1990

Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism

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DECONSTRUCTION AND LEGAL INTERPRETATION: CONFLICT, INDETERMINACY AND THE TEMPTATIONS OF THE NEW LEGAL FORMALISM

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I. DECONSTRUCTION AND THE CRISIS IN LEGAL INTERPRETATION

The practice of legal interpretation is mired in a deep and persistent crisis. This crisis extends both to the realm of private law[1] and to that of public law.[2] Even justices on the United States Supreme Court have increasingly become pitted against one another in fierce and often vituperative debate over questions of legal interpretation.[3]

In the broadest terms, the crisis reflects a loss of faith concerning the availability of objective criteria permitting the ascription of distinct and transparent meanings to legal texts. Moreover, this loss of faith manifests itself in the intensification of the conflict among the community of legal actors, the dissolution of any genuine consensus over important values, the seemingly inescapable indeterminacy of legal rules, and the belief that all the dispositions of legal issues are ultimately political and subjective. The roots of the crisis affecting legal interpretation can be traced back to the Legal Realists' critique of legal formalism,[4] and a comprehensive exposition of the mul-

* Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University. I wish to thank my colleagues David Carlson and Arthur Jacobson for their many helpful and perceptive comments. I am also grateful to my colleague Drucilla Cornell for many stimulating and enlightening discussions on Derrida and deconstruction.

1 See, e.g., Dalton, An Essay in the Deconstruction of Contract Doctrine, 94 Yale L.J. 1007 (1985); Feinman, Critical Approaches to Contract Law, 30 UCLA L. Rev. 829 (1983); Abel, Torts in The Politics of Law 185-200 (D. Kairys ed. 1982).

2 See, e.g., Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, 62 Minn. L. Rev. 1049 (1978).

3 For examples of recent bitterly divided and acrimonious decisions, see Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989); Texas v. Johnson 109 U.S. 2533 (1989); City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989). In Croson, for instance, Justice Marshall's dissent characterized the Court's majority as taking a "disingenuous approach." Id. at 746; see also Rosenfeld, Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality, 87 Mich. L. Rev. 1729 (1989) [hereinafter Decoding Richmond].

4 See, e.g., Pound, Mechanical Jurisprudence, 8 Colum. L. Rev. 605 (1908); Cohen, Transcendental Nonsense and The Functional Approach, 35 Colum. L. Rev. 809 (1935); see also Yablon, Review: Law and Metaphysics, 96 Yale L.J. 613, 615-624 (1987).

tifaceted dimensions of this crisis can be found in writings of scholars associated with the Critical Legal Studies Movement ("CLS").[5]

Deconstruction appears to buttress the proposition that application of legal rules and legal doctrine is ultimately bound to lead to conflict, contradiction and indeterminacy. Any attempt at defining deconstruction is hazardous at best as there is disagreement over whether deconstruction is a method, a technique or a process based on a particular ontological and ethical vision.[6] Nevertheless, leaving these difficulties aside for now, it seems fair to assert that deconstruction postulates that writing precedes speech instead of operating as a mere supplement to speech,[7] stresses that every text refers to other texts,[8] and emphasizes that discontinuities between the logic and rhetoric of texts create inevitable disparities between what the author of a text "*means to say*" and what that text is "nonetheless *constrained to mean*."[9] In other words, in the context of deconstruction, all texts (whether oral or written) are writings that refer to other writings. A text is not a pure presence that immediately and transparently reveals a distinct meaning intended by its author. Instead, from the standpoint of deconstruction, every writing embodies a failed attempt at reconciling identity and difference, unity and diversity and self and other. A writing may give the impression of having achieved the desired reconciliation, but such impression can only be the product of ideological distortion, suppression of difference or subordination of the other. Consistent with these observations, legal discourse—and particularly modern legal discourse with its universalist aspirations—cannot achieve coherence and reconciliation so long as it produces writings that cannot eliminate from their margins ideological distortions, unaccounted for differences or the lack of full recognition of any subordinated other.

For those who take the challenge posed by deconstruction seriously, there can be no easy solution to the crisis affecting legal interpretation. Thus, for example, there cannot be a return to the narrowly circumscribed and simpler jurisprudence of original intent where the meaning of legal texts can be precisely framed by reference to some transparent, self-present intent of the framer of a constitution, a legislator or a party to a private contract. As Arthur Jacobson

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[5] See, e.g., Unger, The Critical Legal Studies Movement, 96 Harv. L. Rev. 561 (1983); Kennedy, The Structure of Blackstone's Commentaries, 28 Buffalo L. Rev. 205 (1979); Kelman, Interpretive Construction in the Substantive Criminal Law, 33 Stan. L. Rev. 591 (1981).

[6] See C. Norris, Derrida 18-27 (1987).

[7] See id. at 23-24, 127.

[8] See id. at 25.

[9] Id. at 19.

has persuasively argued in the course of his contribution to this symposium, even divinely prescribed law involves multiple writings, erasure and intersubjective collaboration.[10] Accordingly, in light of deconstruction, resort to the jurisprudence of original intent can only lead to a paralyzing idolatry[11] that forecloses any genuine intertextual elucidation of legal relationships. In other words, by isolating a particular writing and by elevating it above all other writings in such a way as to sever the intertextual links that constitute an indispensable precondition to the generation of meaning, the jurisprudence of original intent both promotes blind worship of the arbitrary and the unintelligible and blocks discovery of the intertextual connections necessary to endow legal acts with meaning.

Other attempts at overcoming the crisis affecting legal interpretation do not fare significantly better in the face of the challenge posed by deconstruction. For example, the claim that an adequate standard of legal interpretation can be fashioned by reference to the intersubjective perspective of an "interpretive community,"[12] can only prevail through the suppression of difference and the subordination of the dissenting other. Indeed, as evinced by the very crisis sought to be overcome, legal interpretation becomes manifestly problematic *because* of conflict and fragmentation *within* the interpretive community. Therefore, unless appeal to the interpretive community comes on the heels of a genuine resolution of the aforementioned conflict and fragmentation, such an appeal would only make sense if it were accompanied by suppression of some of the clashing voices found in the interpretive community.

Attempts at solving the crisis affecting legal interpretation through submission of legal issues to an interpretive framework informed by extra-legal values also prove ultimately unsatisfactory. Take, for example, the law and economics approach according to which, in the most general terms, legal rules and legal doctrine should be interpreted in such a way as to promote wealth maximization.[13] Even assuming that law and economics were capable of yielding determinate outcomes, it would still fail to meet the challenge posed by deconstruction. This is because there is no consensus that the sole purpose of law is to advance the interests of *homo economicus*. And, to the extent that such consensus is lacking, the canons of legal inter-

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[10] See Jacobson, The Idolatry of Rules: Writing Law According to Moses, With Reference to Other Jurisprudences, 11 Cardozo L. Rev. 1079 (1990) [hereinafter Idolatry of Rules].

[11] See id. at 1118-20, 1125-32.

[12] Fiss, Objectivity and Interpretation, 34 Stan. L. Rev. 739, 744 (1982).

[13] See generally R. Posner, Economic Analysis of Law (2d ed. 1977).

pretation derived from the law and economics approach would operate in disregard of the extra-legal values of a substantial portion of the community of legal actors. More generally, unless there is a society-wide consensus on extra-legal values, no canons of legal interpretation based on extra-legal values can possibly meet the objections raised from the standpoint of deconstruction.

There is a different kind of approach to the crisis of legal interpretation which may initially seem particularly attractive because it does not apparently rely on a concrete definition of the object of legal interpretation or on contested extra-legal values. This kind of approach stresses the *process* of interpretation above the object of interpretation or the substantive values espoused by the interpreter. It is a procedural approach in so far as it suggests that so long as legitimate interpretive procedures are followed, the interpretive outcome will be justified regardless of actual substantive disagreements concerning the object of interpretation or extra-legal values held by members of the community of legal actors.

A prime example of the approach under consideration is provided by Ronald Dworkin's theory of law as integrity developed in his *Law's Empire*. In its broadest outlines, the theory of law as integrity maintains that legal interpretation does not take place in a vacuum, but that it is a historically situated practice. An interpreter confronted with the task of determining what the law requires in a particular case must refer to relevant past instances of legal interpretation in order to be in a position to provide the best possible interpretation of the law in the case at hand. Dworkin analogizes the task of legal interpretation with that of writing a chain novel.[14] A chain novel, in Dworkin's conception, is a work of collective authorship, with each chapter being written by a different individual author. Each of the latter is constrained by the previously written chapters and must insure that the chapter that he or she is about to write "fits" with the preceding chapters and contributes to the preservation of the integrity of the novel. Moreover, each author must endeavor to write the best possible novel consistent with the aesthetic constraints imposed by the need to incorporate already completed chapters. Similarly, in Dworkin's view, a judge confronting a hard case, must decide it on the basis of the best possible legal interpretation compatible with establishing a fit between the case at hand and the line of relevant historical judicial precedents in a way that preserves the integrity of law as a practice that evolves over time.

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[14] R. Dworkin, Law's Empire 228-232 (1986).

Dworkin's approach is intertextual, and while formal and procedural, it is not purely abstract. The substantive values of the community of legal actors do not directly figure in legal decisions but they are not simply severed from the process of legal interpretation. Traces of these substantive values are embedded in the legal precedents that confront the legal interpreter and must therefore be implicitly taken into account by the latter in his or her formulation of an interpretation that is compatible with precedent while preserving the integrity of the legal process.

Under closer scrutiny, Dworkin's theory of law as integrity fails to provide an acceptable solution to the crisis affecting legal interpretation. The principal reason for this failure is, as Alan Brudner has perceptively indicated, that the criterion of fit is too indeterminate to endow Dworkin's principle of integrity with a sufficiently concrete meaning.[15] Indeed, Dworkin's requirement of fit and integrity is reducible to an appeal to coherence made in an interpretive universe that has been stripped of intelligible criteria of coherence.[16] Either the measure of fit and integrity is based on some set of substantive values such as those embedded in certain relevant judicial precedents, or it is reducible to a purely formal and abstract notion that cannot be given any non-arbitrary concrete instantiation. If fit and integrity depend on particular substantive values—even if these values have been filtered through the interpretive process involved in the attempted reconciliation of judicial precedents—then Dworkin's theory is ultimately subject to same the criticisms as those theories which select one set of contested substantive extra-legal values over others or which posit some such values as dominant and the remainder as subordinate. On the other hand, if fit and integrity are to be understood in purely formal and abstract terms, cut off from all extra-legal substantive values, then the coherence which they seek is a mere transcendent ideal devoid of any particular concrete purchase.[17]

Although Dworkin's principle of integrity fails to deliver the means to overcome the challenge posed by deconstruction, the notion of integrity should not be discarded altogether. Indeed, integrity may play a useful, if more modest, role than that reserved for it by Dworkin, in the quest for a satisfactory solution to the crisis affecting legal interpretation. That role is a critical one, and it consists in serving as a constant reminder against the acceptability of a conception of law

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[15] See Brudner, The Ideality of Difference: Toward Objectivity in Legal Intrepretation, 11 Cardozo L. Rev. at 1133, 1156-57 (1990).

[16] See id. at 1158.

[17] *Id.*

that tolerates the reduction of law to mere politics—that is, politics in the pejorative sense of the unprincipled, shrewd and often manipulative quest for advantage in the political arena. Even if no concrete embodiment of law as integrity is presently attainable, drawing attention to the absence of integrity may foster resistance against abandoning law to politics. In short, while legal interpreters may lack a positive conception of integrity, integrity can nevertheless still play the important negative role of standing in for the coherence and the principles that law that is reducible to politics lacks.[18]

II. DECONSTRUCTION AND THE RELATIONSHIP BETWEEN LAW AND POLITICS

What has been established thus far is that deconstruction confirms the genuine nature of the crisis affecting legal interpretation, and that from the standpoint of deconstruction none of the above mentioned approaches designed to overcome this crisis is capable of achieving success. An important question, however, has not been addressed yet, namely whether deconstruction lends support to the proposition that law is ultimately reducible to politics. In this section I address this question and conclude that deconstruction, as I understand it, requires rejecting that proposition. This conclusion, moreover, leads to a further question concerning what there is about law—or more precisely about legal interpretation—which makes legal practice irreducible to the practice of politics (in the sense specified above). This last question will be explored in the next section, princi-

[18] A similar argument can be made concerning the interpretive value of Habermas' process based dialogical method designed to yield a rational consensus and the "ideal speech situation" which he employs as a means to that end. Habermas' aim to achieve a genuine rational consensus through an unconstrained dialogue, see T. McCarthy, The Critical Theory of Jürgen Habermas 306 (1978), certainly seems vulnerable to the Derridean charge of "logocentrism" as it belongs to the western philosophical tradition that presupposes the possibility of achieving universal rationality. From the standpoint of deconstruction, the consensus generated through unconstrained dialogue is either purely formal and abstract and thus deprived of any particular content, or such consensus depends on the pre-dialogical acceptance of certain particular substantive values, in which case the dialogue that is supposed to lead to universal agreement is not genuinely unconstrained.

Within the Habermasian project, the ideal speech situation is a counterfactual device designed to lead to the removal of the distortion which domination, deception and self-deception would bring to the dialogical process designed to produce a rational consensus. See id. at 306-07. Although from the perspective of deconstruction, Habermas' entire dialogical project lacks any genuine positive interpretive value, this does not foreclose the notions of consensus and of an ideal speech situation from playing a useful negative role analogous to that performed by Dworkin's concept of integrity. Thus, the absence of any form of consensus and the failure to devise legitimate means to combat domination, deception and self-deception from legal relationships may well constitute important obstacles standing in the way of a successful resolution of the crisis affecting legal interpretation.

pally by means of an assessment of the hypothesis that law can overcome the interpretive crisis that besets it and escape the stranglehold of politics through a return to legal formalism. As we shall see, the legal formalism to be considered in the next section is not the same as that attacked by the Legal Realists and by members of CLS. It is a new, more sophisticated kind of legal formalism, and I shall concentrate on two significantly different conceptions of it put forth respectively by Stanley Fish and Ernest Weinrib. Finally, although I will argue that neither of these two conceptions of legal formalism is ultimately consistent with the insights derived from deconstruction, both of them will nevertheless prove useful in pointing towards ways in which law may be understood to remain distinct from politics.

A. *The Meaning of Destruction and the Deconstruction of Meaning*

To determine properly whether deconstruction supports the proposition that law is reducible to politics, it is necessary first both to further specify what is understood by deconstruction in the context of the present discussion and to articulate the rudimentary outlines of a workable conception of law. So far, I have stressed the following features of deconstruction: the priority of writing over speech, the intertextual nature of all writings, the dichotomy between what a writing is intended to mean and what it is constrained to mean, and the failure of every writing fully to account for difference or for the other. Moreover, the combination of the priority of writing and of its intertextual nature causes all meaning to be *deferred*. The meaning of a writing is neither immediately given nor self-present, but depends on some future reading (or re-collecting) of that writing's past. And since all reading involves a re-writing,[19] all meaning depends on a future re-writing of past writings as re-written in the present writing which confronts the interpreter. A present writing is a re-written past writing and a not yet re-written future writing. Or put somewhat differently, a present writing is both a completion and an erasure[20] of a past (or no longer present) writing, and a text which must face erasure and completion by some future (or not yet present) writing in order to acquire meaning. In a word, from the standpoint of deconstruction, meaning depends on the transformation of what is no longer present by what is not yet present.

To the extent that meaning requires both a constant reinterpreta-

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19 See Jacobson, Idolatry of Rules, supra note 10.

20 All re-writing presumably seeks both to preserve and to supersede—i.e., to improve, to clarify—the writing which it seeks to restate. Hence, re-writing involves both completion and erasure of the text with respect to which it constitutes itself as a re-writing.

tion of the past and a perpetual openness to future reinterpretation, it would appear to dissolve in an infinite regress that travels in both temporal directions. Every past was once a future and then a present, and every future shall become a present and then a past, and accordingly meaning can seemingly never become ascertained. Or more precisely, inasmuch as present writings are opaque, paradoxically, the meaning of a text could possibly be anything except that which it presently appears to be. Consistent with this analysis, moreover, the crisis affecting legal interpretation could never be overcome so long as one shared the perspective of deconstruction. Indeed, if the search for meaning leads to an infinite regress, those with the greatest power or cunning will impose their (arbitrary) meaning, and law will dissolve into politics.[21]

In the conception referred to above, deconstruction is viewed exclusively as an interpretive method or technique. And, taken as a mere interpretive technique disconnected from any larger framework, deconstruction seems only fit to destabilize all meanings by systematically unveiling the contradictions embedded in every writing and by constantly but fruitlessly inverting the binary oppositions (e.g., mind/nature, subject/object, masculine/feminine) that circumscribe every text. In contrast to this latter conception of deconstruction, however, there is another which, while preserving a necessary link between past, present and future writings, does not inescapably lead to the conclusion that all ascriptions of meaning turn out to be arbitrary.[22] This alternative conception does not cut off the process of deconstruction from the realm of ontology or from that of ethics.[23] Indeed, in this alternative conception, the deconstructive process implies an ontology of the unbridgeable separation of the self from the other (or put in a way that seems less likely to provoke a return to the sterile interplay of binary oppositions, an ontology of infinite postponement of the complete reconciliation of self and other). Moreover, this ontology is

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21 Derrida rejects the equation of knowledge and power. C. Norris, supra note 6, at 217.

22 No conception of deconstruction can be advanced with confidence, as every such conception is subject to further deconstruction. This, however, is not particularly distressing in the context of the present analysis, as the object is not to find the best conception of deconstruction. Rather, the object is to fasten unto *a* plausible conception of deconstruction that seems particularly well suited to shed light on the important questions raised by the crisis affecting legal interpretation.

23 While any conception of deconstruction presented in the course of this article involves, at best, one among many possible readings or re-writings of Derrida's conception of deconstruction, it is noteworthy that Derrida apparently conceives of deconstruction as possessing a definite ethical dimension. See C. Norris, supra note 6, at Ch. 8. Moreover, according to Norris, "For Derrida, the realm of ethical discourse is that which exceeds all given conceptual structures, but exceeds them through a patient interrogation of their limits, and not by some leap into an unknown 'beyond' which would give no purchase to critical thought." Id. at 224.

supplemented by an ethic of inclusion of, and care for, the other—an ethic which must always be attempted and renewed but which can never be satisfied because the meaning of "inclusion" and of "care" can never be sufficiently determined to the extent that the self always remains (somewhat) estranged from the other. In short, in this alternative conception of deconstruction, on the ontological plane, difference can never be fully reintegrated within a totality that encompasses self and other, whereas on the ethical plane, difference both incessantly requires and perpetually frustrates the gesture of inclusion and caring extended towards the other.[24]

Within the alternative conception of deconstruction just outlined, meaning although never permanently fixed does not thereby become purely arbitrary. Because the requirements of ontology and those of ethics are inscribed in history—that is, because they leave their mark on the succession of concrete historical social formations—at every moment, they constrain the range of possible legitimate meanings without ever imposing a single, fully determinate meaning. Hence, ontology and ethics, which are always projected both towards the past and towards the future, constantly open and close possible paths of interpretation without ever settling on any single, distinct, clearly articulated and exhaustively circumscribed meaning.

Given that the alternative conception of deconstruction advanced here is thoroughly committed to the intertextual nature of all writings, the escape from the pure arbitrariness of meaning can only be effectuated by engaging texts at a proper level of abstraction. Indeed, at too high a level of abstraction, all meanings appear to be fully interchangeable, as every writing is grasped in its infinite regress along the opposite directions of its endless past and its perpetually incompleted future. At too low a level of abstraction, on the other hand,

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[24] In this connection, it is worth mentioning Derrida's predominant preoccupation with the writings of Hegel. See J. Derrida, Positions 77 (1981): "We will never be finished with the reading or rereading of Hegel, and, in a certain way, I do nothing other than attempt to explain myself on this point." For other among Derrida's writings dealing with Hegel, see Of Grammatology (1976); Margins of Philosophy (1982); and Glas (1986). Turning the tables on Derrida, one could characterize his deconstructive enterprise in Hegelian terms, as an ontological privileging of difference which makes it irreducibly transcendent thus preventing its sublation (*Aufhebung*) within a totality encompassing both self and other. Because of this ontological privileging of difference, moreover, deconstruction requires the perpetual deferral of the reconciliation between individual morality—that is, Hegelian *Moralität*—and the ethical life of the community—that is, Hegelian *Sittlichkeit*.

For a particularly illuminating analysis of the relationship between the thought of Derrida and that of Hegel, see Brudner, supra note 15, at 1191-98. For a discussion of the conception of meaning within a Hegelian framework, see Rosenfeld, Hegel and the Dialectics of Contract, 10 Cardozo L. Rev. 1199 (1989).

meanings would remain completely opaque as myopic concentration on the features of individual texts would tend to conceal or obscure the relationships between such texts and other texts.

A proper level of abstraction can be reached, however, by grasping texts in their unfolding as part of the process of historical formation that gives shape to the ontology of postponement of the reconciliation of self and other and to the ethical call to the other renewed by each such postponement. In each historical epoch, there are writings which are *meant* to reflect a concrete vision of the desired reconciliation between self and other, but which are *constrained* by the very vision they embrace to produce yet another picture of the further postponement of such reconciliation. Moreover, the latter picture serves to expose the limits of the particular vision or reconciliation which it reflects. And, as they become manifest, these limits suggest particular forms which the renewed ethical call to the other might have to take under the circumstances. In other words, the very limits of a vision of reconciliation indicate how that vision has failed, and suggest to the about to be renewed ethical call to the other which particular failures should be avoided, and which obstacles need to be overcome. Similarly, each emerging vision of reconciliation is informed by the particular failures and contradictions of its historical predecessors as well as by the shortcomings of recent ethical calls to the other.

Conducted at the proper level of abstraction and applied to the historical succession of diverse forms of attempted reconciliation between self and other, intertextual interpretive practice does not culminate in aimless conflict and hopeless indeterminacy. Whereas it cannot avoid conflict, such interpretive practice can reveal particular conflicts which invite a finite range of possible solutions. Similarly, such interpretive practice unavoidably leads to indeterminacy, but not to the kind of indeterminacy which justifies virtually every conceivable meaning. Rather, it is the kind of constrained indeterminacy that results from the interplay between semantic path openings and closings guided by the actual historical succession of intertextual forms of attempted reconciliation between self and other.

It may seem implausible, given the unlimited intertextuality of all writings, that any particular meaning should be able to muster sufficient strength—albeit only for a short fleeting moment—to resist being swept away in the ceaseless exchange of semantic markers. Or, put somewhat differently, it may seem inconceivable, in light of the past and future infinite regresses to which the intertextual ascription of meaning is subject, that the temporary emergence of any particular

meaning would be the product of anything but an arbitrary purely subjective choice. And if this proved to be the case, then we would all wind up permanently trapped between the poles of an insurmountable binary opposition pitting the subjective against the objective.

Meaning, however, is neither subjective nor objective, but intersubjective. Also, acknowledgement of a ceaseless exchange of semantic markers does not compel the conclusion that on a given historical occasion any meaning could be legitimately substituted for any other meaning. These two propositions may not be self-evident, but are consistent nonetheless with the alternative conception of deconstruction being advanced here.

B. *Analogies Between Semantic Value in Intertextual Exchanges and Economic Value in Market Exchanges*

To shed further light on the plausibility of these two propositions, it might be useful to refer to certain parallels between the production of semantic value through intertextual exchange and the production of economic value through the exchange of commodities in the marketplace.[25] Assuming a fully developed rational market with participants who are utility-maximizers, the exchange of commodities depends on such commodities having value.[26] More specifically, exchange depends on commodities having two different kinds of value: use value and exchange value.[27] Unless a commodity had some use value for some ultimate consumer, no one would desire to acquire it, and there would be no point in exchanging it. On the other hand, unless commodities had exchange value, that is unless they were commensurable, they could not become objects of rational exchange.

In the most rudimentary market imaginable, counting with two individual participants who possess equality in bargaining power, exchange value and use value appears to be closely linked to one another, and all market values appear to be subjective. In such a

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25 Cf. Herrnstein Smith, Judgment After the Fall, 11 Cardozo L. Rev. 1291, 1304 (1990): "Value judgments may themselves be considered commodities—useful, appropriable, and thus valuable, in numerous ways. Moreover, some of them are evidently *worth more* than others *in the relevant markets*" (emphasis in original).

26 Indeed, since the exchange of commodities requires some effort and, when such exchange is not simultaneous, some risk, utility-maximizing market participants endowed with rationality of means would not engage in such exchange unless the commodities involved had some value for them.

27 For a more comprehensive discussion of the relation between use value and exchange value and of the relation between subjective and objective values in the context of a developed market economy, see Rosenfeld, Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory, 70 Iowa L. Rev. 769, 814-817, 832-839 (1985) [hereinafter Contract and Justice].

market, for example, it would seem as rational for the market participants to exchange two apples for three oranges as it would for them to exchange three apples for two oranges. That is because the choice between these two transactions is heavily dependent on the participants' respective relative subjective preference as between apples and oranges, and because the exchange value of apples relative to oranges appears to be a direct function of the relative use value of apples to oranges for each of the two participants.

In a fully developed market economy with huge numbers of market participants, on the other hand, market values seem to be objective, while use value and exchange value appear devoid of any palpable connection. Indeed, in a fully developed perfect market, the well-established and well-publicized price of a widely traded commodity does not seem susceptible to change as the result of the efforts of any individual competitor.[28] Moreover, no matter how intense the desire of an individual consumer may be for a particular commodity, such consumer would appear to have no measurable effect on the exchange value of the commodity in question. In a fully developed market, therefore, it would be irrational for anyone to buy a commodity (significantly) above, or to sell it (significantly) below, its market price.

Upon closer scrutiny, the values of commodities on the rudimentary market are no more purely subjective than they are strictly speaking objective on the fully developed market. In both cases, such values are intersubjective as they are the product of a combination of, or a compromise between, the diverse subjective desires which seek fulfillment through market transactions.[29] Even in a rudimentary market with two participants, the terms of the contract for the exchange of commodities are not the product of the subjective will of either of the two participants, but rather the product of their common will which is intersubjective.[30] On the other hand, in a fully developed market, if the value of a widely traded commodity appears to be objective, it is not because it is determined in relation to some objective criterion that is independent from the subjective desires of the market participants. Indeed, in a fully developed market just as in a rudimentary one, value is the product of an intersubjective compromise involving the subjective input of each market participant. The

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28 Cf. P. Samuelson, Economics 455 (10th ed. 1976) ("A perfect-competitor is too small and unimportant to affect market price.").

29 For an argument that is similar in many key respects and that concerns value in general, see Herrnstein Smith, supra note 25.

30 See G. Hegel, Philosophy of Right ¶ 40 (T. Knox trans. 1952) (contract is the transfer of property from one to another in accordance with a common will).

only difference between these two markets is that in the fully developed market the subjective input of each individual participant becomes so infinitesimal relative to the sum of subjective inputs as to become virtually imperceptible.

As we move from the rudimentary to the fully developed market the precise relationship between use and exchange value becomes more difficult to grasp. In a fully developed market, most exchanges may be made among traders who are several steps removed from a commodity's ultimate consumer. To the extent that such traders concentrate on trading the commodities in which they deal they are likely, for the most part, to ignore the use value of those commodities. On the other hand, in a sophisticated, fully developed market, the use value of a commodity may be more the product of an intersubjective compromise between the exchange objectives of traders and the subjective desires of ultimate consumers than merely the product of only the latter.[31] Be that as it may, however, even in the most sophisticated of modern markets, where money makes all commodities fungible from the standpoint of exchange, the exchange of commodities only makes sense so long as there is some dynamic relationship between use value and exchange value.

Useful parallels can be drawn between the production of semantic value through intertextual exchange and the production of economic value through the exchange of commodities in two principal areas. First, the intersubjectivity of all meaning is produced in a way that is analogous to the generation of intersubjective values in the economic marketplace. Second, the manner in which the interchange of semantic markers is prevented from resulting in a senseless and arbitrary ritual structurally resembles the process by which use values become engrafted upon exchange values in order to prevent market transactions from becoming irrational and pointless.

All meaning—or at least all meaning relating to events and transactions in the social and political sphere where the community of legal actors is located—is intersubjective in that it requires some collective consensus or compromise concerning the setting of certain particular intertextual relationships. In other words, all meaning-endowing interpretations in the context of the social and political sphere require a collaborative collective re-writing of historically situated textual material that confronts a group of actors. Moreover, such collaborative

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[31] Cf. id. at ¶ 191A ("the need for greater comfort does not exactly arise within you directly; it is suggested to you by those who hope to make a profit from its creation"); J. Galbraith, The Affluent Society 127 (1976) (consumer wants are to a large extent created by producers).

re-writing may be the product of a pre-existing agreement concerning relevant values among the group of actors involved, or the product of a dialogical compromise bearing a marked resemblance to the process of contract formation in the economic marketplace.[32]

The size of the group of actors that engages in collaborative re-writing can range from a minimum of two to a maximum of all actors confronted with the task of interpreting the same text. Moreover, any actual community of actors is confronted with the task of interpreting a multitude of different texts. Agreement concerning the interpretation of some of these texts may be widespread, while at the same time the interpretation of other texts may be highly contested. Also, the nature and scope of particular widespread agreements is bound to affect the kind of interpretive disagreements likely to be produced in a given community of actors.[33] In general, consensus, compromises and conflicts are fluid rather than fixed because the relationship between them is dynamic as any change in one of the three is bound to produce corresponding changes in the other two. Finally, even when an attempt at a particular collaborative re-writing fails completely because not even two actors can agree to take a common standpoint, such failure need not undermine intersubjective values and may in fact serve to reinforce them. Indeed, the search that culminates in the failure to reach agreement with respect to some values may itself have been prompted by agreements concerning other values, and that search may serve to reinforce commitment to those other values. Thus, for example, two would-be contractors, whose efforts fail because they cannot agree on mutually acceptable terms of exchange,

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[32] Paradigmatically, contract formation involves a bargained-for intersubjective mediation between initially conflicting subjective desires. Both parties to a prospective contract seek to obtain as much as possible in exchange for as little as possible. A contract is struck when a compromise is reached. Such compromise is likely to provide each party with less than originally hoped for but with enough to make it more advantageous for each of them to enter into a contract than to walk away from it. Similarly, two actors with initially incompatible subjective value laden approaches to a historically situated text by which they are jointly confronted cannot collaboratively re-write it unless they first negotiate a mutually acceptable intersubjective standpoint from which they can produce a common interpretation.

[33] In other words, a broad consensus concerning certain intersubjective values closes certain paths of legitimate disagreement while opening (or leaving open) other such paths. For example, if an entire community agrees that all human beings are created equal, then feminist claims for greater equality between the sexes cannot be contested legitimately by arguing that God created women to serve men. Such feminist claims could be legitimately contested, however, by an argument to the effect that while men and women are entitled to equal rights, they are not entitled to equal pay to the extent that physical differences between the sexes make women less desirable than men on the marketplace for jobs. But if a widespread consensus developed concerning the proposition that physical differences between the sexes do not justify different treatment on the job marketplace, then neither of the two above mentioned arguments could legitimately be advanced in opposition to the feminist claims.

may nevertheless by their very efforts reaffirm their joint commitment to the values of market competition and freedom of contract.

Any semantic value generated through a collaborative re-writing is intersubjective regardless of whether it seems subjective (as the product of only a handful of actors) or objective (as the product of virtually an entire community of actors). So far, therefore, the analogy between the intersubjective production of semantic value and the intersubjective production of economic value appears to hold nicely. It may be objected, however, that there is a crucial disanalogy between these two modes of producing values. According to this objection, the very nature of economic exchange makes it impossible for less than two actors to generate economic value in a free market economy. But there is nothing inherent in the nature of interpretive practice which compels the conclusion that a single individual acting alone cannot re-write texts in a way that generates new semantic values.

If this objection were valid and re-writing were not necessarily collaborative, then meaning could be purely subjective and interpretation an essentially solipsistic activity. At least from the perspective of the alternative conception of deconstruction advanced here, however, this objection misses the mark. Indeed, even if interpretation were not collaborative in the sense of involving a group of actors jointly engaged in the present re-writing of a past writing, it would still have to be collaborative and intersubjective to be meaningful. At the very least, interpretation requires a collaboration over time between a past actor, a present actor and a future actor. A reading of a past writing can only be conceivable as a re-writing if there is some intersubjective basis upon which semantic connections between the past writing and the re-writing can be established. Furthermore, to the extent that the meaning of a re-writing depends on future readings of that re-writing, interpretation also depends on the existence of an intersubjective basis for the establishment of semantic connections between present and future writings. On the other hand, if such intersubjective basis were lacking, the interpretation of a past writing would not involve a re-writing (a reading being impossible unless writer and reader share a common language) but an original writing devoid of any *meaningful* connection to any past or future writing. Hence, a writing is meaningless unless it is the product of an intersubjective collaboration (co-laboration) over time that involves a minimum of three actors.

That interpretation is intersubjective and collaborative may be a guarantee against meaninglessness, but it is no guarantee against the unrestricted interchangeability of all meaning. A re-writing must

both bear some semantic connection to, and some semantic difference from, that of which it is a re-writing.[34] Accordingly, the question becomes whether the degree of such connection and difference is in any way constrained, or whether any degree of connection no matter how tenuous, and any degree of difference no matter how extreme, are acceptable provided that they are the product of a collaboration among a minimum of three persons. If the answer is the latter, then virtually every semantic marker would seem to be exchangeable for any other such marker, and re-writing would be encumbered by practically no constraints. If the answer is the former, on the other hand, then the question becomes one of knowing which constraints to impose and how those constraints would make it possible to distinguish between acceptable and unacceptable re-writings.

Consistent with the alternative conception of deconstruction advanced here, constraints regarding the process of re-writing are both necessary and provided by the ontology and ethics that underlie deconstruction. As already mentioned,[35] the operative ontological constraint narrows the range of acceptable re-writings to those which recast the concrete historical writing upon which they elaborate as a vision of a failed reconciliation between self and other and expose the specific aporias, contradictions and blind spots that require the further postponement of the desired reconciliation. Moreover, the operative ethical constraint requires that re-writings as writings (a rewriting being a writing for a future re-writer) specify a renewed ethical call to the other from the standpoint of exceeding the specific historically grounded limits of the vision of reconciliation which has just been interpreted as inadequate.

As also already pointed out,[36] the ontological and ethical constraints imposed by deconstruction do not usually dictate a single determinate meaning. Rather they operate through interconnected path opening and path closing mechanisms which legitimate certain meanings and bar others. Moreover, these mechanisms appear to be constraining without necessarily directly imposing or barring any isolated individual meaning in a way that is reminiscent of how use value indirectly constrains the definition of exchange value in a fully developed market. In both cases, an otherwise seemingly unconstrained, unstop-

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[34] It is conceivable in a purely formal sense that a rewriting would do no more than restate in different words the very meaning of that of which it is a rewriting. From the standpoint of deconstruction, however, re-writing involves erasure and projection into the past as well as into the future, and can therefore never be merely a plain restatement of that of which it is a re-writing.

[35] See supra text accompanying note 24.

[36] See supra text accompanying note 24.

pable and open ended exchange process is kept within certain bounds through the indirect application of normative markers that endow exchange with meaning through punctuation of its flow.

C. *Ontological and Ethical Constraints of Deconstruction and Rejection of Mere Politics*

The interconnected path opening and path closing mechanisms associated with the ontological and ethical constraints imposed by deconstruction frequently leave a fair amount of leeway to interpreters who are about to re-write particular historical writings with which they are confronted. If two interpretive avenues are equally open, only in the future could it become possible to determine whether either of the two would have been better than the other.[37] Because of this, the indeterminacy that inevitably accompanies the interpretive process makes room for potential abuses. By weaving in and out of different open paths of argumentation, an interpreter may skirt his or her ethical obligation and subvert the interpretive process to personal advantage. Indeed, since the complete and definitive reconciliation of self and other is subject to perpetual postponement, every attempted reconciliation pursued along an open path produces a certain configuration of benefits and burdens to be divided between self and other. To the extent that these configurations vary from one form of attempted reconciliation to another, an unscrupulous interpreter may exploit the availability of several genuine avenues of attempted reconciliation, by shifting back and forth from one to the next so as to maximize personal benefits and to minimize personal burdens.

To prevent abuses, interpreters should be held to a standard of integrity according to which shifts from one available interpretive avenue to another would only be justifiable if accompanied by a full and sincere assumption of all the burdens associated with the latter interpretive avenue. Consistent with this requirement of integrity, an interpreter may not resort to an available interpretive avenue to press for an advantage on one occasion, and then on the next occasion, abandon that interpretive avenue in favor of another in order to avoid a burden. On the other hand, an interpreter may switch from one available interpretive perspective to another if that interpreter sincerely believes that the latter perspective is better suited to promote the attempted reconciliation sought and if he or she is fully prepared

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[37] This follows from the fact that whereas the ethical call to the other requires overcoming the particular shortcomings of the failed vision of reconciliation which gives such call its renewed impetus, since no definitive form of the reconciliation between self and other is possible, no blueprint for the ethical call to the other is ever available.

to assume all the burdens that might flow from adoption of the new perspective.[38]

Any interpretive practice that operates within the ontological and ethical constraints of deconstruction, including the requirement of integrity, cannot be reducible to politics in the pejorative sense identified above.[39] These constraints, indeed, are clearly incompatible with any unprincipled, shrewd or manipulative quest for advantage in the arena of intersubjective relationships. Accordingly, deconstruction may provide a satisfactory solution to the crisis affecting legal interpretation. Whether deconstruction actually furnishes such a solution, however, depends on whether its ontological and ethical presuppositions are compatible with law and legal interpretation.

Before exploring whether deconstruction (in the alternative version advanced here) may be legitimately applied to law, it is necessary briefly to further consider the universe that lurks beneath the surface of deconstruction. Deconstruction's presupposition of the perpetual postponement of the reconciliation of self and other implies the existence of an intersubjective universe which is inevitably split into self and other. Moreover, deconstruction's postulation of the ethical necessity of the constant renewal of the call to the other makes it imperative to engage in a search for vehicles of social interaction which promise (although they will be eventually proven not to be able to deliver on their promises) the possibility of a form of reconciliation between self and other that allows for the concurrent full flourishing of self and other. Finally, the concepts of self and other should not be understood as referring to fixed entities, but instead as designating relationships respectively of identity and of difference or alterity. Thus, depending on the particular context, both "self" and "other" may refer to an individual or a group, to an economic class or an ethnic minority, to tribes or nations, and to temporary as well as to permanent groups. Also two (individual or collective) actors may concurrently be part of the same self for some purpose, while standing vis-á-vis one another in a relation of self to other for some other purpose. For example, white men and women may constitute a single self in the context of racism against blacks—that is, such men and women identify with one another as being white and relate to blacks as "the

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[38] The requirement of integrity in the context of deconstruction is hence much more circumscribed than Dworkin's principle of integrity. See supra note 14 and accompanying text. Moreover, deconstruction's requirement of integrity is not an additional constraint to be added to existing ontological and ethical constraints. The requirement of integrity is implicitly contained in those constraints, but needs to be made explicit to better indicate the actual sweep of the constraints of which it forms part.

[39] See supra text accompanying notes 17-18.

other"—and self and other in the context of the relationship between the sexes, where difference is defined along gender lines.

D. *Modern Law's Possible Embrace of Deconstruction to Overcome Mere Politics*

Consistent with the preceding observations, law can embrace deconstruction if it constitutes itself as a practice oriented towards a universe of social actors split into self and other, and if it conceives its mission as seeking to bridge the gap between self and other without sacrificing or compromising either of the two.[40] To be sure, not all conceptions of law satisfy these two conditions. Nevertheless, a strong case can be made that the complex legal systems of modern western democracies in general, and the American legal system rooted in the common law and a written constitution, in particular, do in fact satisfy these two conditions.

In their broadest outlines, modern legal systems prevalent in western democracies are characterized by, among other things, group pluralism;[41] general rules of law that are universally applicable to all regardless of status or group affiliation,[42] and that prescribe duties and entitlements to individuals;[43] and the separation of legislation from adjudication, which is designed to buttress the autonomy of law by sharply separating the function of applying legal norms to particular cases from the political function.

Group pluralism obviously entails social divisions into self and other. General rules of law universally applicable to all actors regardless of their group affiliations, on the other hand, can be viewed as evincing attempts at reconciliation of self and other within an order of duties and entitlements that transcends the divisions arising from the clash of divergent group interests. These attempts at reconciliation, however, are ultimately doomed to fail. This is because whereas they may reconcile antagonistic interests from a formal (and/or procedural) standpoint, even universal laws cannot avoid, from a substan-

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[40] A distinction must be drawn between law embracing deconstruction—that is, availing itself of the interpretive process of deconstruction—and law as an object for deconstruction—that is, law as a subject matter submissible to the interpretive practices of deconstruction. In the former case, deconstruction becomes internalized within law, whereas in the latter, deconstruction remains external to law. In the former case, moreover, law is irreducible to politics, whereas in the latter law might well be reducible to politics. Indeed, in the latter case, deconstruction might well reveal the aporias, blind spots and contradictions of a legal discourse that envisions itself as being severed from politics, and based on these revelations, deconstruction might quite conceivably lead to the conclusion that law is ultimately reducible to politics.

[41] See R. Unger, Law in Modern Society 66 (1976).

[42] See id. at 69.

[43] See id. at 83, 86.

tive standpoint, privileging certain antagonistic interests over others.[44] So long as a legal system operates in the context of group pluralism, and through the application of general laws that are universally applicable, therefore, law meets the two conditions that entitle it legitimately to embrace deconstruction.

Because of its constitution and common law tradition, the American legal system encompasses a conception of law that seems particularly well suited to incorporate deconstruction. The American constitution is designed for a pluralistic society with antagonistic interests, and it seeks to reconcile self and other through prescriptions for accommodation designed to allow both of them to flourish. For example, the Constitution embraces federalism to reconcile local interests and national interests through a complex interplay between identity and difference.[45] Another proof of the Constitution's commitment to a pluralistic society and to the attempted reconciliation of self and other is provided by the adoption and judicial elaboration of the Bill of Rights. The Bill of Rights recognizes the split between the individual and the community, and seeks to prevent communal suppression of individual difference through the grant of entitlements that impose antimajoritarian limits on the democratic process. The long history of litigation under the Bill of Rights indicates, however, that no stable or lasting reconciliation between self and other, identity and difference, or individual and community seems likely under the auspices of the Constitution or as a consequence of the interplay between democratic majoritarianism and constitutional restraints.[46]

The very nature of the common law makes it a prime candidate

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[44] Cf. id. at 129 ("The conditions of liberal society require that the legal order be seen as somehow neutral or capable of accommodating antagonistic interests . . . . Yet every choice among different interpretations of the rules, different laws, or different procedures for lawmaking necessarily sacrifices some interests to others.").

[45] To the extent that it is accepted as the fundamental social charter by all the citizens of the United States, the Constitution plays a principal role in the formation of a national identity that promotes a nationwide notion of collective selfhood. On the other hand, the Constitution recognizes the split between the states and the nation, and proposes a reconciliation designed to preserve the respective identities of the states and of the nation. Because of the open-ended nature of the constitutional text, and because the practice of judicial review subjects it to endless re-writing, however, the work of reconciliation seems bound to remain forever incomplete. For a recent example of the difficulties involved in applying constitutional notions of federalism in an attempt to reconcile state and federal concerns, compare National League of Cities v. Usery, 426 U.S. 833 (1976) (Federalism bars imposing certain federal labor standards on employees of a state) with Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (Federalism permits imposing the same labor standards on employees of a state).

[46] One notorious example of a recent failure to reconcile self and other or individual and community or identity and difference in the context of the constitutional jurisprudence of the Bill of Rights is furnished by the Supreme Court's series of decisions on the constitutional right to privacy since its landmark decision in Griswold v. Connecticut, 381 U.S. 479 (1965). See,

for the incorporation of deconstruction. The common law involves the fashioning of legal rules and the allocation of duties and entitlements by judges who seek to reconcile precedents. As Arthur Jacobson notes, the common law requires three writings: a past writing, a present writing and a future writing.[47] The common law judge is confronted with antagonistic litigants and must extract a rule of law designed to settle the dispute before him or her from a reading (re-writing) of judicial precedents. The judge's decision is a present writing that re-writes the past writings that count as precedents. The present writing that embodies the judicial decision allocates entitlements and duties among the litigants and partakes in the formulation of a rule of law designed to provide a framework for the reconciliation of antagonistic interests such as those possessed by the litigants. The rule of law implicit in the present writing of a deciding judge, however, may well be insufficiently articulated to be grasped before it is "re-written" in the writing of some future judicial decision.[48] Accordingly, the final formulation of the rules of law that account for the attempted judicial reconciliation of self and other in the hands of

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e.g., Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989); Bowers v. Hardwick, 478 U.S. 186 (1986); Roe v. Wade, 410 U.S. 113 (1973).

47 See Jacobson, Idolatry of Rules, supra note 10, at 1106.

48 Consider the following example involving a legal rule that cannot be grasped until it becomes further elaborated in a future judicial opinion. A landowner brings a lawsuit against his neighbor because the latter's cat has entered upon plaintiff's property where it has caused damage for which the plaintiff seeks to be reimbursed. Moreover, the only relevant precedent involves a case holding that the owner of a cow is liable to his neighbor for the damage caused to the latter's property by the cow following its unauthorized entry upon the plaintiff's property. Under those circumstances, the judge sitting in the case concerning the cat can infer at least two different rules from the precedent involving the cow. The first rule is that the owner of a large animal is liable for any damage caused by the latter following unauthorized entry upon the owner's neighbor property. The second rule, on the other hand, is that an owner is thus liable for any such damage caused by any of his or her domestic animals. Since a cat is a small domestic animal, the plaintiff will lose his case if the judge infers the first rule from the precedent, but he will win if the judge infers instead the second rule.

Now, suppose further that the judge in the case of the cat rules in favor of the plaintiff after concluding that the situation involving the cat is in all relevant respects analogous to that regarding the cow. But the judge leaves unclear the basis for the analogy she draws between the case of the cow and that of the cat. Under those circumstances, it will be left to another judge before whom the next case in the series will be brought at some future date, to infer which legal rule might cover all three cases consistent with the results in the respective cases of the cow and the cat. Thus, the judge before whom the third case will be brought may decide, for example, that the rule to be inferred concerns all of an owner's domestic animals, or that it instead covers all animals, whether domestic or not, which usually live on the owner's property. The important point, however, is that no matter which of these two alternative legal rules is eventually chosen, the legal rule that accounts for the result in the case of the cat cannot become explicit until its articulation in the course of the judicial resolution of some subsequent case.

common law judges must always be postponed until the dusk will have settled on the last of the future adjudications.

As Jacobson has pointed out, common law is a "dynamic jurisprudence" rather than a "static" one.[49] For present purposes, the key distinction between these two kinds of jurisprudence is that dynamic jurisprudences fill the universe of social interaction with legal relationships whereas static jurisprudences draw sharp lines between legal relationships and other intersubjective relationships which remain beyond the reach of law. Dynamic jurisprudence is concerned primarily with legal personality while static jurisprudence is above all preoccupied with order.[50] Accordingly, as a dynamic jurisprudence common law appears to be more indeterminate and open-ended than static jurisprudences.[51] But because its dynamism is potentially all-encompassing, and because it is concerned with personality rather than mere order, common law is suited to undertake a comprehensive reconciliation of self and other within the sphere of legal relationships. Static jurisprudences, on the other hand, cannot even hope to seriously attempt such a reconciliation as they are structurally impeded from reaching the other whose intersubjective dealings extend beyond the realm of law.

In sum, some conceptions of law—and, in particular, the American legal system with its constitution and its common law tradition—are well suited to embrace deconstruction as an internal process designed to map a realm of legitimate legal relationships. Accordingly, deconstruction is in principle capable of solving the crisis affecting legal interpretation. It remains to be determined, though, *how* deconstruction might inform the practice of legal interpretation so as to successfully repel the threat of absorption into the universe of mere politics. One tempting hypothesis, which will be critically examined in the next section, is that law can escape from mere politics by embracing some recently conceived revamped versions of legal formalism.

III. THE NEW LEGAL FORMALISM

Two significantly different conceptions of legal formalism have emerged, which may be referred to respectively as the "old formal-

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[49] See Jacobson, Idolatry of Rules, supra note 10, at 1135; Jacobson, Hegel's Legal Plenum, 10 Cardozo L. Rev. 877, 889-90 (1989) [hereinafter Legal Plenum].

[50] Jacobson, Idolatry of Rules, supra note 10, at 1135.

[51] Cf. Jacobson, Legal Plenum, supra note 49, at 890 (in the common law system persons cannot interact without generating rights and duties, but cannot know what those rights and duties are until after having interacted).

ism" and the "new formalism." The old formalism holds that application of a legal rule leads to determinate results due to the constraints imposed by the language of the rule.[52] The new legal formalism envisions law as an internally unfolding dynamic practice that carves for itself a domain of social interaction that remains distinct from the sphere of politics.[53] The new legal formalism depends neither on the belief in the transparency of language nor on the requirement that legal doctrine or legal rules lead to determinate outcomes.[54] Nevertheless, the new legal formalism is properly considered to be a type of formalism to the extent that it maintains that something internal to law rather than some extra-legal norms or processes determines juridical relationships and serves to separate the latter from non-juridical social relationships, including political ones.

As will become obvious soon, the two different versions of the new legal formalism—respectively formulated by Stanley Fish[55] and by Ernest Weinrib[56]—which will be discussed here differ vastly from each other in several key respects. They do share certain important features in common, however, which make them both attractive candidates to carry out the interpretive tasks confronting law conceived as having internalized deconstruction.[57] Fish's central point is that legal formalism is not something given, but something which must be

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[52] See Schauer, Formalism, 97 Yale L. J. 509, 510 (1988); see also Unger, supra note 5, at 564 (Legal formalism is usually understood to describe the "belief in the availability of a deductive or quasi-deductive method capable of giving determinate solutions to particular problems of legal choice.").

[53] If "origins" for this new legal formalism need be sought, one place where they may be found is in the vigorously antiformalist writings of Roberto Unger. See Unger, supra note 5, at 564 (legal formalism evinces "a commitment to, and therefore also a belief in the possibility of, a method of legal justification that can be clearly contrasted to open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical or visionary"). For evidence of reliance by a proponent of the new legal formalism on Unger's formulations, see Weinrib, Legal Formalism: On the Immanent Rationality of Law, 97 Yale L.J. 949, 953 (1988).

[54] See, e.g., Weinrib, supra note 53, at 1008 ("Nothing about formalism precludes indeterminacy . . . . For formalism the possibility of indeterminacy neither can, nor need be, avoided.").

[55] Remarks by S. Fish, Symposium on Deconstruction and the Possibility of Justice (Benjamin N. Cardozo School of Law, Oct. 2-3, 1989).

[56] See Weinrib, supra note 53.

[57] It should be pointed out from the outset that neither Fish's nor Weinrib's version of legal formalism taken as a whole is likely to satisfy the requirements of the alternative conception of deconstruction advanced in this article. Indeed, Fish's legal formalism is based heavily on an identification of law with rhetoric which is more in tune with the conception of deconstruction as an interpretive technique or method than with the alternative conception embraced here. Weinrib's legal formalism, on the other hand, places substantial reliance on the rationality of law, and is thus vulnerable to a Derridean charge of undue "logocentrism." Accordingly, in assessing the suitability of Fish's and Weinrib's theories for purposes of elaborating an interpretive practice consistent with a conception of law as embracing deconstruc-

constantly made and remade.[58] In the dynamic process of making itself formal, moreover, law internalizes values from the ethical and political world and transforms them into legal values.[59] For Weinrib, on the other hand, what endows juridical relationships with a separate identity are the forms of justice, namely corrective and distributive justice. But to establish the meaning and separate identity of juridical relationships, it is not sufficient to contemplate the forms of justice like Platonic forms or the forms of geometry.[60] The relationship between the forms of justice and particular juridical relationships is immanent, and it can only be made explicit by unearthing the links that connect particular socially and historically situated juridical relationships to the more abstract forms of justice which endow such juridical relationships with meaning.[61]

The principal similarity between these two approaches to legal formalism lies in their reliance on a dynamic process that leads to the immanent unfolding of the connections pointing towards the unity of law's content and its form. With this in mind, let us now look more closely at these two versions of the new legal formalism to determine whether, and how, they might be used to solve the crisis affecting legal interpretation in the context of law conceived as having internalized deconstruction.

A. *The New Formalism of Stanley Fish*

The making of law's formal existence, according to Fish, involves a double gesture. Law must absorb and internalize that which threatens it from the outside, and in particular ethical and political values.[62] But, at the same time, law must deny that it is appropriating extralegal values.[63] In other words, the law cannot simply carve for itself a path that remains beyond ethics and politics. Yet the law cannot admit dependence on the ethical and the political, for that would threaten to deprive law of any distinct identity. To resolve this dilemma, the law simultaneously incorporates ethical and political values and denies that it is doing so. This incorporation, however, is not all-encompassing. In the process of making itself formal, the law only incorporates certain ethical and political values while repelling others.

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tion, emphasis will be placed on those features of the respective theories which seem most compatible with the alternative conception of deconstruction adopted in this article.

58 Fish, supra note 55.

59 Id.

60 Weinrib, supra note 53, at 1002-03.

61 See id. at 1003.

62 Fish, supra note 55.

63 Id.

Law's efforts to achieve a formal existence must be ceaseless and energetic, according to Fish, because the law must constantly overcome formidable obstacles to carve out and sustain an identity of its own.[64] Economical, ethical and political pressures have been poised throughout history to overwhelm law, but legal doctrine, argues Fish, against all odds, has managed to survive. And it is this sheer survival that sustains law's identity.[65]

Fish believes that, through numerous stratagems, legal doctrine can not only defuse ethical and political controversy but also conflicts regarding interpretation.[66] Because he is thoroughly committed to the proposition that all meaning is contextual, Fish cannot endorse the old legal formalists' belief that the plain meaning of legal language enables the application of legal doctrine to produce determinate results. Fish's new legal formalism postulates instead that plain meaning is "made"—that is, that it is fashioned or contrived—through the force of rhetoric.[67]

The "making" of (plain) meaning also involves a dynamic process of incorporation and rejection which remains largely concealed through the force of rhetoric. But to preserve itself from a complete surrender of law to rhetoric, legal interpretation must be able to give the impression that something internal to law operates to constrain the unlimited exchange of semantic markers. According to Fish, it is legal doctrine which provides (or gives the impression of providing, depending on how one re-writes Fish's text) the means to constrain the free flow of legal meaning, and which thus sustains the autonomy of law as a practice.[68] Moreover, legal doctrine, according to Fish, fulfills its constraining function by requiring that legal arguments travel along those paths which make possible the avoidance of a head-on collision with legal doctrine.[69]

In the last analysis, the constraints which legal doctrine imposes in the context of Fish's theory of legal interpretation are purely formal. Legal doctrine, for example, does not bar the importation of ethically based arguments into legal discourse. But because it has incorporated selected ethical values which it privileges while concealing that it has done so, legal doctrine both skews the ethical landscape which it traverses and forces the submersion of the ethical values that inform legal arguments. Moreover, legal doctrine does not foreclose

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64 Id.
65 Id.
66 Id.
67 Id.
68 Id.
69 Id.

any legal interpretation, even one that directly contradicts that doctrine's traditionally accepted meaning, provided only that the interpretation in question follow a path that permits the avoidance of the appearance of contradiction. Thus, Fish believes that legal interpretation can succeed in totally contradicting the (accepted) meaning of a legal doctrine, provided that it present the new meaning as expanding and supplementing what is encompassed by the legal doctrine rather than as promoting a contrary legal doctrine.

In order to be in a better position to assess Fish's new legal formalism, it would be useful to examine one of the specific examples which he discusses—namely, that relating to the legal doctrine of consideration in contract law. "Consideration," a term of art, refers to the requirement of a *quid pro quo* which makes an agreement enforceable.[70] According to modern contract law, only agreements that satisfy the requirement of consideration—that is, agreements that embody a mutuality of bargained-for exchange—are legally binding.[71] Consideration, thus serves to distinguish between promises or agreements that are *legally* binding and those that are only *morally* binding.

Consistent with Fish's view of it, the requirement of consideration is purely formal in at least two senses. First, consideration operates to distinguish enforceable exchanges from all other events in the flow of history.[72] In other words, the doctrine of consideration is used to impose a given abstract form on certain transactions in order to lift the latter out of their concrete spatiotemporal context. Second, consideration is purely formal in the sense of requiring compliance with certain formalities—that is, each party to an agreement must exchange something for something else at the time of making the agreement[73]—without permitting any inquiry into the substantive terms of the exchange—that is, the relative values of the things exchanged.

On this view, consideration not only exemplifies the dichotomy between legal and moral obligation, but it also appears to play an active role in establishing it and maintaining (re-establishing) it. Indeed, consideration iterates (and reiterates) the difference between legal and moral obligation each time that it requires enforcing a contractual obligation that appears to be unfair (or not enforcing a morally com-

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[70] Restatement (Second) of Contracts § 71 comment a (1979). Consideration has also been described as the "element of exchange required for a contract to be enforceable as a bargain." Id.

[71] Fish, supra note 55.

[72] Id.

[73] Typically, the parties exchange promises of future performance, or such a promise in exchange for a present performance.

pelling promise). Furthermore, consideration serves to abstract legal relationships from the general historical flow of intersubjective relationships. Under modern contract law, consideration brackets the moment of agreement and disconnects it from both its past and its future.[74] Thus, the operation of the doctrine of consideration seems to demonstrate how law strives to carve out an independent existence for itself, by ascending to a level of abstract formalism from which it can negate (or differentiate itself from) both history and morality.

Fish emphasizes, however, that for all that the doctrine of consideration marks a clear boundary between law and morality, it fails to keep morality from permeating contractual exchanges. The binary distinction of law/morality actively promoted by the doctrine of consideration masks another binary opposition that *actually* shapes the realm of modern contractual transactions. That latter binary opposition involves two different moralities: the morality of the marketplace, which is the morality of abstract and ahistorical agents engaged in arms-length dealings,[75] and a morality concerned with fairness, justice, sympathy and compassion. As envisaged by Fish, therefore, the doctrine of consideration proclaims a dichotomy between law and morals, but operates according to the canons of market morality.

It may appear, based on the preceding remarks, that the purpose of the doctrine of consideration is to imbue contract relationships with the morals of the market and to foreclose further moral debate concerning contracts by presenting law as being beyond morals. Fish, however, accords the doctrine of consideration a much more modest role. Indeed, as he sees it, consideration privileges the morality of the market, but does not exclude other moralities from silently penetrating into the realm of contractual transactions.[76] All that the requirement of consideration demands is that the other moralities be filtered through paths of argumentation that do not lead to head-on collisions with the official narrative designed to keep consideration in place. Accordingly, these other moralities can inform contract doctrines that are inconsistent with the doctrine of consideration, provided that

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74 Under modern contract law, the mutuality of bargained-for exchange must occur in the present tense of the entering into the agreement. Under pre-modern contract law, in contrast, a past benefit conferred upon a promisor was deemed adequate consideration for his or her subsequent promise to become legally binding. See Rosenfeld, Contract and Justice, supra note 27, at 829. As a matter of fact, "[t]he old doctrine of consideration was presumably an attempt to confine legitimate contractual transactions within some broad parameters of fairness." Id.

75 Fish, supra note 55.

76 Id.

the former doctrines do not appear to contradict the requirement of consideration.

As an example of a modern contract doctrine that is supposed to supplement the doctrine of consideration but that is clearly inconsistent with it, Fish cites the doctrine of contract implied in law.[77] Unlike a contract implied in fact, which is based on the parties' intent,[78] a contract implied in law allows a judge to disregard the intention of the parties and to impose terms based on justice and equity.[79] Thus, we seem to have come full circle. What the requirement of consideration bars makes a full fledged re-entry into the precincts of modern contract law through the deployment of the doctrine of contract implied in law.

Fish's treatment of the example of consideration clearly indicates that the constraints derived from law making, itself formal, are purely procedural and not substantive. The path closing mechanisms associated with legal doctrine amount to no more than the imposition of a rhetorical etiquette on the practice of legal argumentation. For all practical purposes, under Fish's theory, the meanings generated through legal interpretation are the exclusive product of rhetorical force.

Fish's equating of law with the rhetoric of the empowered appears to place him squarely in the camp of those members of CLS who claim that law is ultimately reducible to politics. Fish insists, however, that his position differs significantly from that of CLS. While he acknowledges that his conception of the development legal doctrine as being *ad hoc* and contradictory is the same as theirs, Fish maintains that the conclusions he draws from this differ significantly from CLS conclusions.[80] Whereas CLS laments the use of the inherent indeterminacy of legal doctrine as a means to advance the political agenda of the powerful under the guise of a politically neutral rationality, Fish unabashedly celebrates such use.[81] Moreover, Fish contends that it is a mistake to insist that judicial precedents be reconciled.[82] Indeed, Fish goes on to argue, it is only in the particular circumstances of an individual controversy that given legal arguments

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77 Id.

78 For example, when a person enters a restaurant and orders food, it can be reasonably inferred that the intention of both the patron and the restaurant owner is to exchange the ordered meal for the price of that meal calculated by reference to the menu that the patron consulted before ordering.

79 See, e.g., Continental Forest Prods., Inc. v. Chandler Supply Co., 95 Idaho 739, 743, 518 P.2d 1201, 1205 (1974).

80 Fish, supra note 55.

81 Id.

82 Id.

actually succeed or fail. That cases are *decided* is law's triumph. Doctrinal inconsistencies spreading over numerous cases may be troubling from the standpoint of philosophy, but not from the internal perspective of legal practice.

In the last analysis, far from providing a solution to the crisis affecting legal interpretation, Fish's new legal formalism compels the conclusion that the only way to punctuate the ceaseless flow of exchange of semantic values produced by law as an interpretive practice is through *ad hoc* exercises in power. Thus, legal practice may feign to transcend, but is in fact animated by, politics. Also, the dynamism of Fish's legal formalism is ultimately deceiving, because it is the dynamism of someone who runs in place rather than the dynamism of those on the move towards a new destination.

Because it locates justification in the purely present act of the decisionmaker,[83] Fish's new legal formalism leads to a perpetual celebration of the *status quo* (of each decision regardless of its content). Accordingly, Fish's formalism lacks the means to launch any real attempted reconciliation of self and other. Due to the constraints imposed by its abstracting and atomizing features, Fish's formalism can only offer a temporary palliative to ease the pain of the fissure of the body politic into self and other. Yet for all the shortcomings of his theory, Fish's analysis does yield some salient insights into the crisis affecting legal interpretation. Chief among these insights are: the need for law constantly to carve out an identity for itself; the need for law to incorporate and rework extra-legal value-laden materials from the realms of ethics and politics; and the need for law as a practice not to be ultimately reducible to any other practice, such as politics or philosophy.

All three of these insights relate to the dialectic between law and the universe of extra-legal norms, practices and values. Fish is correct in insisting that law must simultaneously plunge into, and differentiate itself from, the realm of the extra-legal, and that in order to accomplish this law must remain constantly on the move. As we shall see, Fish's analysis becomes problematic, however, when it comes to assessing the law's incorporation and reworking of extra-legal materials, and the relationship between law as a practice and other practices.

What is most important about law's constant dynamic striving to carve out an identity for itself is the process of differentiation itself. *What* law is different from and *how* law is different from it may be

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[83] This act is "purely present" in that it is lifted out of the flow of historical events and has no past or future. Indeed, the decisionmaker's decision is legitimated because of the decisionmaker's present authority rather than because of any links to past or future writings.

subject to change (within certain limits beyond which juridical relationships would be altogether impossible). Thus, it seems futile to search for a universal form of mediation between legal and non-legal relationships. Instead, the task for law is, as Fish aptly indicates, to "make" a formal existence for itself, that is, to emerge and distinguish itself from the particular socio-historical context in which it is located. In other words, although there is no universal form by which law becomes law, at each moment of its existence law must find *a* form (or several forms) through which it can express its difference from the particular extra-legal materials on which it presently depends.

Fish's analysis becomes unpersuasive, however, in its reduction of law into arbitrary rhetorical gamesmanship. While law and legal doctrine mediate the ethical material with which they deal, they do not necessarily dissimulate it. Moreover, while the meaning of a legal doctrine may not be simply or directly inferable from the moral vision which it incorporates, such moral vision places *substantive*, not merely formal or procedural, constraints on the legitimate use of that legal doctrine. In general, the extra-legal values that inform legal doctrine do not make its meaning transparent. Nevertheless, those values serve to open and close certain possible (substantive) semantic paths for legal interpretation.

These points can be profitably illustrated by a return to the modern contract doctrine of consideration. Fish is correct in stressing that this doctrine incorporates the morals of the market to the exclusion of other moral visions. The remainder of his account of consideration, however, is much more questionable. This becomes apparent, moreover, if one takes a closer look at the morals of the market.

One of Adam Smith's well known insights is that a market economy better serves the common good if every individual who trades in the market pursues his or her self-interest rather than that of society.[84] It does not follow, however, that because market participants ought to pursue self-interest rather than altruism, morals are altogether expelled from the economic sphere. If it made no difference whether market actors pursued their self-interest or acted out of altruistic motives, then arguably market relations would by and large escape the fetters of morality. But it does make a difference because altruism would not promote society's good as well as self-interest, and therefore it seems quite proper—if counterintuitive—to claim that in-

[84] See A. Smith, An Inquiry into the Nature and Causes of the Wealth of Nations 477-78 (E. Cannan ed. 1976). For a more extended discussion of Adam Smith's views and of the morals of the market, see Rosenfeld, Contract and Justice, supra note 27, at 873-77.

dividuals who participate in the market have a moral obligation to pursue self-interest.[85] Accordingly, consistent with Smith's theory, the individual is always subject to moral constraints, but these constraints differ depending on whether the individual is acting in the economic sphere or any other sphere of intersubjective interaction.[86]

Bearing in mind that "[a] regime of contract is just another legal name for a market,"[87] let us now subject consideration to a Smithian conception of the morals of the market. The modern doctrine of consideration wholly incorporates, and is justifiable in terms of, the morals of the market.[88] Indeed, consideration requires the kind of *quid pro quo* which should be expected of agents who bargain to advance their self-interests.[89] Furthermore, consideration does not have to be interpreted as dissimulating its incorporation of the morals of the market by stressing the distinction between legal and moral obligation. Strictly speaking, the distinction that consideration highlights is that between the morals of the market and the morals of other spheres. Thus, it seems fair to interpret consideration both as not attempting to hide that it incorporates moral values, and as incorporating moral values derived from a single moral vision.

This leaves the more difficult question of how to reconcile the coexistence of consideration and contracts implied in law. The difficulty here is not the one raised by Fish, but rather one stemming from the fact that different hypotheses may provide equally persuasive accounts for the juxtaposition of consideration and contract implied in law. For example, such juxtaposition may be equally legitimate under the morals of the market[90] or under a clash of conflicting moral vi-

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85 To the extent that individuals are naturally inclined to pursue their self-interest, it may sound odd to speak of an "obligation" to act out of self-interest. Nevertheless, if one is willing to admit that it is possible for individuals to chose to act out of motivations other than self-interest, then it is not inconsistent to claim that the individual has a moral obligation to act out of self-interest even though he or she might be naturally inclined to do so in most cases. Cf. L. Dumont, From Mandeville to Marx 61 (1977) ("[E]conomics escapes the fetters of general morality only at the price of assuming a normative character of its own.").

86 According to Smith's theory, while in the economic sphere the individual must act out of self-interest, in other spheres he or she must act out of sympathy. See A. Smith, The Theory of Moral Sentiments (1976). Notwithstanding these differences, however, Smith derives both the morals of the market and the morals of sympathy from a single moral vision predicated on utilitarian values.

87 Unger, supra note 5, at 625.

88 For a more comprehensive discussion of this point see Rosenfeld, Contract and Justice, supra note 27, at 827-32.

89 Promises to make a gift which are unenforceable as lacking consideration, on the other hand, are generally motivated by altruistic rather than self-interested concerns. Accordingly, consistent with Smith's analysis, such promises are less likely to promote the economic common good than promises purely motivated by self-interest.

90 Under this hypothesis, the proper function of contract law is to enforce exchange agree-

sions concerning the market and the law of contract.[91] Moreover, in both these cases legal doctrine and legal interpretation would be substantively constrained by the moral vision or moral visions which they incorporated. The nature and scope of the doctrine of consideration would vary depending on the particular moral vision which is deemed to be operative. But regardless of which plausible moral vision is adopted, *some* substantive constraints are bound to be imposed on what should count as legitimate interpretations of the doctrine of consideration.[92]

The last of Fish's insights which requires brief consideration is that law as a practice is not ultimately reducible to any other practice, such as politics or philosophy. The principal lesson taught by this insight is that law carves out an independent existence for itself, not because of the material which it incorporates, but because of the way in which it deals with such material. Philosophy and law, for example, may be concerned with the same ethical values, but whereas philosophy may consider how these values might fit within certain theoretical frameworks, law is likely to rework them and to give them expression (or to re-inscribe them) in legal doctrine. Because of this, moreover, it would be just as inappropriate to engage in abstract philosophical debate concerning a moral value which happens to be embedded in legal doctrine before a court of law, as to cite judicial

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ments motivated by self-interest. Consideration is a principal means to assure that contract fulfills its proper function, particularly in less developed markets where the subjective expression of self-interest by an agent is likely to be the best available evidence of that agent's self-interest. In fully developed markets where no single individual has a perceptible influence on the exchange value of commodities, however, an agent to a transaction may not always be the best judge of his or her own self-interest with respect to a given exchange transaction. Accordingly, contracts implied in law may be justified as a means to secure the promotion of an individual's self-interest where that individual is not in the position to be the best judge of his or her own self-interest.

91 Unger, for example, has argued that modern contract doctrine has been defined by vision and countervision, involving on the one hand freedom of contract and market values, and on the other, communitarian values and fairness. See Unger, supra note 5, at 616-633. Moreover, in the context of a conflict between moral visions, law may well be more indeterminate and more incoherent than when it is firmly anchored in a single moral vision. Thus, it may be that consideration and contracts implied in law respectively embody conflicting moral visions, and that no valid internal connections could be drawn between these two legal doctrines. But in that case the failure is not with legal doctrine or legal interpretation, but with the lack of a unified moral perspective.

92 Another plausible hypothesis is that the moral vision that encompasses the morals of the market has become so eroded that contract law as a distinct and independent body of mutually consistent legal doctrines has disintegrated. This hypothesis is endorsed by the proponents of the death of contract thesis. See, e.g., P. Atiyah, The Rise and Fall of Freedom of Contract (1979); G. Gilmore, The Death of Contract (1974). Under this hypothesis the doctrine of consideration may seem incoherent but that would be because of the collapse of its moral foundation rather than because of any inherent problem with legal doctrine as such.

opinions as dispositive on controversies concerning moral values to an assembly of professional philosophers.

Not only does Fish assert that law is not reducible to any other practice, but that law as a practice is self-contained, so that there is no overlap between law and other practices. Fish acknowledges that law may be assessed from the standpoint of other practices, such as philosophy. But a philosophical assessment of law, he would insist, cannot form part of the practice of law. More generally, for Fish, any theory of law would involve the practice of theory but could not belong to the practice of law.[93]

There is a sense in which Fish's conception of law as a self-contained practice is unexceptionable. Indeed, to the extent that law is given structure by, and functions in accordance with, a particular combination of certain rules, norms, standards and conventions, it seems clear that it is a unique and self-contained practice. In this sense, law is a self-contained practice just as is a game like chess or checkers. Thus, although the same board can be used for both chess and checkers, it would be obviously inappropriate to claim that there is an "overlap" between the practice of chess and that of checkers. Moreover, on any given occasion, one would determine whether the board in question was a chess board or a checkers board, not by reference to the nature of the board, but to the dynamic relation between the board and the rules and conventions of the game being played on it. When two people are moving chess pieces according to the rules of chess on the board, then the board is a chessboard, and the practice involved—which incorporates the board as an element within it—is the practice of chess. Similarly, in the sense in which law is properly viewed as a self-contained practice, the same argument—for example, that equality requires equal treatment of those who are in the same essential category[94]—would belong to the practice of law, when made by a litigating attorney to a judge in court, and to the practice of philosophy, when made by a university professor conducting a philosophy class.

Because law as a practice is not simply a game like chess or

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93 Thus, consistent with Fish's vision, there is a parallel between the appropriation by law as a practice (through incorporation and transformation) of materials from other practices such as morals and politics, and the appropriation by the practice of theory of legal materials such as legal doctrines as subject matters for evaluation.

94 Compare C. Perelman, The Idea of Justice and the Problem of Argument 16 (1963) (according to the principle of formal justice "beings of one and the same category must be treated the same way") with Trimble v. Gordon, 430 U.S. 762, 780 (1980) (Rehnquist, J., dissenting) (The equal protection clause of the Fourteenth Amendment does not require "that all persons must be treated alike. Rather, its general principle is that persons similarly situated should be treated similarly.").

checkers, however, there is an important sense—which Fish altogether fails to capture—in which law is a practice that is open to, and that overlaps in part, with other practices. Unlike a game such as chess or checkers, which is a self-contained practice, law is a highly complex and dynamic practice which can incorporate not only decontextualized materials from another practice, but also—albeit to a limited extent—the very processes by which the latter practice generates its materials. Thus, there are cases in which lawyers not only refer to ethical values, but also make philosophical or ethical arguments which are subject to the same processes of generation, validation and refutation as if they had been made in the course of a serious philosophical discussion. For example, there are cases in constitutional law, where neither the constitutional text, nor the intent of the framers, nor precedent can offer sufficient guidance to settle an actual controversy.[95] In such cases, ethical or philosophical arguments concerning such values as freedom, equality or privacy may be legitimately invoked and may well determine the judicial outcome.

As a specific illustration, consider the equal protection clause which constitutionalizes the conception of equality.[96] In several equal protection cases, the crucial question for the court to resolve is whether constitutional equality requires equal treatment or equality of result.[97] Frequently, this question cannot be answered by reference to the kinds of arguments that might be preferred by those who regularly engage in the practice of constitutional interpretation—namely, arguments from the text of the Constitution, or the framers' intent, or judicial precedent. Accordingly, the requisite decision must ultimately rely on the kinds of arguments and evaluations that are customary within the practice of moral and political philosophy.[98] In short, in those cases where only philosophical arguments can suggest whether one of two possible legal outcomes is preferable to the other, the practice of constitutional interpretation overlaps with that of philosophy. In other cases, philosophical arguments may be relevant but subordinate to other arguments, or may be altogether trumped by other arguments. Thus, there are overlaps between the practices of

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95 Cf. Fallon, A Constructivist Coherence Theory of Constitutional Interpretation, 100 Harv. L. Rev. 1189, 1189-90 (1987) (the practice of constitutional interpretation recognizes the relevance of at least five types of arguments, including "value arguments" making claims about justice, morality or social policy).

96 See, e.g., id. at 1205.

97 This question has been at the heart of the affirmative action cases decided by the Supreme Court. See M. Rosenfeld, Affirmative Action and Justice: A Philosophical and Constitutional Inquiry, Ch. VII (forthcoming: Yale Univ. Press 1991) [hereinafter Affirmative Action]; Rosenfeld, Decoding Richmond, supra note 2.

98 See Fallon, supra note 95, at 1205-06.

law and philosophy, albeit that these are limited in nature.[99]

It should not be surprising that law as a practice should be open to, and overlap with, other practices. Indeed, games such as chess, checkers or for that matter baseball or basketball can be seen as self-contained ends in themselves in a way that law cannot. These games bear no connection to one another as practices, and suggesting that the rules or conventions of one of them should be made applicable to another would be ludicrous. Law, however, is not an isolated practice, but rather one of a cluster of interrelated practices which need not be viewed exclusively as ends in themselves. These interrelated practices, which include ethics and politics as well as law, are linked, at some level, by a common pursuit of the reconciliation of self and other within the sphere of social interaction. To be sure, each of these practices undertakes this common pursuit in its own way, and sometimes they may each diverge significantly from the other. But at other times they converge and overlap thus belying Fish's unduly reductionist thesis.

In the last analysis, Fish's atomistic tendencies and his underestimation of the richness and complexity of law as a practice lead him to the unwarranted conclusion that law is *in all relevant senses* a self-contained practice. Fish is right that law is a distinct practice which is capable of incorporating and transforming materials from other practices. To the extent that ethical, political and philosophical arguments have a genuine place *within* the practice of law, however, that practice is not self-contained. But if law as practice is distinct but not self-contained, the question arises anew as to whether there is something internal to law (other than Fish's purely procedural and purely tautological conception of law as a self-contained practice) which makes it in essence different from the interrelated practices with which it overlaps. Weinrib's new legal formalism suggests an affirmative answer to this question. Accordingly, I shall briefly turn to Weinrib's theory to determine how it might contribute to the solution of the crisis affecting legal interpretation.

B. *The New Formalism of Ernest Weinrib*

Reduced to its bare essentials, Weinrib's new legal formalism postulates that law remains distinct from politics to the extent that law's structure is intelligible as an internally coherent practice.[100]

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[99] For a more extensive analysis of the relationship between the practice of philosophy and that of constitutional interpretation in the context of the equal protection clause, see M. Rosenfeld, Affirmative Action, supra note 97, at Ch. VI.

[100] See Weinrib, supra note 53, at 951.

Moreover, the internal coherence of law can be grasped, according to Weinrib, through interpretation.[101] As Weinrib specifies, "from a perspective internal to the law's content, formalism draws out the implications of a sophisticated legal system's tendency to coherence by making explicit the justificatory patterns to which the content of such a system must conform."[102] In other words, in a mature legal system, interpretation—and Weinrib has in mind principally judicial interpretation[103]—reveals law's tendency towards internal coherence through the articulation of immanent links between the form and the content of particular juridical relationships. At the most abstract level, the forms of juridical relationship envisaged by Weinrib are universal and ahistorical,[104] but the process of judicial interpretation nevertheless remains dynamic. This is because the concrete juridical relationships to which such forms must be immanently linked are embedded in particular social and historical contexts, and because judicial decisions must employ the public meanings developed in, and applicable to, such contexts.[105]

As already mentioned, the abstract forms that endow juridical relationships with meaning, according to Weinrib, are the forms of justice, namely corrective and distributive justice.[106] Weinrib further indicates that these two forms of justice are irreducible, and that accordingly particular juridical relationships come either within the sweep of corrective justice or within that of distributive justice, but never within that of both.[107] Moreover, drawing upon Aristotle's insight, Weinrib emphasizes that, paradigmatically, the juridical relationships that embody the forms of justice are those "that obtain between parties regarded as external to each other, each with separate interests of mine and thine."[108] In other words, juridical relationships involve agents who are connected through external links as opposed to such internal interpersonal links as those forged through love or virtue.[109]

Thus far, Weinrib's brand of new legal formalism seems to mesh well with law conceived as having internalized deconstruction. Indeed, the universe in which Weinrib locates juridical relationships is

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101 Id. at 1014.

102 Id.

103 See id. at 1004-05.

104 Id. at 1011.

105 Id.

106 See supra text accompanying notes 59-60.

107 See Weinrib, supra note 53, at 980, 984.

108 Id. at 977.

109 See id.

one in which there is a clear split between self and other. Juridical relationships understood in terms of the forms of justice, on the other hand, appear to provide a path towards the reconciliation of self and other, all the while permitting self and other to remain external to one another. But before any further assessment of the apparent virtues of Weinrib's new legal formalism is possible, it is necessary to take a somewhat closer look at the forms of justice which he invokes, and at the way in which they are supposed to endow juridical relationships with distinct meaning consistent with his conception of law as being irreducible to politics.

As understood by Weinrib, corrective justice involves the award of damages which simultaneously quantifies the wrongdoing of one party and the suffering of the other party in a bipolar (voluntary or involuntary) private transaction.[110] Moreover, under this view, all bilateral relationships characteristic of the private law of torts and contracts are ultimately intelligible in terms of the structure of corrective justice.[111] In other words, the legal universe carved out by juridical relationships intelligible in terms of corrective justice is one in which formally equal individual legal actors are initially placed side by side owing each other nothing but reciprocal negative duties (of non-interference).[112] The initial equilibrium maintained by a network of reciprocal negative duties which makes for purely external relationships among legal actors, however, is bound to become upset as individuals either seek the cooperation of others in the pursuit of self-interest (contract) or voluntarily or involuntarily interfere with others in the course of such pursuit (tort). Corrective justice, through the award of damages, undoes (erases) the positive entanglements of (unfulfilled) contracts and the interferences of torts, and thus purports to reestablish (re-inscribe) the initial equilibrium between purely externally linked equals.

Corrective justice, argues Weinrib, deals with the immediate relationship of person to person,[113] and is completely removed from politics,[114] as it merely seeks to restore the initial equilibrium between a doer and a sufferer regardless of the actual wealth, merit or virtue of the interacting legal actors.[115] Thus, it apparently makes no difference whether one is politically inclined to advance the interests of the wealthy or the poor, as there is only one legitimate way to resolve

110 See id. at 978.
111 Id.
112 Id. at 999.
113 Id. at 988.
114 Id. at 994.
115 Id. at 997.

legal disputes arising under private law: that is, by commanding payment of the quantity of damages which corrective justice requires in order to restore the initial equality between doer and sufferer. Accordingly, as Weinrib sees it, the judicial task in the context of dispensing the quantitative equality mandated by corrective justice is limited to the specification of the actual damages required in the particular case to be adjudicated.[116]

In contrast to the quantitative equality of corrective justice, distributive justice requires the implementation of proportional equality. Whereas corrective justice is concerned with the recovery of a status quo ante, distributive justice requires the allocation of the benefits and burdens of social cooperation in the proportions set by an applicable criterion of distribution.[117] Also, consistent with Weinrib's analysis, unlike corrective justice, distributive justice cannot be completely severed from politics. Indeed, settling on any given criterion of distribution for purposes of achieving proportional equality involves a political decision.[118] Thus, for example, whether certain benefits ought to be distributed equally in proportion to need or in proportion to merit depends not on anything inherent to law or to juridical relationships, but instead on some collective decision that remains extrinsic to law and that must draw, at least in part, on political considerations.

Although distributive justice cannot avoid politics, Weinrib maintains that the former is not thereby reducible to the latter.[119] Once a particular criterion of distribution has been selected, distributive justice requires that juridical relationships conform to the proportional equality mandated by that criterion.[120] Moreover, Weinrib also believes that inherent in the very notion of distributive justice there is a conception of personhood and of equality which constrains all legitimate juridical relationships falling within the scope of that form of justice.[121] The concept of personhood thus requires judges to make sure that people engaged in the relevant juridical relationships are not treated as things; the concept of equality, that each person be treated as an equal consistent with the dictates of the prevailing criterion of distribution.[122]

Distributive justice, particularly through its conception of per-

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116 See id. at 993.
117 See id. at 988.
118 See id. at 989.
119 See id. at 990.
120 See id. at 991-92.
121 Id.
122 Id.

sonhood and equality, is supposed to preside, in Weinrib's formalist vision, over the domain of public law. On the one hand, Weinrib maintains that the notions of personhood and equality impose nonpolitical constraints on the legislative and administrative processes.[123] On the other hand, Weinrib argues,

> The positive law may give effect to the fundamental values of personhood and equality in a variety of ways: by incorporating them into the techniques for construing statutes, by elaborating notions of natural justice or fairness for administrative procedures or by enshrining specifications of personhood and equality into constitutional documents.[124]

Corrective and distributive justice, as conceived by Weinrib, may be viewed as offering two distinct (and irreducible to politics) paths towards the reconciliation of self and other as persons capable of engaging in mutually external relationships. Corrective justice promotes the minimal harmony of mutual non-interference through the spread of a quantitative equality that ritualistically effaces the encroachment of a wrongdoing self upon a suffering other. Moreover, since the self's devotion to its own interests is bound to cause interference with the negative rights of others, the completion of the mission of corrective justice must be deferred until such time as the self becomes completely self-sufficient—an impossibility in terms of deconstructionist ontology.

Distributive justice, on the other hand, also aspires to promote mutual non-interference by defusing the conflict between self and other over the allocation of collectively generated benefits and burdens. By instituting proportional equality, distributive justice circumscribes an order within which each person can see him or herself as a moral equal who is treated as an end rather than merely as means by being given his or her due. Because each individual self is ascribed a dignified place within the order carved out by the proportional equality of distributive justice, moreover, the self can presumably renounce confrontation with the other as a means to secure the socially generated goods which self-respect and dignity require. Thus, distributive justice, much like corrective justice, tends towards a harmony of purely external relationships of non-interference between a self an other who have competing claims on the products of social cooperation.

Finally, the task of distributive justice, like that of corrective justice, can never be completed, both because presumably there will al-

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123 Id. at 991.
124 Id.

ways be new goods to be distributed according to proportional equality, and because the particular criterion of distributive justice to be applied in given social and historical circumstances is likely to be a subject of political controversy so long as society remains divided into self and other.

Not only do corrective and distributive justice as the forms of justice seem highly compatible with law conceived as having internalized deconstruction, but they also allow for indeterminacy in the course of discharging their meaning-endowing function. Indeed, in Weinrib's assessment, indeterminacy is inevitable in the course of applying abstract forms to particular juridical relationships that necessarily comprise an element of contingency.[125] Indeterminacy, however, is only objectionable if it allows juridical relationships to be ultimately swept into the whirlwind of politics. The indeterminacy created due to the application of Weinrib's forms of justice does not. As Weinrib states,

> The forms of justice determine juridical relationships by representing the justificatory structures through which those relationships can be understood as the sorts of thing that they are and to which they must conform if they are to be intelligible. The forms of justice are thus determinative as the distinctive—not the exhaustive—modes for the understanding of law.[126]

In other words, although the forms of justice may not determine the outcome of every case, only those outcomes which are consistent with the forms of justice (and hence not merely reducible to politics) may be legitimately defended. Thus, even when not completely determinative, the forms of justice operating in the context of Weinrib's formalism are supposed to perform a path closing function capable of preventing the slippage of the legal into the political.

If Weinrib's conception of the two forms of justice and of their potential for making juridical relationships immanently intelligible were acceptable, then his new legal formalism would provide a genuine solution to the crisis affecting legal interpretation. Unfortunately, as convincingly demonstrated by Alan Brudner, Weinrib's new legal formalism is ultimately unacceptable to the extent that it rests on certain arbitrary and unwarranted premises.[127] In the remainder of this section, I briefly focus on these premises with a view to determining whether, and to what extent, Weinrib's insights might still be incorpo-

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125 See id. at 1009.

126 Id. at 1009-10.

127 See Brudner, supra note 15, at 1168-81. Since I agree, on the whole, with Brudner's incisive critique of Weinrib's formalism, I only concentrate on those shortcomings of Weinrib's theory that have a direct relevance to the specific concerns addressed by this article.

rated in a satisfactory resolution of the crisis affecting legal interpretation.

From the standpoint of our own concerns, there are two basic flaws with the premises underlying Weinrib's formalist thesis: the first relates to his conception of the forms of justice, the second, to his appraisal of the relationship between corrective and distributive justice. More specifically, the first flaw, as noted by Brudner, derives from Weinrib's elevation of one (among many possible) historically grounded and ideologically determined version of what is entailed by corrective and distributive justice as the universal and ahistorical essence of those forms of justice.[128] Moreover, the reason why this flaw is particularly troublesome is because it reveals that Weinrib's apparent depoliticization of the forms of justice is achieved through the privileging and enshrining of a particular ideological vision which is certainly subject to political debate. The second flaw stems from Weinrib's insistence on the existence of an unbridgeable gap between corrective and distributive justice, and from his assertion that corrective justice is concerned with immediate relationships among persons. At least under some conceptions of the forms of justice, there need be no insurmountable gap between corrective and distributive justice. Also, when all the relevant considerations are taken into proper account, it becomes clear that the relationships that come within the sweep of corrective justice must be mediated ones. Furthermore, to the extent that there is no gap between the two forms of justice, and that all relationships encompassed by either of two must be mediated ones, these cannot be, contrary to Weinrib's claim, a total separation between politics and corrective justice.

Two of the principal unwarranted assumptions made by Weinrib are that the domain of corrective justice must preside over a regime of purely negative rights and that distributive justice necessarily involves respect for Kantian notions of equality and personhood. Corrective justice can operate in the context of purely negative rights under certain particular historical and ideological circumstances, namely those associated with a free market economy.[129] Thus, private law shaped so as to afford the greatest possible legal protection to free market transactions would undoubtedly be primarily oriented towards the protection of the negative rights and freedoms best suited to promote the orderly proliferation of market exchanges. And, under those circumstances, corrective justice would be quite properly confined to "undoing" the entanglements having resulted in infringements upon

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[128] See id. at 1173.

[129] Id. at 1178-81.

negative rights and freedoms. Nothing in corrective justice as a form of justice taken at the highest level of abstraction, however, precludes extending corrective justice to cover a regime of positive rights, or, in other words, a legal system in which private legal actors are charged with positive duties towards one another.

Corrective justice is necessarily backward looking, in that it must pick some point in the past and set it as a baseline. After selecting its baseline, corrective justice must compare the set of intersubjective relationships existing at the baseline and that which is in force at the subsequent time at which a claim for compensation arises. Corrective justice must also introduce a concept of "disruption" pursuant to which it can distinguish between compensable and non-compensable deviations from the baseline. Weinrib seems to assume that if we seek to establish the baseline logically, by carrying corrective justice to its highest level of abstraction, we will all be lead by reason to the same point: a static universe of purely abstract egos who remain entirely independent from each other and who scrupulously refrain from interfering with one another as a consequence of their strict adherence to a regime of purely negative rights and duties. Moreover, for those who accept this point as providing a purely logically compelled—and hence completely apolitical—baseline, the definition of what should count as a compensable disruption becomes self-evident: any deviation from the status quo of the baseline that involves a violation of a negative right.

Logic alone, however, does not compel acceptance of the atomistic universe that Weinrib projects at the highest level of abstraction. Indeed, it hardly seems contradictory to contend that at the highest level of abstraction, persons are cleansed of their selfish individualistic concerns, and that they are mutually dedicated to the maintenance of social harmony and welfare within their community through the deployment of care, concern and an elaborate network of positive rights and duties. Within this communitarian vision, moreover, the baseline would be one of solidarity and mutual assistance, and any deviation involving a violation of a positive duty would quite naturally qualify as a compensable disruption.

Neither Weinrib's atomistic vision nor its communitarian counterpart are in any sense logically compelled. Each of them figures as an originary myth suited to buttress a particular ethical and political ideology. More generally, setting a baseline for corrective justice involves an irreducibly arbitrary—i.e. political and ideological—element. And because of this, corrective justice no more requires the imposition of purely negative rights than a regime heavily composed

of positive rights. Thus, for example, it seems entirely legitimate for tort law to impose, at least under certain conditions, on individual actors a positive duty to rescue fellow human beings who are in danger. Corrective justice in the latter case would have to extend to nonfeasance and not merely to misfeasance, as Weinrib would have it, but that would simply reflect one possible legitimate choice among several plausible alternative ethical and political visions.[130] In short, it is only by suppressing alternative political visions of the proper role of corrective justice, that Weinrib succeeds in conveying the impression that corrective justice is apolitical.

As we have seen, Weinrib does concede, on the other hand, that distributive justice has a political component, but he insists that it nevertheless transcends politics to the extent that imposes a duty to abide by Kantian notions of personhood and equality. Unless one incorporates these Kantian notions tautologically in the very definition of distributive justice, however, there is no reason to assume that all plausible conceptions of distributive justice need include such Kantian notions. For example, there seems to be nothing contradictory about a feudalist conception of distributive justice, according to which persons are inherently unequal depending on the social class to which they are born, according to which much greater dignity attaches to those born into aristocratic families than to commoners, and according to which distributions should be made unequally, with a disproportionate share of society's goods going to the members of the aristocracy.[131] Once again Weinrib has taken one possible conception—or in this case more precisely a class of possible conceptions—of a form of justice and presented it as universally valid. But to the extent that distributive justice at the highest level of abstraction does not imply Kantian notions of personhood and equality, judicial protection of the latter is not likely to be apolitical in the sense that Weinrib intends.

Turning to the second principal flaw underlying Weinrib's premises, the unbridgeable gap which he perceives between corrective and distributive justice does not extend to all plausible conceptions of the relation between the two forms of justice. To be sure, there is one

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130 Just as in the context of a Smithian market economy where morals are not expelled from the marketplace, see supra text accompanying notes 84-86, a vision of corrective justice as applying exlusively to a regime of negative rights is not apolitical. Instead it is informed by the particular morals and politics that underly the free market economy.

131 It may be objected that in a feudal society distributions of benefits and burdens would not be conceived in terms of distributive justice. Even conceding this point, the fact remains that there is no *logical* impediment against a feudal conception of distributive justice such as the one outlined here.

sense in which there is an irreducible difference between corrective and distributive justice: the former is backward-looking whereas the latter is essentially forward-looking.[132] In another sense—which is more important in terms of the relationship between law and politics—however, corrective and distributive justice may be harmonized (at least under certain conceptions) under unified all-encompassing system of justice. Such unified system may comprise several components such as distributive, corrective and procedural justice, but is above all characterized by its possession of an internal congruence and harmony that binds all its component parts together in a single whole which is greater than the sum of its parts. Such a unified system of justice may rely, for example, on an overriding criterion of justice to be applied to all distributions. Distributions, however, may be tampered with, either through interference with the process of distribution or with the products of such distribution. And, at least in the latter case, corrective justice, subsumed under the relevant overriding criterion of justice, may be called for as a means to preserve the integrity of the then operative all-encompassing system of justice.[133]

To the extent that the *measure* of compensation under corrective justice depends on a criterion of justice that is applicable across the board to all intersubjective dealings coming within the sweep of an

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[132] It may be objected that from the standpoint of adjudication, both forms of justice must be viewed as backward-looking given the very structure of adjudication. Upon reflection, however, this objection misses the mark. Corrective justice seeks to recapture the past whereas distributive justice—whether oriented towards a past, present or future moment—construes all points in time upon which it focuses as presents looking into the future. As an illustration, consider the following example. A municipality has as a distributive rule that each of its adult members is entitled to be provided by government with housing having a market value of $50,000, and a corrective rule that a victim of intentional wrongdoing is entitled to full compensation in kind or in the market value equivalent of his or her loss by the wrongdoer. Suppose now that A collected her $50,000 government subsidy and invested $50,000 of her own money to have a $100,000 house built. After A has moved into her new house, B, an arsonist, burns it to the ground. A could sue B and obtain $100,000 in damages under corrective justice. In that case, the judicial objective would be to recreate as nearly as possible the moment preceding the wrongdoing in a ritualized attempt to erase that act of wrongdoing. On the other hand (assuming that B is destitute), A could bring an action to establish that she is (distributively) entitled to a $50,000 housing subsidy (even though she has already received such a subsidy in the past). In this latter case, applying legal norms derived from distributive justice, the judge would have to focus on two past moments: that of the destruction of A's house by arson and the earlier moment in which she received her original housing subsidy. But such judicial focus on the past would not be for purposes of reinstating the past (as the judge in this action does not seek to put A in the position to have a new $100,000 house similar to the one she owned prior to the arson). Instead, it would be for purposes of determining whether these judicially framed past events give rise to a present entitlement to a future distribution.

[133] For a discussion of the argument that the implementation of corrective or compensatory justice is necessary to buttress the achievements of distributive justice in the face of violations of distributive entitlements, see M. Rosenfeld, Affirmative Action, supra note 97, at Ch. I.

all-encompassing system of justice, corrective justice cannot be completely apolitical. Indeed, selection of one among several available criteria of justice inevitably involves the making of a political choice, and that choice bears some imprint on the articulation of the dictates of corrective justice. Also, because of this, the intersubjective transactions that come within the purview of corrective justice necessarily involve mediated relationships between legal actors.[134]

Notwithstanding the failure of Weinrib's legal formalism persuasively to detach law from politics, some of his insights might be profitably incorporated in a proposed solution to the crisis affecting legal interpretation in the context of law understood as having internalized deconstruction. Specifically, whereas corrective justice cannot rid law of politics, it structures the relationships between self and other to which it applies in a distinctive manner that makes them distinguishable from political and ethical relationships. In other words, while not excluding the ethical or the political, corrective justice rearranges them in a way that gives a distinctive legal contour to the relationships that come within its scope. Furthermore, whereas Weinrib's conception of distributive justice is both time bound and ideologically

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134 To illustrate these points, let us consider the example of a breach of contract. Suppose that the buyer in a contract for the sale of goods refuses to pay the seller after receipt of the goods in accordance with the terms of the contract. While it seems obvious that corrective justice requires that the buyer compensate the seller for the buyer's breach of contract, it is not self-evident what the measure of damages should be. Should it be the contract price? The market price of the goods? Or, the "just" or "fair" price for such goods? Moreover, stipulation that the objective of corrective justice is the simultaneous wiping out of the wrongdoing of the defendant and of the suffering of the plaintiff through an award of damages does not suffice to establish the proper measure of damages. It might be interjected that it is obvious that the contract price is the proper measure of damages, since payment of the contract price as damages would put buyer and seller in the position in which they would have been absent any breach. Upon careful consideration, however, it should become apparent that the contract price only affords the proper measure of damages if it is (distributively) just (or at least not unjust). Thus, if under the applicable overall principle of justice, the market price of goods is deemed just, then if the contract price in question happens greatly to exceed the market price it would be unjust and could not provide the proper measure of damages in the breach of contract case. Strictly speaking, in the latter case the collection of that portion of the contract price which is in excess of the market price would itself constitute wrongdoing calling for compensation. And in view of the two wrongdoings involved—namely, the buyer's failure to pay for the goods, and the seller's attempt to collect that portion of the contract price which is in excess of the market price—corrective justice would require (as the simultaneous erasure of both wrongs) that the buyer defendant pay the market price of the goods as damages to the seller plaintiff. In short, since the measure of damages depends on what counts as a wrongdoing under a particular criterion of (overall) justice, the relationships that come within the scope of corrective justice are clearly mediated, and the content of corrective justice is itself derived from substantive principles of justice inevitably grounded in politics. For an extensive discussion of the relationship between contract and justice, including the relationship between corrective or compensatory and distributive justice in the context of contract, see Rosenfeld, Contract and Justice, supra note 27.

conditioned, the Kantian constraints which it imposes nevertheless arguably provide a legitimate way to distinguish legal from purely political relationships in the context of those legal systems that share its ideological assumptions. Significantly, the contemporary American legal system with its constitutional rights to due process and to equality and with its numerous private law doctrines grounded on premises of individual autonomy and equality clearly seems to conform to the ideological assumptions embodied in Weinrib's conception of distributive justice. Finally, Weinrib's insight that law is concerned with external relationships between persons furnishes apparently cogent means of demarcation between legal relationships and purely ethical ones.

It remains to be determined *how* corrective justice conceived as inextricably linked to politics, and distributive justice imposing Kantian constraints interpreted as being ideological, as well as law construed as ordering external interpersonal relationships, may contribute to maintenance of the distinction between law and politics in the context of law understood in terms of having internalized deconstruction. These issues are addressed in the next section, as part of an attempt to shed some preliminary light on the question concerning deconstruction's potential for resolving the crisis affecting legal interpretation in spite of the above mentioned shortcomings of the new legal formalism.

IV. LAW, ETHICS, POLITICS AND A PROPOSED SOLUTION TO THE CRISIS IN LEGAL INTERPRETATION: SOME PRELIMINARY OBSERVATIONS

While it is beyond the scope of this article to attempt a comprehensive examination of deconstruction's potential for resolving the crisis affecting legal interpretation, a few preliminary conclusions may be drawn from the preceding analysis. First, there is no single formula or form which underlies all juridical relationships or which could be relied upon to draw any clear cut boundaries between law and politics. Second, law as a practice is distinct from other practices but not self-contained, as it borrows and incorporates elements from other social practices, and as it partially overlaps with such other practices. These overlaps, moreover, are intelligible in relation to the common ultimate objective that animates all the practices involved, namely the reconciliation of self and other within the realm of social relationships. Third, the law's distinct existence is not given, but must be constantly fought for, through a dynamic process of differentiation operating in a specific social and historical context and con-

strained by the requirement of integrity. It is not sufficient, however, for law rhetorically to proclaim that it is different from other practices. To keep earning its distinct identity, law must (through interpretive work) constantly carve out a sufficiently determinate and differentiated meaning (identity) for itself as a practice, by processing and reworking the actual social and historical materials with which it happens to be confronted. But because law's meaning-endowing work cannot be carried out successfully if conducted at too high or too low a level of abstraction, one can make no general prescriptions concerning how law in general ought to operate as a distinct practice.

By concentrating on modern law, and in particular on the contemporary American legal system, however, one can gain useful insights into the means by which law in a given set of social and historical circumstances strives to carve out a distinct existence for itself. As a dynamic jurisprudence resting on a strong common law tradition and on a broadly encompassing constitutional vision, American law generally favors the proliferation of juridical relationships to suit the multiple needs of the legal personality—that is, the human personality to the extent that it is prone to being shaped, developed, perfected and fulfilled through *external* relationships that are distinguishable from the constantly waged struggles and ad hoc compromises typical of politics. Moreover, in the context of contemporary American law, juridical relationships can be distinguished from other external intersubjective relationships inasmuch as the former are much more prone to embrace corrective justice and a broadly interpreted version of the Kantian constraints attached to Weinrib's conception of distributive justice. On the other hand, although contemporary American law embraces corrective justice and a particular vision of distributive justice as part of its quest for a meaningful existence, the juridical relationships that it encompasses tend to remain distinct from internal intersubjective (moral) relationships based on the same forms of justice.

Before turning to a closer examination of each of the above points—and particularly since these points must be addressed one after another in a linear fashion—it bears emphasizing that none of these points *standing alone* allows law to fashion for itself a distinct identity in the context of the contemporary socio-historical scene. Rather, if contemporary law can find such an identity it would have to be due to the convergence of these various points. Also, since there are bound to be significant changes of circumstances over time, yesterday's successes cannot be necessarily counted on today, and today's may not last past tomorrow.

A. *Dynamic Jurisprudence and Multiplication of External Relationships*

To understand how a dynamic jurisprudence may constantly produce new juridical relationships to meet the changing needs and aspirations of the legal personality, it is necessary to focus briefly on the difference between static and dynamic jurisprudences. A static jurisprudence bent on establishing its order[135] settles on certain kinds of potential external relationships and draws them into the realm of law, but it excludes others. For example, a static legal order may require subjecting all market transactions to law, but not the vast majority of relationships between family members. A dynamic legal order, on the other hand, would not be thus limited. To the extent that needs for external relationships arise within the family—as in the case of wife or child abuse—a dynamic legal order, like that framed by the common law, would be able to cope with them, through internal growth and evolution.[136] Accordingly, when no other road to reconciliation appears open, dynamic jurisprudence offers the hope of reconciliation through external relationships.

As previously mentioned,[137] external relationships, as described by Weinrib, involve persons engaged in the pursuit of self-interest, and are contrasted with internal relationships, such as those fostered by love or virtue. To the extent that external relationships mediate the pursuit of self-interest, they are not necessarily legal relationships. They may also be political relationships. Therefore, the characterization of legal relationships as external ones may suffice to distinguish them from purely ethical relationships, but does not contribute to the separation of law from politics. Moreover, the very classification of intersubjective relationships into internal and external ones appears vulnerable to the deconstructionist charge that it sets another arbitrary invertible binary opposition.

The validity of the above deconstructionist charge must be conceded in part, insofar as it seems impossible to draw any clear cut lines between internal and external in relation to interacting subjects. But whereas the dichotomy between internal and external may lack ontological validity, it is not thereby deprived of phenomenological validity. Indeed, relative to the particular circumstances in which they find themselves, interacting actors may tend to perceive certain

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135 See supra note 50 and accompanying text.

136 See, e.g., Schneider, The Dialectic of Rights and Politics: Perspectives From the Women's Movement, 61 N.Y.U. L. Rev. 589, 644-48 (1986) (discussing emergence of legal rights of battered women).

137 See supra text accompanying notes 108-09.

relationships as internal and others as external. These perceptions, moreover, provided that they are widespread among the members of an interacting community, can serve as *a* basis for distinguishing legal from non-legal relationships. Thus, in contemporary society, moral relationships may be construed as involving an internal self-generated and self-policing curbing of self-interest whereas legal relationships may be perceived as only involving external constraints on the pursuit of self-interest, buttressed by external sanctions.

The separation of law from politics depends not on the phenomenological distinction between internal and external, but rather on law's embrace of forms not usually present in purely political relationships. In our contemporary setting, these forms may well be those of corrective justice and of the particular version of distributive justice invoked by Weinrib. Again, it bears repeating that law does not strictly depend on the presence of either of these forms of justice, and that, as we shall more fully elaborate below, mere presence does not necessarily transform the external relationships to which they apply into legal ones.

B. *Corrective Justice: Legal and Political*

As already mentioned,[138] corrective justice is backward-looking. It seeks to reestablish (re-inscribe) a disrupted past by ritualistically erasing the wrongdoing and suffering that has opened a wedge between self and other. Corrective justice seeks to inscribe the return to a baseline projected into a particular point in time lifted from the flow of past events. This baseline, as we have seen, always involves an arbitrary—in the sense of political and ideological—element and is always established ex post facto (as is the particular point in time selected as its temporal anchor).[139] Moreover, the arbitrary element involved in selecting the baseline also extends to the definition of the "disruption" sought to be overcome through the application of corrective justice. Thus, what constitutes a compensable "disruption" as opposed to, for example, "the cost of doing business" or the "risk assumed" by motorists or consumers, under any particular conception of corrective justice depends on the political and ideological assumptions behind that conception of justice. In short, dispensing

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138 See supra text following note 129.

139 Id.; cf. Cornell, Institutionalization of Meaning, Recollective Imagination, and the Potential for Transformative Legal Interpretation, 136 U. Pa. L. Rev. 1135, 1162 n.95 (1988) ("Derrida brilliantly demonstrated the constitutive power of the past at the same time that he has also shown why the 'present' evaporates as an interpretive category, leaving us instead with the promise of the future implicit in a past never capable of being made present to itself.").

corrective justice involves an interpretive task which is not merely limited to the rewriting of past texts, but which also requires re-writing these as if they had already been re-written in the past. In other words, corrective justice not only draws the past into the present, but also seeks to transform every present (here and now) into a past.[140]

The past writings defining disruptions and prescribing measures of compensation may be fairly straightforward legal statutes or judicial precedents giving rise to broad interpretive consensuses among particular groups of legal actors. On the other hand, the writings in question may appear to offer much less guidance—such as when no judicial precedent seems directly applicable—and may accordingly lead to much greater interpretive controversy. In either case, however, the past writing must be read—that is, rewritten—before it can be made to reveal what corrective justice requires in a particular instance. Accordingly, the projection of the present into the past that is supposed to accompany law's embrace of corrective justice may appear to be largely illusory. And if that proved to be the case, then there would be ostensibly no palpable difference between legal and political corrective justice.

The projection of the present into the past does not have to be viewed as a mere collapse of a present into a past. It may plausibly involve a dynamic effort to embed a present in its past, through the establishment of a network of interpretive links travelling between the two. As I have already pointed out[141] the re-writing involved in reading a past writing is not arbitrary, if it is constrained by the openings and closings of semantic paths that result from punctuation of the free flow of meaning attributable to genuine historically grounded efforts to reconcile self and other. Accordingly, whether the projection of the present into the past in the context of corrective justice involves a slight or very extensive rewriting of past writings is not crucial, so

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140 Corrective justice's propensity to (re)turn every here and now into a past is vividly illustrated by cases in which the plaintiff seeks *prospective* (compensatory) relief, such as those involving a petition for an injunction. Suppose a defendant places a crane in front of the plaintiff's house and declares that he intends to demolish the house. Plaintiff then sues defendant and seeks a preliminary injunction ordering the defendant not to destroy the house. In a sense, the judge who must decide the case, is asked to "restore" a status quo that has not yet been disrupted. Moreover, to the extent that the grant of the injunction must be predicated on a judicial finding of future likelihood of the threatened action by the defendant causing the plaintiff an irreparable harm, see J. Friedenthal, M. Kane and A. Miller, Civil Procedure 703 (1985), the judge must treat the here and now as if it were a past, and determine, based on his or her interpretation of the likelihood of future events, whether such present as past ought to be re-written as if it had been already disrupted.

141 See supra text following note 24.

long as the travels between past writings and present re-writings take place over open semantic paths which are used with integrity.

Interpreting the here and now as a past in the context of external relationships, however, is not the exclusive preserve of the law. Indeed, politics can make use of the form of corrective justice in ways that do not seem to involve any legitimate legal relationships. For example, in a case involving political justice against a deposed tyrant where such tyrant is called upon to account for wrongdoings clearly not encompassed within any plausible interpretation of positive law, corrective justice—in the sense of the erasure of the tyrant's (wrong)doing—may well be carried out without recourse to anything genuinely interpreted by legal actors as law.

This last example is arguably illustrative of the ability of politics to mimic law. More generally, one may object that political justice often involves genuine appeals to law (as when a deposed tyrant is prosecuted in part for violations of the criminal code), and that even what seem to be purely legal matters are often imbued with politics (as when a rarely enforced criminal statute is invoked against a political enemy), thus negating the possibility of drawing any genuine boundary between politics and law.

To this one may reply that, whereas law and politics are often close bedfellows, and whereas it may be sometimes impossible as a practical matter to disentangle one from the other, in theory law as an embodiment of corrective justice remains distinguishable from politics. Indeed, not only does law's embrace of corrective justice, like politics', depend on collapsing presents into pasts but also on re-inscribing such presents in a special kind of past—namely one in which the nature of future disruptions and the measure of compensation needed to erase such disruptions has already been identified in writings. These writings, moreover, cannot just be any writings, but only those which can be fairly read as revealing generally applicable norms, rules and standards that circumscribe an order within which external relationships can be intelligibly reconciled.

Consistent with this, legal corrective justice can be distinguished from its political counterpart. Indeed, in its legal embodiment, corrective justice involves a projection of a present into a past that preserves (or creates) a continuity in meaning over the temporal intervals which must be traversed. In its purely political embodiment, on the other hand, corrective justice faces an inevitable rupture which stems from its inability to find a sufficient continuity in meaning between the present texts and past texts which it must confront in the course of its efforts to reattach its present to its past. Finally, because of this differ-

ence, legal corrective justice gives the impression of operating according to pre-existing norms, rules and standards, whereas purely political corrective justice seems to operate on an essentially ad hoc basis.[142] In other words, whereas in legal corrective justice the return to a baseline through the dispensation of damages according to an intelligible measure is inscribed into a single and continuous order elaborated for the external reconciliation of self and other, in purely political justice there are two irreconcilable orders which make any such inscription impossible. In the case of purely political corrective justice, therefore, the selection of a baseline projected into the past is always bound to remain arbitrary from the standpoint of at least one of the two orders—that is, the order of the old regime or that of the new regime—with which that selection would have to be reconciled in order to avoid an unbridgeable rupture making any genuine reconciliation between past and present selves impossible.

That legal corrective justice is distinguishable from its purely political counterpart does not mean that the former is altogether detached from politics. Corrective justice, as I have argued[143] necessarily involves politics in the selection of a baseline and of a measure of damages, and its legal incarnation is no exception. Legal corrective justice, however, apparently successfully separates its legal function from its political one along temporal lines. The political process of selecting baselines, defining disruptions and settling on measures of compensation appears relegated to the past. The seemingly purely legal process of determining whether a particular plaintiff and defendant have become entangled in the kind of wrongdoing and suffering which requires legal compensation, on the other hand, appears to be always situated in the present—or more precisely in a point in time that is always a future from the standpoint of the past moment of political determination of the substantive components of legal corrective justice. Upon closer scrutiny, however, this temporal division between the law and politics of corrective justice does not hold up. Indeed, to the extent that all readings of past writings involve re-writings, no temporal division between law and politics could ever be consistently sustained.

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142 To avoid the sense of arbitrariness that follows from its seemingly ad hoc mode of operation, purely political justice may appeal to the precepts of some unwritten natural law. Given that for deconstruction, speech is a form of writing, it does not matter that natural law is not actually written law. Accordingly, depending on the actual circumstances involved, natural law may or may not be deemed to form part of a community's law. Where natural law is properly part of a community's law, and where political justice can be justified in terms of such natural law, political justice may be legitimately viewed as essentially reducible to legal justice.

143 See supra text following note 129.

In the last analysis, maintenance of the distinction between law and politics in the context of corrective justice is an interpretive matter. The political cannot be dislodged from legal interpretations of corrective justice. But such legal interpretations can transcend mere politics in their dynamic strivings to produce meaning by circulating with integrity through open semantic paths (and by opening new such paths) capable of binding past, present and future texts together in a single order oriented towards the external reconciliation of self and other—that is, the reconciliation of self and other through external relationships mediated through universally applicable norms, rules, and standards. Moreover, these norms, rules and standards may be interpretively found, inferred or created in the course of applying corrective justice, provided that they can be legitimately squared with the relevant set of past, present and future texts with which they must combine to sustain a single order of external reconciliation between self and other. Stated more generally, legal relationships, including those based on corrective justice, differ interpretively from purely political ones, principally because of the following. Law is supposed to reconcile (without suppressing or transcending) antagonistic self-interests within an external order dynamically sustained through the constant generation (and regeneration) of norms, rules and standards that can plausibly be interpreted as being universally applicable. Mere politics, on the other hand, only seems suited to produce ad hoc accommodations between clashing self-interests, which are intelligible solely in terms of the balance of power among the political actors with competing interests or of purely contingent convergences among such disparate interests. And this difference in the respective capacities of law and politics for dealing with the external relationships which they encounter is perhaps most vividly illustrated by the contrast between the legal and the political embodiment of corrective justice.

C. *Distributive Justice: Legal and Ethical*

Because it is forward-looking, distributive justice shapes legal relationships quite differently than does corrective justice. Whereas corrective justice projects juridical presents into the past, distributive justice projects such presents into the future. For example, in a school desegregation case where a black plaintiff seeks enforcement of his or her distributive constitutional right to a racially integrated education, the fashioning of an appropriate judicial remedy does not involve the restoration of a (now disrupted) past status quo. It requires, instead, the deployment of a scheme—such as mandatory busing—designed to produce future departures (towards school integration)

from the present (racially segregated) status quo.[144]

Although distributive justice is essentially forward looking, its judicial dispensation involves a past as well as a future. Indeed, whereas a judge must project a present into the future in order to fashion an appropriate distributive remedy, the particular criterion of distribution which the judge must use in order to arrive at an appropriate remedy always appears embedded in a past from the standpoint of the here and now of judging. Thus, consistent with Weinrib's conception, in judicial applications of distributive justice the political act of selecting a criterion of distribution seems separable from the legal act of applying such criterion in a particular case: the political act is located in the past of judging; the legal act is projected towards its future.

Just as in the case of corrective justice, however, a closer examination of the legal embodiment of distributive justice reveals that no neat distinctions along temporal lines can be drawn between law and politics. Even if the criterion of distributive justice were always to be found in past writings, its application would require reading these past writings, and hence re-writing them. Because of this, the political cannot be expurgated from the legal application of distributive justice, as Weinrib would have it. Nevertheless, legal applications of distributive justice may still be legitimately distinguished from the purely political elements associated with distributive justice, along the same lines as the legal can be differentiated from the political in the case of corrective justice.

There is also another way in which the legal may be distinguished from the political in the case of those conceptions of distributive justice which impose the Kantian constraints stressed by Weinrib.[145] It seems that when these Kantian constraints are applicable, the law appropriates the ethical categories of personhood and equality and employs them to limit the reach of the purely political will engendered through the deployment of democratic majoritarian processes. Thus, judges are supposed to examine the legislative enactments expressive of the political will of the majority and validate them only to the extent that they are consistent with applicable Kantian constraints made legally enforceable by some generally accepted writing such as a (written or an orally transmitted) constitution. For example, under the American Constitution, the due process and equal

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144 Cf. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) (busing children for purposes of achieving racial desegregation of public schools is constitutionally permissible).

145 See supra notes 120, 121 and accompanying text.

protection clauses can be read as imposing broadly interpreted Kantian constraints on democratically generated legislation. Moreover, these constraints appear to impose extra-political limitations on the products of the democratic political process, regardless of whether they are very narrowly construed by "strict constructionists" or market libertarians or very broadly understood by "liberal" judges or welfare egalitarians—or, in other words, regardless of whether due process is narrowly conceived as only protecting certain procedural rights or broadly conceived as also encompassing an extensive domain of substantive rights, and of whether equal protection is narrowly restricted to sustaining formal political equality or broadly expanded to cover equal opportunity and basic social welfare rights.

Although the judicial implementation of Kantian constraints is a task that runs counter to the ordinary processes of majoritarian politics, it is not thereby altogether immune from politics. Indeed, interpretation of the relevant constraints—including such open-ended constitutional provisions as the due process and the equal protection clauses under the American Constitution—cannot help but involve politics to the extent that it requires the judicial (reading) re-writing of past texts.

In the last analysis, both legal distributive justice in general and the implementation of Kantian constraints in particular necessarily encompass political elements. Nevertheless, in the case of Kantian constraints, legal interpretation conducted with integrity leads to the transcendence of ordinary majoritarian politics. Moreover, in the cases of both legal distributive justice and Kantian constraints, execution of the requirement to bind pasts, presents and futures together so as to insert external relationships among legal actors in an order structured by universally applicable norms, rules and standards, if performed with integrity along the proper interpretive paths, succeeds in producing a difference between legally mandated distributions and purely political ones. Finally, even though the same criterion of distributive justice may inform ethical as well as legal relationships, and even though legal distributive justice may necessarily encompass ethical elements, legal implementations of distributive justice nevertheless are generally distinguishable from ethical ones. And the reason for this difference is that not all prescriptions and sanctions suitable for internal relationships are likewise applicable to external relationships, or in other words, that there can be no complete overlap between ethics as a practice based exclusively on self-constraint and law as practice that requires the imposition of external constraints.[146]

[146] For example, suppose there is a general consensus that distributive justice requires the

D. *Assessing the Distinct Identity of Modern Law*

If the preceding broadly based observations are warranted, then modern law viewed through the prism of deconstruction's ontology of postponement and ethics of reconciliation can interpretively carve for itself a distinct identity. Within this deconstructionist perspective, law like ethics and politics presupposes a social universe split into self and other and a call to attempt overcoming that split.[147] Law is, however, unlike ethics (as a practice) insofar as ethics operates by means of self-restraint and internal sanctions. On the other hand, law is also unlike politics, to the extent that politics can aspire to no more than ad hoc compromises among competing self-interested parties. By charting an intermediate course which uses external constraints and sanctions in order to channel disparate self-interests to a common ground of (possible) reconciliation buttressed by generally applicable norms, rules and standards, law can through its interpretive deeds sustain an identity of its own, and thus overcome the crisis affecting legal interpretation. Furthermore, whereas (at least Kantian) ethics seeks to overcome the dichotomy between self and other by completely subordinating the self to the universal other that is the categorical imperative; and whereas politics cannot prevent the self in pursuit of its interests from constantly threatening to destroy the tenuous ad hoc compromises on which the other depends for protection; law's promise of external reconciliation seems to strike a much better balance between the interests of the self and those of the other.

From the standpoint of the broader ontological and ethical concerns of deconstruction, the external impersonal reconciliation promised by law appears to fall far short of the mark. Indeed, the pluralism of interests assumed by modern law seems but a pale and partial image of the profound split between self and other which informs deconstruction's ethic of reconciliation. Perhaps the limitations of law could be overcome by supplementing its external relationships with internal relationships capable of fostering greater intimacy and solidarity between self and other. Perhaps, however, the

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allocation of socially produced goods in proportion to each individual's subjectively felt needs. Under those circumstances, it seems perfectly natural to impose an ethical duty against claiming entitlements to goods which are not necessary to satisfy one's subjectively felt needs. But by the same token, it may be inadvisable to impose a similar legal duty, because of the severe difficulties or distasteful burdens—ie., the need to use lie detector tests to insure that claims do not exceed subjectively felt needs—which the requisite mechanism of external enforcement needed to sustain legal duties would inevitably have to produce.

147 The call involved here is, of course, the ethical call of deconstruction which involves a substantive ethical prescription, and which must be distinguished from ethics in general understood as a practice relying on internal constraints and sanctions.

ontological and ethical demands of deconstruction require the erasure of the distinction between external and internal relationships which may require superseding the very order established by law. These alternative possibilities raise important and vexing issues that cannot be pursued here. Therefore, it must suffice for now that whereas the status of law may be ontologically and ethically in doubt in the context of deconstruction, epistemologically, law's distinctness as a practice remains on firm ground.