the status quo. Justice viewed as a heavenly concept is dangerous, becomes it becomes mystical, unknowable and open for abuse or avoiding responsibility. However, defining justice so narrowly that it can be equated with calculation is also problematic.

The problem seems to be this: if justice is defined with the emphasis on order and distributive functions it falls into a number of traps. It underestimates complexity of society and the interactions between individuals, it ignores the notion of power and it defines justice so narrowly that it becomes a question of the correct manner to add and subtract benefits and burdens. On the other hand, if justice is defined broader it runs the risk of becoming an empty notion, unknowable to contingent individuals. And there is the problem of injustice, which is mostly ignored by traditional theories of justice. The history of justice

carries with it a history of injustice, because, as Derrida (1992: 18) reminds us, the 'we' included under justice until recently excluded those who were not white chistian males.

How are we then supposed to talk about justice? Are we trapped between these two options stated in the previous paragraph or is there another way? There is also another important question, stated in the Introduction that needs to be answered, namely what is the relationship between law and justice?

The focus of the next chapter will be an examination of Jacques Derrida's understanding of justice based on his arguments in "The Force of Law". Derrida does not provide neat and clear cut answers to the questions stated in this chapter. In fact he seems to complicate matters further by calling justice an aporia. Despite not providing answers, he might do is to provide a richer and more dynamic understanding of justice as well as its relationship with law.

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[1] Davies (1994: 2)

[2] This approach is used by James P. Sterba (1986/1992).

[3] It is not my intention to explore Rawls''s argument in great detail; my intention is to point out that even in Rawls the point of departure is order.

[4] In contrast, Derrida argues that justice can only be 'achieved' if there is a sensitivity to the singularity of the situation. Caputo (1991: 5), discussing Derrida's understanding of justice, writes that "[justice] is to be found amidst the chaos and singularity of action, the idiosyncrasies of human interaction, the unreproducable exchanges between people" - in other words, it both escapes and defies order. In contrast to traditional theories of justice, Derrida's focus is not on the execution of a plan or the designing of society ; it is a focus on the fate of singulars (Caputo 1991 : 17-18).

[5] This is also reflected, more recently, in the reaction to Daniel Goldhagen's *Hitler's Willing Executioners: Ordinary Germans and the Holocaust* (1996), for example by Finkelstein and Birn in *A Nation on Trial: The Goldhagen Thesis and Historical Truth* (1998).

[6] Charles Tilly (1985) argues that there is but a subtle difference between the processes of state-making and organised crime. He writes, "[i]f protection rackets represent organized crime at its smoothest level, then war making and state making - quintessential protection rackets with the advantage of legitimacy - qualify as our largest examples of organized crime" (Tilly, 1985: 169). The establishment and continuation of a nation-state depends on the centralization of coercive force and the elimination of any groups that could possibly offer resistance or opposition.

[7] In this regard Peter Haas (1992: 179) writes, "[t]he Holocaust was not the result of the absence of ethics, but of an ethic that conceives of good and evil in different terms. The Nazi state illustrates not the banality of evil but how it is possible that ethical systems redefine evil. That is why the horrors of Auschwitz could be carried out by otherwise good, solid, caring human beings".

[8] Bauman (1991: 103) uses the following examples to illustrate this point: "Soldiers are told to shoot *targets* which *fall* when they are *hit*. Employees of big companies are encouraged to destroy *competition*. Officers at welfare agencies operate *discretionary awards* at one time, *personal credits* at another. Their objects are *supplementary benefit recipients*. It is difficult to perceive and remember human beings behind such technical terms. The point is that as far as the bureaucratic goals go, they are better not perceived and not remembered."

[9] An even more horrific account of 'ordinary' people's behaviour in the Holocaust is *"The Good Old Days": The Holocaust as Seen by Its Perpetrators and Bystanders* (1988). It refers, for example, to a massacre in the town square of Kovno, where Jews and captured partisans were beaten to death with

crowbars by townspeople - with no involvement by any German soldiers - while the crowds watched and cheered. One German soldiers who arrived at the scene described it as follows: "While I was travelling through the town I went past a petrol station that was surrounded by a dense crowd of people. There was a large number of women in the crowd and they lifted up their children...so that they could see better. At first I thought this must be a victory celebration or some type of sports event because of all the cheering, clapping and laughter breaking out" (Klee et al., 1988: 28-29). Only when he stepped to the front of the crowd did he realize there was a massacre taking place.

Another example : An SS doctor describes in his diary, with the same enthusiasm that describes the concert he attended and the superb supper he had - and separated only by paragraphs - the way in which he walks through the wards in Auschwitz and point to Jews he wants "put down" in order to dissect them, and is greatly pleased by the fact of the "freshness" of the organs he examines (Klee et al., 1988 : 256-263).

[10] For a somewhat similiar South African study of this issue see Julie Frederikse's *The Unbreakable Thread: Non-Racialism in South Africa* (1990). A more (vaguely) related book in the South African context, which focuses on an individual, is Stephen Clingman's *Bram Fischer: Afrikaner Revolutionary* (1998).

[11] Zygmunt Bauman (1993: 39) makes a similar point when he argues that the traditional understanding of the concept of citizen is problematic since the individual only has the attributes assigned to him/her by "the laws of the single and uncontested authority acting on behalf of the unified and sovereign state".

[12] I derive this phrase from MacKinnon (1987: 38-39), who writes, while discussing Gilligan, "[b]ut she [Gilligan] achieves for moral reasoning what special protection rules achieve in law : the affirmative rather than the negative valuation of that which has accurately distinguished women from men, by making it seem as though those attributes, with their consequences, really are somehow ours, rather than what male supremacy has attributed to us for its own use. For women to affirm difference, *when difference means dominance* [my emphasis], as it does with gender, means to affirm the qualities and characteristics of powerlessness".

[13] Deleuze (1990:144) who, in writing on Nietzsche's "nomad thought", creates a similar image when he writes, "to row together is to share something beyond law, contract, or institution. It is a period of 'deterritorialization'".

[14] Perhaps it will be useful to make a distinction between sympathy and empathy. Sympathy carries with it the idea of distance from the other; empathy could imply involvement.

[15] Hannah Arendt (quoted by Luban, 1990: 239): "No philosophy, no analysis, no aporhism, be it ever so profound, can compare in intensity and richness of meanings with a properly told story". And also, Patricia Williams (1989a: 2148): "I think silence is too common, too institutionalized, and too destructive not to examine it in the most nuanced way possible".

[16] Stack (1974) developed these ideas in *All Our Kin: Strategies for Survival in a Black Community*. She describes the role that community networks and a cooperative lifestyle plays (i.e. a form of connectedness).

[17] Beverly Thiele (1986), following Artemis March (1981), identifies three "vanishing acts" in which issues involving women are excluded from political and social thought. This, of course, holds true for other groups (blacks, Jews, i.e. members of the non-WASP group). The three strategies are exclusion , pseudo-inclusion and alienation. This is achieved through decontextualisation ("abstracting from real people, real activities and events in order to make generalizations about 'Man', Society' and so on" (Thiele 1986: 35), - in other words, essentialising categories that is violent to difference), universalisms (that obscure the value-laded nature of the concepts) and naturalism, dualism (that create a value-laden hierarchy) and propriation and reversal (women's activities are denigrated and trivialized) (Thiele, 1986: 35-38).

[18] Ginsburg (1996: 53)

[19] Shriver (1995: 6)

[20] This is similar to Karl Jaspers's (1971) definition of moral and metaphysical guilt. Jaspers (1971: 45) defines moral guilt as "blindness to the misfortune of others, lack of imagination of the heart, inner indifference towards witnessed evil". Metaphysical guilt is defined as follows : "There is exists a solidarity among men as human beings that makes each co-responsible for every wrong committed in his presence or with his knowledge. If I fail to do whatever I can to prevent them, I too am guilty" (Jaspers, 1971 : 46).

[21] Kitty Genovese was murdered in full view of her neighbours, who merely looked on as she was killed.

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[22] Thurgood Marshall makes a similar point when he says, "legal decisions and lawmaking frequently have nothing to do with understanding human experiences, affects and suffering - how people *do* live" (quoted by Henderson, 1987: 1574-5).

[23] A similar argument is made by Paulo Freire (1993). Freire (1993: 29) argues that "to surmount the situation of oppression, people must first critically recognize its causes". Such a theory must, importantly, be articulated not for the oppressed, but *by* the oppressed. They must recognize their situation as socially caused. Freire (1993: 31) writes, "they must perceive the reality of oppression not as a closed world from which there is no exit, but as a limiting situation which they can transform". The second crucial aspect is finding a conceptual framework to articulate their experiences and strategies for change. The oppressed must break the "culture of silence" induced by oppressors and find their own voices (Freire, 1993: 12).

CHAPTER 2
DERRIDA'S UNDERSTANDING OF THE CONCEPT OF JUSTICE

1. Introduction

> *"The trick in deconstruction...is to keep your head without having a heading."*
> John D. Caputo[1]

In the previous chapter I examined the problems surrounding justice as order and distribution. In this chapter I will examine Jacques Derrida's understanding of the concept of justice and the implications that it could possibly have for the concepts of justice and injustice, as well as jurisprudence.

The theme of justice is important to Derrida. My focus here will be on the arguments he uses and the challenges he poses in "The Force of Law: The Mystical Foundation of Authority" (1992) (hereafter "The Force of Law'). The emphasis he places on justice could be linked to other themes that are significant in his work such the notion of the gift, the importance of democracy and his ideas on community, as reflected, for example, in "Before the Law" (1992b), *The Other Heading: Reflections on Today's Europe* (1992c) and *Specters of Marx: The State of the Debt, the Work of Mourning* (1994). It would be impossible to give exhaustive reference to these themes and the way in which they link with Derrida's understanding of justice. However, an enduring aspect evident in all these works is Derrida's emphasis on singularity, difference and their 'relationship' with the idea of impossibility. This is very relevant for his understanding of justice. Caputo (Derrida/Caputo 1997: 135) writes,

> "[w]hat [Derrida] means by Justice and its impossibility, in the typically unorthodox, exorbitant style of deconstruction, is the 'singular', the Abrahamic exception to the law, the 'remnant' and the 'fragment' that drops through the cracks of law, not as a merely factual omission or defect of existing laws, but structurally, necessarily. The singular is not a case that can be subsumed under the universal, not a specimen of a species, but the unrepeatable, unreproducibly idiosyncratic".

Derrida's emphasis on difference and singularity is reflected in his arguments on democracy and community. He recognizes the desire for and importance of community and unity, yet he remains wary of the ideas of consensus and fundamental agreement (Derrida 1992c; Derrida 1992d: 355). In *Specters of Marx* (1994) he argues against the smug acceptance of the 'new world order'; in *The Other Heading* (1992c) he argues for an understanding of identity that allows for difference and multiplicity. He writes that "identity or identification in general, if it were to be equal *to itself and to the other*, up to the measure of its own immeasurable difference 'with itself'...*must* belong, to this *experience and experiment of the impossible*" (Derrida 1992c: 45; Derrida's emphasis). The unity and community, and democracy, that Derrida argues for is always deconstructing, unsure of itself and willing to redraw its boundaries. Caputo (Derrida/Caputo 1997: 107) writes, "[Derrida] advocates highly heterogeneous porous, self-differentiating quasi-identity, unstable identities...[they] do not close over and form a seamless web of the selfsame". Derrida rejects both the atomistic subject of the liberals and the unity proposed by communitarians based on tradition, natural bonds and, ultimately, exclusion.

The continual emphasis falls on difference and dynamic interaction where interpretation is always mediated and boundaries, although necessary, must be redrawn. This point should be made very clear: Derrida is not arguing against the existence or importance of boundaries. (Which links with his arguments in favour of the importance of law, a point to which I will return shortly.) What he does argue for is a different way of understanding of rules, laws and boundaries, namely, one which is sensitive to difference. In other words, there is a need for boundaries and laws and, at the same time, an acceptance of the impossibility of them encapsulating everything or being be able to do justice. In the "The Force of Law" he argues that justice must always be concerned with "singularity, individuals, irreplaceable groups and lives...a unique situation" (Derrida 1992: 17).With this understanding of the justice's focus on singularity comes a realization of its impossibility. How can one do justice to each singular case? How can one do justice by making use of law where the emphasis is on "the generality of a rule, a norm or a

universal imperative" (17). According to Derrida (1992c: 44-45) the realization of the impossibility of justice leaves us not with an easy way out but rather a renewed sense of responsibility: "there is no responsibility that is not the experience and experiment of the impossible". Singularity and the ways in which it defies ideas of unity and procedures brings us to the acknowledgment of impossibility, but not in an 'anything goes' manner. It is here that Derrida's notion of the aporia becomes important. He argues that "a demand for justice whose structure wouldn't be an experience of aporia would have no chance to be what it is, namely, a call for justice" (Derrida 1992: 16). The impossibility of justice and the need for justice is reflected in the three aporias of justice, which will be the focus of this chapter.

In other words, The "The Force of Law" is as much a plea for a renewed sense of the (ethical) importance of justice as it is an argument for its impossibility. Derrida's understanding of justice, I will argue in this chapter, is not one of procedures or order, but with an emphasis on the singularity of both justice and the individuals and instances that it comes before it. This is a point he stresses allude in *The Other Heading*: "the singularity of each decision, each judgment, each experience of responsibility, to treat each of these as if they were a case - this would be the surest, most reassuring definition of *responsibility as irresponsibility*, of ethics confused with juridical calculation" (Derrida 1992c: 72; Derrida's emphasis).

2. The Aporia of Justice: Restoring Justice to its Original Difficulty

> *"Action belongs in the element of justice".*
> John D Caputo[2]

Jacques Derrida discusses his understanding of justice in "The Force of Law", a lecture he delivered at a symposium on "Deconstruction and the Possibility of Justice"[3], organised by Drucilla Cornell at the Benjamin N Cardozo School of Law in New York in October 1989[4]. I will, firstly, give an outline of Derrida's argument and will then focus on specific issues.

"The Force of Law" consists of two sections. The first section deals with law and justice, and the aporia of justice. The second section deals with the violence of the law, with a specific focus on Walter Benjamin's "Critique of Violence"[5]. In a recent interview Derrida (Derrida/Cilliers 1999: 281) says that his 'aim' with the paper was to dispel the myth that deconstruction is nihilistic, relativistic and does not care for the notion of justice. He wanted to show that "deconstruction is on the side of justice" (281).

In the second paragraph of his paper Derrida (1992: 3-4) comments on the title of the symposium, namely "Deconstruction and the Possibility of Justice". The word "and" brings together the two concepts of deconstruction and justice, yet also suggests a form of suspicion on whether deconstruction permits justice. He argues that some people will not object to the title. Others will disagree since they fear that "deconstruction doesn't permit any just action, any just discourse on justice but instead constitutes a threat to *droit*[6] , to law or right", thereby threatening the whole idea of justice (4). This objection, however, is based on the assumption that there is very little difference between law and justice. Consequently, Derrida's next move is to examine the concept of law in order to show that it is different from justice.

The structure of his argument is to first examine the concept of law, and then contrast this with the concept of justice. By looking at the way in which the word "law" is used in the English language, for example, "to enforce the law", Derrida argues that the idea of force, violence and legitimate power is very closely associated with the idea of law (5-6). He writes, "there is no such thing as law (*droit*) that doesn't imply *in itself, a priori, in the analytic structure of its concept*, the possibility of being enforced, applied by force...there is no law without enforceability, and no applicability without force, whether this force be direct or indirect, physical or symbolic, exterior or interior, brutal or subtly discursive and hermeneutic, coercive or regulative, and so forth" (6) [Derrida's emphasis]. The question then follows what the difference is between the force of law, and unjust(ified) violence, the law/violence of a legitimate power versus law/violence without legitimacy (6). It is here, argues Derrida, that

deconstruction becomes important since it destabilizes the difference between the two sides (8). It questions the ('legitimate') 'foundations' of force.

The 'fundamental' distinction between justice and law lies in this foundational force of law. Derrida follows Pascal and Montaigne in arguing that the law is not founded on reason or justice, but upon an act of interpretive violence (10-14). Montaigne argues that law is founded on convention/nomos (1-12). Its foundation is derived not from justice, but customs. Montaigne (quoted by Derrida 1992: 12) writes, "laws keep their good standing not because they are just: that is the mystical foundation of their authority, they have no other". In other words, one obeys laws not because they are just, but because they have authority, and this authority is not based on reason or justice. If every law is traced back by asking "what is the authority of this law?" this questioning ends with the acknowledgment that it is based on custom, more specifically custom backed by (state) violence. A legal system is, therefore, founded by a violent act. Derrida writes, "[i]ts very moment of foundation...the operation that amounts to founding, inaugurating, justifying law (*droit*), making law, would consist of a *coup de force*, a performative and therefore interpretative violence that no justice and no previous law with its founding anterior moment could guarantee or contradict or invalidate" (13). It is here, argues Derrida, that the limit of the discourse is reached and what he calls the mystical foundation of law: "Here a silence is walled up in the violent structure of the founding act" (13-14). In other words, law's founding act is a violence without ground since it rests on nothing but itself. He is, however, quick to point out that law cannot simply be disregarded (as, for example, Critical Legal Studies does) as illegal and unjust, since in its founding moment it is neither just or unjust, legal or illegal, but it is a construct. This means, argues Derrida that law is "essentially deconstructable", and this is good news, because it means no law - be it just or unjust - can escape being deconstructed (14). It also means/implies, because of the foundationless violence of law, that one has a responsibility to continually do this. Two important points can be made here. First, the 'fact' that law is a construct is good news, since it means that it always has the opportunity to be moved by justice. Second, arguing that law is a construct does not mean that it instantly

becomes useless. Law is still very important to justice, because without law, justice would be powerless.

Justice, on the other hand, is undeconstructable - since it is outside law - and yet deconstruction *is* justice, meaning that justice is the "force" that makes us deconstruct law. Justice is what the deconstruction of law means to bring about (Derrida/Caputo 1997: 131). Justice, says Derrida (Derrida/Caputo 1997: 16), "is what gives us the impulse, the drive, or the movement to improve the law, that is, to deconstruct the law". It is important to note that this does not mean that justice is an entity that is present, nor does it mean that it is an transcendental ideal "toward which we earthlings down below heave and sigh while contemplating its heavenly form" (131). Derrida (Derrida/Cilliers 1999: 282) states that "this idea of justice is not the infinitely remote ideal of a goal to be reached, but it is something which, here and now, gives us order beyond any given set of concepts". It is both an unforseeable prospect which urges us to deconstruct the law, and an aporia. He now makes two important points (Derrida 1992: 15). First, the deconstructibility of law of makes deconstruction possible. Second, the undeconstructibility of justice also makes deconstruction possible.

Perhaps a few words need to be said about deconstruction before the rest of Derrida's argument is examined. Deconstruction views systems (for example, language) as a play of differences. Cornell (1992: 1) defines it as the philosophy of the limit, because it is concerned with the limits of a system, and what the system excludes. It is therefore an important *ethical* move[7], the first indication that Derrida's understanding of justice has more to do with ethics than order or procedures. Deconstruction 'does' this through a play with differences, supplements, contradictions and hierarchical oppositions. It tries to show that concepts, systems and traditions have no definable meanings and determinable missions (Derrida/Caputo 1997: 31). It does - as justice does do to law - disturb any idea of fixed meaning or equilibrium. Concepts that are important when speaking about deconstruction are logocentrism, *différance*, trace and presence. Logocentrism refers to the "deluded sense of mastery of concept over language" (Norris 1982: 29) - in other words, the

assumption is that there is a point of reference outside language, that meaning can precede language and that fixed meanings can be guaranteed. *Différance* means both to differ and to defer, and is concerned with the play of differences, and of signs referring to one another. Meanings are not fixed, but is the result of signs that differ from and refer to each other. This links with another important aspect of deconstruction, namely trace. Signs bear the traces of other signs. Lastly, the idea of presence is undermined. There is no centre of fixed meanings, only a play of differences. Any idea of presence will remain a construct. Deconstruction, furthermore, is concerned with hierarchies and problematizing those hierarchies (Culler 1982: 85). This is not done from a privileged position outside, nor does it mean that hierarchies are undone: "deconstruction works within the terms of the system but in order to breach it" (86). It identifies hierarchical oppositions and premises and undermines them. It does this by taking the inferior aspects in a system seriously. It problematises the inside and the outside of a system. It disrupts both hierarchies and boundaries. Rather than removing a hierarchy, deconstruction questions the very foundation of hierarchies and oppositions. Deconstruction shows how "claimed foundational character collapses or undermines itself when they are thought through" (White 1991: 15).

Pensky (1996) argues that remembrance is also an important aspect of deconstruction. The will to deconstruct, writes Pensky (1996: 239), "is only to be sensed as...a kind of remembrance". Part of the 'task' of deconstruction is to mobilize a critical memory (240). Deconstruction is, therefore, also a critical remembrance of a past that is built/founded on the exclusion of others, i.e. recalling limits. Justice is haunted by this memory of the other. This haunting, argues Pensky, is the beginning of a realization of the infinite responsibility towards the other (241). And when this responsibility is in some way met, it can never be law, only justice - in other words, "experiences of a radical break in the fabric of legality and force" (241). This haunting/critical remembrance, which is 'central' to deconstruction, keeps us from forgetting the limits of law and systems of law, and the injustices that have been done in the name of justice. Above all, declares Derrida (Derrida/Cilliers 1999: 280), deconstruction is about intervening, i.e. an act of intervention that is "attentive

to the singularity of the event". It displaces and opens a structure to this singularity. Protevi (1996: 231) writes, "[d]econstruction is democratic justice, responding to the calls from others". The call to action is embedded, writes Davies (1996: 14), in the idea of a limit: "The limit gives us a place to begin, a place to put our thoughts, a place to proceed...in some instances...[it] empowers us to act and to be". A limit, argues Davies (1996: 16), is an invitation to think beyond, even though this does not destroy the limit nor comes without consequences.

I now return to Derrida's argument in "The Force of Law". If the first section of Derrida's paper concerned the difference between law and justice, the second move in this section is a focus on the aporia of justice. Before I move on to Derrida's discussion of the aporia of justice, I would like to summarize the characteristics of law that have been dealt with so far Law is a system of rules. Its function is to calculate between (competing) claims. It is based/founded not on justice, but custom. It has no rational point of departure, but is self-grounding. The founding moment of a legal system is an act of violence. The fiction of law's foundation is forgotten or ignored, or painted in the language of Reason or Natural Law. This, however, is also a source of hope, since if law is a construct, it is also deconstructable. This creates the space for the possibility of justice.

Justice, writes Derrida (1992: 16), is experienced as an aporia. An aporia could be defined as a "non-road" (Derrida 1992: 16) or "[being] entangled in a contradiction without a solution" (Bauman 1993: 89). By this Derrida means that justice is "an experience of the impossible" (16). And, he argues, justice *should* be experienced as an aporia, otherwise it would not be justice. Why? Because, writes Derrida (1992: 16), "[e]very time that something comes to pass or turns out well, every time that we placidly apply a good rule to a particular case, to a correctly subsumed example, according to a determinant judgment, we can be sure that law (*droit*) may find itself accounted for, but certainly not justice" (16). Law might be a calculation; justice is difficult. Law can calculate, writes Derrida, but the decision between just and unjust is never ensured by a rule. Law is concerned with the rule and its generality;

justice is concerned with singularity, in other words, irreplaceable groups and lives and unique situations (16). Justice "runs deep within the abyss and interstices of singularity, about which there can be no calculation" (Derrida/Caputo 1997: 136). Law is a system of rules. Justice can never be part of a structured system of representations in which law is articulated and imposed (Pensky 1996:238).

How does one address oneself in the language of the other? This is both the condition of justice and its impossibility (Derrida/Caputo 1997:17). It is also here that Derrida's gives some indication of his understanding of injustice. I have already argued in Chapter One that this concept is ignored by traditional theories of justice. Injustice, Derrida (1992: 18) argues, occurs when someone is judged in a language or idiom that she does not understand. Furthermore, this injustice "supposes that the other, the victim of the language's injustice, is capable of a language in general" (17). Derrida also links with this discussion of injustice the subject that is spoken of in the realm of justice - i.e. who is addressed. Not too long ago, he points out, the 'we' who spoke of justice, meant white (christian) males (18). If one takes injustice seriously, one needs to continually reassess the boundaries between what is labeled just and unjust (19). In other words the opposition between 'justice' and 'injustice' also needs to be deconstructed.

We need to remember, therefore, what has been done in the name of justice in the past. Derrida's understanding of memory links closely with the first aporia of justice, which will be discussed shortly. Judges use memory when judging, but justice does not permit that this memory be simply the remembering and applying of precedent. Justice cannot be calculated and the judge cannot be reduced to applying precedent. Cornell (1992: 148) writes, "[the judge] is responsible for her memory and the future which she promotes in the act of remembering". Critical remembrance is not applying or posing the (static) past on the present, but includes a responsibility to the future. Derrida's idea of critical memory is, therefore, more closely related to the concept of genealogy. Genealogy, as for example Nietzsche understands it, is an undermining activity since it digs through the surface of codified and/or

official history. It opposes the traditional understanding of history, because it seeks out singularity and detail, and not universality and anonymity. It does not strive for essence or underlying laws of history, but discontinuities, that which is "deepest and murkiest" (Dreyfus et al. 1982: 106).

Derrida emphasizes this 'genealogical' memory, because it remembers the exclusions and prejudices that were/are made in the name of justice. In other words, this understanding of memory and the history of justice is not one that glorifies the past and the application of precedent. Rather, it "uses bits of the past to unsettle the present and deprive it of its peace of mind" (Minow 1996: 33). It is memory that does not gloss over the past, and specifically past injustices, but seeks those things out in order disrupt the idea of justice. Justice, therefore, 'means' to be unreconciled to the past and discontented with the present[8] . Memory is tied to responsibility, a responsibility not only in the "face of heritage" but also to a "reinterpretation of the whole apparatus of boundaries within which a history and a culture have been able to confine their criteriology" (Derrida 1992: 19). Derrida writes, "[t]his responsibility toward memory is a responsibility before the very concept of responsibility that regulates the justice...of our behavior" (20). Derrida's emphasis on the relation between memory and justice also highlights another distinction between law and justice. In contrast to justice's 'genealogical' memory, law's only memory is precedent. In other words, it is not critical memory, but repetitive remembrance, in other words, memory as calculation and justification of the status quo. It is, however, important to note that a shift from 'precedent' to 'memory' is not enough. It needs to be a shift to *critical* memory, meaning an understanding of memory that has nothing to do with memorials and monuments, and everything to do with the reconsideration of boundaries. Caputo (Derrida/Captuo 1997: 157), on discussing Walter Benjamin's understanding of history, writes, "[w]e live today in a pact with the disasters of the past, inheriting a promise we never made, to recall *the dangerous memories* of past suffering, which is a pledge not taken lightly...the 'now' in the present time is...a time in which we are responsible for the entire history of mankind" [my emphasis].

The difference between the critical memory that Derrida argues for and law's understanding of memory can perhaps be illustrated by contrasting it with the three types of history that Friedrich Nietzsche (1983) identifies. Monumental history revolves around exemplary individuals who must serve to inspire the masses, but this ends up being little more than the mythology of great men who must serve as models of inspiration and such history at times "it comes close to poetic invention" (Lacoue-Labarthe 1990: 220). Nietzsche (1983: 71) writes, "[m]onumental history deceives by analogies: with seductive similarities it inspires the courageous to foolhardiness and the inspired to fanaticism". 'Great men' are a also a very effective social lever in the hands of "gifted egoists and visionary scoundrels" (Nietzsche 1983: 71) to mobilize groups for ideological reasons, e.g. a figure like Chairman Mao. History, and not only under fascist regimes, is filled with examples. In *Beyond Good and Evil* Nietzsche (1973) declares his deep disgust with martyrs - for a number of reasons. Firstly, we are never sure enough in our beliefs to die for them - we should rather have the courage, not to die for our convictions, but to challenge them. Secondly, martyrs often throw themselves into the fire, willingly, hoping that their 'hero's death' will convince the masses of the truth of the convictions they died for. Whether it be an individual or more often some unfortunate other, who must be punished, nothing seems to prove an ideology so true as human sacrifice.

Antiquarian history focuses on origins - or a certain reconstructions of them. Respect for, reverence to and preservation of these roots are encouraged. Roots and Origins are not only respected, but nurtured. This understanding of history is, therefore, a very conservative enterprise and "always possesses an extremely narrow field of vision" (Nietzsche 1983: 74). In the end it no longer preserves life, but mummifies it. Antiquarian history links with an ideological strategy that John B. Thompson (1990) identifies, namely that of legitimization of ideology through narrativization: "claims are embedded in stories which recount the past and threaten the present as part of a timeless and cherished tradition" (61). The latter are often invented to create an sense of belonging to a community. It can also serve as a strategy for unification on a symbolic level

or a standardization of history (Thompson 1990: 64). And more dangerously, to vindicate injustice.

Critical history stands in opposition to these uses of history. It urges an assessment and condemnation of history - even its total negation. But, argues Nietzsche (1983), the total rejection of history does not serve life either. It not only denies a rich source of meaning (genealogies), but it is also an attempt to ignore the responsibility that history places on us.

Following his discussion of the importance of memory, Derrida (1992: 19) again stresses that deconstruction is not "a quasi-nihilistic abdication before the ethico-politico-juridical question of justice", but it is rather a boundless responsibility (19). This means not only that it is not a calculation, but also that a historical and interpretative memory is central to deconstruction (20). It takes the history of the idea of justice seriously. It hears and tries to understand where it comes from, constantly questioning the conceptual and theoretical apparatus of justice.

Derrida's understanding of justice is therefore clearly different from traditional theories of justice. To Derrida justice is not a calculation, a grid placed on society to organize it better or a distributive pattern. His emphasis is on (continuous) responsibility. This responsibility starts with listening, with being attentive and concerned with "the singularity of the other, despite or even because it pretends to be a universality" (20). It is/demands a constant questioning of the origin and the theoretical and conceptual framework of anything that pretends to be justice. This also includes a great sensitivity to what is called injustice. Justice as deconstruction means to continually re-examine the boundaries between what is called just and unjust (19-20). This includes, argues Derrida (1992:19), "responsibility in the face of heritage" , in other words taking the history/genealogy of 'justice' seriously. Justice, therefore, is closely linked to the idea of (boundless) responsibility[9].

Even though there is a critical difference between law and justice, Derrida (1992: 22) claims the distinction between law and justice is not so simple.

Why? Because law must be exercised in the name of justice and justice needs to law to enforce itself (22). It is here that Derrida identifies the three aporias of justice. This is an important move in Derrida's understanding of justice. In "defining" justice as an aporia, Derrida "protects justice from being encompassed by whatever convention describes as the good of the community" (Cornell 1992: 118). It resists reducing justice to convention or calculation. This links closely with the idea of the three aporias of justice.

Before I examine the three aporias of justice, I would like to highlight two points. First, the aporias have to do with the tension between law and justice. Justice and law need each other. Laws should strive to be just; justice needs law in order to intervene. Second, even though justice rejects the violence of law and is attentive to the singular, it still needs the law. Put differently, "[l]aw is on the one hand appropriation, reduction, objectification, force - everything antithetical to the notion of an 'ethical relation' with the other...[y]et curiously, it is a thorough analysis of the law of this law which allows us to see the 'beyond', to see through it and at least imagine the other" (Davies 1996: 8).

The first aporia is that of the *épokhè* of the rule (Derrida 1992: 22-24). Derrida (1992: 22-23) argues that in order to make a just decision, a person/the judge must be free and responsible for his actions; it does not mean to simply follow a rule. Yet, each time a judge makes a decision, he does not make up the rule, he does not make a fresh, a *de novo* judgment. He is still applying a rule or law. In other words, the aporia the judge is caught up in is that he must both follow and apply the law, and thereby approve it, yet justice also demands that he makes a fresh judgment (Derrida 1992: 23). This aporia, argues Cornell (1992: 166), "stems from the responsibility of the judge not only to state the law, but to *judge* it" [Cornell's emphasis]. Responsibility demands more than conformity. Derrida (1992: 23) writes, "for a decision to be just and responsible, it must...be regulated and unregulated: it must conserve the law and destroy it or suspend it enough to have to reinvent it in each case". The judge must follow the law and yet still be responsible (respons[e]-ible) to the singularity of the situation. Each case and each decision is different and demands an "absolutely unique interpretation" (23).

The judge, therefore, cannot calculate his decision, he cannot simply apply the law, because that would not be just. Yet, Derrida (1992: 23) points out, if the judge simply made things up as he went along, if he "improvises and leaves aside all rules, all principles" that would not be just either. The judge is caught in this aporia, knowing (we hope) that there is never a moment where either the decision or the person making the decision *is* just (23). Derrida (Derrida/Caputo 1997: 17), declares that "[i]f someone tells you 'I am just', you can be sure that he or she is wrong, because we being just is not a matter of theoretical determination". To summarize the aporia of suspension of the rule: justice demands a judgment/decision that is not merely an arbitrary decision *and* that a judgment is not merely the blind following of a rule, in other words a calculation. The judge must, therefore, both use the rule and suspend it. He cannot simple calculate. Justice is not a calculation of benefits and burdens, punishments and rewards (although that might be the law). Justice demands, according to Derrida (Derrida/Caputo 1997: 17) that the judge "reinvent in a singular situation, a new just relationship", because justice is concerned with the other.

The second aporia is the ghost of the undecidable that haunts decisions/ judgments (Derrida 1992: 24-26). Decisions about justice are not and may never be easy; they must be haunted by the ghost of undecidable. This does not mean merely to be caught between two contradictory positions. In order for a decision to be both free and just, it must go through the "'the ordeal of the undecidable" (Derrida 1992: 24). Undecidability is, therefore, not a sign of weakness or of an inability to act (Derrida/Caputo 1997: 137). On the contrary, it is what makes a decision a decision, otherwise it would be a calculation. A decision worthy of its name must depend on the experience of undecidability, because "[s]omething must remain incalculable for a decision to be a decision" (Derrida/Cilliers 1999: 280). Put differently, decision-making depends upon undecidability (Derrida/Caputo 1997: 137). Derrida (1992c: 41) writes, "I will even venture to say that ethics, politics, and responsibility...will only ever have begun with the experience and the experiment of the aporia". This, however, does not mean that Derrida abandons the idea of law and rules. Derrida (Derrida/Cilliers 1999: 280) declares, "[d]ecision and

responsibility worthy of these names should not be controlled by previous knowledge, it should not be programmed...that does not mean that we have to give up knowledge...on the contrary we have to know all that we can know...but we should also know and think that between the act of knowledge, between science and the act itself, the decision, there will be a gap"[10]. To summarize: the second aporia is knowing that one must know all that one can know in order to make a ('just') decision, yet realizing that even if that was possible, it would not be enough to make the decision just. There will always be the gap, the realisation that to make a decision is to know that you do not know *and* take responsibility for it (Derrida/Cilliers 1999: 280). Put differently, we must know and apply the law as best we can, yet at the same time we must realize that this does not lead to/guarantee justice. This links closely with the third aporia of justice.

The third aporia is "the urgency that obstructs the horizon of knowledge" (Derrida 1992: 26). Justice, argues Derrida, does not wait (26). A just decision is always demanded/needed immediately. Justice cannot wait for all the information to come in, since it is demanded here and now. At the same time all the information that is needed to make a decision is never there. Yet, even if there was all the time in the world and all the facts were available, the decision is still an instant of madness (26). Why? Because, writes Derrida, "the moment of *decision, as such*, always remains a finite moment of urgency of precipitation, since it must not be the consequence or the effect of this theoretical or historical knowledge, of this reflection or this deliberation, since it always marks the interruption of the juridico- or ethico- or politico-cognitive deliberation that precedes it" (26) [Derrida's emphasis]. The just decision cannot be programmed by knowledge. Justice, argues Derrida (Derrida/Caputo 1997: 17), is not a matter of knowledge or of theoretical judgment and, therefore, not a matter of calculation. This decision is taken in the night (Derrida 1992: 27). This again points to the gap between law and justice: Justice cannot be codified. If justice is this leap, then it implies a break with previous knowledge. Justice cannot be the following of tradition, of custom, the way-things-have-always-been-done. The aporia lies in justice that is demanded immediately, yet justice is always still to come (27). Justice

is demanded now, yet it wants time because it cannot be a calculation. He writes, "[j]ustice as the experience of alterity is unpresentable...justice exceeds law and calculation" (27-28). Derrida, however, is quick to point out that this is not an excuse to avoid making decisions or to stay out of juridico-political battles (28). He also makes a second important point by saying that, although justice can never be equated with calculation, we still need to calculate. There is, however, "a point or limit beyond which calculation must fail, and we must recognize that"[11] (Derrida/Caputo 1997: 19). We must "know all that we can know" but the decision remains madness, a leap in the dark (Derrida/Cilliers 1999: 280). To Derrida judgment and justice begin where calculation ends (Cornell 1992: 135).

To summarize: Derrida illustrates the complex relationship between law and justice by pointing out three aporias of justice. These aporias are the suspension of the rule, the ghost of the undecidable, and the urgency of justice. Before I move on to the second section of "The Force of Law", I would like to pause briefly and single out some important points/aspects/implications. Derrida's understanding of justice is a radical departure from the way it is understood traditionally. In traditional theories of justice – including those of Rawls and Nozick - justice is an ordering principle, meaning strategies to order society - most importantly the distribution of benefits and burdens - society is governed by this concept. This ties the concept to the idea of order. To Derrida, justice is primarily an ethical concept since it is concerned with the singular and with the relationships between people. Derrida (Derrida/Caputo 1997: 17) favours Levinas's 'definition' of justice as the relation to the other[12]. Furthermore, it is clear from the three aporia that Derrida identifies that justice is a call to action. The suspension of the rule, the ghost of the decidable, the urgency of the decision and the "madness of the decision" all point to this call to action - a call to action that is both urgent and caught up in the aporias.

The second section of "The Force of Law" is focused on violence which, as Derrida has already pointed out, is central to the idea of law. In this section Derrida concentrates on Walter Benjamin's (1978) essay entitled "Critique of

Violence". He spends the first page of section two giving some background as to when and why Benjamin wrote this essay. Derrida makes use of Benjamin to draw some distinctions between kinds of violence. In law, argues Derrida (1992: 31), there are two kinds of violence. First, the founding violence that institutes law. But this violence is not enough and, therefore, a second kind is needed, namely the violence that conserves the law. This violence that "maintains, confirms, ensures the permanence and enforceability of law" (31). Although Benjamin argues that these two kinds of violence can be separated, Derrida argues otherwise. To him they are interwoven. He argues that law's violent 'foundation' leaves us with a double bind (40). It appears to be easy to criticize law's violence since it has no foundation. At the same time, however, in what name will this criticism take place, since "one cannot summon it to appear before the institution of any existing law" (40)? The law, writes Derrida, is haunted by violence (44). Every juridical and legal contract is founded on violence. Violence permeates law in its foundation and its outcome[13] (47).

Derrida's understanding of justice has been criticized for being too vague, for offering no real strategy, unlike the views of, for example, Rawls (1971) and Nozick (1974). I would like to argue that Derrida moves the justice debate to a wholly different 'sphere'. It is not that traditional theories of justice underestimate the difficulty of justice. The difference is that Derrida makes it his point of departure. The notion of the difficulty/aporia of justice and the complexity of society permeates his understanding of justice. The 'fact' that justice is difficult is not something he wants to calculate away, nor does he want to establish institutions to protect us; he engages in the challenge. The very idea that law is indeed a construct is a source of hope. Justice as deconstruction is a refusal to be satisfied with any construct as just, since it is also a realization that to "identify any existent state of affairs as justice is to impose silence on the Other who cannot or dares not speak in that system" (Cornell 1992: 132).

The 'level of analysis', so to speak, shifts from the state and society and how to order them to the 'level' of relationships, and the complexity of these relations and their interaction, and from procedures to people (read concrete

others). The focus thus no longer falls on 'order' but on the relationships between people and the complex system of society in which these interactions take place. This understanding of justice that Derrida argues for is not intent on 'containing' complexity in a rigid way. Justice, in Derrida's understanding, is not so much the idea of maintaining order, but challenging the idea of order as something that is universal, just or a finished project. It is a continual call to action to seek out that which has been excluded. Justice as deconstruction is, therefore, not destructive but has an irreducible affirmative character (Derrida 1992: 25). Justice, as I have argued earlier, could then perhaps be 'defined' as being unreconciled to the past and discontented with the present. It is respons[e]-ibility , in other words, a response to the call to action.

In the previous chapter I mentioned Young's (1990a) criticisms of traditional theories of justice. She argued that these theories reduce justice to tinkering with distributive relations, as well as limiting the relations between people to transactions between atomistic/self-contained individuals. These traditional theories of justice ignored both the institutional context and the elusive nature of power. Justice does not 'take place' in a neutral context where power can simply be added or subtracted to make society appear more just. Derrida's understanding of justice does seem to respond to some of Young's urgent and important concerns. Derrida's understanding of justice is not concerned with justice as order nor as a mechanism for achieving social equilibrium (that is the function of law). Justice is concerned with singularity. Justice is concerned with the relationships and, more importantly, the responsibility between people. It is, therefore, an important move away from reducing the relation between people to transactions between self-contained individuals.

Justice as deconstruction is also 'inherently' sensitive to power. While deconstruction acknowledges the elusive nature of power in that it cannot simply undo relations of power, it does constantly subvert hierarchies. Deconstruction is the philosophy of the limit. It is haunted and driven by limits. I have already mentioned the important role that critical remembrance/memory plays in justice as deconstruction. Justice is haunted

by the injustice that has been done in the name of "justice". It is a realisation that justice demands far more than granting formerly/formally marginalised groups rights; it demands the critical reconsideration of the very boundaries of what we call justice.

Derrida's understanding of justice also links with some of the points that Gilligan (1982) stresses. Derrida's understanding of justice is perhaps *the* (?) different voice when speaking of justice. Gilligan (1982) argued for an ethic of care in contrast to the traditional logic of justice, in other words, an understanding of justice that takes concrete aspects and singularity seriously. She argues that the world does not consist of atomistic individuals who engage in the occasional transaction, but of people standing in complex relationships of responsibility to one another. Furthermore, ethical dilemmas cannot simply be solved by weighing various rights and calculating an answer, because the world is not a math problem with humans in (Gilligan 1982: 22).

This links with a point that Derrida stresses over and over again, namely that justice can never be calculation. It also links with Derrida's Levinasian 'definition' of justice as the relation to the other. (It is perhaps important to note that justice refers to a relation *to* the other, not *with* the other. This is an indication that the self, although responsible to the other, is not absorbed by the other, not enslaved by the other. The self remains a (responsible) individual. Justice lies in the relation to the other and the responsibility to open space for the other (Derrida/Caputo 1997: 154).)

To summarize: justice, according to Derrida, can never be calculation. Justice can never be equated with law, yet at the same time it cannot intervene against injustice without law. Justice implies being caught in the three aporias. It is therefore more complex and more far-reaching than the traditional narrow (distributive) understanding of justice. It is not a call to order, but a call to action. Justice, writes Iris Marion Young (1991: 5), "begins in a hearing, in heeding a call, rather than in asserting and mastering a state of affairs, however ideal...[t]he call to be 'just' is always situated in concrete social and political practices". Derrida's understanding of justice is not concerned with

law's calculable duties, but with responsibility that comes before the law. Justice is not caught in a social institution, as is law, but is very thing than disrupts the boundaries and foundations of a legal system.

After giving an outline of Derrida argument in "The Force of Law", I would now like to identify three themes, namely the difference between law and justice, the issue of violence and responsibility, and the implications that Derrida's understanding of justice could have for the concept of injustice.

3. The Difference between Law and Justice

> "The 'sufferance' of deconstruction...is perhaps the absence of rules, of norms, and definitive criteria that would allow one to distinguish unequivocally between droit [law] and justice."
>
> Jacques Derrida[14]

> "The right to be treated the same, gives you the right to be different."
>
> Albie Sachs[15]

In this section I will argue that the difference between law and justice lies on two levels. Firstly, there are the differences between "law" and "justice" that Derrida identifies in "The Force of Law". Secondly, between law and justice lies difference. This second aspect has to do with how to 'deal' with difference, the different "approaches" that law and justice have to complexity and difference.

Derrida argues in "The Force of Law" that justice and law should never be confused. Law is a system of rules. It assumes the generality of a rule, a norm or a universal imperative (Derrida 1992: 17). It is "the positive structures that make up judicial systems...that in virtue of which actions are said to be legal, legitimate, or properly authorized" (Derrida/Caputo 1997: 130). Justice, on the other hand, disrupts the system. Justice, declares Derrida (1992: 14-15), is deconstruction. Cornell (1992: 1) "defines" deconstruction as the philosophy of the limit. Justice is, therefore, concerned with critically and continually

redescribing the boundaries of a system. Law needs the boundaries to be set, otherwise it would not be law. Justice cannot live with boundaries/limits that proclaims themselves to be natural and fixed.

In other words, the first difference between law and justice is that law is a system of rules/limits, and that justice (as deconstruction) continually deconstructs these limits. Most importantly, writes Derrida (Derrida/Caputo 1997: 16-17), justice is never reducible to law or a system of legal structures. Staying for a moment with the concept deconstruction: perhaps to Derrida the most important difference between law and justice is that law is deconstructable, while justice is never deconstructable. Law is a construct. Law's foundation' is custom backed by state-sanctioned violence. It is "historically instituted or constituted, forged and framed, ratified and amended" (Derrida/Caputo 1997: 130). Law, writes Derrida (1992: 5), is always an authorized force. Force is implied in law. Derrida (1992: 12) quotes Montaigne who wrote that people respect and obey the law, not because it is just, but because it has authority, force. In other words, it is a structure that is constructed on a foundation that is unfounded. And because it is a construct, 'based' on custom and backed by violence, it is deconstructable. This, declares Derrida (1992: 14), is good news, a stroke of luck, since this means that law can be improved, that it can be continually moved by justice. The history of law and legal systems is a history of transformation (Derrida/Caputo 1997: 16). Justice, on the other hand, is not deconstructable: "Justice in itself, if such a thing exists, outside or beyond law, is not deconstructable....Deconstruction is justice" (Derrida 1992: 14-15). Derrida (1992: 10) argues that one cannot speak directly about justice, yet he does not mean that justice is a metaphysical or transcendental concept. Derrida (1992: 7) states that justice has more in common with the idea of "the gift beyond exchange"[16]. According to Derrida (Derrida/Caputo 1997: 18) one cannot be thankful for a gift. The moment that happens, the gift is canceled, "[one] starts destroying the gift, by proposing an equivalence" (Derrida/Caputo 1997: 18). It is also, as is justice, beyond calculation.

A third difference between law and justice links closely with the first. Law's function is to calculate between competing claims. It weighs and measures, and gives judgment. The law, writes Derrida (Derrida/Caputo 1997: 17) is a coded system. Law can calculate, correctly, that according to a rule/law a person deserves a certain punishment. It might be correctly calculated, but this does not mean that it is just.

Justice on the hand, writes Derrida (1992: 27-28), exceeds calculation. If justice was a mere calculation, it would not be caught in the three aporias that Derrida identifies. Justice would then be simply the application of a rule/law, unhaunted by the ghost of the undecidable. Secondly, justice is not a matter of knowledge or theoretical determination (Derrida/Caputo 1997: 17). For a decision to be just it must go through the ordeal of the undecidable, argues Derrida (1992: 24-25), when describing the second aporia of justice. Thirdly, justice, because it is also the relation to the other, cannot be mere calculation. Justice has to do "with the infinite distance of the other...[and this] is always unequal to the other...always incalculable" (Derrida/Caputo 1997: 17). The moment the other appears on the scene, calculation can no longer be just.

A fourth difference between law and justice is that law's focus is the universal - the calculable, the symmetrical. Justice is concerned with the singular (other). Law is concerned with applying general rules and universal principles to particular cases. It is system of regulated coded prescription which aim is to stabilize society (Derrida 1992: 22). Justice, on the other hand, is "infinite, incalculable, rebellious to rule and foreign symmetry, heterogeneous and hetereotopic" (22). Derrida (1992: 22) uses Levinas's definition of justice as the relation and concern with the other - a definition of justice which Derrida (Derrida/Caputo 1997: 17) calls "very minimal...[but] really rigorous". Law's focus is on 'the legal subject' and the 'citizen', where the only difference allowed for is the difference between neatly compartmentalized categories, for example, "minor" and "major", "married" and "unmarried". Individuals, in the eyes of the law, are self-contained and atomistic. In contrast, to justice individuals are not self-contained nor atomistic; they stand in a network of complex relationships. Justice's focus is the asymmetrical differences which

means that one human being cannot simply be exchanged for another. Justice is vigilant against any theory which claims that this is indeed possible. Individuals cannot simply be exchanged. Firstly, such a theory obscures differences between people (Young 1997a: 346-347). Individuals have their own histories and act in a complex net of relationships. Secondly, maintaining the symmetry between individuals is politically suspect since it ignores that people stand in specific relations of power and privilege with respect to one another (349). This point also links with the arguments of Shklar (1989, 1990), Lötter (1990, 1993) and Freire (1993) who argued that the what counts as 'injustice' and 'misfortune' has more to do with power than with concrete experiences of injustice. To summarize: justice's emphasis is not on the universal, but on the singular. And the singular, writes Caputo (Derrida/Caputo 1997: 135), "is not a case that can be subsumed under the universal, not a specimen of a species, but the unrepeatable, unreproducible idiosyncratic".

This links with a fifth difference between law and Derrida's understanding of justice, namely that law is (primarily) a call to order while justice is a call to action. Law is there to order the world, to make its complexity digestible and to prevent us from being overwhelmed. Our world is structured by laws and we cannot really get away from them. Davies (1994: 3) writes, "[l]aws are necessary to existence - without them we would have no knowledge, no reason, no understanding of anything...[b]ut this is not to say that we have to accept unquestioningly the laws we have, and nor does *that* mean that the laws we have are not real" [Davies' emphasis]. This is not something one should underestimate and Derrida does not. If he did disregard the law, he would not have spoken of the aporetic relationship between law and justice. Justice, however, is not a call to order. It is a call to action. The suspension of the rule, the ghost of the undecidable and the urgency of justice all have in common this call to action. Derrida's Levinasian 'definition' of justice as the relation with the other is also a call to action because, as Levinas and Bauman never tire of reminding is, it is the face of the other that calls us to responsibility (respons[e]-ibility) and to action. Justice as deconstruction is a continual and never-ending call to action. Deconstruction does not undo

hierarchies. It is far more potent and responsible than that. It remains always active and always vigilant against hierarchies and boundaries. It is always subverting the hierarchies, pointing to the other that has been excluded by the limits of the system. In other words, another possible 'definition' of justice is that it seeks and points out the power of the absent and the loudness of their silence in a system[17]. Caputo (Derrida/Caputo 1997: 131) makes a similar point when he writes, "the eyes of justice are fixed on the silenced and the oppressed".

Another aspect - and a sixth difference between law and justice - of the different way in which law and justice view individuals is this: law commands the other. The other is to act in a certain way or face the consequences. Justice, on the other hand, not only commands the self (to act, to be responsible), but also resists the appropriation of the other, since it realizes the asymmetry between the self and other. Justice is concerned with the singularity of the other and avoids judging it in terms of general categories. Law, however, focusus on the symmemtrical: it treats individuals the same and as interchangeable. The focus is justice is on singular and irreplaceable individuals (Derrida 1992: 16).

This links with a seventh possible difference between law and justice. Law is concerned with duty. Justice is concerned with responsibility. Duty is what we owe to the law. Duty is to the abstract, to structure, to the logic of law. It is what is owed to the universal. The web of responsibility, on the other hand, is far wider. As Derrida, Levinas and Gilligan have emphasized, responsibility is towards concrete others. The focus is not the universal, but relationships and the singular. Responsibility, argues Levinas, is what makes us unique. Bauman (1993: 54) writes, "[o]ne may legislate universal rule-dictated duties, but moral[18] *responsibility* exists solely in interpellating the individual and being carried individually. Duties tend to make humans alike; responsibility is what makes them into individuals. Humanity is not captured by common denominators - it sinks and vanishes there. The morality of the moral subject does not, therefore, have the character of a rule" [Bauman's emphasis]. Following Levinas, who calls ethics "the first philosophy", Bauman (1993: 13)

argues that responsibility is the first reality of the self. Bauman (1993: 13) writes, "[i]t precedes all engagement with the Other, be it through knowledge, evaluation, suffering or doing". It is, in other words, also before law. Before there is law, there is a responsibility, to answer the call of the other, that which Derrida calls justice. Justice is, therefore, responsibility before the law. Following rules and the duty to follow the law do not save us from responsibility.

It is important to note that the difference between duty/law and responsibility/justice, in Derrida's understanding, is not the same as the way in which the traditional school of natural law understands this difference. Natural law, to summarize it a bit crudely perhaps, argues that one can know and not follow an unjust law, because we know what justice is. Apart from the 'fact' that 'unjust' and 'injustice' are not simply concepts, and the idea of 'knowing' what justice is, is problematic, there is also another aspect which problematises the relationship between law and justice. To Derrida the relationship between law and justice is not an either/or choice. Law is problematic and violent, but we still need law since we cannot reinvent strategies to cope (not control) with the complexity of the world very day. Above all, justice needs law. In other words, while natural law can argue that if there is an unjust law we can simply disregard it, that we can bank on justice to save us, things are more complex to Derrida. The complex relationship between law and justice is illustrated by the three aporias that he identifies. Law and justice, even if they contradict each other, need each other. Similarly, duty and responsibility also stand in a complex relationship to one another. The important point is that if we focus on duty alone, we are heading for trouble. Duty is open to manipulation since is founded, as Bauman (1991, 1993) points out, on instrumental rationality - the consequences of which Bauman illustrates in no uncertain terms in *Modernity and the Holocaust* (1991). The result is that one might rationalize oneself out of duty. The web of responsibility is wider, it is "the first philosophy". Here there are no excuses or just-ifications.

To summarize: Law's focus is duty, which has a far more narrow scope than responsibility, which justice emphasises. Another possible 'definition' of Derrida's understanding of justice could be responsibility before the law.

A last possible difference between law and justice is one I have addressed earlier, namely the different approach that law and justice have to memory. Law's *applies* (i.e. calculates) memory in the form of precedent. Precedent is stabilized, formalized and uncritical memory. Justice approaches memory more critically and 'uses' it as a subversive force to deconstruct the present and dissolve smug ideas of how just we are. Justice, therefore, favours genealogy over precedent. There is also another concept that could be important here, namely iterability. This can be defined as follows: "The structural necessity that a sign be repeatable...that one should be able to use it again and again, in different circumstances...in the radical absence of both the sender and receiver" (Cilliers 1998a: 55). The sign is recognized and it has a history, but each time that it is used it interacts with other signs and its meaning is shifted (55). In other words, to put it in terms of how justice deals with memory, although a judgment can be remembered and used again, it cannot simply be applied/forced on a new set of facts and singular individuals; its meaning will shift.

To summarize: justice uses critical memory as force to disrupt the limits of law. Another possible 'definition' of justice could, therefore, be one I have already mentioned in this chapter, namely to be discontented with the present and unreconciled with the past[19].

As I mentioned in the beginning of the chapter, there is also another aspect to the difference between law and justice, namely the way in which they treat difference. Law's emphasis is on the universal, justice is attentive to the singular and difference. Put differently, law's focus is on the symmetrical. In other words, it deals with 'subjects' and 'citizens' who are the same and interchangeable. The focus of justice is on asymmetrical relations. Individuals stand in asymmetrical relations to one another, not only because of the responsibility between self and other, but because of their particular history

and social position (Young, 1997a: 341). Law, by its very nature, has a problem with difference, since its emphasis is on the universal and order. Furthermore, as Minow (1990: 8) points out, "[l]egal boundaries within each field of law also tend to establish categories, conceived as bounded rather than open-ended or determined through interaction with events". Law, argues Minow (1990: 9), is preoccupied with boundaries and ignores the importance of relationships between people. It is important to note that law does not become more attentive to difference, or more just, by simple adding more categories. Adding new categories should not take the place of seriously *re-considering* boundaries and acknowledging complexity. It is not possible to do justice to difference by resorting to categories. Why? Differences are relational, not intrinsic or natural. And, as Scales (quoted by Minow 1990: 54) points out, dealing with difference can not be "a mechanistic manipulation of essences".

First, difference is important for (at least) three reasons. First, difference is necessary condition for meaning. Second, if we want to take complexity seriously, then difference is very important. Thirdly, the politics of difference, and the politics of recognition, have become increasingly important in today's world, placing urgent demands on both law and justice. In the following paragraphs I will examine these two aspects. I will argue that, although justice should be attentive to difference, we should not make a law of difference.

Difference is a necessary condition of meaning. Something does not have meaning because it has a natural, fixed meaning, but because it differs from other things. This is the point made by Ferdinand de Saussure in his philosophy of language. According to Saussure (1974), language is made up of a system of differences. Words have no natural or essential meaning, but we ascribe meaning to them. The word 'yellow' has meaning, because it differs from the words 'red' or 'brown'. Saussure does, however, argue that this does not mean that the meaning of the word is simply up to the individual user; there are conventions that limits change. Change does take place, but slowly and over time. This focus on relationships and meaning in difference looks like a radical departure from traditional understandings of language and

meaning. Cilliers (1998a), however, writes, "if one considers Saussure's insistence on both the stability of the system in a *linear* temporal dimension, it becomes clear that the mechanisms of the system can be given a fairly conventional description". Words still have their place and their meaning. Derrida's understanding of difference is less anchored (42). To Derrida, language is an open system, meaning that we are always interpreting and there is no 'inside' and 'outside' in language (43). Cilliers (1998a: 43), writes,"[w]here there is meaning, there is already language". Saussaure (1974: 66) argues that the two components of the sign, the signifier (the linguistic unit) and the signified (the concept to which it refers), are not separate but a "two-sided psychological unit". Derrida argues that this relationship is not so fixed, and the two components also find themselves in a relationship of difference.

To summarize: to Derrida difference is condition of meaning. Some things have meaning, because it differs from other things. This relationship, however, is not fixed, but has the 'nature' of an open system. In other words, things stand in a relationship with each other, but they also interact with each other and with their environment. It is a dynamic process. If we want to take complexity seriously then difference becomes an important concept. A complex system, as I argued in Chapter One, consists out of a large number of units that stand in relationships to each other that are non-linear, dynamic and asymmetrical, in other words relationships of difference. A single or complete description of these systems cannot be given, i.e. not in terms of unchanging and universal laws.

The third aspect of the importance is the prominece of the politics of difference, in other words, the rise in prominence - and power - of formerly marginalised groups, for example blacks, women and gays. By demanding to have their rights included, they destabilized both the idea of rights and equality by pointing out that the right to be treated the same gives one the right to be different. The traditional politics of assimilation was disrupted by the rise of women's rights, black power and gay rights. The "dark forces of irrational prejudice, arbitrary metaphysics, and...the towers of patrichial

church, state and family" were/are challenged (Young 1990a: 156). The challenge, Young (1990a: 156-191) argues, is two-fold. Firstly, the politics of differences challenged exclusions and prejudice. Secondly, it questioned the assimilationist ideal, namely, that equality, and justice, require (only) that all people are treated according to the same principles, rules and standards - in other words, making a law of justice (158). By arguing that people should simply be treated alike, difference is ignored, resulting in oppressive consequences (164). Assimilating 'others' into the mainstream brings them into the game after it has already begun, and they have to accept the existing rules and standards, which are portrayed as normal and universal (164-5). 'Others' are 'accepted' as long as they follow these rules and standards. Both these challenges are important aspects of Derrida's understanding of justice: they challenge exclusion and limits, and subvert the idea that justice can be 'done' by treating everyone alike.

One must, however, be careful not to confuse the politics of difference with identity politics. Difference must not mean domination. The rise of marginalized groups should not be accompanied by what Aziz (1992: 300) calls, aptly, "the deceptive air of internal coherence". The assumption of internal coherence is based on a compartmentalized understanding of difference, in other words an understanding of difference that understands/views different groups neatly divided into compartments and internally coherent. This is a very 'thin' understanding of difference. Also, as Young (1990a: 169) points out, "[t]he drive to unify the particularity and multiplicity of practices...turns difference into exclusion". It still upholds the idea of a logic of identity, and of one group being the norm against which other groups are measured. Difference is not the calculated differences between norms; difference is concerned with relations, relations of similarity and dissimilarity, that cannot be reduced to "coextensive identity nor overlapping otherness" (171). Difference lies in complex interaction and relations. It is ambiguous, relational, shifting, without clear boundaries; it means variation and heterogeneity (171). Identity politics tries to essentialize difference, but difference, in Derrida's understanding, is far more complex, rich and playful than that. It is, therefore, important not to equate the politics of

difference with identity politics. Identity politics promotes difference within an assumption of a "deceptive air of internal coherence" (Aziz 1992: 300). This, as Young (1997: 384) points out, "reduce[s] the politics of difference to the most crass form of interest-group politics in which people simply compete to get the most for themselves". Identity politics, furthermore, can be a very useful camouflage for protecting domination.

How does one then do justice to difference ? Firstly, I would argue, one does not do justice to difference by making a law of it. If difference is totalized and universalized by law, it dissolves any space for difference to interact meaningfully and richly. This legislates difference, thereby pretending that differences are Differences, in other words, natural, unchanging and compartmentalized. Haber (1994) makes a similar point when she argues that to universalize difference (i.e. to make it an absolute) limits the resistance politics, i.e. movements to give a voice to the other/voices to others. She argues that some for unity is needed, although we must always be willing to deconstruct this unity (123). She writes, "there is a human condition; the human condition is that the human condition can never be fully articulated; there is no single description of the human condition ranging over all its possibilities. This is not, however, to render us impotent or speechless" (123).

In other words, if difference and a concern for the other are truly taken seriously, we need more than an emphasis on difference. We also need a 'strategy' of opposition against hierarchies and exclusion (because justice is a call to *action* and for that we need 'unity' and some form of structure - which is similar to Derrida's argument that justice needs law). Haber argues that, if we want more than a simple concern for the other, we must not abandon structure, but we do need to rethink it urgently (115-118). She warns that any idea of unity should not be equated with terror (123). A new understanding of unity, namely one that is always open to deconstruction and redescription, carries with it important oppositional possibilities. Put differently, "[i]f democracy is to fulfill the promise of human dignity and full participation it extends to...people, its citizens must know and value in the particularity, not in some imagined or imposed homogeneity" (Schneider 1997: 114). Haber

(1994: 117) writes, "[t]he idea that any structure or unity is necessarily subject to redescription is also politically attractive because it renders problematic all claims to sovereignty and hierarchy". Davies (1994: 22) argues that law is a basic condition for meaning since it defines and provides categories which are conditions for communication. Cilliers (1998b) makes an similar point when he argues that some form of sameness and structure is necessary if we want to take difference seriously:

> "[t]here is an irreducible difference between the self and the other that will always complicate the relationship. But we are not lost in space. The moment we can recognize the other as other, there must be a minimal form of identity (of the same) at work to make recognition possible. The relationship will remain complex, and merely acknowledging this does not guarantee that the other will not be violated. It merely provides a point of departure from where a non-violate relationship with the other can be attempted" (32).

The difference between law and justice seems to leave us with a fourth 'aporia'. On the one hand, if we make a law of difference, we underestimate the rich and dynamic interaction that makes difference a condition for meaning. It also disregards complexity. On the other hand, as Cilliers (1998b) points out, difference without limits becomes meaningless and impossible to comprehend. Cilliers writes, "[t]he boundaries of a system are certainly not *fixed*...but they are boundaries none the less. What is more, one could argue that in a boundless system it would not be possible for the relationship to generate meaning, at least not in a finite amount of time. The interference patters that generate meaning can only form if there is a reflection from a boundary" (30) [Cilliers's emphasis]. This does not mean to imply that the boundaries are fixed or natural, but that the relationships in a system are not completely unrestricted (30).

To summarize: if we want to do justice to difference, we cannot make a law of it, since this underestimates both complexity and the rich and dynamic way in which difference produces meaning. We want to interact with difference - and here we must remember that justice is a call to *action*, it demands more that

being merely attentive to difference - we need some boundaries/laws in order to have some understanding and in order to act.

4. Violence and responsibility

> *"Law operates in a field of death and pain."*
> Robert Cover[20]

I have already noted the two kinds of violence that Derrida mentions and indicared how they are interwoven. Derrida (1992), following Benjamin, 'identifies' two types of violence. Founding violence institutes a legal system, although this foundation is founded on a myth (for example, the intent of the founding fathers or the clear meaning of words) or custom. Secondly, there is the conserving violence, the violence that keeps the legal system in place. Derrida's focus on the violence of law forms an intricate part of his understanding of justice as deconstruction, since the 'purpose' of deconstruction is "to expose the nakedness of power struggles and, indeed, of violence masquerading as the rule of law" (Cornell 1992: 155).

Robert Cover also focuses on the violent 'nature' of law. Cover (1986) argues that legal interpretation is inextricably bound to violence. Cover (1986: 1609) writes that judges, sitting "atop a pyramid of violence, deal in pain and death". The words and interpretation of the judge are part of a violent system. He, therefore, defines legal interpretation as "a practical activity, designed to generate credible threats and actual deeds of violence, in an effective way" (1610). Judges give an interpretation that both mandates and requires (violent) action of other people. The mandate from the judge lets them play their role, overcoming the inhibitions that members of society usually have with respect to violence. They are authorized to act violently and are part of a hierarchy which suppress any inhibitions they might harbour - the same point which Milgram (1974) made so powerfully. To implement the law/the legal interpretation of the judge, effective conditions of violence - i.e. an organized hierarchy - are needed (1616). To be effective law/the judge must be able to put interpretation into action, overcome inhibitions of violence and be

sufficiently violent to deter any revenge (1617). Cover points out that if this structure, this violent hierarchy, is not here, the judge cannot give a legal interpretation. He illustrates this by referring to the case of the *United States v Tiede* (1619-1620). An America judge, Judge Herbert Stern, was called on to give a judgment against two hijackers in the United States Court in West Berlin. The men were found guilty and it was left to Stern to impose the sentence. Yet his words, his interpretation could not be brought to action. Even though Judge Stern had the mandate to give judgment, there was no hierarchy 'beneath' him to make his interpretation law. Cover (1986:1621) writes, [a]ll most all judicial utterance becomes deed through the acts of others - acts embedded in roles". This condition was absent. Stern freed the two defendants.

To summarize: Cover makes important points when he argues that legal interpretation *needs* violence if it is to be more than simply words. Derrida's concern lies not only with this type of violence, but with the founding violence of law, and the violence that law needs to sustain itself. Furthermore, law is violent to the ideal of justice.

The following points on violence and the law can now be made. The relationship between law and violence lies on more than one level. First, as Cover (1986) points out, the effects of law - rules, judgments and their consequences - are violent. They operate in "a field of pain and death". In order to operate, law needs a system/hierarchy that can implement decisions that take away rights, freedom and even life. Secondly, violence is a condition for law's very existence. Law is founded and conserved by violent means. Thirdly, law, because it is a system, is already violent to otherness. Systems exists by excluding, by drawing boundaries between selves and others. It is, therefore, violent to otherness. Lastly, law is violent to the ideal of justice. Law, writes Cornell (1992: 159), defines what is relevant. With this, she points out perhaps the most important aspect of the violent nature of law. Davies (1994: 4) makes a similar point when she argues that it seems that "laws and patterns are first, and people are fitted into them...[f[irst the rule, then the case, which fits or doesn't".

When one considers these points one cannot help but agree with Cornell (1992: 167) that the law is a monster. This does not mean, however, that silence or inaction is excused or justified. On the contrary, argues Derrida (1992: 28), action is more important than ever before. Derrida's sentiment is echoed in the words of Leo Baeck who, in the 1930s with the rise of Nazism and the beginning of violence against Jews under the eyes of a complacent world, said that there is nothing so sad as silence[21]. Realizing that law is violent - as is realizing that it is a construct - is good news. It creates both a sense of urgency and the possibility of justice.

It is important to note that by pointing out the founding and perpetual violence of law, Derrida does not argue that law is now useless. For one thing, justice needs law. We do, however, have a responsibility to always remember the violent nature of law and the inescapable responsibility this leaves us with. This responsibility has to do not only with the violence of law, but also with the aporetic relationship between law and justice. We must take a decision, make a judgment while knowing that knowledge is not enough, that we do not have all the information, and a decision is called for urgently. Yet, we are still responsible for the consequences.

In a previous sub-section of this chapter I made a distinction between duty and responsibility. I argued that we have a duty to uphold the law, and responsibility to justice, i.e. to subvert the law, to deconstruct it. Responsibility is a crucial aspect to Derrida's understanding of justice. According to Levinas's 'definition' of justice as the relation of the other, which Derrida makes use of, we have an endless responsibility to the other. Derrida's focus on the violence of law highlights another aspect of this boundless responsibility, namely, to continually question the foundations of the law. To realise the violent nature of law is, for Derrida, also to realise one's responsibility and to 'practise' justice as deconstruction. Derrida might not give us a strategy to undo the violence of law, but he does tell us what we must never do: be silent and passive.

5. Injustice and Derrida's understanding of justice

In Chapter One, I argued that traditional theories of justice pay little attention to the idea of injustice. They either state that injustice is that which is to be avoided, or that it is what happens in the absence of proper rules and procedures. Philosophers such as Shklar (1989, 1990), Lötter (1993) and Young (1990), however, argue that injustice is far more than simply the flip-side of justice. The problem is that injustice is worsened by the fact that traditional theories of justice ignore it. Injustice can not be 'dealt' with if the emphasis is placed solely the just distribution of benefits and burdens which, although this is important, is not all that justice entails. Traditional theories of justice more often than not label experiences of injustice as misfortune, since the focus is on distributive procedures and not the concrete experiences of individuals. Injustice can only be seriously considered once the boundaries between what is considered 'justice' and 'injustice', and 'misfortune' and 'injustice' are critically reconsidered. This can only be done if the focus is not (only) on abstract rules and principles, but in looking at institutional factors and the concrete experiences of injustice.

Shklar, Lötter and Young argued that traditional theories of justice do not take context and concrete experiences of injustice seriously. These theories measure experiences against a checklist of abstract principles and then pronounce them to be merely misfortune or the effect of the absence of rules. Derrida (1992: 20), on the other hand, argues for a constant questioning of the 'origin' and conceptual framework of anything that pretends to speak in the name of justice. Justice as deconstruction also includes continually re-examining the boundaries between what is called 'justice' and 'injustice'. In other words, traditional theories of justice assume that injustice is what happens when the procedures of justice are not properly applied. According to Derrida's understanding of justice, the boundary between the concepts of justice and injustice are not fixed. In fact, this 'boundary' should be re-drawn continually, for (at least) three reasons. Firstly, a narrow definition of justice should never be an excuse not to act against injustice. Secondly, the definition of justice is not written in stone. Thirdly, as Cornell (1992: 118)

points out, Derrida's understanding of the concept of justice "protects the concept of justice from being encompassed by whatever convention [describes] as the good of the community". This links with another important aspect of Derrida's understanding of justice that shows how 'inherently' sensitive it is to injustice. As I have already argued, critical memory/remembrance is an important aspect of Derrida's idea of justice and deconstruction. Derrida (1992: 19) argues that we have a responsibility toward memory and the heritage of what has been done in the name of justice. He is quick to remind us that not too long ago the 'we', when speaking of justice, meant white (christian) males (18).

A point that Shklar (1989; 1990) especially argues strongly is that "the sense of injustice", in other words concrete experiences of injustice, is ignored by traditional theories of justice. These theories, argues Shklar (1989: 1149) "limit [themselves] to matching their [victims'] situation against the rules...which is inadequate...for 'victim' has an irreducible subjective component that the normal system of justice cannot simply absorb". Derrida's understanding of justice has a completely different point of departure. Justice, argues Derrida (1992: 22), following Levinas, is the concern for the (singular) other and the other's singular experiences of injustice. Justice lies in answering this call of the other.

To summarize: unlike traditional theories of justice, Derrida's understanding of justice does take injustice seriously. This is illustrated by three aspects of Derrida's understanding of justice. First, Derrida does not argue for a fixed definition of justice and, therefore, he posits no hard and fast boundaries between 'justice' and 'injustice'/'misfortune'. Secondly, justice as deconstruction continually redraws the boundaries between what counts as 'justice' and 'injustice'/'misfortune'. Thirdly, Derrida's understanding of justice takes the singular other and her concrete experiences of injustice seriously. It does not, unlike traditional theories of justice, first measure these experiences against abstract principles of justice.

6. Conclusion

In this chapter I have tried to give some account of Derrida's understanding of justice. Derrida's argument is divided into two sections. The first focuses on the law and justice, the second on the relationship between violence and law. The first section could be divided into two sub-sections. The first focuses on the concept 'law' and its foundationless violence. The second part focuses on the three aporias of justice, which not only show the complexity of justice, but also its interwoven and difficult relationship with law. The second section of Derrida's argument is a discussion of Walter Benjamin's "Critique of Violence" and two kinds of violence that he identifies, namely, founding and conserving violence.

After considering Derrida's argument, I examined three important themes that are emphasized in his understanding of justice: the difference between law and justice, the important link between violence and responsibility, and the importance of Derrida's understanding of justice for the concept of injustice.

In the first of these sub-sections, I argued that Derrida highlights a number of important distinctions between law and justice (see Table 3). An important aspect of these differences is that there are a number of characteristics that one could argue Derrida sees as included in the sphere of law (for example, an emphasis on the universal, settling competing claims), traditional theories of justice sees as the duty/function of law. Derrida's understanding of justice takes the debate on justice to a completely different level. It moves the 'level of analysis' from calculation and procedures to the singularity of the other and subversion of limits. I also argued that the difference between law and justice is also the *difference* between law and justice. Law does not have eyes for difference. Furthermore, one cannot be just to difference by making a law of it.

Table 3: The Difference between Law and Justice

LAW	JUSTICE
System of rules	Emphasis on deconstructing the limits of the system
Deconstructable	Undeconstructable
Calculation	Caught in aporia, realisation that one cannot calculate
Precedent	Critical remembrance/genealogy
Importance of universality	Importance of singularity
Symmetrical relationships	Asymmetrical relationships
Self-contained/atomistic individuals	Individuals stand in a complex network of relationships
Call to order	Call to action
Duty	Responsibility
Commands the other	Resists appropriation of the other
Settling competing distributive claims	Complex network of relationships

In the second sub-section I examined the theme of violence and how it is linked to the idea of responsibility. Derrida identifies two kinds of violence, namely the violence that founds law and the violence that conserves it. Furthermore, law is violent in four respects. First, the effects of law are violent. Second, law is both founded and conserved by (foundationless) violence. Thirdly, law as a system is violent to otherness, since the system exists by virtue of exclusion. Lastly, law is also violent to the idea of justice. This, however, does not mean that we cannot say anything about this inherently violent nature of law. On the contrary, because law cannot catch up with its justifications, since it is foundationless, we are left with inescapable responsibility. The one thing Derrida seems to be most passionate about when it comes to the violent nature of law is that it should not reduce one to silence and passivity. It should rather be call to action.

In the last sub-section I tried to consider the possible implications that Derrida's understanding of justice could have for the concept of injustice. In Chapter One, I identify a number of problems between traditional theories of justice and the concept of injustice. These theories either paid no attention to

the concept, other than saying that it is to be avoided, or they worsened the situation by labeling concrete experiences of injustice as 'misfortune'. I argued that Derrida's understanding of justice seems to be the only theory of justice that takes injustice seriously. This is the 'result' of Derrida's 'inherent' sensitivity to the singularity of the other, and the other's concrete experiences of injustice, as well Derrida's plea that we should never be too smug about we do in the name of 'justice'. Great injustices have been done in its name. Furthermore, justice as deconstruction/the philosophy of the limit has a better chance of not falling into the trap of labeling injustice as misfortune, since it continually and critically reconsiders the boundary between 'justice' and 'injustice', and 'injustice' and 'misfortune'.

Does Derrida's understanding of justice, therefore, address the problems/shortcomings of traditional theories of justice identified in Chapter One? It does, as I have argued above, go to great lengths to address the lack of emphasis on the concept of injustice. It also addressed the important fears of Young (1990a), who argued that traditional theories of justice reduce it to settling competing distributive claims between self-contained/atomistic individuals (i.e. it reduces justice to law). As I argued earlier, Derrida takes the concept of justice to a different 'level', moving the focus from distributive claims and procedures to the relations between people, specifically the relation with the other. For this reason, Derrida also addresses Gilligan's problems with "the logic of justice", i.e. justice equated with law as calculation. Justice, as Cilliers (1999: 1) points out, "resides in the contingent relationship between people, and is therefore an *ethical* concept".

Where does this leave us? Does Derrida give a 'definition' of justice other than justice as deconstruction? In the sub-section on the difference between law and justice, I argued that there could be phrases that could belong to the constellation of justice. Justice emphasizes critical memory; one way to' 'describe' justice is that it 'means' being discontented with the present and unreconciled to the past. Justice as the philosophy of the limit and the relation to the (singular) other seeks out the excluded. Another 'description' of justice could be the realisation of the loudness of silence and the power of the

absent, and being called to action by it. Lastly, justice is caught up in an aporetic relationship with law which is violent without foundation. Law's foundationless violence leaves us with an inescapable responsibility. Justice, in other words, could also be 'described' as responsibility before the law. Davies (1994: 271) makes an important point regarding the interwoveness of justice and law's when she writes, "[j]ustice is not another normative order existing in a different place from law: it rather becomes possible only through the existence of law and its deconstructible nature...[j]ustice is possible because law is deconstructable".

If we cannot give a clear definition of justice, what does Derrida say about the 'status'/'nature' of the ideal of justice ? It is not a projected ideal. It is not a transcendental concept, since if it was, we would not have access to it (Cilliers 1999: 10). Cornell (1992: 165-166) writes, "[t]o try exactly to define what Justice *is* would once again collapse prescription into description and fail to heed the [call of justice]". It is, perhaps, best described as a quasi-transcendental concept. In other words, we must realise that we cannot know justice, yet at the same time we must tirelessly strive to be more just, never abandoning the ideal of justice. Or, put differently, it exceeds law/society even if it takes place nowhere but within law/society[22].

If we see law as a construct, *and* refuse to let it justifify an 'anything goes' positions, then we must tirelessly and fearlessly cling to idea of justice with the knowledge that we will never get there. And to know that we do not know, that we are caught in the aporia of justice is, as Cilliers (1999: 10) argues, the first step in accepting and acting on one's ethical responsibility. In other words, Derrida does not give us a clear-cut definition nor a blue-print of how to build the just society. But if Derrida (and postmodernism - whatever it might mean) has done anything, it is to point out the mercilessness and atrocities that *are* caused/generated by absolute plans and answers, i.e. final solutions[23]. Giving a blue-print for justice, therefore, is fundamentally an unjust act. Justice lies in the dynamic and contingent relationships between people and 'functions' in a complex world where things are constantly in flux (Cilliers 1999: 1-2). Therefore, unlike traditional theories of justice, where justice is a

mechanism to organize society better, this understanding of justice sees justice as an ethical relationship.

Derrida emphasises the aporetic relationship between law and justice. Law would be a monster without justice, but justice cannot enforce itself without law. Without law, we will not be able to act against injustice (lest justice serve as an excuse to avoid the call to action). As Cilliers (1999: 10) argues, "[w]e...therefore have to compromise on a certain amount of justice in order to put a practical legal system in place. It is not perfect, but like democracy, it is the best we've got". Justice does not make law easier (and law does not permit justice to be easy). It forces us to acknowledge the gap between knowledge and the decision and to accept responsibility for the consequences of our decisions (of justice made law) despite the consequences, even if made (or perhaps especially when) with the best intentions. Justice demands not only a reconsideration of boundaries, but also that when we make a decision and thereby draw a boundary, that we take responsibility for it. Perhaps Cornell (1992: 169) summarizes it best when she writes, "Derrida...leaves us with the infinite responsibility that undecidability imposes on us...[u]ndecidability in no way alleviates responsibility...[w]e cannot be excused from our own role in history because we could not know as to be reassured we were 'right' in advance".

In the Introduction I stated that the two important concepts in this thesis is justice and law. In Chapter One and Chapter Two I discussed justice. In the next chapter I will focus on law and specifically the way it is understood (and critisized) in two contemporary movements in jurisprudence.

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[1] Derrida/Caputo (1997:116)

[2] Caputo (1991: 5)

[3] Derrida delivered only this first half of his paper at the Cardozo symposium. He delivered the second half at a conference on "Nazism and the Final Solution : Probing the Limits of Representation" at UCLA in 1990.

[4] It was first published in the Cardozo's law review during 1991 (Vol. 11). It was then published for a second time in *Deconstruction and the Possibility of Justice* (1992), edited by Drucilla Cornell, Michel Rosenfeld and David Gray Carlson. I will be quoting from this version.

[5] This essay of Benjamin forms part of his collection of essays *Reflections: Essays, Aphorisms, Autobiographical Writings*.

[6] An explanatory note on the way in which Derrida uses the words *droit* and *loi*. Derrida (Derrida/

Caputo 1997: 16) writes, "I found it useful to make a distinction between law and justice, what one calls in French *le droit*, that is, the right, or *Recht* in German. In English, when you say "law", you say both right and law, *le droit et le loi*, at the same time, whereas in French we distinguish between them."

[7] Simon Critchley (1992) also argues for the ethical significance of deconstruction, by emphasizing the dialogue between Derrida and Levinas, and the significant influence of Levinas on Derrida.

[8] I derive this phrase from Benita Parry (1995: 95) who, in paper on reconciliation and remembrance wrote, "our best hope for universal emancipation lies in remaining unreconciled to the past and discontented with the present".

[9] In this regard, Derrida (1992: 22) refers to Emmanuel Levinas and his "Jewish humanism", his understanding of justice as the concern for the other , and the absolute dissemmetry between the self and the other.

[10] Berns (1996: 78), discussing Derrida, writes, "[i]n a situation of undecidability, only a decision can bring a resolution. But the status of such a decision cannot be decisionistic. A decision always borrows from the system and is, therefore, enclosing...a decision under conditions of undecidability requires more. Decisions have to be made because of an inaccessible outside. Therefore, a decision is always such that what has to be reached cannot be reached. That is why politics is deconstructable".

[11] In the same paragraph Derrida declares, "[a] democracy or a politics that we simply calculate, without justice and the gift, would be a terrible thing". A society that has given itself totally to calculation is perhaps best illustrated by Zygmunt Bauman in *Modernity and the Holocaust* (1987). He argues that the 'cause' of the Holocaust lies not in exceptionally evil human beings, but in Modernity. Bauman (1987: 17) writes, "The 'Final Solution' did not clash at any stage with the rational pursuit of efficient, optimal goal implementation. On the contrary, *it arose out of a genuinely rational concern, and it was generated by bureaucracy true to its from and purpose*" [Bauman's emphasis].

[12] I will not examine Levinas's arguments or philosophy in any detail. He is referred to here only in as much as Derrida makes use of his 'definition' of justice. I also refer, in Chapter Two and Chapter Four, to the Derrida's critique of Levinas since it is relevant to his arguments on justice.

[13] Rober Cover (1986) makes some very important points on violence and law, to which I will refer in section 2.5 .

[14] Derrida (1992: 4)

[15] Sachs (1997: 17)

[16] Derrida's notion of the gift is complex and one which I will not explore in any detail here. For more specific references by Derrida on the concept see *Given Time* (1991) and *The Gift of Death* (1995).

[17] I derive this formulation from David Fraser (1989: 168), a Critical Legal Scholar who will feature in the next chapter who writes, "[b]ut this is the key developing... a postmodern politics. To discover the power of the absent and the loudness of silence".

[18] It is important to note that Bauman (1991, 1992, 1993) uses "moral" and "morality" in the same way in which Cornell (1992) uses the concepts "ethics" and "ethical", i.e. not rule-bound behaviour, but a focus on a non-violent relationship with the other. It is a move from rules to responsibility, and from the universal/general to the singular.

[19] An interesting/important aspect of Derrida's understanding of justice is the concept of haunting. Justice is haunted by remembrance, by the ghost of the undecidable. Above all, justice is haunted by limits that it runs into in its aporetic relationship with law. But this does not mean that haunting is something negative. Being haunted is to be constantly reminded that justice is difficult and that society is complex, and that we are continually called to action.

[20] (1986: 1601)

[21] Quoted by Bauman (1991) on an unnumbered page preceding the title page.

[22] I derive this formulation from Berns (1996: 78) who writes: "Deconstructible in the name of something undeconstructible, and that which I referred in my introduction as 'quasi-politics', because it is something that exceeds politics even if it takes place nowhere but within politics".

[23] This, of course, is Bauman's argument in *Modernity and the Holocaust* (1991).

CHAPTER 3

DISRUPTIVE MOVEMENTS IN CONTEMPORARY JURISPRUDENCE: CRITICAL LEGAL STUDIES AND CRITICAL RACE THEORY

1. Introduction

> *"But this is the key to developing... a postmodern politics. To discover the power of the absent and the loudness of silence."*
>
> David Fraser[1]

Traditionally jurisprudence has been dominated by two schools of thought, namely, natural law and positivism. The former focuses on the relationship between law and morality and argues that there are universal standards, inherent in nature which make it possible for us to know justice. The latter places the emphasis on law, because, they argue, ethics or morality is contingent. Justice is reduced to what the law says it is. In the last twenty years, however, there have been two important developments in jurisprudence that have challenged the traditional schools. They are the Critical Legal Studies (CLS) movement, which started in the mid 1970s, and the Critical Race Theory (CRT) movement, which was formed in the 1980s. Both these movements are more radical than any that preceded them, and they strongly challenged the idea that the law was neutral or could be equated with justice.

In this chapter I will look at both these movements. I will give a brief account of their history and main themes. I will also assess them against the ideas that were discussed in the previous chapters, namely, injustice and the aporias of (an ethical conception of) justice, in other words, Derrida's understanding of justice. Both CLS and CRT reflect an unease with justice as it has traditionally been understood in jurisprudence. I will examine the way in which this unease is expressed and the strategies that these schools propose.

My examination of CLS and CRT is by no means exhaustive, but that is not my intent; I wish to point out that these two jurisprudence movements could

be seen as important disruptive forces. The disruption they cause within jurisprudence, although not without problems, is important since it creates the space to talk about law in a different way.

2 Critical Legal Studies

2.1 Background

> "When they find out what we are doing, they're going to come after us with guns."
>
> Mark Tushnet, CLS scholar[2]

Critical Legal Studies (CLS) was launched at a conference[3] in 1977 that was convened by Mark Tushnet at the University of Wisconsin. It consisted of a group of legal scholars "repelled by the supposition that neutral and apolitical *legal* reasoning could resolve charged controversies...[and] put off by the hierarchical classroom style in which phony priests first crush and then bless each new group of initiates" (Kelman, 1987: 1) [Kelman's emphasis]. Tushnet (1991: 1516) gives a broad definition of CLS: "It is a political location for a group of people on the Left who share the project of supporting and extending the domain of the Left in the legal academy". In the USA these conferences - also referred to as Summer Camps - were held annually. The movement spread to France, Germany and, most notably, Britain. The focus here, however, will fall mainly on the American movement.

The CLS movement is a diverse movement. It cannot be called a school of jurisprudence. They have an informal approach to legal scholarship, which has been criticized - specifically by the Critical Race Theory jurisprudence movement (a point to which I will return shortly). This is illustrated, for example, in articles such as "Roll Over Beethoven" (1984), which takes the form of a conversation, sometimes heated, between two prominent CLS scholars, Duncan Kennedy and Peter Gabel. The CLS style has also been criticized for being "moralistic and preachy" apart from being too informal (Schwartz 1984: 44).

'Disorganized' or not, however, they were seen as a considerable threat to traditional schools of law and jurisprudence. The fear of 'crits' led to a wave of "new McCarthyism"[4] in American law schools (Fraser 1990: 781). Yale University's Law School went as far as to fire six academics involved in the early developments of CLS[5]. The *Wall Street Journal* declared that Harvard Law School will "sink or swim with its ability to quiet the crits" (quoted by Frug 1987: 681). CLS was portrayed not only as a disruptive movement, but also a violent one. More than a decade after the first CLS conference the witch-hunts continued: Clare Dalton and David Trubek were refused tenure at Harvard; in Trubek's case his tenure was overruled by the university's president (Gordon 1989: 14). Guyora Binder (1987 : 6-7) aptly declared, "[t]o some their rise to prominence has heralded the collapse of the rule of law, Western civilization and - worst of all - the Harvard Law School".

The CLS movement has links with other movements, namely, the student politics of the 1960s, neo-Marxism and the American Legal Realist jurisprudence movement (hereafter Realism). Firstly, the people who attended the CLS conferences were strongly influenced by the radical politics of the 1960s and the "famous and sentimental piece of utopianism that emanated from the Yale Law School in 1970" (Schwartz 1984: 415-416). A negative aspect of this link with radical politics is that some CLS members/followers believe(d) that labeling something 'law' or 'ideology' was enough to utterly debunk it. The positive aspect of CLS relationship with radical politics is that it retained a utopianism and a hope that society might be improved. Secondly, neo-Marxism also influenced the CLS movement, specifically its use of the concept of ideology. CLS uses it in the pejorative sense, in other words, to indicate false consciousness and practices that are morally wrong. Thirdly, the Realist attack on liberal ideology is taken further by CLS. Lastly, the (American) CLS movement was also influenced by other developments in philosophy and the social sciences, for example, structuralism.

A few words need to be said about Realism, of which CLS, although it takes it a step further, it is a descendant. Realism - which has its origins in the years following the First World War/European Civil War - started the revolt against

formalism[6]. It is, like CLS, a diverse movement. Two dominant themes can be identified (Fraser 1988/9: 37). First, the "pure deconstructive stage" that challenged the inherent contradictions of legal rules and doctrines and law's formalistic and rationalistic world view (Fraser 1988/9: 37). Second, there was the "reformative approach" which argued for a contextualization of law, rather than its total debunking (Fraser 1988/9: 37). A few general points regarding Realism can be made. It rejected mechanical jurisprudence that ignored experience; it stressed that legal decision-making could not be separated from social context and extra-legal phenomena (therefore, they were also critical of legal education, because it was too far removed from legal practice). Oliver Wendell Holmes declared, "the life of the law has not been logic: it has been experience" (quoted by Van Blerk 1996: 57). The Realists - such as Llewelyn, Cook and Oliphant - also made the (then) radical move of acknowledging the indeterminacy of law - one of the main tenets of CLS. Special attention was also paid to the history of law in order to expose this (Van Blerk 1996: 65). Language was also not such a simple matter any more. Frank argued that legal language had no center of meaning: "you peeled and you peeled until there was nothing left" (quoted by Van Blerk 1996: 66). He describes accepted (norm-alized) terminology, such as 'freedom of contract' and 'good faith' as "weasel words" and "safety valves" (Van Blerk 1996: 66).

Put differently, Realists examined the historical development of legal doctrines and discovered that they had evolved into their 'modern' forms because of chance, contingencies and partisan interests. There is far more to law than logic, there are also values and interests. With this Realism linked the important role the personality of the judge did in fact play in legal adjudication. Social context is of the utmost importance, and this includes the social context of the judge. For example, Frank, in *Law and the Modern Mind* (1932), argued that judging can be reduced to the Freudian underpinnings of judges' minds. The Realist are also skeptical of the idea of rights - which they labeled "lump-concept thinking" - especially property rights, since they argued that these are nothing more than a strategy to protect the status quo[7]. At the end of the day, the Realist argued, law is what the judge says it is, nothing more.

Realism and CLS share a concern for 'law in action' and, more importantly, for exposing the myth of law as a rational and neutral process. Rules and their application are interwoven, not only with the personal values and prejudices of the judges, but of all the people benefiting from the maintenance of the status quo. Both movements aims to shatter the consensus of liberalism, arguing that it is not consensus but merely arbitrary compromise (Duxbury 1997: 424, 457). Realism and CLS, however, differ on four main points. Firstly, Realists' criticisms were more selective and suggested reform in certain areas - and they believe that some real reform/transformation is indeed possible. CLS, on the other hand, is more concerned with the entire framework of the ideology of liberalism and law (Holdcroft et al. 1991: 473). CLS wants to change society entirely, i.e. not the simple continuation or slight adaptation of existing norms and rules, but rather the establishment of an entirely new system. The second point links with the first. Realism aims their attack at law and retains some faith in processes, i.e. politics (Fraser 1988/9: 39). CLS vehemently attacks (liberal) politics and, especially, its relationship with law. There is no retreating into 'democratic ideals', rather CLS is critical of these notions since they hide partisan interests. Thirdly, CLS uses the methodologies of other disciplines, borrowing interpretive devices. For example, Duncan Kennedy (1988) uses structuralist techniques to unpack Blackstone's *Commentaries*. Lastly, Realism was more a school of thought than a formal movement; they did not hold conferences nor did they compile mailing lists (Duxbury 1997: 425).

2.2 Main Themes

> *"The world is not running smoothly."*
> Mark Kelman, CLS scholar[8]

Although CLS is by no means a single school of thought, it can be divided into three phases or "generations" (Minda 1995: 115-123). The first phase started in the mid-1970s and focused on the indeterminacy of law - the leading figures being Unger and Kennedy[9]. This was followed, in the early 1980s, by a second phase, when the focus fell on the deconstruction of legal doctrines, with Frug being a central figure. In the late 1980s, under the influence of

Critical Race Theory, the question of identity politics was the most important theme (although this never became a very prominent CLS theme). Minorities accused the CLS movement of not paying serious attention to the issue and formed a new movement, namely the Critical Race Theory movement.

Russell (1986: 4-5) identifies three schools in the CLS ranks. The first is the Frankfurt School of Marxist Criticism. Law, they argue, reflects, confirms and reshapes the social divisions and hierarchies inherent in capitalism. Secondly, there is the Orthodox or Scientific School, which was opposed by individuals such as Trubek and Kennedy. Lastly, there is the "law and society perspective", which combines the first two schools. Peirce (1989: 47) argues that CLS operates on two levels. The first is the empirical level which addresses the judicial decision-making process. The second is the theoretical level, which links with critical social theory and deconstruction. The emphasis in CLS thus falls on theory and process; little reference is made to concrete experiences of injustice.

A theme that dominates CLS is the ideological character of law (i.e. Law). The purpose of laws, judges and even law schools is to maintain and protect the status quo: "behind all legal doctrine and legal systems stand political judgments that reflect the...domination of the makers and shapers of the law" (Standen 1986: 995). Not only does law legitimate unjust practices, but it is itself an illegitimate hierarchy. CLS aims to demystify the notion that law is neutral or even rational. According to CLS there is nothing ultimate or timeless about law; it is the outcome of ideology and social contingency. First principles are "products of historical circumstances and historically specific modes of legal reasoning" (Holdcroft et al. 1991: 472). Davies (1996: 4) perhaps summarizes it best when she writes, "[o]ne of the most entrenched and dangerous ideas about the law is that it is neutral". Liberal ideology, CLS argues, obscures this fact by denying the value choices inherent in the application of legal rules, thereby freezing the status quo (Belliotti 1987: 26). Liberalism also assumes that truth, knowledge, politics and self-interest can be separated.

CLS, like Realism, does not simple accept standard legal terminology, especially not concepts such 'rights' and 'Constitution'. CLS takes the history of these legal concepts seriously, seeing it not as History but as genealogy. In other words, it rejects essentialist ideas of history and undermines codified history. Genealogy, as I argued in Chapter Two, aims not for essence and underlying laws, but discontinuities, that which is "deepest and murkiest" (Dreyfus et al. 1982: 106). It focuses not on History and Great Events, but on the 'small' stories and singular narratives. By approaching law's history by way of genealogy, CLS refuses to glorify origins; it scratches away at the origins of accepted legal concepts. CLS argues that the legal order as well as legal rules are indeterminate; in other words, every case is a mirror-image of contradictory norms (Van Blerk 1996: 151). This is the result not only of the plural nature of society, but also because there is no difference between legal and political discourse. The opposing ideological controversies of politics are reproduced in law (Van Blerk 1996: 152). Therefore, judicial decision-making is not a rationally determinate process.

A second important theme in CLS is the attack on liberalism, which to them is the source of all evil. Liberalism preaches the gospel of Individuals (i.e. self-contained, atomistic individuals), private property, the distinction between public and private, and law and politics. It is the latter conception that comes under criticism from CLS, namely, the assumption that law is something above and beyond politics. Although many would acknowledge that law and politics are connected in some (superficial) way, CLS has a more specific understanding of this connection: "law is a form of social activity in which conflicts [are] worked out in ways that [contribute] to the stability of the social order" (Tushnet 1991: 1526). In other words, the status quo is protected and portrayed as the natural order via the legal order. Furthermore, the ideology of liberalism - that which law protects - produces contradictions, namely, between individual autonomy and communitarianism. All human rights are fundamental; some (read: right to private property) are more fundamental than others. The rights that uphold and entrench the ideology of liberalism, such as private property, are regarded as more fundamental[10]. Gabel and Harris (1989: 304), two prominent CLS scholars, write, "the great weakness of a

rights-oriented legal practice is that it does not address itself to a central precondition for building a sustained political movement - that of overcoming the psychological conditions upon which both the power of the legal system and the social hierarchy in general rest...in the long run it tends to reinforce alienation and powerlessness, because the appeal to rights inherently affirms that the source of social power resides in the state rather than in the people themselves".

Liberalism is bound to the myths of The Constitution (i.e. the myths of the intent of the Founding Fathers and the clear meaning of words) and The People (i.e. a homogeneous group of self-contained, atomistic individuals). It uses this mythology to produce "a narrative that reconciles reason with authority, authority with freedom, and freedom with reason" (Schlag 1997: 3). These concepts, argue CLS, are not innocent; they are enmeshed in ideology that protects the dominant group. Furthermore, CLS is sensitive to the fact that human relations are more complex than liberalism pretends it to be. Individuals are not simply Individuals, but stand in relation(s) to others.

Thirdly, CLS argues that legal theories are false consciousness. Law is one of the most powerful methods to uphold false consciousness - after all, it is the law. As Cornell (1992: 159) points out, law decides what is relevant, and that is an enormous amount of power. Law legitimates the status quo in such a way that it is seen as natural and, literally, as illegal to undermine it. Law is meaning in the service of power[11] and that power lies in the hands of the dominant class. Peter Gabel declares, "[l]egal thought originates...within the consciousness of the dominant class because it is in this class's interest to bring it into being, but it is accepted and interiorized by everyone because of the traumatic absence of connectedness that would otherwise erupt into awareness" (quoted by Van Blerk 1996: 156).

The method that CLS uses to analyze legal texts is called trashing - which some scholars, mistakenly, equate with deconstruction. It exposes hierarchies, contradictions and undermines illegitimate structures and destabilizes "pervasive complacency-inducing rationalizations" (Kelman 1984:

327). The aim of trashing is to reveal the partisan nature of ideology within the law and to do so often enough so as to cause unease with the law and the legal system[12] (Peirce 1989: 56). Mark Kelman (1989: 209), a CLS scholar, writes, "it takes specific arguments very *seriously* in their own terms; discovers that they are actually *foolish* ([tragi]-*comic*); and then look for some (external observer's) *order* (*not* the germ of truth) in the internally contradictory, incoherent chaos we've exposed". It shakes traditional legal scholarship out of its smugness about order and coherence and the belief that law is the only thing standing between society and chaos. Furthermore, law can never simply be calculation, because law itself is contradictory. Kennedy used trashing to expose the contradictions in Blackstone's *Commentaries*, and the application of the cost-benefit analysis to entitlements. In the former case Kennedy (1979) points out that there is a fundamental contradiction between individual freedom and community, because relationships with others are both necessary and incompatible with our freedom. His second important argument is that legal categories are not neutral, but created; they should be eyed with great suspicion. In the latter article, Kennedy exposes that it does not create a rights framework, but requires a preexisting one.

Two comments needs to made. Firstly, one must be careful about equating trashing with deconstruction. Trashing seems to work with the assumption of a weak version of postmodernism, i.e. a type of "anything goes" approach. But if anything goes, then everything stays the same. It could be understood then as a conservative move. Deconstruction, and specifically Derrida, acknowledges that transformation is also necessary. Secondly, pointing out hierarchies and the oppression and injustice that they contain and sanctify is an important *ethical* move, and to a limited extent trashing does this. It points out that which has been marginalized and the voices that have been silenced - an aspect that Critical Race Theory (CRT) places great emphasis on.

One of the hierarchies that CLS criticizes (especially in the work of Kennedy) is the critique of legal education. Law and therefore the status quo, argues CLS, is maintained and protected not only by judges, lawyers and liberals, but also by law schools. According to Kennedy (1988) the purpose of legal

education is the theoretical justification of existing rules. It is, after all the Law, unchanging, with a long and proud History and state-endorsed.

Kennedy[13] (1988) is highly critical of the way in which belief structures are transmitted in law schools[14]. Law schools, writes Kennedy (1988: 38), are intensely political places with a trade-school mentality[15]. Students are taught how to 'think' and 'act' as lawyers. Anything that does not fall under the checklist that they are provided with is nonsense or, even worse, illegal. In other words, they are taught to calculate by using correct legal reasoning. Kennedy (1988: 45) declares, "[t]eachers teach nonsense when they persuade students that legal reasoning is distinct, as a method for reaching correct results, from ethical and political discourse in general". And yet, students are taught that Law is the Final Word - and the Just Word. Without it, the world will sink into chaos. Williams (1987: 134) writes,

> "we as lawyers are taught from the moment we enter law school to temper our emotionalism and quash our idealism. We are taught that heartfelt instincts subvert the law and defeat the security of well-ordered civilization, whereas faithful adherence to the word of law, to *stare decisis* and clearly stated authority would as a matter of course lead to a bright, clear world like that of the Land of Oz".

The teachers are silent on the immense power that is involved in law - and the ideology that it serves. Legal rules and reasoning are presented as objective, necessary and neutral. But, "rules in force are a factor in the power or impotence of all of social actors...[they are] an part of the equation of power rather than simply the function of it, people struggle for power through law"[16] (Kennedy 1988: 47). But in stead of pointing it out or being critical about it, legal education mystifies it. Kennedy's critique of legal education links with Freire' s critique of the so-called banking concept of education. Freire (1993: 52), whom I mentioned in Chapter One, writes, "[t]he teacher talks about reality as if it were motionless, static, compartmentalized, and predictable...[h]is task is to fill the students with the content of his narration - contents which are detached from reality...words are emptied of their concreteness and become a hollow, alienating verbosity". Education, argues

Freire, becomes an act of depositing. The students are left to memorize the checklist bestowed on them. The checklists that Kennedy and Freire describe are dangerous for three reasons especially. Firstly, they serve those who are already in power and, therefore, they provide no framework for oppressed or marginalized groups to express their experiences of injustice, thereby aiding injustice. Secondly, these checklists have the power to label experiences of injustice as 'misfortune' or 'natural'. Thirdly, law is taught as calculation; if it is taught as calculation, it will be practised as such. Allegretti and Dougherty (1985) argue that the way law is taught leaves no space for students' moral instincts. It also does not leave the space for law that is improved by the impulse of justice.

Critics of CLS criticize trashing as a purely negative process that leaves behind only debris - and to their great frustration, no new checklist or blueprint for a ordered society. Kelman (1984: 297) responds by saying that the problem with the more traditional legal scholars is that "[they] were told (repeatedly) by their moms and dads, 'If you don't have anything nice to say, say nothing at all' "[17].

Unger (1983: 25-39), however, does make some more 'concrete' proposals under the heading of internal transformation. First, personal relations must be transformed to minimize social division and hierarchy. Second, the institution of democracy must be carefully watched at all times to ensure that power is not vested in the hands of a small faction. Third, government must be reorganized and transformation programmes must be implemented in all branches of government. Unger (1983: 32) also proposes that there be multiple branches of government in order to deal better with many concrete issues of social injustice. Lastly, the systems of rights needs to be reconsidered so that the emphasis does not fall solely on property rights. Unger (1984: 39) proposes four categories of rights: immunity rights (security against the state, organizations and other individuals), destabilization rights (the right to disrupt established institutions), market rights (claims to proportions of social capital, i.e. distributive justice) and solidarity rights (mutual alliance and communal rights).

Gabel and Harris (1989) propose a different strategy, namely one that does not focus on rights-consciousness, but rather on expanding political consciousness; or, put differently, a strategy of resistance that emphasizes empowerment rather than rights. Gabel and Harris (1989: 304-306) emphasize three general points. First, there must be a relationship of equality and respect between lawyer and client, thereby subverting the usual lawyer versus non-lawyer hierarchy. Second, the symbolic authority of the law must be demystified and challenged. Third, the way in which legal conflicts are represented must be reshaped. They cite some infamous political trials where these strategies were used effectively. In the Chicago Eight trial, in the 1960s, the accused were charged with inciting violence against the state, i.e. challenging the hierarchies of the state (Gabel et al. 1989: 306). The traditional defense would have been to argue that there was no 'intent' or that the accused did not 'conspire'. However, the defense lawyers, in line with their clients' 'crime' challenged the hierarchy of the court itself, making the charges look ridiculous. In the Inez Garcia trial a woman was charged with killing one of the men who raped her (Gabel et al. 1989: 307). The traditional defense would have been to argue 'impaired consciousness' or 'temporary insanity'. Susan Jordan, the defense lawyer, however, challenged the myths surrounding rape as well as the sexist myths about self-defense (Gabel et al. 1989: 308). The anger of the accused was portrayed not as a motive, but as justified.

According to Gabel and Harris (1989: 315) the strategies that they propose can also be used in more 'ordinary' cases. For example, in family law the public/private distinction should always be challenged and so-called non-traditional families should be supported (Gabel et al. 1989: 316). In the court rooms itself 'standing rules' should be challenged (Gabel et al. 1989: 318). Lawyers should also form small working groups in order to be more effective. The bottom line, argue Gabel and Harris (1989: 318-319), linking with Kennedy, is that lawyers should stop talking and acting like lawyers and disrupt the system in daily practice.

To summarize the arguments in the preceding paragraphs: CLS argues that law is not neutral or independent, but "historically contingent and related to a broad social and political content of which it is but a part" (Fraser 1989: 154). They challenged the underlying ideology of law in (their) society, namely, liberalism. CLS argues passionately against law as calculation, the area where they make their most important contribution, perhaps. But there are also some serious problems. Firstly, CLS says very little about concrete experiences of injustice - a point stressed by Critical Race Theory (CRT) scholars such as Richard Delgado. Secondly, some CLS scholars - with David Fraser as an exception - reject the idea of 'law' to quickly. Law is a problematic concept and a mechanism of exclusion, but because it is so powerful, it also deserves attention.

2.3 Some problems with CLS

Richard Delgado (1987), arguing from the point of view of Critical Race Theory[18] (CRT), identifies a number of problems with CLS. He argues that CLS has very little to offer minorities (i.e. marginalized groups in the context Delgado speaks in), because of its informal character and negative programmes.

Delgado identifies five problems with CLS. First, argues Delgado (1987: 304-306), the criticism of rules is problematic for minorities. Rights, despite all the problems that CLS notes, are at least a start. While CLS view rights as a source of alienation and mystification, minorities do find a high degree of safety in them - while they are waiting for the CLS utopia to arrive. Second, CLS rejects piecemeal reform as useless; minorities view it differently (Delgado 1987: 307). They realise that, although decisions, such as *Brown v The Board of Education* do not end racism, they do help. They do play a crucial part in legal and social transformation. Third, CLS's idealism is problematic to minorities (Delgado 1987: 308-309). CLS assumes, according to Delgado, that the obstacles in the path of a just society are intellectual; society only needs to be freed from the liberal ideology and the rest will follow. In other words, the world does not need to change so much as we have to

learn to think differently about it. Fourthly, Delgado (1987: 310-312) argues that the CLS understanding of false consciousness is problematic. It assumes that oppressed groups easily buy into the System and never distrust it. CLS also assumes that only these groups are affected by false consciousness. This also links with Lötter's (1993) and Freire's (1993) argument that is important for oppressed groups to find a way to conceptualize their experiences of injustice in order to effectively act against injustice. Merely being 'freed' from their 'false consciousness' will not achieve this. Lastly, Delgado (1987: 315) attacks the informality of the CLS movement - this links with his earlier comments on rights. Oppressed groups and minorities need rules and procedures because, argues Delgado, if there are none, decisions are left to discretion and these decisions will be tainted by racism and sexism. Rules, therefore, have a positive side in that they can curb such discriminatory practices. This is an important point. Rules might be problematic and they might not be the best solution, but we need them. We need (imperfect) rules and laws to cope with injustice. Rules and laws might not be equated with justice, but they do help us to do something about injustice.

Delgado (1987: 319) ends his critique of CLS with a bitter attack on white law professors and calls CLS a gang of friends oblivious to real injustice. Some of this is true. CLS has very little to say about concrete injustice, but perhaps this is because their target is rather legal scholarship and law in general. A CLS scholar, Guyora Binder (1987: 32), acknowledges that CLS "simply is not a movement of oppressed people", because its members are not oppressed. Louis Schwartz (1984: 421) declares that "no doubt many CLS members, upon emerging from the nightmare of discovering evil, will eventually turn to the constructive tasks of reform. But CLS has not yet taken this step". Furthermore, they are not truly willing to risk too much for the radical change they propagate. They do not lobby for legislation, because they do not believe that it will produce social change. They do not engage in or incite radical political action, because it is too dangerous. But what they *did* do is cause great unease in their 'own' environments, namely, ivy league law schools at Harvard and Yale universities. Perhaps Binder (1987: 36) summarizes the

situation best when he writes, "if they lack the courage of their convictions, at least their convictions require courage".

Concerning Delgado's other point: CLS did start as a close-knit group of Yale and Harvard academics and, especially, because of the friendship between Duncan Kennedy and David Trubek[19] (Davies 1994: 144-145). Yet one can hardly debunk a movement such as CLS because the leading figures are friends. Delgado also omits to mention that CRT grew from the CLS movement and it makes use many of CLS's ideas. In spite of all its shortcomings and mistakes, CLS did create the space for the other "non-traditional" jurisprudence movements that followed. Even if they do not give a clear framework of what they are doing or a blueprint for where they are heading, they must be valued for the disruption they caused in traditional legal scholarship.

Perhaps the most serious criticism of CLS comes from Cornell[20] (1992: 100-103). Cornell argues that CLS falls into the trap of the first version/story of postmodernism. This is the 'anything goes' version; in other words, there is no hope, no Good and certainly no justice. According to the second version/story' of postmodernism we should still strive for justice, constantly being discontented with the present structures, while realizing that we will never achieve true justice. This criticism is illustrated with reference to CLS' theory of legal and social transformation: there is no theory (Theory). This links in an important way to Delgado's most "fundamental" criticism against CLS, namely, a blindness to concrete injustice. CLS, in other words, does protest against the exclusionary nature of the law, but fails to truly heed Derrida's call to action. A possible explanation, if not defense, could be this: CLS is a less of a t/Theory than it is a disruption. It seems to pin its hopes on the withering away of law, government and liberalism in the not too distant future, to be replaced by "a communal world of spontaneous social cooperation" (Forbath 1983: 1064). Until that happens, however, CLS proposes little else in the sense of transformation. Until the 'withering away' little can apparently be said or done about concrete injustices. Put differently, CLS ignores the urgency that Derrida stresses. Feeling dissatisfied with existing structures is important,

but not enough. Action is also (and always) needed because, as Derrida (1992: 26) argues, justice is demanded here and now. The 'fact' that society is complex, and the relationship between law and justice is even more so, is never an excuse to keep out of juridico-political battles (28).

Another serious problem with CLS is that slips too easily into portraying law "as a Satanic mill churning out nothing but snares, illusions and false consciousness" (Forbath 1983: 1043). Law might problematic, but its complexity - and the complexity of the society in which it functions - is too easily ignored by some CLS scholars. (David Fraser being a notable exception.) Furthermore, CLS presumes to a large degree that once the indeterminacy of rules and the hidden ideology of law is pointed out, there will be some revolt. But, as Forbath (1983: 1040) points out, most people either know or suspect this. Even though they do not agree with it, they do submit to it, because laws do make society more manageable, and they do place some constraints on power as well as providing a way to intervene against injustice. To some extent, CLS does acknowledge this. Kennedy (1989: 147) declares that "contradiction is a historical artifact...[u]nderstanding this is not salvation, but it does help".

2.4 The Importance of CLS

Kennedy's words in the previous paragraph say something crucial about CLS in general: it did not bring salvation and it did not provide a blueprint of how to organize society better, but it did help. CLS 'channeled' Realism's unease with law as an easy calculation into a disruptive force. It not only disrupted the smugness of traditional jurisprudence, but also created the space for other movements, like CRT, to follow. (The measures that Gabel and Harris propose is also an example of this movement to disrupt.) CLS creates the space to talk about justice, although its opponents never really make this move - and *this* is their greatest failure.

The CLS movement argues, as Kelman (1989: 329) puts it, that "the world is not running smoothly". Law and politics cannot be separated. There is more to

human beings than liberalism propagates; they are not simply empty subjects, but stand in relation to others. CLS distrusts rules, categories and rights; we cannot fall back on the ideal 'democratic ideals'. It takes the history of these concepts seriously and acknowledges that "legal history is winner's history" (Minda 1995: 108) and that the law's vocabulary allows certain voices only. For, like Realism, CLS takes the genealogy of traditional/accepted legal categories seriously. CLS does not herald the end of legal scholarship as its opponents argue. It is a type of jurisprudence that rejects easy answers. The critics of CLS declare that it is nihilist, but it is rather a move towards acknowledging complexity.

CLS is not unproblematic, but it did make a very important move in jurisprudence, since it was so disruptive. CLS, argues Fraser (1988/9: 40-41) does not make a move toward nihilism, but towards Law (under erasure). In other words, it is not a denial of the importance of law, but a rigorous attempt at the micro analysis of the power relations which create law and which are operate with the implementation of laws. Some may argue that Fraser is being too generous to CLS, but I do think that this aspect of CLS is often ignored[21] too easily. CLS vigilance toward power and ideology is a welcome relief from the smugness of of the belief in traditional jurisprudence that all is well and society is running smoothly - this, at least, is a nod in the direction of complexity. Most importantly, the ethical importance of disruptions should not be underestimated. Disruptions create space for that which has been ignored or marginalized. CLS was vigorously irreverent in contrast to the traditional respect for law as something divinely pure, removed from politics and ideology and an instrument to attain the perfect society. If Realism initiated the feeling of unease, CLS emphasized that law should never simply be calculation. Furthermore, CLS also has its "unerasable Utopianism". Fraser (1984: 775) writes, "[t]he vision of abnormal discourse remains one of enlightenment and liberation. Those goals must be of our own creation, we can expect nothing from the hierarchical he-God of liberalism". This is a move in the direction of Derrida's understanding of justice, namely, the impulse to improve the law and the realization that there are no easy answers.

2.5 CLS and Derrida's understanding of justice

Now that I have tried to give some account of the CLS movement, I will attempt to asses the way it 'measures up' against the important points raised by Derrida.

CLS is an important move in the direction of a Derridean jurisprudence with its statement that law is not neutral nor far removed from power and violence. Even if one does not agree with where CLS goes next with this statement (i.e. falling into the 'anything goes' trap), they still make an important point. CLS refuses to underestimate the power of law and its exclusionary power, and the emphasis that they place on this aspect of law had not been seen before in jurisprudence. In refusing to accept the neutrality of law and even legal terminology and arguing that law is closely geared towards protection of the status quo for sake of veiled (and not so veiled) interests, they take the power games and violence involved in law very seriously. A second point which links with Derrida's arguments on law and justice is that CLS also refuses to glorify law's origins. In exposing law's history as the result of custom and the protection of partisan interests, CLS points to law's foundationlessness. Furthermore, it also exposes "the nakedness of power struggles and, indeed, of violence masquerading as the rule of law" (Cornell 1992: 155). Lastly, by revealing law's unglorious past, CLS also plays a role in pointing out how injustice is legalized by reference to tradition and/or precedent - in other words the acceptance that it is the way in which 'things have always been done'.

CLS argues against the ideology of liberalism's understanding of the individual, i.e. one who is self-contained and atomistic and the in which liberalism also limits the dealings between individuals to (distributive) transactions. CLS criticizes this and stresses that individuals are also members of communities, and that individuals are engaged in more relations than those which liberalism's law legislates. This links with Derrida's understanding of the individual as standing in a network of complex relations. Furthermore, the relation with the other - which is how Levinas describes

justice, and which is a formulation Derrida has great appreciation of - never has the 'nature' of a transaction.

Derrida's understanding of justice and law, however, also highlights some important problems with CLS. Firstly, as Forbath (1983: 1043) points out, CLS does seem to view law as "as a Satanic mill churning out nothing but snares, illusions and false consciousness". It also, as I have argued earlier, seems to assume that calling law ideology is enough to debunk it and render it useless. Derrida's understanding of law, as I tried to illustrate in Chapter Two, is far more complex. Put differently, "it is not possible to eradicate the force of law by arguing for its conceptual instability" (Davies 1996: 5). Although Derrida has no doubt as to the violent and exclusionary nature of law, he does not abandon it. Instead he argues that we need law to put justice's call to action into action. We need law, because justice demands that we intervene against injustice. Derrida's complex understanding of law, also links with another crucial neglect of CLS, namely its omission of the idea of justice. CLS, quite rightly, protests vehemently against the oppressive nature of law. But it then uses this to abandon law and with it action. Delgado (1987) accuses CLS members of saying much, but refusing to get their hands dirty. His accusation is perhaps not too far off the mark. CLS does seem to realize the terrible 'nature' of law, but then at a crucial moment, it turns away from the challenge posed by this discovery. What they seem to miss, and which Derrida does not miss nor underestimate, is that living in a complex society means getting your hands dirty, and having to fight battles with less than ideal means. This is, I think, is one of the most important aspects of Derrida's understanding of the aporetic relationship between law and justice. If law (which is violent) and justice (which inspires us always to improve things) did not need each other, if they were not so interwoven, there would be no aporia of justice. The 'foundation' of the aporia of justice is that justice needs law.

To summarize: CLS seems to commit two main errors. First, it underestimates the necessity of law and, secondly it omits the importance of justice. CLS's understanding of the relationship between law and justice is perhaps similar law to that of natural law, i.e. heavenly and untainted. To Derrida, although

justice can never be equated with law, it does still need law to answer the call to action. Furthermore, while CLS members seems to be driven into the trap of 'anything goes' by law's foundationless 'nature', Derrida (1992: 14) sees it as a stroke of luck, since it means that we can (and must) still improve the law. It means that there is still the gap/space for justice to be "the impulse, the drive, or the movement to improve the law" (Derrida/Caputo 1997: 16). CLS's realization of the violent nature of law becomes its excuse for not acting against it, in the name of justice. This difference in understanding of law between CLS and Derrida is, perhaps, best illustrated in the differences between CLS' method of trashing and Derrida's idea of deconstruction. The proponents of trashing, as I have argued earlier, points out the hierarchies and contradictions in legal texts and decisions, and then gleefully stand back. The problem is that CLS assumes that it can stand back. Deconstruction, on the other hand, also points out hierarchies, contradictions and (unjust) exclusion. Yet it does not do so from a privileged position outside nor does it remove all the hierarchies it criticizes. As Culler (1982: 86) points out, "deconstruction works within the terms of the system but in order to breach it". CLS fails to see this and in doing so they fail to take on the challenge that justice poses.

Therefore, although CLS does make important moves, it fails in one crucial respect. The failure of CLS is not, as its critics maintain, the fact that it vehemently attacks the idea of law. It fails because it forgets to make a space for the idea of justice.

3. Critical Race Theory
3.1 Introduction

As I have already pointed out, the CLS movement created the space for other similarly 'radical' movements to follow. During the 1986 CLS Conference the fem-crit, i.e. a feminist movement based on CLS, was established. The issue of race was subsequently raised, but it was met with opposition. The majority of CLS members argued that such a move was unnecessary since they were already in alliance with the oppressed. Ever since that particular conference

the tension between the CLS and Critical Race Theory (CRT) movements grew. Numerous CRT scholars - Delgado, Matsuda and Williams, to name a few - have written articles criticizing CLS. The bottom line of these attacks is that CLS fails to address racial discrimination and concrete injustice, and that no more than token efforts have been made to include black academics in the CLS movement. Matsuda (1987: 323) argues that CLS has no normative source, because it fails to address issues of injustice raised by black academics. Williams (1989b: 403) writes that CLS "has failed to make [itself]... tangible, *reach*-able and applicable to those in society who need its powerful assistance most" [Williams's emphasis]. The fact that prominent CRT scholar Delgado (1993a: 741) omits CLS from his list of so-called "outsider jurisprudence" is significant. Although CRT is critical of CLS, it took over many of CLS's most important themes, namely, a skepticism towards the concept of law and the rejection of the idea that law is neutral (Delgado 1993: 744). The tension between the followers of the movements, however, remained.

The more formal establishment of the CRT movement followed a series of conferences, in the middle and late 1980s at the University of Wisconsin, under the leadership of Derrick Bell. Bell's departure from Harvard played an important role in the growth of the CLS movement. Some of his former students organized "The Alternative Course" which centred on the themes of law and race (Crenshaw et al. 1995: xiii). Ironically, the people who played an important role in keeping this course going were CLS scholars, the same people who were subject to bitter criticism from the CRT movement. The second important event in the CRT movement was the establishment of a minority section of the Association of American Law Schools (AALS) under the leadership of Ralph Smith and Denise Carty-Bennia (Crenshaw et al. 1995: xxi).

Another important factor in the rise of the CRT movement was the deep dismay and disillusionment that grew under black academics. Delgado (1984), in his famous article "The Imperial Scholar", argued that black academics in law schools were nearly non-existent. Furthermore, if they were appointed they were expected to "play it straight" and stay away from controversial (read

racial) topics (561). Law scholars were at best reluctant to consider the viewpoints of people who came from minority/marginalized groups. Delgado (1984: 561) points out that the twenty most cited law review articles on civil rights were all written by white men. There is, he argues, a failure in even in civil rights literature to consider the views from the margins. A few years later, Delgado (1989a), with his Delgado-Bell survey, discussed some of the most pressing concerns. Black academics at law schools experienced that they were assumed to be less qualified than their white colleagues; they felt isolated; they were told not to lecture on "sensitive topics" such as racism; they were denied tenure even if they published more than their white counterparts; and there were treated with disrespect by students "who assume they are the cleaning staff" (349-361). McCristal Culp (1991: 41) declares that law schools as well as legal scholarship "remains one the last vestiges of white supremacy in civilized society". These experiences were compounded by the fact that CLS did not address these and other experiences of marginalised groups.

There is also another aspect in CRT's genealogy that makes it so significant, namely that is was a departure from the dominant civil rights discourse (Peller 1990: 758). It moves away from the civil rights' approach of integration and assimilation and advocates the idea of a "voice of colour". Espinoza (1997: 932) declares, "[t]o be colorblind is to face assimilation into the standard of whiteness". In other words, CRT moves away from the position that justice requires that all people should be measured by the same standards and that the same rights and laws apply to all to an approach that argues that differences do in fact matter. This leads not only to a rejection of assimilation, but CRT also argues that difference, especially race, "makes a substantial difference in how scholars approach legal topics" (Peller 1990: 759). Their rejection of the intergrationist approach also has to do with their argument that the civil rights movement did not achieve real justice. Bell (1987: 22), in a book that is titled significantly *And We Are Not Saved*, writes, "we sought the Holy Grail of 'equal opportunity' and, having gained it in court decisions and civil rights statutes, find it transformed from the long-sought guarantee of

racial equality into one more device that society can use to perpetuate the racial status quo".

CRT does, however, seem to have a rather ambiguous relationship with the idea of rights. CRT (for example, Delgado (1987) whom I mentioned in the section on CLS) criticizes CLS for discarding the idea of rights and for failing to see that rights are important to minorities/marginalized groups. Yet, CRT also argues that rights (alone) are problematic, because they can be used as a norm-alizing power, one of the aspects of CRT to which I will now turn.

3.2 Main Themes

> *"I had learned a strange lesson: walls are laws to some people, and laws are walls to others."*
> C. Potok[22]

> *"Whatever is unnamed, undepicted in images...whatever is buried in the memory by the collapse of meaning under inadequate or lying language - this will become, not merely unspoken, but unspeakable."*
> Adrienne Rich[23]

CRT, like CLS, is a diverse movement[24], but it is united by two common interests (Crenshaw et al. 1995: xiii). Firstly, there is a focus on how the system of racial subordination and domination was created and its relation to concepts like the rule of law and equal protection. Second, CRT strives to find not only an understanding of this relationship between law and power, but also the formulation of strategies to change it.

As I mentioned earlier, CRT does share some of CLS's most important themes, namely a scepticism towards law and a rejection of the idea that law is neutral. It also shares with CLS a sensitivity to the brutal exclusionary power of the law. Like CLS, CRT attacks liberalism and specifically its cornerstones of universalism and formal equality, because liberalism furthers the pretence of 'colour-blind law', i.e. the myth that law is neutral. Apart from a distrust of law, two important themes, which are to some extent interwoven,

can be identified. Firstly, CRT places an emphasis on race consciousness in opposition to the idea of colour-blind laws. In other words, they argue that difference *does* matter. Second, CRT argues that there is a different voice, namely the voice of colour, that poses a significant challenge to law. CRT, therefore, places great value on narratives.

CRT acknowledges that law is power, and that this power serves to enforce and protect the status quo. It goes one step further, however, by bringing the concept of race and, most importantly, the 'different voice' of race into play. CRT protests against the blind application of the principles of 'neutrality'. Williams (1991: 48) writes that "[l]aw and legal writing aspire to formalized, color-blind, liberal ideas". Neutrality, argues CRT, is the standard for ensuring these (liberal) ideals and thereby protecting the status quo. In other words, the assumed neutrality of law is both a disguise for protecting the status quo and a disregard of the complexity of society. Far from being neutral, neutrality is itself also meaning in the service of power, because it is a useful way to disguise power and hierarchies[25]. Neutrality and objectivity, argues Delgado (1990: 1874), are used to make the legal system impregnable to minorities. Minorities and oppressed groups are forced to speak through these standard and accepted concepts - concepts that do not allow/acknowledge difference - if they are to be heard.

CRT argues that neutrality and objectivity should therefore be challenged, because there are different ways to think and talk about the world than simply these categories. The abstracted discourse of law, argues Crenshaw (1988: 1347) makes is much more difficult for marginalized groups (she specifically refers to black Americans) to speak of their realities and experiences of injustice. The concrete realities of experiences of minorities/marginalized groups must be taken seriously since they are perspectives that differ from the norm (Barnes 1990: 1864). Social justice, according to CRT, is not something that can be achieved by methods of objectivity and neutrality; rather, truth has more to do with the "symphony of experience" (Barnes 1990: 1870). Liberalism, as CLS pointed out and with this point CRT whole-heartedly agrees, preaches the gospel of universalism and formal equality: as

long as everybody has the same (*de iure*) rights, then there is no need to pay any attention to the (*de facto*) inequalities and unjust practices that still prevail. Williams (1991: 48) writes, "when segregation was eradicated from the American lexicon, its omission led many to actually believe that racism therefore no longer existed...race-neutrality in law has become the presumed antidote for race bias in real life". Furthermore, the ideology of rights draws boundaries on what can be said and what can be demanded. It also, therefore, has a norm-alizing function - and with this a mechanism for smothering difference. It is also important to note that justice does not lie in simply giving - or rather 'granting' - others the rights that you already have. It could simply be another way of trying to show the superiority of the dominant group ('look how generous and just we are'). Neither is it tolerance or respect. Tolerance "reaches its full potential only when it offers more than the acceptance of diversity and coexistence...when it acknowledges not just the *otherness* of the other, but the legitimacy of the other's interests and the other's right to have such interests respected, and, if possible, gratified" (Bauman 1992: xxi-xxii).

In contrast to neutrality and colourblind laws, CRT argues for race consciousness and the many ways in which society tries to ignore it or cover it up by referring to rights. CRT argues for a "contextualized, specified worldview that reflects the experience of blacks" (Crenshaw 1988: 1349). In doing this, argues Crenshaw (1988: 1351-1352), CRT exposes hierarchies, stereotypes and delegitimisizes the idea that these are fair and normal.

By focusing on race consciousness and the ways in which law tries to ignore it, CRT also raises the issue of what Moody-Adams (1994) calls affected ignorance, in other words that role that culture plays in 'covering up' unjust practices. This is all linked to affected ignorance and the ways in which it affects agency and, with it, responsibility, because "one's cultural background may radically impair one's capacity for responsible action"[26] (Moody-Adams, 1994: 292). But even if it "radically impairs", it can only be a "mitigating excuse", according to Moody-Adams. Or, in the words of Karl Jaspers (1971: 46), nobody who keeps quiet about injustice will ever find an absolute excuse

for doing so. Culture, however, and Moody-Adams' definition of culture includes law, is a very successful mechanism for providing excuses, justifications and soothing consciences. The we-must-have-law-and-order justification is one of the most prominent. And if culture is a powerful mechanism to do this, law is even more so - it is after all the Law. Charles Lawrence (1987: 237), a critical race theorist, writes, "[t]raditional notions of intent do not reflect the fact that decisions about racial matters are influenced to a large part by factors that can be characterized as intentional". Lawrence stresses the role of the cultural heritage of law and how it deeply influences belief.

CRT argues that law and legal scholarship should not be colour-blind; it should not be afraid of acknowledging difference. Neutrality, objectivity and formal equality gloss over the idea of difference and also injustice. Law and legal scholarship focus on the universal, were things seem perfect, and ignores concrete issues of injustice. Instead of objectivity and neutrality, CRT makes a plea for narratives, i.e. for the victim's perspective in order, to give concrete example of injustice and of the gap between law and justice. The standards of objectivity and neutrality make it difficult for oppressed groups to described their reality. In other words, one of the main aims of CRT is "to maintain a contextualised, specified worldview that reflects the experience of blacks" (Crenshaw 1995: 107). This is the only way, according to CRT, to challenge myths surrounding race (see Table 4). Crenshaw (1998: 1373) lists a number of oppositional dualities between blacks and whites. Whites are characterized as the norm and blacks as the subordinated other (1372). Crenshaw (1988: 1373-1374) writes, "[t]he oppositional dynamic symbolized by this chart was created and maintained through an elaborate and systematic process...[l]aws and customs helped create "races" out of a broad range of human traits...the categories came to be filled with meaning...Whites came associated with normatively positive characteristics; Blacks became associated with the subordinate, even aberrational characteristics".

Table 4: Historical Oppositional Dualities

WHITE IMAGES	BLACK IMAGES
Industrious	Lazy
Intelligent	Unintelligent
Moral	Immoral
Knowledgeable	Ignorant
Enabling Culture	Disabling Culture
Law-Abiding	Criminal
Responsible	Shiftless
Virtuous/Pious	Lascivious

from: Crenshaw (1988 :1373)

In other words, CRT argues that the 'purity' from experience in traditional jurisprudence is at best the result of ignorance and at worst due to malicious exclusion. Secondly, the racial hierarchy that exists in law cannot be undone/challenged through race-neutral laws, but by taking differences and concrete experiences of injustice seriously (Crenshaw 1988: 1377-1378). The strategy to challenge injustice, according to CRT, lies not in colourblindness, but rather "in the possibility of listening across that great divide, of being surprised by the unknown" (Williams 1997: 72).

This links closely with CRT's second important theme, namely the importance of the voice of colour and (its) narratives. Delgado (1990: 103) writes, "[A]ll people of color speak from a base of experience that in our society is deeply structured by racism. That structure gives their stories a commonality that warrants the term 'voice' ". Johnson (1991: 2010) writes that the voice of colour "draws on the experiences and the insight gained from living as a person of color". The problem with law, argues CRT, is that it leaves no space for this 'voice of colour'/'different voice', i.e. voices of oppressed groups that might threaten the status quo. Law achieved its purity, writes Williams (1997: 3) through ignorance. Furthermore, law and rules are formalized repetitions that enforce conformity and embody power (Massoro 1989: 2099). It equates logic with reason and understanding. In order to have (legal) standing what is said must be abstract and universal. Narratives are defined as "first-person

renditions of 'experience' - their own or others - with all the immediacy and richness that the term implies" (Abrams 1991: 975). These narratives are 'counter stories', the stories of individuals or groups who were/are excluded by the legal system. The most famous/quoted example of a personal narrative by a CRT scholar is Patricia Williams's Benneton story (It has been used by Williams on numerous occasions). Williams wrote an article on racism she experienced at a Benneton store. (The store owner, seeing that Williams is black, refused her entry, claiming that the store was closed.) The article centres on Williams's personal experience and emotions and this is where her dilemma begins: because of this, journals refused to publish the article. One editor responded, "it is nice and poetic but it does not advance the discussion of any principle...this is a law review, after all" (Williams 1991: 52). In short, if it is personal and does not serve a Principle, then it is irrelevant. Why? It is not neutral. But this neutrality is the denial of experience and difference, and of the "fact" that principles and law do not solve everything. It is also the denial of the complexity of society and law's failure to be sensitive to this. Injustice lies not only in the failure to have/gain knowledge of the other's position, but also in the refusal to acknowledge that the position is unjust. Secondly, labeling narratives 'unacademic' is one way to protect the status quo against the subversive power of narratives: "stories, parables, chronicles, and narratives are powerful means for destroying mindset - the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse take place" (Delgado 1989: 2413).

Storytelling in legal scholarship is nothing new, but CRT gives a new dimension to it, for three reasons (Faber et al. 1993: 808). Firstly, it places "subversive" narratives in the centre, instead of seeing narratives only as a useful aid for the traditional methods. Secondly, the emphasis is placed on stories "from the bottom" or "from the margins", i.e. from oppressed groups. Thirdly, less emphasis is placed on whether these stories are descriptively accurate, i.e. if they have functional value, for example, serving the law. They invite the reader to "suspend judgment, listen for their message, and then decide what measure of truth they contain" (Delgado 1989: 2415). In other

words, CRT argues that one should listen before you start measuring the story against law's checklist. Furthermore, CRT argues that there is a special affinity between narratives and 'the voice of colour'. Firstly, because minority cultures have a strong tradition of storytelling; Secondly, because it is a method of communication that can convey new truths that cannot be articulated by using the legal voice (Faber et al. 1993: 815-6). The ethical dimension of telling these narratives should not be underestimated. As Delgado (1989: 2414-5) argues, they open up new perspectives on what is considered just and normal, they "quicken and engage conscience" and above all they point out unjustified exclusion. The core of this argument is that the stories told by oppressed groups have a special value and that this is different to anything represented in law. It is also in this area/aspect that CRT's greatest importance, as a move to towards justice as an ethical concept, lies.

To summarize: CRT argues that there is, in opposition to the idea of colourblind laws, a different voice. This voice of colour speaks of a new perspective, of different encounters with the law. These different perspectives highlight viewpoints that differ from the norm, pointing out the complexity of social interaction. Secondly, this different voice makes explicit the need for fundamental change in the way we view law (Barnes 1990: 1864). These experiences (of injustice) that the voice of colour speaks of point to where the limits of law lie. The voice of colour, in Matsuda's (1995) words, "looks to the bottom"; in other words to the experiences of those are marginalised and/or excluded by the law.

3.3 Narratives as Writing Wrongs: The Importance of CRT

> *"To let suffering speak is the condition of all truth."*
> Theodore Adorno

The use of narratives as tools and aids is nothing new. They are used in education, psychology and ideology. Hannah Arendt's *The Origins of Totalitarianism* (1967) is also interwoven with narratives. She does this

because narratives "are the mode for lending understanding to human action". Arendt also states another important reason for doing this: Totalitarians were given a very powerful helping hand from social sciences that wanted to explain and, more importantly, control human behaviour by laws and rules of human behaviour[27]. By listening and acknowledging narratives, Arendt admits that reality is complex and to deny this or legislate it away is inherently violent and unethical. The idea of unique perspectives in different voices was made famous by Carol Gilligan's *In a Different Voice* (1982), which I referred to in Chapter One. The "different voice" idea also argues that members of different groups (in Gilligan's case, men and women) have different methods of understanding their experiences and communicating their understanding to others (Faber et al. 1993: 810). Also, some experiences of oppression are unique to a certain group. Gilligan (1982) argues that the different voice speaks of an "ethic of care" in contrast to the "logic of justice"[28]. They are two voices: "what I mean by two voices [is] two ways of speaking. One voice speaks about equality, reciprocity, fairness, rights; one voice speaks about connection, care and response" (Gilligan 1982: 7). The ethic of care gives prominence not to abstract principles, but to the individual and the face-to-face relations in everyday life. It also stresses that choice - and not blind application - is involved in moral dilemmas and that individuals must take responsibility for it. It places emphasis on the consequences of choices. The ethic of care enables the involved person to "see, hear, and feel things that she or he might not see or hear otherwise" (Rooney 1991: 351). In other words, there are many things to take into consideration other than the claims of the logic of justice. The ethic of care views moral and legal dilemmas not as a math problem with humans, but as a narrative of human relationships that extends over time (Gilligan 1982: 28).

Law, as I argued earlier, also works with a narrative (or rather Narrative), namely, precedent. Postema (1987: 11-31) identifies three conceptions of precedent, namely positivist, traditionalist and conventionalist. The three have an important theme in common: the importance of a single Example or Narrative that is used over and over again because of its 'authority'. It does give some predictability and perhaps even some 'even-handedness' but does

carry with it a serious lack of sensitivity to the complexity and the violence of the field that it is operating in. It reasons that judging everyone according to the same Narrative is just. But Derrida and Cornell (Cornell 1992: 148-150) argue that is 'fundamentally' *unjust* and *unethical*, not only because it is violent to difference, but also because it becomes a way to sidestep responsibility. Citing 'the Example' becomes enough of a justification[29]. Furthermore, because it simply repeat it is uncritical of the history of legal principles and rules. In short, the narratives that I have tried to describe are exactly the narratives that procedures such as precedent ignore.

The dominant group also has narratives that have been repeated often enough that they are seen as natural and true (Delgado 1993a: 666). According to CRT 'counter' narratives or narratives told from the margins are important for three main reasons. Firstly, these narratives challenge the dominant mindset. Secondly, narratives relate concrete experiences of injustice. Thirdly, narratives have been linked with the idea of care and empathy. The time has come for the counter-stories to be told, because "narratives are powerful means for destroying mindset" (Delgado 1989: 2413). Apart from these three reasons, another three could be added. First, the way in which CRT emphasizes narratives has important epistemological 'value', in that it deepens knowledge by letting individuals and groups who are marginalized speak out. Narratives also illustrate that there is no single, all-encompassing description of reality. It can, therefore, be a powerful tool to combat the moral exclusion that Opotow describes (see Table 1). It can, as Delgado (1989b: 2413) argues, destroy mindsets of exclusion. This links closely with the second point, namely that narratives can have important transformative political potential because they can (potentially) change mindsets and urge reform. The narratives that CRT focuses on mainly speak of concrete experiences of injustice, which also urge reform of existing structures. Barnes (1990: 1864) argues that the narratives minority/marginalized groups and individuals are able to formulate the need for social transformation most explicitly. Thirdly, narratives and the way in which CRT uses them to confront and disrupt the law has ethical importance. They confront the law with the singularity of the individuals and events before

it. They disrupt the law in an attempt thereby to create space for the other. Before I return to these important points, I will first give a more general overview of CRT's understanding of narratives.

By 'narratives' CRT means the stories that speak of concrete experiences of so-called "outgroups" (Delgado 1989b: 2412). CRT refers mostly to the narratives and experiences of black Americans, but it is possible to view them in broader way. In other words, narratives can refer in general to the experiences of marginalized groups and individuals ('others'). According to CRT these narratives have to power to "destroy mindsets", "shatter complacency", "challenge injustice", "open new windows into reality" and "quicken and engage the conscience (2413-2415). "Outgroups" should tell their stories to point out injustice and challenge subordination. "Ingroups" should listen "enrich their reality...and [to realize] that reality is not fixed nor given" (2439). Narratives, in other words, point out not only injustice, but that society is complex (Scheppele, 1989: 2047). Lastly, they allow marginalized groups to speak of and out against injustice. Chang (1993: 1267) writes, "[n]arratives allow us to speak our oppression into existence, for it must first be represented before it can be erased".

It is important to note that CRT argues for the use of narratives of minority/marginalized groups and individuals *not* (I hope) because these stories are interesting or quaint. They advocate narratives because they are a powerful tool to urge transformation. Barnes (1990: 1867) writes that these groups "have insisted on the need to incorporate the concrete, practical realities of oppressed groups [told in narratives] into agendas for reform". These groups are viewed and judged through the eyes of the dominant groups and their norms and laws. They confront these norms and laws with narratives that speak of concrete experiences of injustice that law overlooks (1867, 1869).

One of the values that narratives promote, argues CRT, is empathy. Henderson (1987: 1576) defines empathy as follows: "it is a way of knowing that can explode recited knowledge of legal problems and structures, that

reveals moral problems previously sublimated by pretensions to reductionist rationality, and that provides a bridge to normatively better legal discourse". Traditional jurisprudence guards against any 'irrationality' that tries to subvert law. Judges and legislators should create and use neat checklists. Law calculates, treating human beings as self-contained and atomistic units. Narratives brings law 'back to the ground' showing that very real lives are involved in legal decision-making. Narratives stress human dignity and the fact that people and not units nor means to an end. The idea of empathy, however, can also be also problematic, as I pointed out when discussing Gilligan's (1982) use of the concept: Empathy can very easily be patronizing, one of the sugar-coated cruelties that Nietzsche speaks of, and it undermines the tolerance that Bauman (1992) proposed. Furthermore, empathy can lead to the undermining of responsibility in two ways. Firstly, if there is *only* empathy - or rather, pity - towards the teller of the narrative, then there is no action and no attempt is made to help the person. But, the second problem lies exactly in the response. Every response, every attempt to represent the other, as Derrida (Cornell 1992: 155-159) has pointed out, is an act of violence because no representation is ever complete. Something is always left out.

Another important aspect of CRT's emphasis on narratives is that they are a powerful way to speak of injustice and thereby to challenge accepted ideas of what counts as justice (this links with the arguments of Shklar (1990), Lötter (1993) and Freire (1993) that I have already mentioned). Matsuda (1989: 8) perhaps summarizes it best when she writes that narratives allow marginalized groups to express that "their anger, their pain, their daily lives and [their] histories...are relevant to the definition of justice".

By arguing for narratives and advocating their subversive force, CRT is furthermore being sensitive to the idea of complexity. Narratives urge the splitting open of closed-systems and categories. When we listen to stories, writes Dalton (1996: 58), "we step outside existing categories and the prevailing mindset". They plead for a more open-ended understanding of society that is sensitive to the complexity of society and the ideal of justice, in

other words, a 'system' that considers (not only) abstract principles and rules, but history/genealogy, individual persons and concrete situations. Taking this seriously is taking an important step towards taking seriously the consequences of the application of laws and rules and accepting responsibility for this. Rules should not simply be formalized repetitions that are blind to the very subject they are dealing with, namely, concrete human beings. Narratives bring individual human experience back into play. And because these narratives are so diverse, they make any complacency about the ideal of justice impossible - without arguing for the abandonment of this ideal.

CRT's use of narratives has, as I pointed out earlier, important ethical significance. There is also an important ethical dimension in taking narratives seriously. Hallie (1984: 37) writes, "[i]f ethics is about *ethos*, the character of a particular person, why shouldn't it be deeply involved in using the particular names of people in the context of their particular doings and sufferings? And why shouldn't we use the verbs of narratives in these contexts instead of using only the empty, timeless verbs that connect high abstractions with each other?"[30]. Traditional jurisprudence argued that following a rule, or applying the law, is enough, the consequences come second. Furthermore, the legal person, it was argued, "is an abstract definition of the self in which the individual is understood as irreducible to her concrete social situation" (Cornell 1992: 95). But listening to narratives most often means being confronted with the very people who were at the receiving end of the blind application of rules. Narratives, argues Espinoza (1997: 915), "reveal the workings of the system of power that affect...lives". Narrative highlights the importance of experience and the fact that experiences differ, something that abstract legal rules and principles are quick to ignore[31]. Narratives remind the legislators that we must never forget that "legal interpretation takes place in a field of pain and death...it signals the imposition of violence upon others" (Cover 1986: 1601).

Furthermore, CRT's idea of narratives also has important epistemological implications since they illustrate that there is no single, all-encompassing description of reality. This can be a powerful tool to combat the moral

exclusion that Opotow describes (see Table 1). It can, as Delgado (1989: 2413) argues, destroy mindsets of exclusion. Narratives also have has transformative political potential. The "broadened and deepened understanding" discussed above, leads to the current political and social framework being destabilized and, hopefully, also transformed. Delgado argued that narratives can shatter existing mindsets, and in this he includes politics and, more specifically, law. They subvert the 'in-group reality' that makes the status quo seem fair and natural.

To conclude: Narratives do not present principles or provide new checklists. It is, however, a move in the direction of acknowledging the complexity of society, law and justice by placing the emphasis on the singularity of individuals (who themselves stand in a network of relationships with others). Narratives have "humility and acknowledge the partiality of truths" (Minow, 1996: 35), but *without* saying that anything goes. Rather narratives point out that which has been excluded and urge the continued struggle for the ideal of justice and a renewed acknowledgment of the complexity of society. CRT argues throughout that the ideal of justice must never be forsaken, and by emphasizing the importance of narratives it acknowledges that Justice is difficult. (This links with Derrida' s description of justice as an aporia.) It is an aporia because we must - for ethical reasons - abandon Ultimate Goals. Ultimate Goals, such as in Hegelian History, gave justifications for the elimination of those who stood in its way. And yet, goals - for ethical reasons - can not be abandoned completely. If anything goes, everything stays the same.) The urge to transform, in the name of justice, must remain because justice is, above all, a call to action.

3.4 Some Problems with CRT

CRT, especially the idea of a voice of colour, was criticized by, amongst others, Sowell (1985), Kennedy (1989), Tushnet (1993), and Faber and Sherry (1993). CRT scholars, most often Delgado, responded, which led to the so-called racial critiques debate.

Two of the most famous critics of CRT are Thomas Sowell (1985) and Randall Kennedy (1989). Sowell (1985:109) criticized CRT's scepticism/rejection of the civil rights era, stating famously that "[t]he battle for civil rights was fought and won - at great cost". Sowell's main argument is that (formal) equality was fought for and was achieved. This is enough. Any further emphasis on race/difference boils down to nothing more than special interest politics.

Kennedy (1989) attacks CRT by saying their race-based criteria are bad legal scholarship. Kennedy (1988: 1787-1810) is also concerned about the way in which CRT disregards contributions of scholars solely on the basis on their being white and arguing that they therefore have no standing. He argues that Delgado specifically underestimates the transformative role that white legal scholars can indeed play. Furthermore, writes Kennedy (1988: 1795), silencing white scholars would be a disaster since "[t]o restrict the field on a racial basis would surely - and rightly - degrade the reputation of the field to far lower depths...Delgado seems to want to transform the study of race relations law into a zone of limited intellectual competition". The point that Kennedy raises is important: who has the right to speak? Who can speak on certain injustices? CRT has a point when it argues that the dominant group cannot truly understand the concrete experiences of injustices. The dominant group do make themselves guilty of what Foucault calls the "indignity of speaking for others" (quoted by Haber 1994: 93). But there is also another aspect, one where perhaps Derrida's criticism of Levinas, which I mentioned earlier, could be useful. If the other is portrayed as so radically other, then communication and action become impossible. The experiences of injustice might be 'unique, but it will remain only that if they are not communicated, in order to be acted upon.

One of the greatest problems with CRT's idea of a voice of colour is that it threatens to become a Voice of Colour, in other words, essentialist. Critics point out that CRT assumes, in Aziz's (1992: 300) words, "the deceptive air of internal coherence". Chang (1993), for example, argues that the difference that CRT emphasises is narrow and that it does not take the experiences of Asian Americans into consideration. Faber and Sherry (1993) specifically

criticize the way in which CRT uses narratives. Apart from criticizing the essentialism of CRT's narratives, Faber and Sherry (1993: 849) claim they serve little other purpose than appealing to emotions: "[the emotive force of the stories is seen as their primary goal. In our view, however, emotive appeal is not enough to qualify as good scholarship". Then again, what counts or not as "good legal scholarship" is an important point that CRT wants to challenge. One of their main arguments is that there is far worse to consider when speaking of the law than what "good legal scholarship" deems to be relevant. Delgado (1993b: 666) responds by arguing that it is not as if accepted legal scholarship does not have narratives: "Empowered groups long ago established a host of stories, narratives, conventions and understandings that today, through repetition, seem natural and true". Delgado (1993b: 670) argues that Faber and Sherry ignore how important it is to speak of injustice and narratives' power to do this. Furthermore, they deem narratives useless, using the very standards that CRT wants to question (675-676).

To summarize: CRT can be criticized on two main points. First, what they are busy with is not really legal scholarship. This criticism can be countered to some extent by arguing that CRT is then judged in terms of a narrow idea of legal scholarship, which is precisely what they criticize. Secondly, CRT can be criticized for essentializing their idea of a voice of colour and not accepting that difference is also complex. This is, I think, the most serious problem with CRT. They argue that law should be confronted with the singular, that legal categories should be challenged and expanded, yet they tend to fall into the trap of underestimating the very thing they advocate, namely difference.

3.5 CRT and Derrida's Understanding of Justice

After considering the main themes of CRT and their importance, the question remains of how CRT 'measures up' against Derrida's understanding of justice.

The most obvious theme is that of CRT's emphasis on narratives and their subversive power. CRT argues that these narratives have the power to provoke the law. These narratives can, as Delgado (1989b: 2413-2415) says,

challenge mindsets, complacency and injustice. This links with the next important aspect, namely that CRT ceaselessly and continuously, point out injustice. Through narratives they point out in a powerful way the violence and mercilessness of law. In other words, CRT, like Derrida, places the emphasis on the other that law excludes, although they sometimes come dangerously close to essentialising it. The important point is that CRT uses narratives to confront law with singularity.

Furthermore, CRT, in a crucial difference from CLS, has great sensitivity to the idea that justice has not been achieved and that simply granting everyone the same rights (i.e. law) cannot be equated with justice. CRT, more than CLS, shares Derrida's sense of urgency that justice is needed here and now. They acknowledge that rights and laws are important, yet at the same time also argue that this alone is not enough. This sense of urgency also links with CRT's readiness to act against injustice, something which Derrida' repeatedly points out. CRT, perhaps more than any other jurisprudence movement, emphasizes the need to act against injustice - and to do this not by measuring society (only) against abstract principles, but being attentive to the concrete experiences of injustice.

There is, however, one important problem. Even though CRT places great emphasis on injustice as a 'substantive' concept (and not simply the flip-side of injustice), it says very little about justice. It tends to convey an idea of justice as something of a heavenly concept. Although it realizes the importance of justice and its transformative power (more so than does CLS) it seems to be too idealistic about the concept. If CLS can be critisized for simply waiting for the state/law to whither away, then CRT can be critisized for waiting for justice to arrive. Derrida, on the other hand, although he acknowledges justice's impossibility, he also emphasizes that this does excuse action. Justice is a call to action and it's impossibility a challenge to transform and redraw boundaries continually.

To summarize: CRT, like Derrida, is sensitive to the brutal exclusionary power of law and, by making use of narratives, they provide concrete examples of

this exclusion. Secondly, they realize the importance of confronting law, for the sake of justice, with the singular. This they do by placing the emphasis on narratives. Thirdly, CRT shows great attentiveness to injustice and the history of what has been done in the name of justice. Fourthly, like Derrida, CRT emphasises the urgency of justice.

3.6 Concluding Remarks on CRT

CRT, like CLS, is an important disruptive jurisprudence movement, radically different from any that preceded it. It challenges jurisprudence, law and justice in an important way. It not only takes the CLS attack on the ideology of and supposed neutrality of law further, but confronts law with singularity. They do this by arguing against colourblind law and arguing for the importance of narratives that speak of concrete experiences of injustice. Consequently, CLS also show an important attentiveness to injustice. Furthermore, CRT is passionate, perhaps far more than any other school or movement of about the idea that a just society has not been established and that we have a continual responsibility to seek justice and challenge injustice.

4. Conclusion

In this chapter I examined two contemporary jurisprudence movements, namely CLS and CRT. I singled out CLS and CRT because they not only raise problems with law's violent and exclusionary nature, but also because they create the space to talk about law in a different way than traditional jurisprudence.In other words, to a large extent they share Derrida's unease with law and many of their arguments 'measure up' to points Derrida makes when arguing that law is problematic.

CLS's focus on the indeterminacy of law is a move in the direction of acknowledging the complexity of society in which law operates, but it fails to pay much attention to the aporetic relationship between law and justice. CRT's focus on the singularity of narratives told by those on the receiving end of the law links with Derrida's own emphasis on the singular and irreplaceable

individuals involved in matters of law and justice. Both CLS and CRT argue that law can not simply be calculation or encapsulate society. CLS does it by pointing out the indeterminacy of law, and the interwoveness between law and power/ideology. The 'strategy' that CRT uses is to confront law that claims to neutral with the concrete experiences of injustice from marginalised groups in the form of narratives.

CLS and CRT, however, fail to make two important moves. First, they fail to articulate an understanding of or attach importance to the concept of justice. Secondly, they seem to think of law and justice as radical opposites. Derrida, on the other hand, although he does see law and justice as radically different concepts, still regard them as interwoven. Or, as Davies (1994: 271) puts it, "[j]ustice is not another normative order existing on a different plane from law: it rather becomes possible through the existence of law and its deconstructable nature...[j]ustice is possible because law is deconstructable".

Is there then a school or movement of jurisprudence that does take both justice and Derrida to heart? There is perhaps not a movement, but there is a specific (legal) philosopher, whom I have mentioned throughout the text who does, namely Drucilla Cornell - at least to a larger extent than CLS and CRT. Cornell's understanding of jurisprudence will be the focus of the next chapter.

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[1] Fraser (1989: 168)

[2] Quoted by Schlegel (1984: 403)

[3] CCLS : Conference of Critical Legal Studies

[4] For an extensive discussion on "new McCarthyism" and CLS see Jerry Frug's article "McCarthyism and Critical Legal Studies" (1987). For example, he makes significant comparisons between "McCarthy-speak" and the attacks on CLS.

[5] They were Richard Abel, Lee Albert, John Griffiths, Robert Hudec, Larry Simon and David Trubek (Tushnet 1991: 1530).

[6] Formalism assumes that law and politics can be distinguished and be kept separated. It also assumes that there are clear legal justifications for decisions, that law has a distinctive rationality and that there is an intelligible moral order (Weinrib 1988: 950-952). Unger (1983: 1) defines formalism as follows : "[it] is a commitment to, and therefore also a belief in the possibility of, a method of legal justification that contrasts with open-ended disputes about the basic term of social life, disputes that people call ideological, philosophical, or visionary". Davies (1994: 115) defines formalism as "an approach to legal reasoning which emphasizes the specifically *legal* dimension of a dispute... [it] assumes that the law is a closed legal system: this means that it is considered to be the law alone - relations between legal concepts and the facts of a case - and not anything outside the law, which resolves legal questions".

[7] Compare Herbert Marcuse (1969:98) on repressive tolerance: "[W]ithin a repressive society, even the most progressive movements threaten to turn into the opposite to the degree which they accept the rules

of the game. To take a most controversial case: the exercise of political rights (such as voting, writing...) in a society of total administration serves to strengthen this administration by testifying to the existence of democratic liberties which, in reality, have...lost effectiveness".

[8] Kelman (1984: 329)

[9] Schlegel (1984: 392) describes Duncan Kennedy as follows : "[He] is a cross between Rasputin and Billy Graham. Machiavellian, and with a gift for blarney that would make the stone get up, walk over and kiss him, he can work   an audience or an individual with the seductiveness of a revivalist preacher".

[10] In this regard see Nozick's (1974) argument, in *Anarchy, State, Utopia,* that justice is entitlement. The right to entitlement is more fundamental than any other right. In contrast, John Rawls (*A Theory of Justice,* 1971) argues that a right only deserves this 'label' if it passes the test of fairness (i.e. the two principles, freedom and equality).

[11] John B. Thompson (1990: 7) defines ideology as "meaning in the service of power".

[12] Alan D. Freedman (1981: 1230) writes the following, "Why defend trashing? For one thing, trashing is fun".

[13] Kennedy was refused a position at Yale University because of an angry attack on the Law School in a law review (Schlegel 1984: 393).

[14] Duxbury (1997), although he is not a CLS scholar, examines the history of American legal education and argues that the scientific methods of the "founding fathers" of law schools, including Harvard, has an important and enduring influence on the way in which the concept of law is understood.

[15] Two other legal scholars, Allergretti and Dougherty (1985) - although they are not CLS scholars - use arguments that are similar to those of Kennedy. They argue that by teaching students to thinking and act like lawyers, they are taught to focus solely on what is regarded as legally relevant and to be sceptical of their moral intuitions. The only "ethics" students are taught to take seriously is the code of professional ethics.

[16] Compare : "Power is not a commodity, a position, a prize, or a plot; it is the operation of political ideologies throughout the social body" (Foucault quoted by Dreyfus et al. 1982: 142).

[17] Fraser (1990: 804) puts it more bluntly: "For those who may be troubled by... vision[s] of kneecapped deans and car-bombed curriculum committees, I close with words that must become our credo: Fuck'em all if they can't take a joke".

[18] CLS is also criticized by a number of other CRT scholars, most notably Williams (1987) and Matsuda (1987), to which I will return in the section on CRT.

[19] Schlegel (1984: 392) writes, "[it] is impossible to understand the organization of ...CLS without focusing on the friendship of two individuals - Duncan Kennedy and David Trubek". Schlegel gives a detailed account of the internal politics of the movement and maps the figures and friendships that played an important role in the movement.

[20] Derrida is somewhat more positive about CLS. Derrida (1992: 8-9) names it as a movement , along with others, who "from the point of view of a certain deconstruction, [is] among the most fertile and most necessary" since it encourages the use of deconstruction in fields other than philosophy. He does, however, acknowledge that he does not know that much about the movement.

[21] Compare: "If ideology seems untaught it is because its lessons speaks to us everywhere, it is nurtured throughout our lives, throughout the complex institutionalized practices in which we are necessarily involved. Pascal once said provocatively: Kneel down, move your lips and you will believe. Ideology is like this, a system of ideas congealed within a series of ritualized social practices" (Cronin 1976: 147)

[22] Quoted by Davies (1996: 143)

[23] (1979: 199)

[24] One movement that grew from CRT was Critical Race Feminism and most of its important themes, for example the significance of narratives, are shared with CRT.

[25] Tushnet (1989: 168) makes an important distinction between the neutrality of content and application. He writes (1989: 168), "If neutrality is to be understood as a meaningful guide, it must be understood not as a standard for the content of principles, but rather as a constraint on the process by which principles are selected, justified, and applied".

[26] Compare to Karl Jaspers's (1971: 45) definition of the moral guilt of Germans for the Holocaust, "blindness for the misfortune of others, lack of imagination of the heart, inner indifference toward the witnessed evil - that is moral guilt".

[27] This is very similar to Zygmunt Bauman's argument in *Modernity and the Holocaust* (1991).

[28] See Table 2.

[29] This also links with the American legal principle of making use of the intent of the Founding Fathers. Cornell (1992: 116-154) discusses this at length.

[30] Compare to Hannah Arendt's (quoted by Luban, 1990: 239), "No philosophy, no analysis, no aporhism, be it ever so profound, can compare in intensity and richness of meanings with a properly told story". And also Williams (1989: 2148), "I think silence is too common, too institutionalized, and too destructive not to examine it in the most nuanced way possible".

[31] Ann C. Scales (1986: 1374) writes, "It is impossible to see solutions to inequality through the lens of abstraction".

CHAPTER FOUR

APPEALING TO COMPLEXITY: THE JURISPRUDENCE OF DRUCILLA CORNELL

1. Introduction

The work of Drucilla Cornell has been refered to several times, specifically to the arguments she uses and her understanding of Derrida in *The Philosophy of the Limit* (1992). In this chapter I will aim to compare her arguments to what has already been discussed, namely the discussion in the previous chapter on justice, and (radical) movements in contemporary jurisprudence.

Cornell is both a philosopher and a law professor, putting her in an interesting and important position with regards to Derrida's understanding of justice. She has a deep respect for law, both its violence and its necessity, but she also takes the idea of justice as seriously as does Derrida. Cornell organised the conference where Derrida (1992) delivered his paper, "The Force of Law". She delivered a paper entitled "The Philosophy of the Limit: Systems Theory and Feminist Legal Reform", which contains themes which are reflected in *The Philosophy of the Limit* (1992). Most of Cornell's work, for example, *Beyond Accommodation: Ethical Feminism, Deconstruction and the Law* (1991) and *Transformations: Recollective Imagination and Sexual Difference* (1993), has dealt with feminist legal theory. However, in *The Philosophy of the Limit* the focus is on some of the potential possibilities of Derrida's understanding of justice, and deconstruction for jurisprudence and I will focus on these arguments. It is not my intention to argue that Cornell provides a solution to the problems of/in jurisprudence nor that her arguments are without problems. Furthermore, I do not intend to make an exhaustive study of her views and arguments on legal theory as a whole. I merely wish to argue that she does provide an important perspective on the relationship between justice and law and represents and important move in jurisprudence. Furthermore, by focusing on her arguments I wish to also provide a link between the arguments posed in Chapters Two and Three.

In this chapter my focus will be, first, on her idea of the "the philosophy of the limit" and, second, on her understanding of the concepts 'law' and 'justice'.

2. Cornell's Jurisprudence

Cornell's argument in *The Philosophy of the Limit* is complex. She makes use of a number of philosophers, including Hegel, Adorno, Levinas and, of course, Derrida. The purpose of *The Philosophy of the Limit*, argues Cornell (1992: 1), is to point out the power of this philosophy of the limit, i.e. deconstruction, and its relationship with ethics, justice and legal interpretation. Her aim is therefore the same as Derrida's (1992) in "The Force of Law" who argues that deconstruction is not a nihilistic, destructive activity, but that it is in "alliance" with justice and that it has important implications for ethics, law and legal interpretation.

Before I focus on Cornell's idea of the philosophy of the limit, I will briefly look at the way she uses key concepts, namely 'deconstruction', postmodernism', 'ethics' and 'responsibility'. Cornell makes an important move by giving ('new') content to these three concepts. Cornell (1992: 1) reformulates deconstruction as "the philosophy of the limit" in order to get away from the destructive or nihilistic image of deconstruction. Cornell argues that deconstruction/the the philosophy of the limit is important for two reasons. First, it exposes the limits of the system and the "quasi-transcendental conditions that establish any system". A system is a system because it excludes. It is the way in which systems are founded and how they exist. Deconstruction exposes and problematises this. Second, there is also a limit to what the system can capture. There is a "secondness" (Peirce's term), an "ethical philosophy of alterity" (Levinas) or "différance" (Derrida) which resists being assimilated into the system (Cornell 1992: 1-2). This is reflected, for example, in Derrida's Levinasian interest in the relationship with the other. Cornell writes, "Derrida's insistence...on secondness is crucial to his own aspiration to heed the call of the Other" (2). The other resists being captured by the system; the other remains other to the system (2). The alterity of the other not only resists being captured by the system, but also from being known positively.

Secondly, Cornell is also eager to move away from labeling deconstruction - as well the arguments used by philosophers such as Derrida and Levinas - as 'postmodern' since they lose much of their richness when carried over into legal studies[1]. The clichés associated with the concepts ('postmodernism','deconstruction') has led to their transformative power being dismissed (2, 7). Cornell is sceptical of the words 'modern' and 'postmodern' since they have become code-words in academic mud-slinging contests (11). She defines postmodern "as an allegory and that, as such, it represents an ethical insistence on the limit to 'positive' descriptions of the principles of modernity long-elaborated as the 'last word' in 'truth', 'justice' 'rightness', etc."

Thirdly, Cornell also gives a Levinasian formulation of ethics (13). As I pointed out in Chapter One, following Bauman (1992, 1993) and Cilliers (1998a, 1999), ethics is understood traditionally as the following of rules, and this is problematic for both the idea of ethics and justice. The most important break with the rule-bound understanding comes when Levinas (1989) defines ethics as the "first philosophy", as a responsibility to the other that precedes both ontology and epistemology. To Levinas (1989: 84) ethics is a "responsibility for my neigbour, for the other man, for the stranger or sojourner, to which nothing ontological binds me - nothing in the order of things". In turn Cornell (1992: 13) defines ethics as "[a focus] on the person one must become in order to develop a nonviolative relationship with the Other". This she contrasts with morality, which she defines as "any attempt to spell out how one *determines* a 'right way to behave', behavioral norms which, once determined, can be translated into a system of rules" [Cornell's emphasis] (13). Ethics is therefore not captured in rules that regulate behaviour, nor does the mere following of rules constitute ethical behaviour. It is process ("to develop") that focuses on the relationship with a singular other. Critchley (1992: 17) writes that for Levinas the meaning of ethics lies in the relation with the singular other who does not lose herself in a crowd of others. The emphasis shifts from an emphasis on rules and the following of rules. In other words, there is an unease with ethical behaviour as rule-bound behaviour, and a renewed emphasis on responsibility.

Lastly, Cornell also places an emphasis on the concept of responsibility. Cornell (1992: 149) defines responsibility as individuals being accountable for their actions and judgments. It is precisely because we have no certain foundations, and have no guarantee that our actions and judgments will have the intended consequences (yet we still need to stand in for them) that we are responsible. Cornell writes, "[w]e are responsible precisely because we cannot be reduced to automatons who cannot chose to do other than what comes naturally" (149). Individuals and the choices they make are *not* reducible to the workings of the machine - as Fish seems to think (149). Cornell argues that people/judges cannot be reduced to cogs in a machine, which in turn leaves them with with an "inescapable responsibility" (149). Or as Cilliers (1999: 4) argues, if we were merely following rules, then there would be no ethical behaviour, merely calculation.

This links with the arguments of Bauman (1991, 1992, 1993) which I referred to in Chapter One, namely, that in a postmodern world (in other words one where foundations are no longer certain and meta-narratives are not to be trusted), the individual is confronted with her responsibility. There is no longer any super-structure which can carry this responsibility. This gives a renewed significance to ethics and responsibility and restores to the individual "the fullness of moral choice and responsibility"[2] (Bauman 1992: xxii). Cornell, in other words, would agree with Bauman (1993: 250) when he writes that responsibility "is the most personal and inalienable of human possessions, and the most precious of human rights...[i]t cannot be taken away, shared, ceded, pawned, or deposited for safe keeping[3]". It is not only the foundationlessness that makes us responsible. It also lies in the 'fact' that, if we were merely following a rule (Cornell's automons), then there would be no notion of ethical behaviour

To summarize: Cornell follows Derrida in her focus on justice's relationship with deconstruction. Throughout *The Philosophy of the Limit* her focus falls on exactly that, namely the way in which society and systems are based on limits and exclusion, and how it is justice's responsibility to expose this. To illustrate

this she focuses on philosophers such as Adorno, Hegel, Benjamin and Young. The second aspect of her focus is that these limits leaves us with responsibility/respons[e]-ibility, in other words, a call to action that must be answered. Cornell acknowledges the complexity of society and the violence of (legal) systems, yet, unlike the assumption in Critical Legal Studies (CLS), this does not paralyze her. She also argues, like Derrida, for the importance of transformation. Cornell (1992: 8) argues that there is an "unerasable moment of utopianism which is inherent in deconstruction". Derrida, she argues, does not reject the ideals of justice or the rule of law. Rather he, and the philosophy of the limit, give a renewed ethical importance to these ideals (8-9). He places an emphasis on the urgency of doing justice and the ongoing responsibility to the ideal of justice. In other words, deconstruction does not stand in opposition to these ideals, but in alliance with them. The philosophy of the limit is also linked with the understanding of justice as an aporia (11). Both emphasize doing justice to marginalized groups and the need for transformation. The philosophy of the limit does not mean merely being aware of the limits of a system, but it also means to be called to action by it.

I will now return to the first aspect of Cornell's argument, namely, her focus on the limits of the system. The idea of the limit is crucial to Cornell/Derrida's understanding of law and justice.

Systems and the philosophy of the limit
Davies (1996) makes some important points on the idea of the limit. A limit, she argues, is an end to thought, action and even the way in which we define ourselves (13). It is a limit to thought since "something is there preventing us from thinking *that*". This inhibits our ability to take action, since our thought, which is limited/runs into these limits, makes us see the world in a certain way. Thirdly, limits also define what we are and how we behave (14). They are paths, argues Davies, "that we follow to determine our existences" (15). They not only define what counts as acceptable and unacceptable behaviour, but also who count as human beings.

Davies, however, argues that there is also a positive side to limits: "The limit gives us a place to begin, a place to put our thoughts, a place to proceed and a place to make conclusions" (14). It is also a call to action and an invitation to think beyond (14). In other words, we have a responsibility to transgress limits, which is at the same time both a necessity and an impossibility. Furthermore, as Davies points out, to transgress a limit does not destroy the limit (16). It can, however, create the space for transformation and, perhaps, even a moment of justice. The 'fact' that the limit is not undone, also links with the points I tried to make on deconstruction in Chapter One, namely that, although deconstruction problematises and subverts hierarchies, it does not undo them.

In Cornell's focus on the philosophy of the limit, three 'areas' of limits could be identified, namely history, identity/community and systems. In her focus on history Cornell refers to Hegel, Adorno and Benjamin. She uses the arguments of Young and Levinas to make certain point on limits and the idea of identity/community. Lastly, she focuses on the limits that systems produce, referring specifically to the work of Luhmann.

One of the first philosophers that Cornell makes use of is Hegel[4] (18-22). According to Hegel, history has a goal; ultimately there is a correct system where everything has its place. The problem with this understanding, argues Cornell, is that it leaves no space for those ('others') who do not fit. The other is only allowed if she can be assimilated into the system. Furthermore, the exclusion and suffering of those others who do not or who refuse to fit into the system are justified by History's ultimate goal. Adorno, on the hand, rejects Hegel's argument because of its violent relationship with the other and its imperialism (14). He reacts against Hegel's identity thinking since "[it] aims subsumption of all particular objects under general definitions and/or a unitary system of concepts" (Held 1980: 202). In other words, the particular/the singular is made to fit into the Greater Scheme. Adorno argues that reality cannot be grasped in a single standpoint (204). Adorno wants things to exist in their difference. He argues against Hegel's idea of synthesis, since it will always be violent to the other. He views Hegel's idea of a unifying spirit as a

coercive force (Cornell 1992: 21). Adorno's negative dialectics, argues Cornell (35), "reminds us again and again of the relations of domination and exclusion which are implicated in an abstract appeal to the 'we' who *share*" [Cornell's emphasis]. Adorno's appeal is that difference, that which lies on the other side of the limit of the system, can only be excluded through violent means yet, otherness will come through the cracks in the system demanding a new focus on the ethical relationship.

A further aspect of Cornell's understanding of the philosophy of the limit and history is an image that she borrows from Walter Benjamin. He uses two contrasting images when speaking of his philosophy of history, namely the Angel of History and the *chiffonnier*[5]. In his "Theses on the Philosophy of History" Benjamin (1973: 249) writes,

> "A Klee painting named 'Angelus Novus' shows an angel looking as though he is about to move away from something he is fixedly contemplating. His eyes are staring, his mouth is open, his wings are spread. This is how one pictures the angel of history. His face is turned towards the past. Where we perceive a chain of events, he sees one single catastrophe which relentlessly piles wreckage upon wreckage, and hurls them before his feet. The angel would like to stay, awaken the dead, and make whole that which has been smashed. But a storm is blowing from Paradise...The storm drives him irresistibly into the future to which his back is turned, while the pile of debris before him grows toward the sky. That which we name progress is this storm".

The *chiffonnier*, on the other hand, is a far less dramatic figure, yet unlike the Angel of History, is respons[e]-ible to the debris of history, in other words, the others who have been disregarded or whose suffering has been justified by an Ultimate Goal. The *chiffonnier* carefully gathers the debris, that which has been excluded by the system, "the forgotten Other, whose remains have been scattered" (63). Derrida, argues Cornell, is perhaps the best example of a *chiffonnier*. Deconstruction is the action of a *chiffonnier*, picking up the debris and pointing out its importance. The debris/remains are cared for in their singularity; they are not gathered to form a larger/greater system (74). The

debris survives the system: "The Other cannot be completely eliminated in any given representational system...[i]n this sense, the ethical is a necessity as well as an impossibility - a necessity in that the remain(s) cannot be totally evaded even if they need not be heeded...[t]he Other remains".

In contrast to understanding history as a unified narrative with an ultimate goal, Cornell focuses on genealogy - a concept I have already discussed in Chapter Two. Genealogy digs through the surface of codified history, and seeks out singularity and detail. Cornell argues that genealogy is important for the idea of justice, since it calls to remembrance exclusions and prejudices (149). She writes that it is "crucial to the integrity of *justice* that demands that we also examine the existing limits of actualized concepts of justice, particularly as these exist in, and perpetuate, the patriarchal order of society" (149-150; my emphasis). Taking the history of law seriously is important because of law's foundationlessness and the ways in which it tries to obscure this. Cornell writes that we need to be reminded that "the stories we tell to justify one state of legal affairs over another are just that, stories...[t]hey can only be judged practically" (108).

The second aspect of the idea of limits that Cornell examines is the limits of and produced by community and identity. She does this by considering the arguments of Young and Levinas. Young (1990a, 1990b), whom I mentioned in Chapter One, argues that although the desire for community and wholeness can be understood, it is unethical since it is denies difference and creates hierarchies. She argues that the idea of community relies on the same desire for social wholeness that underlies racism and ethnic chauvinism and political sectarianism (Young 1990b: 302). Community excludes those who do not fit. The desire for unity/community, argues Young, "generates a logic of hierarchical opposition...[a]ny move to define identity, a closed totality, always depends on excluding some elements...the logic of identity seeks to keep those borders firmly closed" (303).

Cornell (1992: 39-40) acknowledges the dangers in the use of the concept and the "ways in which community and convention can do violence to

difference and particularity". She points out that Derrida too is wary of the concept and rejects Rousseau's dream of community, since it is life without *différance* and is based on a metaphysics of presence that assumes the possibility of unmediated face-to-face relations (49, 52). Yet Cornell, like Derrida, is not willing to totally reject the concept, since it is more complex than Young seems to admit. It is important for the notion of justice that 'community' be taken seriously. Cornell writes, "[t]o see in the Other the spirit of oneself is also to recognize the other as different...[t]he sameness that defines each one of us as an individual is not a composite of identifiable properties shared by all individuals...[w]e are the same in that we are I's; but to be a subject, to be an I, is to be different" (43). These moments of sameness seems to be important to Cornell for two reasons. First, she shares Derrida's criticism of Levinas' understanding of the Absolute Other and how this can lead to an end in communication and responsibility/action. Both Cornell and Derrida agree with Levinas that responsibility lies in the relationship between the self and other, yet the idea of an absolute other reinstates the idea of absolute identity, which is as dangerous as the idea of community (53-54). While they agree with the ethical asymmetry between self and other, they argue that there is also a relationship of phenomenological symmetry. In other words, the self is also the other's other. Secondly, law needs some concept of community, of treating individuals alike, in order to operate. Law needs sameness, and justice needs law. Although justice is 'inherently' a response to the singular, it make some 'concessions' in the direction of law and sameness in order to act against injustice.

To summarize: although Cornell has great sympathy for Young's argument against the idea of community, she does not reject the concept. She follows Derrida in arguing that although community has both a violent and exclusionary foundation and effects, there is some need to hold on to the *ideal* of community. Most importantly, deconstruction/the philosophy of the limit cannot simply reject the idea of community to simply take in another extreme, i.e. radical otherness: "[d]econstruction dedicates itself to the disruption of dualistic hierarchy, not to its acceptance" (59). One should still strive for "a belonging together without violence", which is perhaps the closest that Cornell

(1990: 60) comes to giving a "definition" of her understanding of the ideal of community[6]. It is an ideal, writes Cornell (1990: 60), that recognizes "the connection between sameness and difference that allows us to understand belonging together without some overriding spirit in and through which we are connected".

Another aspect of the philosophy of the limit and identity/community is the philosophy of Levinas . To Levinas the other is both the limit of the system and undermines it. The other cannot be captured by the system. The other cannot be simply included under a sumtotal of "we's" since each other is irreplaceable and stands in an asymmetrical relationship to the self (Bauman 1993: 48). The other, and specifically the ethical relationship between self and other, forces us to reconsider limits in society. Levinas leaves us with two important thoughts on the notion of the limit. First, the other, that which the system excludes, is a limit that can only be 'made' to 'fit' through violence. Second, the responsibility between self and other is without limit, "it breaks through very sort of intentional or regulative circularity" (Waldenfels 1995: 42).

The third 'type' of limit that Cornell examines is that of systems. Here she makes use of the work of Luhmann to point out another two aspects of the limits of a system. The first is the concept of autopoiesis. This refers to self-referential and self-producing systems. It could be defined as follows: "The core image of autopoiesis is the individual organism, ceaselessly generating elements out of elements, forming each element into an indissoluble unity...[e]very element of an autopoietic system is produced by and produces the operations of the system" (Jacobson 1989: 1646). Teubner (1988: 3) defines an autopoietic system as one which "produces and reproduces its own elements by the interaction of its elements". The two core elements are the generation of elements and the way in which the system sets the conditions of its own validity (Jacobson 1989: 1648). It is a concept usually used by biologists and system theorists, but it has attracted some attention among legal scholars as well[7].

Jacobson (1988: 1648) argues that legal scholars find two aspects of autopoietic systems important, namely dynamism and unity. First, legal systems perpetually produce norms in a dynamic way. Second, legal systems maintain unity through "a special brand of validity" (1648). These self-referential systems "produce as unity everything which they use as unity" (Luhmann 1988: 14). Luhmann (1988: 14) writes, "[t]he crucial insight is that elements presuppose enormous complexity in terms of their energy/matter basis, but nonetheless function within systems as indissoluble units in terms of the respective system". The systems that Luhmann speaks of are closed systems. He is quick to point out that this does not mean that systems do not interact with their environments (15). The closed nature of the system lies in the fact that all operations of/in the system reproduce the system (15). Cornell (1992: 122) understands the concept to mean "that legal propositions or norms must be understood within a self-generating system of communication which both defines relations with the outside environment and provides itself with its own mechanism of justification". Law has its own specialized way of processing information, and it is autonomous in this sense (123). It is not cut off from the rest of the environment, yet it maintains "operational closure" (123). It is a "normative network that continually processes information through its established presuppositions". It functions with a binary opposition between justice and injustice.

The second aspect of Luhmann's theory that Cornell (1992: 124-131) refers to is his understanding of time. Luhmann defines time as "the social interpretation of reality with respect to the difference between past and future" (124). Luhmann argues that an important part of social evolution is the temporalization of being. In other words, the past is no longer thought to be grounded in a single event or origin, nor is there a *telos* in history (125-126). His focus is on the present of which past and future are part. Luhmann (quoted by Cornell 1992: 125) writes, "[t]he *relevance* of time...depends upon a capacity to interrelate the past and the future in the present" [Luhmann's emphasis]. The positive side to Luhmann's understanding of time is that there is no mythical origin/past, nor is there a *telos* in history that can justify injustice. Cornell (1992: 127), however, argues that precisely because past

and future are integrated into the present, justice becomes simply what the system says it is. She writes, "any norm, legal or otherwise, only means something to the degree that such a norm exposes the present understanding developed through a network of legal operations" (128). This privileging of the present is challenged by Derrida's idea of *différance*, since it claims that there is no encompassing ontology, thereby disrupting the idea of the 'fullness of reality' (128). The past, present and future cannot be integrated in the way Luhmann wants them to be. According to Derrida, writes Cornell, there is no absolute beginning because the future has already begun (129). The past is not a mythical origin nor is the future reduced to being the horizon of the present. To Derrida the future brings redemption since it carries with it the possibility of justice (131). In other words, Luhmann views time as a succession of 'nows', where past and future is also present. To Derrida/Cornell things are more complex. The past, as I argued in Chapter Two, can be understood as genealogy. In other words, there is no single origin or version of history; there is a multitude of narratives. Instead of arriving at a single origin, the number of histories/narratives increases the further back one goes. The future too is a complex matter. It is brings both the chance for justice/redemption, thereby calling us to be responsible.

To summarize: Luhmann's understanding of a system is that if is self-organizing. It defines itself and one is never outside the system. Furthermore, if one is to be understood, one must play according to the system's rules. The system evolves in a way that will ensure its own survival. In other words, Luhmann's system is self-contained, leaving no space for transformation. Derrida's idea of *différance*, on the other hand, disrupts any system that privileges the present in the way that Luhmann's understanding does. To Derrida - and to Cornell - the system cannot keep up with difference. More importantly, justice does not allow a self-contained system. There must be some (hope of a) beyond. Without this moment no criticism would be possible and the system would remain exactly like it is. Derrida and Cornell want to keep the possibility/the need for criticism alive, yet they do not want to create a new metaphysics. This is why the philosophy of the limit is so important and so crucial for the idea of justice. It is always within the system, yet at the same

time it intervenes. Cornell argues that the philosophy of the limit intervenes in three ways (142-143). First, it destablises/problematises the idea of an 'inside' and an 'outside' of the system (142). Second, it points out that the very idea of a limit/boundary implies that there is a beyond. This Derrida calls "the logic of parergonality" (142). Third, the philosophy of the limit intervenes against the idea of privileging the present. Derrida's idea of *différance*, writes Cornell, disrupts the present that would allow self-identity for the system (143). The most crucial difference between Luhmann and Derrida, writes Cornell (1992: 143), is that, although Luhmann does not simply see individuals as automons, his focus is on the (self-contained) system; Derrida's focus is on the individual and her responsibility to the other and to justice. Put differently, if Luhmann's focus is on the system, Derrida's is on the 'beyond-ness' of responsibility and justice.

Luhmann also seems to make a mistake that Young (1990a) points out in traditional theories of justice, namely that the idea of power is viewed in a somewhat simplistic way as something that can be easily identified as well as added and subtracted. This is exactly what Cornell (1992) does not want to do. The 'aim' of the philosophy of the limit, after all, is "to expose the nakedness of power struggles and...of violence masquerading as the rule of law". Luhmann, it seems, needs the certainty of law more than the idea/possibility of justice. Jacobson (1989: 1651) writes, "[a]s Luhmann sees it, if autopoiesis is a correct description of legal systems...then law can make good the claim to provide a fixed point, a reliable standard for citizens...if autopoiesis is wrong, then the legal system must succumb". Luhmann's emphasis is on the production of limits and how this maintains the system; Cornell and Derrida are concerned with exposing the limits for what they are and creating the space for justice. This does not mean that either of them is unconcerned with the idea of law. On the contrary, as I tried to argue in Chapters Two and Three, there are few philosophers who take the notion of law as seriously as Derrida and Cornell do. Luhmann might 'explain' the way in which law operates, but he leaves no space for justice and ignores law's aporetic relationship with justice.

Perhaps the understanding of 'system' that is closest to that favoured by Cornell and Derrida is Cilliers's (1998a) idea of complex systems. A complex system adapts to its environment in a dynamic way, with no form of central control (Cilliers 1998a: 12). To successfully adapt to change the system must be able to represent information about its environment and, secondly, be able to adapt its structure through self-organsation (10).

First, the system must be able to gather and store information about its environment and be able to represent it (11). It must be able to find some meaning in the information and this is a complex process. Cilliers writes, "[m]eaning is the result of a process, and this process is dialectical - involving elements from inside and outside - as well as historical, in the sense that previous states of the system are vitally important...[this] process takes place in an active, open and complex system" (11). Things to do not have meaning in themselves, but because they stand in relation to other elements in the (complex) system. By contrasting Saussure's understanding of language with that of Derrida, Cilliers points out that the relationship between the elements in the system are "always playfully changing in an unpredictable way" (43). This does not mean that it becomes impossible to say something meaningful; there are pockets of stability (43). Here Derrida's concepts of 'trace' and 'différance' play an important role.

The second important aspect of complex systems is self-organisation[8]. Self-organisation is a characteristic of many systems, although not always to the same extent. Both a human cell and the economic system are self-organising systems, yet the internal structure of the former is far more stable (90). Cilliers identifies eight characteristics of a self-organising system (91-93). First, the structure of the system is the result of interaction between system and environment, and is not created by an external designer (91). Second, the system adapts to changes in its environment in a dynamic way (91). This links with the third point, namely, that this adaptation to environment "cannot be modelled by sets of linear differential equations" (91). Fourthly, interactions between elements on a local level can lead to complex behaviour (92). Fifth, these systems increase in complexity since they have to store and remember

information and uses it to act in new situations (92). Sixth, memory plays an important role in self-organising systems. Information that needs to be used frequently is remembered; that which is not, is forgotten (92). A seventh characteristic of these systems is that it is difficult to assign one function to them since this implies an external reason for the systems' existence (92). The function of a system, argues Cilliers (1998a: 92), is closely linked to the description of the system. Lastly, self-organising systems cannot be described in a reductionist manner.

I have already discussed in Chapter One the characteristics of a complex system that Cilliers (1998a) identifies. For the purpose of contrasting this with Luhmann's understanding of systems, I think it is necessary to briefly state the characteristics. A complex system consists of a large number of components that are richly connected so that they interact in a dynamic way. These interactions are non-linear, meaning that small things can have larger results. The characteristics of the system are not primarily the result of the nature of the components but of interconnections and interactions. This means that a complex system cannot be merely be replaced with an equivalent, simpler system. This also means that the system cannot be completely described, since something will always be left out. Furthermore, the reason why one description is accepted as the norm rather than another, "has little to do with rationality and a lot with power" (Cilliers 1999: 9). Most importantly, to disregard this and the complexity of the system is not merely a technical or descriptive error; it is unethical.

The bottom line is perhaps this: Luhmann's understanding of the legal system, namely as a closed, self-referential system, might be an explanation of 'law'. It is, however, also potentially a dangerous one, since it leaves no space for a (critical, aporetic) understanding of justice. Justice becomes merely what the system says it is. The possibility of being critical, of pointing out injustice and acting against it becomes impossible. On the other hand, Derrida's idea of *différance* and Cilliers's understanding of complex systems do leave this space for justice and do this without appealing to any Ultimate Goal or metaphysics. Cilliers (1999: 9) argues that if one takes the idea of (society as)

a complex system seriously, that it must also be acknowledged that one cannot give a complete and just description of society: "One cannot begin to think about the problem of justice if one does not accept its impossibility". Two important points, however, need to be made. First, this does not mean that one must give up on the idea of justice (9). Second, it also does not mean that justice is principle from 'outside' or 'beyond' the system (9-10). As Cilliers (1999: 10) points out, a transcendental understanding of justice does not solve the problems, since we do not know what it is.

Where does this leave us? I think one could argue that it brings us back to Derrida's understanding of the aporia of justice. In other words, to know and to know that one does not know; to try and 'do' justice, even while knowing that it is impossible and that any act of 'justice' will always be incomplete. This is not a move in the direction of metaphysics, but an acknowledgment of complexity. The aporia of justice 'means' to be caught up in knowing the (violent) nature of law, yet realising that justice needs law. It 'means' to know that justice is concerned with singularity and unique situations, yet is also tied to law which strives to be universal.

Cornell's understanding of law

I will now examine Cornell's understanding of law. Following Cover[9], Cornell (1992: 103-105) argues that the law 'maintains' itself in two ways, namely through "jurispathic" power and "jurisgenerative" power. These "powers of the law" should be seen in the light of the two types of violence of law that Derrida identifies, the violence that founds the law and the violence that conserves it. The jurispathic power of the law is the way in which it silences other (Other) competing perspectives when the law is interpreted. This is not something that can easily be escaped, since when the judge chooses for one interpretation over another, he/she necessarily excludes other interpretations (103). This is necessary for the creation of an effective legal system (104)[10]. Furthermore, argues Cornell, it helps to create the idea of universal principles and of community: "The power of the law to establish 'universal' principles within a community both represents imperial power and its ability to regenerate the paideic pattern of law making as [a] world of shared precepts".

The second power of law is its jurisgenerative power, in other words, the power of the law to create normative meaning. It is the power, writes Cornell, "to create unified meaning through the establishment of generalizable and universalizable standards" (104).

Cornell emphasises the violent nature of law and with this deconstruction's role to expose the "nakedness of power struggles" (155). She refers not only to Derrida's treatment of law's violent nature, but also to Cover's and LaCapra's criticisms of Derrida on this very topic. LaCapra, according to Cornell, argues that Derrida's argument on the foundationlessness of law could lead to a "might is right" position (155). Yet, writes Cornell, "Derrida explicitly begins his text, 'The Force of Law', with the 'Possibility of Justice'" (157). Deconstruction's 'aim' is to expose any identification of law with justice. The 'fact' that law is a construct based on foundationless violence does not bring Derrida and Cornell to despair, nor does lead to a relativist position. On the contrary, law as construct not only makes the idea of justice all the more important, but it also places a renewed emphasis on responsibility. Cornell writes, "any legal system's process of the self-legitimation of authority as myth leaves us...with an *inescapable responsibility* for violence, precisely because violence cannot be fully rationalized and therefore justified in advance" (157) [Cornell's emphasis]. Law never catches up with its justifications, nor are there any external norms to appeal to (157). This does not leave us trapped in a society where 'anything goes'. Rather, it leaves us with the responsibility to use the impulse of justice to improve the law. Cornell argues that another philosopher, namely Stanley Fish, makes the mistake of thinking that law's foundationlessness leads to might being right (158). Fish argues that law is foundationless and that the legal system (alone) defines what is relevant. The law is a "machine...[that] functions to erase the mythical foundations authority" (158). Fish finds this wondrous; Cornell calls it monstrous (158). The mistake that Fish makes, she argues, is that he identifies law with justice, instead of justice being the impulse that urges us to improve the law (158).

Law does hide its fondationless origin, masking its violence, but this does not mean that law is identified with justice. For Fish the ability of the law to hide its

foundationless origins, as well as law's violent nature, renders all resistance useless (161). The functioning of the system and its justification become one (163). It defines reality, thereby making it impossible to challenge its myths (163). For Derrida it is precisely law's foundationlessness and the 'fact' that it is a construct that gives us hope and the opportunity for transformation (164). The consequence of the deconstructabilty of law, writes Cornell, is "that law cannot...shut out its challengers and prevent transformation" (165).

This does not mean that either Cornell or Derrida underestimates the important role that law does and must play. Cornell is quick to point out that Derrida's conservation of the law and the rule of law is also important (165). We need law because we cannot reinvent the world everyday; we need it to make the world manageable. Most importantly, we need law, inspired by justice, to act against injustice. We must conserve, yet always also transform.

Most importantly, law's violence and myth of foundation leaves us not with undecidability, but with responsibility (169). Cornell writes, "[u]ndecidability in no way alleviates responsibility..[t]he opposite is true...[w]e cannot be excused from our role in history because we could not be reassured that we were 'right' in advance" (169). We are always caught in the aporia, knowing that we must act, now, and realising that we do not have all the information nor are we assured of the consequences. Yet we must still stand in for our actions and our judgments. Cornell, in other words, agrees with Derrida that justice is an aporia. Justice is not a projected ideal, nor can it be defined, since the latter would collapse description and prescription leaving us with justice-as-the-norm-of-the-day (165).

But why is law necessary? First, as Derrida stressed, and with this Cornell agrees, justice needs law to act, to answer the call of the other. Law and justice are two, yet they are one; they are indisassociable, argues Derrida (Derrida/Cilliers 1999: 284). Second, argues Cornell (1992: 105), the arrival of the third makes law necessary. One is never simply alone with the other; it is never simply a matter of the self and the other and the boundless responsibility that lies between them. The third arrives and interrupts this

relationship. Cornell, although she acknowledges this, makes a further important point, namely that the arrival of the third is no excuse to fall back into law and justice as a matter of calculation. Cornell (1992: 105) writes, "[t]he aspiration to a just and egalitarian state proceeds from the irreducible responsibility of the subject to the Other...[e]ach Other has her claim, and her claim must be addressed". Legal principles, argues Cornell (1992: 105), are needed to help decide between the enormous number of competing claims.

Cornell's understanding of justice

Cornell (1992: 110) argues, as strenuously as Derrida did, that justice can never simply an appeal to convention or its repetition. Cornell (1992: 116) writes, "even if law in a modern differentiated society is an autonomous system...the operations of that system can never be identified as justice".

A further important point that Cornell makes is that the dilemma of talking about justice is that it must never simply be an appeal to conventions, yet at the same time the history of the development of legal and moral conceptions should not be ignored either (4). She writes, "[i]n order to have an adequate understanding of justice, then, we must begin with the recognition of individual partiality" (5). In the words, like, Cornell argues for attentiveness to singularity.

Cornell argues that there are two reasons why deconstruction is justice (132). First, it undermines the 'tyranny of the real', in other words the violent, self-justifying legal system. Second, it refuses to identify any status quo as justice, which thereby justifies injustice and silences the other. Justice cannot be defined; it is always to be. Cornell writes that if justice is to be defined, "it reinstates a circular mode of justification that turns on what already is" (132). Defining justice collapses description and prescription. Cornell writes, "[j]ustice 'is' the limit of the immanent norms of the legal system to the extent that these norms are identified as Justice...this limit is not projected as a transcendental ideal...[r]ather, it is an unsurpassable ideal" (133). It is also an action, an operation within a complex society, which means that there are no easy answers. In other words, to Cornell justice can never be an appeal to

existing conventions nor a(n) (empty) transcendental ideal. She wants to preserve the ideas of ethics and responsibility.

It is Derrida's understanding of justice as aporia and his refusal to gloss over the complexity of law, justice and society that preserves this ethical moment. Cornell writes, "Justice as aporia, the philosophy of the limit protects the divide between law and justice, and protects justice from being encompassed by whatever convention described as the good of the community...[t]his exposure of the aporias of Justice is in itself ethical" (118).

If justice cannot be defined, to avoid collapsing prescription and description, and neither is it some heavenly ideal, then where does that leave us? Apart from answering that justice lies in deconstruction/the philosophy of the limit or is an aporia, it can also be described as a quasi-transcendental concept. A quasi-transcendental concept "is a gesture in the direction of metaphysics and then standing back again" (Derrida/Cilliers 1999: 282). One of the most important aspects of defining justice in this way is that there is no foundational gesture, we are still left with our inescapable responsibility (282). Justice, like ethics, is not a checklist; it is a call to action and responsibility.

Another important aspect of Cornell's agreement with Derrida of justice as an aporia is the relationship between justice and law. The interwovenness of law and justice is already 'evident' in the way in which deconstruction/the philosophy of the limit operates: not from a privileged position, but from within the system. Culler (1982: 86), whom I quoted earlier, writes, "deconstruction works within the terms of the system but in order to breach it". Justice, as law-inspired-by-justice, is always already in the system. So is justice as aporia. If it was not at the same time within and yet al.so 'outside' (as the impulse to change and improve law), there would be no aporia. Derrida (Derrida/Cilliers 1999: 280) argues that deconstruction is intervention and action. It is "a way of thinking about what responsibility and decision should be".

Perhaps Cornell (1992: 62) summarizes it best when she writes,

"the entire project of the philosophy of the limit is driven by an ethical desire to enact the ethical relation...by ethical relation I mean to indicate the aspiration to a nonviolent relation to the Other and to Otherness more generally, that assumes to guard the Other against the appropriation that would deny her difference and singularity".

3. Cornell, Critical Legal Studies and Critical Race Theory

Cornell's understanding of law and justice is a radical departure from traditional jurisprudence. In Chapter Three I discussed two other movements in contemporary jurisprudence, namely Critical Legal Studies (CLS) and Critical Race Theory (CRT), which also moved away from and even disrupted traditional jurisprudence. I would argue that, although they are important movements that created the space to think differently about the law, they differ from Cornell's jurisprudence on a crucial point: they fail to take both the notions of law *and* justice seriously. In this section I will compare Cornell's ideas with both CLS and CRT in order to make this point clearer.

CLS shares with Cornell the idea that law is not neutral nor independent. It is a powerful, and violent, way to protect the status quo. CLS also argues that law is interwoven with the ideology of liberalism, which leads to some rights (e.g. the right to private property) being given preference over other rights. Furthermore, the history of legal concepts, argues CLS, is contingent and the reason why they are accepted as the norm has little to do with justice and more to do with power.

To summarize: CLS and Cornell do agree on some issues. Law is not neutral and serves as a mechanism of exclusion. Law is also violent. Lastly, CLS also takes the history of legal concepts seriously.

Cornell, however, points out a number of problems with CLS. Although she never underestimates or tries to argue away law's violence or foundationlessness, she still sees the importance of law. It is precisely her concern for *justice* that makes her take law so seriously. CLS proclaims law to

be a construct and then waits for the legal system to collapse. Cornell - and Derrida - see the law as a construct *and* as a call to action and responsibility. Law as construct is there to be deconstructed, to be engaged with and, hopefully, to be transformed. Furthermore, justice needs law to act against injustice. Or, as Davies (1994: 271) argues, "[j]ustice is not another normative order existing in a different place from law: it rather becomes possible only through the existence of law and its deconstructible nature...[j]ustice is possible because law is deconstructable".

As I mentioned in Chapter Three, Cornell is critical of CLS. The central error of CLS, argues Cornell, is to confuse law's foundationlessness with a complete loss of meaning (94). The danger of this, writes Cornell, is that "[i]f legal sentences can have no ethical meaning...then the machine is free to make us feel its meaning nevertheless...[t]he machine needs no justification to keep on running" (94). The appeal to justice must not be lost. CLS abandons the idea of an ethical vision and its importance for law (101). Cornell, on the other hand, refuses to give up on the idea of justice and the possibility of transformation: "The Good does leave its mark...[i]ndeed...the Good *constitutes* the subject as responsible to the Other" [Cornell's emphasis].

Furthermore, whereas CLS seems to be immobilised or driven to despair by law's lack of foundation, Cornell, as Derrida did, views it as a challenge and a call to action. Cornell writes, "[t]he challenge presented by the absence of a single, 'objective' interpretation is...the need to maintain a sense of legal meaning despite the destruction of any pretence of superiority of one *nomos* over another...[w]e are called to remain open to the invitation to create new worlds" (109).

The second contemporary jurisprudence movement that I discussed in Chapter Three was CRT. This movement also argues that law is not neutral, but rather a powerful and violent way not only to protect the status quo, but also to maintain racial subordination and domination. The role that law plays in racial subordination is hidden behind concepts such as "neutrality", which disguises not only the power and exclusion involved, but also the complexity

of society. CRT argues that instead of hiding behind the ideology of neutrality, the legal systems should take differences seriously. Subsequently, great emphasis is placed on the idea of a different voice and the importance of narratives.

CRT and Cornell to have important aspects in common. Once again they agree on law's "nature" being violent, powerful and exclusionary. CRT also takes law's history/genealogy seriously realising, as Derrida (1992: 18) does, that the "we" who spoke of justice meant white (christian) males. Another important point is that CRT argues that there are people, singular individuals who are at the receiving end of law. In other words, CRT takes seriously the "singularity, individuals, irreplaceable groups and lives" that Derrida and Cornell speak of (16). Unlike CLS, CRT is far more concerned with transformation and the idea of justice. Whereas CLS seems to focus on debunking the law, CRT leaves space for the idea of justice. Cornell shares both the CRT emphasis on the urgent need for justice and its claim that the concept of rights is still important. She writes, "Levinas once indicated that we need rights because we cannot have Justice...[r]ights...protect us against the *hubris* that any current conception of justice or right is the last word" (167). The idea of rights is, however, qualified. It must, like law, be open to transformation (167).

To summarize: CRT and Cornell agree on the 'nature' of law (violent, exclusionary), the importance of rights, justice and transformation. They also share a sensitivity to difference and the way in which law chooses to ignore and suppress it. CRT and Cornell, however, differ on some points. Firstly, CRT seems to underestimate difference. The 'voice of colour' that they argue for threatens to become a Voice of Colour, in other words essentialist. Although CRT is an important move in taking difference seriously, it seems to underestimate the complexity of difference, thereby risking falling into the trap of identity politics. Put differently, CRT risks reducing difference to interest group politics[11]. Cornell, although she does focus on feminism to make some points on difference, does not limit herself to it. She agrees with Derrida that difference cannot be contained nor limited to some forms of identity politics.

CRT and Cornell also differ in they way in which they understand the idea of justice. Although CRT does take the idea of justice, and the urgency of justice, seriously, they seems to view it as a transcendental ideal "toward which we earthlings down below heave and sigh while contemplating its heavenly form" (Derrida/Caputo 1997: 131). CRT seems to view justice as Ideal, outside the existing order, which we can look to and, perhaps, even know. As I have argued in this chapter as well as the previous chapter, Cornell and Derrida see justice as deconstruction; in other words, it is (primarily) a call to action, a continuous act of intervention and of transformation. They see justice as a quasi-transcendental concept; in other words, we treat it as an ideal while at the same time realising that it is not a metaphysical concept. It is part of an everyday struggle to answer the call to be ethical.

To summarize: the main theme that Cornell shares with (radical) contemporary movements in jurisprudence is the argument that law is not neutral, but that it is by 'nature' violent and exclusionary. The crucial difference, however, between Cornell and these movements is two-fold. First, she does not think law's violent nature makes it unimportant nor does she debunk it. She takes it very seriously. Second, she makes a move that CLS and CRT fail to make, namely, she also takes the notion of justice very seriously. Furthermore, she argues, like Derrida, that justice and law are radically different, yet also interwoven. Cornell's 'central' argument is one she shares with Derrida, namely that the law/limits need to be deconstructed. This, however, is not done to "trash" the law (CLS) or to undo it; it is done in the name of justice.

4. Concluding Remarks

Cornell largely follows Derrida in his understanding of justice, most importantly his insistence of justice as an aporia which leads to a complex relationship between law and justice. She highlights this with her idea of deconstruction, recast as the philosophy of the limit. She illustrates the idea of

limits by referring to philosophers such as Hegel, Adorno, Young, Levinas and, perhaps most importantly, Luhmann.

The idea of limits is so important to Cornell, not only because of her formulation of deconstruction as the philosophy of the *limit,* but because law is one of the most important and powerful limits. Davies (1996: 15) perhaps summarizes it best when she writes, "that is what law is [a limit] - something which defines an inside and an outside, gives us the possibilities and impossibilities of phenomena, and...mediates oppression by defining and legitimating the categories of sameness and deviancy". Law and limits are necessary to make life possible and make it easier to process the world. However, their violence should never be underestimated nor the boundaries they draw assumed to be neutral or natural. Cornell's jurisprudence is so significant because, following Derrida, she is able to take law seriously in both its positive and negative aspects, while at the same time never losing sight of justice. She makes the move that both CLS and CRT fail to make, namely take justice as seriously as law.

But how does Cornell answer the questions posed in previous chapters?
In Chapter One I argued that traditional theories of justice place the emphases on order. The focus is placed on procedures and maintaining the status quo. Young (1990a) argues that this not does this limit the scope of justice to distributive justice; it also reduces the dealings between (atomistic) individuals to contractual dealings and it underestimates the idea of power. Power is both multidirectional and permeates every corner of (complex) society. Traditional theories of justice, however, seem to assume that power can be added and subtracted and traded along with other goods. It ignores the forces of power and domination, reduces justice to distributive procedures and underestimates the complexity of both individuals and society.

In contrast Cornell does take the idea of power - and of violence - very seriously. Unmasking power struggles, the "violence of the masquerade of law dressed up as justice", is what drives the philosophy of the limit (155). Furthermore, Cornell, following Derrida, moves the understanding of justice to

a different level. Derrida 'defined' justice as deconstruction; Cornell makes a further important move by reformulating deconstruction as the philosophy of the limit. The philosophy of the limit, by definition, takes law, procedures and power seriously. It seeks out limits and engages with them, not from somewhere 'outside', but from within the system. It identifies and subverts hierarchies, not undoing them, but creating the space for otherness and perhaps even justice.

Cornell's jurisprudence, unlike that of CLS, does take the concept of injustice seriously. She refuses to label any situation as just/justice, which is one of the most important strategies of justifying injustice. Instead, she argues that justice is a continuous call to action and transformation. Cornell argues that "we are left...[with] an infinite responsibility to which we can never close our eyes or ears through an appeal to what 'is'" (182-183). Furthermore, justice is to Cornell, as it was to Derrida, an attentiveness to singular others. In doing this, she avoids the emphasis in traditional theories of justice that lead to injustice, namely focusing on the rules and what they determine as injustice instead of the concrete experiences of singular and irreplaceable individuals.

Cornell's understanding of justice is also interwoven with the content she gives to the concept of ethics. The 'premise' of Cornell's jurisprudence is not procedures and rules, but ethics understood as the search for a non-violent relationship with the other. This is why she places the emphasis on law's violent nature and why she argues for deconstruction as the philosophy of the limit. The idea of the limit is significant not only because laws are limits that must be challenged and transformed by justice, but because the other is on the receiving end of these limits.

Cornell's arguments, however, are not unproblematic. She has been criticized, for example by Gray (1993) that she does not do justice to Hegel. Supporters of Levinas may argue the same. McCarthy (1995) points out that Cornell dismisses Kant too easily. However, I have tried to argue that in jurisprudence Cornell's arguments are important. In jurisprudence/the philosophy of law radical movements as whole seem to fall into the trap of

relativism. In contrast, Cornell's jurisprudence is rigorous, with an unfailing commitment (and responsibility) to both law and justice. Furthermore, she gives a valuable account of Derrida's arguments and tries to point out their practical consequences (for example, that the use of precedent cannot reduce judges to automatons).

To summarize: the most important aspect of Cornell's jurisprudence places the emphasis on both law and justice. This focus lies in two key aspects of her jurisprudence. First, her reformulation of deconstruction as the philosophy of the limit means that does not operate from 'outside' the system from a privileged position. It is, in other words, not outside the law; it engages with and challenges it. Second, Cornell has a Derridean understanding of justice as an aporia. Justice is an aporia precisely because it is so radically different from the law, yet it is indisassociable. Aporetic justice never 'rids' itself of the law. They are interwoven.

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[1] American legal scholars/journals are especially guilty here, very easily labeling ideas as "postmodern" or subscribing them to Derrida.

[2] Once again, it is important to note that Bauman (1991, 1992, 1993) uses the 'moral' and 'morality' in the same way in which Cornell (1992) uses the concepts 'ethics' and 'ethica'", i.e. not simply the following of rules, but a focus on a non-violent relationship with the other. This is a move from rules to responsibility, and from the universal/general to the singular.

[3] Bauman (1993: 81) emphasizes the importance that he place on the individual's inescapable responsibility when he recounts the following narrative from the Talmud (Trumot 8:10): "Ulla bar Koshev was wanted by the government. He fled for asylum to Rabbi Joshua ben Levi at Lod. The government forces came and surrounded the town. They said: 'If you do not surrender him to us, we will destroy the town.' Rabbi Joshua went up to Ulla bar Koshev and persuaded him to give himself up. Elijah used to appear to Rabbi Joshua, but from that moment he ceased to do so. Rabbi Joshua fasted for many days, and finally Elijah revealed himself to him. 'Am I supposed to appear to informers ?' he asked. Rabbi Joshua said: 'I followed the law'. Elijah retorted: 'But is it the law for saints?' ". Bauman comments: "Saints are saints because they do not hide behind the Law's broad shoulders. They know, or they feel, or they act as if they felt, that no law, however generous and humane, may exhaust the moral duty" (81).

[4] For a more extensive discussion of the importance of Hegel for legal theory, see Cornell et al. (1991) *Hegel and Legal Theory*.

[5] Benjamin describes the *chiffonnier* as follows: "[a] mysterious creature who [lives]...off the leavings of the big city...everything in the big city that has been cast off, everything that it lost, everything it distained, everything it broke, he catalogues and collects" (quoted by Cornell 1992: 62).

[6] Compare with Cornell's (1990: 13) 'definition' of ethics as the quest for a non-violative relationship with the other.

[7] In this regard see *Autopoietic Law: A New Approach to Law and Society*, a collection of essays on the concept of autopoiesis and law/legal systems, edited by Guenther Teubner (1988).

[8] Cilliers (1998a: 111) does acknowledge that self-organising systems do carry with them the danger of seeing human existence as mechanistic and with no reference to values. He points out, however, that a selfish system would not survive; 'altruistic' behaviour is important for the survival of a system (111).

Secondly, systems increase their chances of survival by the way control is distributed and decentralised.

[9] Specifically his essay "*Nomos* and Narrative" (1983), which appeared in the *Harvard Law Review* (Vol. 97, No. 1).

[10] Tilly (1985) makes a similar point when he argues, in an essay entitled "War-Making and State-Making as Organised Crime", that a crucial phase in the creation of a nation-state is wiping out dissenting voices and destabilising narratives. In order for states to be successful, there must be only one version of history; this is dependent not only on the centralisation of coercive power, but also of narratives. Migdal (1988) also argues this in *Strong States, Weak Societies*. He argues that states can only be really successful if power in centralised. If society takes on web-like formations, the state is seriously undermined.

[11] Iris Marion Young (1997b) makes this point in more general terms in "Difference as a Resource for Democratic Communication".

CONCLUSION

The Introduction of this thesis stated that the relationship between law and justice is a problematic one. It gives rise to questions such as: does one guarantee the other, should law be seen as independent from justice? I started by examing some general assumptions made by traditional theories of justice, as well as challenges posed to them by, among other, Bauman, Gilligan and Young. In the following chapter I argued that these challenges are taken seriously, and further, by Derrida. By focusing on his arguments in "The Force of Law" (1992) I tried to point out not only the important challenges he poses to traditional theories of justice, but also the complex and crucial relationship between justice in law. Derrida makes it clear that it is not possible to discuss the concept of justice without refering to the law, and vice versa. In Chapter Three I examined two jurisprudence movements, CLS and CRT, that share Derrida's unease with law. They make important points as to law's violent and exclusionary nature, and the importance of confronting the machine of law with the narratives of concrete, singular experiences of injustice. However, both movements (CLS because they largely ignore the concept and CRT because they remain too idealistic about it) fail to take justice seriously. In Chapter Four I argued that Cornell's jurisprudence, as argued for in *The Philosophy of the Limit* (1992), does focus on the interwoveness of law and justice.

In Chapter One I argued that traditional theories of justice - including those of philosophers such as Rawls and Nozick - place the emphasis on justice as distributive justice. In other words, the focus is on rules, procedures and order. This has significant implications. First, justice becomes defined only in terms of the distribution of benefits and burdens. Second, the relationships between people become reduced to contractual dealings between atomistic, self-contained individuals. Third, society (and justice) viewed in such a simplistic manner also means that power is viewed as something that can be (easily) added and subtracted to make society more just.

The emphasis on justice-as-order is also problematic for other reasons. By focusing on the arguments of Lyotard and Bauman, I tried to highlight the most important objections of 'postmodernism' against an emphasis on order. Milgram (1974) and Bauman (1991, 1992, 1993) point out the unethical implications of such an emphasis. Both of these authors argue that when (unquestioned) order becomes the most important goal, torture and genocide are usually not that far behind. Milgram (1974) shows that the potential to be a torturer lies in most individuals. In a context where there is a chain of command and hierarchy, and where the boundaries and limits of the system are not challenged, this potential can be fulfilled. In other words, Milgram and Bauman's arguments show that an (uncritical) emphasis on order can have lethal consequences.

In contrast 'postmodern' ethics moves the focus from rules to responsibility, and from calculation to choice and an attentiveness to consequences. Cilliers (1998a, 1999) and Bauman (1992, 1993) argue that following a rule and calculating 'correct' behaviour may ensure 'good order', but that does not mean that it is ethical behaviour. Rather, individuals must make choices and stand in for choices, realizing that they are both constituted by the choices they make and that they must stand in for their consequences.

With this new focus on the tension between order/rules and responsibility, I linked the idea of complexity. In this regard I followed Cilliers (1995, 1998a, 1999) who argues that society is a complex system, meaning that it consists of a large number of elements that interact in a rich, dynamic and non-linear way. Furthermore not only can a complex system not be replaced by a simpler equivalent system, any attempt to give a complete description of the system will disregard and violate some aspect of the system. Most importantly, to ignore this is not merely a technical or descriptive error, but it is unethical (Cilliers 1999: 9).

I then examined the arguments of Gilligan (1982). She argues in favour of an "ethic of care" and the importance of the "different voice" in contrast to the rule-bound "logic of justice". The ethic of care places the emphasis on context

and concrete individuals who are faced with difficult choices; the logic of justice places its emphases on rules and calculation. I argued that although Gilligan's position is not unproblematic (for example, she comes close to essentialising the "different voice", and the notion of care could have problematic consequences), she does pose important challenges to justice as order or merely distributive justice.

To summarize Chapter One: in the first section of Chapter One I argued that traditional theories of justice seem to have a narrow view of justice as order or as a mechanism to manage distributive relations in society. I then tried to point out the problems with this by making use of the arguments of Young (1990a, 1990b), Bauman (1991, 1992, 1993), Cilliers (1998a, 1999) and Gilligan (1982). They each pointed out different problems with justice-as-order. In the second section of Chapter One, I tried to point out a second aspect of traditional theories of justice that is very problematic, namely the way in which the concept of injustice is ignored. Following Shklar (1989, 1990), Lötter (1990, 1993) and Young (1990a), I argued that these theories seem to view injustice simply as that which happens in the absence of "proper" rules and procedures. Furthermore, traditional theories of justice take the abstract as point of departure and consequently have little sensitivity to concrete experiences of injustice. Lötter (1990, 1993) argues that traditional theories of justice assume what he calls "nearly just societies" and have very little use in so-called "radically unjust societies". In other words, I tried to argue that the concept of injustice poses important challenges to traditional theories of justice for the following reasons: if (a) society measures up to some checklist of justice (i.e. justice as an ordering principle), where the focus is on abstract and universal rules and procedures, that does not necessarily say something about concrete experiences of *injustice*. An understanding of justice that places the emphasis on order, rules and procedures makes it difficult to discuss and, more importantly, act against injustice.

In Chapter Two I tried to point out that Derrida takes these challenges against traditional theories of justice seriously, and moves the debate on justice to a different 'level'. I first examined Derrida's argument in "The Force of Law",

which can be divided into two sections. First, he makes a distinction between the concepts 'law' and 'justice', yet at the same time he argues that they stand in an aporetic relationship to each other. In the second section, Derrida examines the violent nature of law, specifically referring to Walter Benjamin's "A Critique of Violence". He argues that law not only needs violence to be founded (and this is a foundation based on myth), but also to conserve itself.

After considering Derrida's argument, I focused on three themes: the difference between law and justice, the important relationship between violence and responsibility, and the implications of Derrida's concept of justice for the understanding of injustice. In examing the difference between law and justice I identified eight possible differences between them, as well as focusing on the different ways in which they approach the idea of difference. I then focused on the relationship between law's violent nature and responsibility. Although law is both founded and conserved by violence, Derrida argues that it leaves us with an inescapable responsibility. Lastly, I argued that Derrida's understanding of justice has important implications for the concept of injustice. His attentiveness to injustice is not only reflected in his arguments on how the history of 'justice' should be taken very seriously, but also in two other aspects of his argument. First, one of the most important 'elements' his understanding of justice is his focus on the singular other and her concrete experiences of injustice. Second, one of his most important motivations for not abandoning the idea of law is because we need it to act against injustice; we need law "as there are always the wicked" (Derrida 1992: 11).

To summarize: Derrida shifts the debate on justice to a different level, namely from rules, distributive procedures and an emphasis on order to a focus on inescapable responsibility, the impossibility and necessity of choice and the aporetic relationship between law and justice. A significant aspect of Derrida's arguments surrounding justice is his refusal to reject the idea of law. He has no doubts as to its foundationlessness and violence, yet he also argues that one cannot speak of justice, nor act against injustice, without also leaving space for law. It is perhaps this that make his arguments so important to

jurisprudence. Derrida's understanding of justice could be 'defined' as follows: a responsibility before the law, meaning that we are always already (and in the name of justice) responsible to a singular other, yet we are also *before* the law, meaning that any action striving to be just will always already be interwoven with the law. Furthermore, we are never simply alone with the singular other, and the moment a third party enters the law becomes both inevitable and necessary.

In Chapter Three I tried to highlight the significance of Derrida's arguments for jurisprudence by contrasting them with two 'radical' movements in contemporary jurisprudence, namely, Critical Legal Studies and Critical Race Theory. In each case I examined the movements' backgrounds, main themes, key problems, their importance, and how they compared to Derrida's arguments. I argued that, although both these movements make important points regarding law's violent and foundationless 'nature' and, in the case of CRT, the way in which the individuals' concrete experiences of injustice are ignored and justified, they both fail to leave the space for justice.

In Chapter Four I argued that the jurisprudence that Cornell (1992) proposes does seem to take both law and justice into account. She largely follows Derrida in arguing that, although they are radically different, law and justice are also indisassociable. Derrida says that deconstruction is justice; Cornell reformulates deconstruction as the philosophy of the limit. This is an 'active' notion of justice, a responsibility to expose in the name of justice, "the nakedness of power struggles and...of violence masquerading as the rule of law" (Cornell 1992: 155). She, therefore, avoids the trap that CLS and CRT fall into, namely, to recognize the problems surrounding law, but becoming blinded by them, leaving no room for the idea of justice. Cornell is in agreement with Derrida that justice can never be (merely) about procedures and rules. She argues that the philosophy of the limit is "driven by a desire to enact the ethical relation...to the other" (62).

The 'core' argument of this thesis is that Derrida's understanding of justice not only poses significant challenges to traditional theories of justice, but also to

jurisprudence. The most important implication of his idea of justice is that, unlike traditional theories of justice, it does not become caught up in a discussion on procedures to ensure a better ordered society; it is not a 'passive' understanding of justice. Rather, justice-as-deconstruction is a continuous call to action in the face of an inescapable respons[e]-ibility. The 'foundation' of the aporia of justice is perhaps this responsibility. We have a responsibility to justice and at the same time also to the law. We must make judgments while being attentive to the singularity of the situation, but at the same time we cannot simply make up the rules as we go along. We are responsible to the singular other before the law is there; we are responsible precisely because the law is there, since it must continually be deconstructed in the name of justice.

This understanding of justice (and law) has three 'categories' of possible implications: philosophical, jurisprudential and for legal practice. On a philosophical 'level' Derrida's understanding of justice forces us to re-think traditional theories of justice. As I have tried to point out, these theories tend to narrow the scope of justice to distributive justice, thereby ignoring both the complexity of the concept and of the society in which it 'operates'. His understanding of the concept is both a call to action and responsibility which carries with it a new and rich understanding of ethics. This again has implications for whether 'justice' is considered a matter for political philosophy or ethics - or a combination of both.

I tried to point out the implications for jurisprudence in Chapters Three and Four. Some of the possible implications are that 'radical' movements on contemporary jurisprudence - specifically CLS and CRT - have made important points about law's violent and foundationless nature. However, the implication of Derrida's arguments is that pointing this out is not enough. Law should be challenged in the name of justice. Derrida (Derrida/Caputo 1997: 16) declares, "[w]ithout a call for justice we would not have any interest in deconstructing the law". Arguing that law is violent and founded on myth does not make matters more simple. On the contrary, it forces us to take the complexity of society in which these legal systems operate seriously.

Furthermore, it places a renewed emphasis on responsibility, a notion that does not feature often enough in jurisprudence.

Lastly, Derrida's understanding of justice has possible implications for legal practice. In Chapter Two, in the discussion on the difference between law and justice, I argued that there are implications for the way in which precedent is understood. If Derrida's arguments are taken seriously, then precedent cannot simply be the re-application of past cases to singular cases. His notion of iterability could have possible implications for legal practice in the sense that past cases can have relevance for other cases, but every time a precedent is repeated it is interpreted, and the meaning is neither fixed nor identical. The understanding of justice as aporia also has other implications. Even though it is impossible to gather all information and consider all consequences, as much as possible should be done. Furthermore, judges should realize that applying a rule is interwoven with making a fresh judgment. Although they cannot simply make up the law as they go along, at the same time they are dealing with singular and irreplaceable groups who are part of a complex system. Another aspect of this implication is that judges should know all that they can know, yet also acknowledge "that between the accumulation of knowledge and the moment I make a choice, I take responsibility...there is an infinite abyss" (Derrida/Cilliers 1999: 280)[1].

Derrida's arguments perhaps also imply that placing all this responsibility on one judge is not just either, and that some creative measures should be found to do justice to this responsibility. His position on justice has possible implications for the way in which laws are drafted. Cilliers (1999: 11) writes, "[laws] should be drawn up *as if* they were universally valid, but with the proviso that they have to be re-evaluated *each time they are applied*" [Cilliers's emphasis]. A 'just' law is not necessarily one that is written in stone, that is true for all time. It is one that is moved by the impulse of justice, and that is open to deconstruction and sensitive to complexity. Above all, argues Cornell (1992: 182), the implication of Derrida's understanding for legal practice is that legal interpretation can never be reduced to the following of rules. This is linked with Derrida's insistence that justice cannot be an appeal

to the law or established norms. He wants to maintain the gap between law and justice and with this his "utopian moment" (182).

It is justice's concern with singularity, irreplaceable individuals and groups that leads us to its impossibility, to the aporia of its relationship with law. The aporetic relationship between law and justice is not only the 'result' of an emphasis on singularity, but of the need for justice to be 'applied'. Therefore, Derrida's understanding of justice (and law) leaves us with a challenge, a call to action and, above all, with a renewed emphases on the importance of choices and responsibility.

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[1] Compare: Derrida (Derrida/Caputo 1997: 19) who argues, "there is a point or limit beyond which calculation must fail, and we must recognize that...[a] democracy or a politics that we simply calculate, without justice and the gift, would be a terrible thing, and this is often the case".

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