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Incommensurability and Alterity in Contemporary Jurisprudence

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COMMENTS

Incommensurability and Alterity in Contemporary Jurisprudence

NICK SMITH†

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I. PREFACE AND FRAMING

A. *An Overview of the Project and its Structure*

Numerous jurisprudential books and articles have recently appeared on the topic of value incommensurability.¹ Authored by several prominent legal philosophers of the 1990s, the incommensurability discourse deliberates on the following issue: How can we, or should we, assess value within a pluralistic community composed of institutions and individuals who possess incommensurable systems of valuation? How can we decide on the value of something such as clean air, a fetus, a professional reputation, or a body part if members of the community have different interpretations and understandings of not only how much that thing is worth, but also of how it should be appropriately and respectfully valued? If an injury is suffered to one's reproductive capabilities, for example, how should a court determine a remedy that will both compensate for such a loss and honor the belief that the human body should not be equated with a cash value? Or, in another example, how should a legislature or administrative agency mediate between animal rights advocates, steadfast in their belief that animals should live free from torture, and a research lab that performs experimental surgeries on live animals?

1. See ELIZABETH ANDERSON, VALUATION IN ETHICS AND ECONOMICS 55 (1993); MARTHA NUSSBAUM, LOVE'S KNOWLEDGE (1990); MARGARET J. RADIN, CONTESTED COMMODITIES (1996); MARGARET J. RADIN, REINTERPRETING PROPERTY (1993); JOSEPH RAZ, THE MORALITY OF FREEDOM (1986); Jane B. Baron & Jeffrey L. Dunoff, *Against Market Rationality: Moral Critiques of Economic Analysis in Legal Theory*, 17 CARDOZO L. REV. 431 (1996); Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2142 (1990); Margaret J. Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56 (1993); Frederick Schauer, *Commensurability and its Constitutional Consequences*, 45 HASTINGS L.J. 785 (1994); Dennis J. Schmidt, *Can Law Survive?: On Incommensurability and the Idea of Law*, 26 U. TOL. L. REV. 147 (1994); Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994); Jeremy Waldron, *Fake Incommensurability: A Response to Professor Schauer*, 45 HASTINGS L.J. 813 (1994); Richard Warner, *Incommensurability as a Jurisprudential Puzzle*, 68 CHI.-KENT L. REV. 147 (1992); Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441 (1990).

For a problem of incommensurable valuation to arise, the following three conditions must exist: (1) a belief is held regarding the value of something (the right of animals to be free from torture); (2) this belief comes into conflict or is incompatible with another belief regarding the value of that thing (the right to sacrifice animals in furtherance of promising medical research); and (3) a choice must be made between the competing beliefs. Also, incommensurability can occur in two forms: (1) intersubjectively, such as between one party who believes people should have freedom to contract for sexual services and another party who believes prostitution should be outlawed because it degrades the value of sexual relations; and (2) intrasubjectively, such as in a decision between leaving your toddlers with a day care provider so that you can pursue a fulfilling career, on the one hand, and placing your professional life on hold to spend all of your time with your children, on the other.

Incommensurability theorists hope to debunk both utilitarian and law and economics methods of valuation that deny the existence of genuinely incommensurable values and assert that all things are universally quantifiable, fungible, or transferable and therefore believe that there exists one comprehensive scale of valuation, such as money, utility, or good, against which all decisions can be evaluated.² Legal incommensurability theorists level their critique against such monistic analytic frameworks by demonstrating the variety of ways "in which economic analysis of law, and most forms of utilitarianism as well, miss important commitments of a well-functioning legal system."³

Generally speaking, incommensurability theorists believe that human valuation flows from particular institutional or personal beliefs about what each actor considers and interprets to be meaningful and important, and thus value cannot be reduced to a single quantifiable calculus that would be appropriate in all circumstances. Thus, incommensurability theorists assert that it is crucial for us to evaluate certain goods, such as love, profit, talent, or friendship according to separate scales and within distinct "spheres,"⁴ in Michael Walzer's terms, so as to properly understand the nature of that good as qualitatively distinct from

2. See RICHARD A. POSNER, *AN ECONOMIC ANALYSIS OF LAW* (4th ed. 1992); see also RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* (1981); JAMES GRIFFIN, *Are There Incommensurable Values?*, 7 *PHIL. & PUB. AFF.* 39 (1977); DONALD H. REGAN, *Authority and Value: Reflections on Raz's Morality of Freedom*, 62 *S. CAL. L. REV.* 995, 1056-75 (1989).

3. Sunstein, *supra* note 1, at 782.

4. See MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983).

other goods. In Margaret Jane Radin's words, a belief in the incommensurability of values "means that there is no scale along which all values can be arrayed in order so that for any value or package of values we can say definitively that it has more or less value than some other."⁵

Simultaneous to the emergence of value incommensurability in legal theory, the disciplines of Philosophy, Comparative Literature, and various brands of Critical Theory have developed an interest in a different breed of incommensurability as articulated in the thought of the late Emmanuel Levinas.⁶ Described as a Lithuanian Jewish Talmudic scholar, a World War II concentration camp survivor,⁷ a student of Husserl and Heidegger, and one of the originators of deconstruction, Levinas meditates on what he names "alterity" or the quality of being "Other."⁸

What does it mean to recognize something or someone as genuinely "other" and therefore entirely different from all things

5. RADIN, *CONTESTED COMMODITIES*, *supra* note 1, at 11.

6. For a sample of the literature developing around Levinas' thought, see ROBERT BERNASCONI & SIMON CRITCHLEY, *RE-READING LEVINAS* (1991); RICHARD A. COHEN, *ELEVATIONS: THE HEIGHT OF THE GOOD IN ROSENWEIG AND LEVINAS* (1994); SIMON CRITCHLEY, *THE ETHICS OF DECONSTRUCTION: DERRIDA AND LEVINAS* (1992); *FACE TO FACE WITH LEVINAS* (Richard A. Cohen ed., 1986); ROBERT GIBBS, *A Jewish Context for The Social Ethics of Marx and Levinas*, in *AUTONOMY AND JUDAISM: THE INDIVIDUAL AND THE COMMUNITY IN JEWISH PHILOSOPHICAL THOUGHT* 161 (Daniel H. Frank ed., 1992); MARTIN JAY, *DOWNCAST EYES: THE DENIGRATION OF VISION IN TWENTIETH CENTURY FRENCH THOUGHT* (1993); JOHN LLEWELYN, *EMANUEL LEVINAS: THE GENEALOGY OF ETHICS* (1995); ROBERT J. S. MANNING, *INTERPRETING OTHERWISE THAN HEIDEGGER: EMMANUEL LEVINAS'S ETHICS AS FIRST PHILOSOPHY* (1993); JILL ROBBINS, *PRODIGAL SON/ELDER BROTHER: INTERPRETATION AND ALTERITY IN AUGUSTINE, PETRARCH, KAFKA, LEVINAS* (1991); BRIAN SCHROEDER, *ALTARED GROUND: LEVINAS, HISTORY, AND VIOLENCE* (1996); EDITH WYSCHOGROD, *THE PROBLEM OF ETHICAL METAPHYSICS* (1974); KRZYSZTOF ZIAREK, *SEMANTICS OF PROXIMITY: LEVINAS ON NON-INDIFFERENCE* (1994); Travis Anderson, *Drawing Upon Levinas to Sketch a Heterotroph Poetics of Art and Tragedy*, 24 *RESEARCH IN PHENOMENOLOGY* 69 (1994); Peter Atterton, *Levinas and the Language of Peace: A Response to Derrida*, 36 *PHIL. TODAY* 59 (1992); John E. Drabinski, *The Status of the Transcendental in Levinas' Thought*, 38 *PHIL. TODAY* 149 (1994); Wendy Farley, *Ethics and Reality: Dialogue Between Caputo and Levinas*, 36 *PHIL. TODAY* 210 (1992); Roger S. Gottlieb, *Ethics and Trauma: Levinas, Feminism, and Deep Ecology*, 44 *CROSS CURRENTS* 222 (1994).

7. Peter Schertz, *Vigorous Engagement*, *JERUSALEM POST*, Mar. 13 1992, available in *LEXIS*, Nexis Library, Major Papers File.

8. See EMMANUEL LEVINAS, *COLLECTED PHILOSOPHICAL PAPERS* (Alphonso Lingis trans., 1987); EMMANUEL LEVINAS, *ETHICS AND INFINITY* (Richard Cohen trans., 1985); EMMANUEL LEVINAS, *IN THE TIME OF NATIONS* (Michael Smith trans., 1994); EMMANUEL LEVINAS, *NOMS PROPRES* (1976); EMMANUEL LEVINAS, *OTHERWISE THAN BEING OR BEYOND ESSENCE* (Alphonso Lingis trans., Kluwer Academic Publishers 1991); EMMANUEL LEVINAS, *OUTSIDE THE SUBJECT* (Michael B. Smith trans., 1994); EMMANUEL LEVINAS, *THE THEORY OF INTUITION IN HUSSERL'S PHENOMENOLOGY* (Andre Orianne trans., 1973); EMMANUEL LEVINAS, *TIME AND THE OTHER* (Richard Cohen trans., 1987); EMMANUEL LEVINAS, *24 TOTALITY AND INFINITY* (Alphonso Lingis trans., 1969).

to which it might be compared? Levinas' philosophy navigates the difficulty of defining the terms "alterity" and "Other," and much of the intrigue and originality of his thought lies in the peculiarity of these notions to traditional discourse. Levinas brings us to realize that we as Western thinkers cannot understand the quality of otherness, and for him this inability to accommodate otherness bespeaks a grave ethical shortcoming that must be confronted in order to engage in responsible interpersonal relationships. Therefore if you do not immediately understand the meaning of the term "other," or if you have difficulty coming to a provisional definition of alterity, you should be comforted that you share this problem with Plato, Hegel, Heidegger, and quite probably every thinker in the history of the Western world. Our very inability to understand alterity is precisely Levinas' preoccupation.

Whereas value incommensurability exists between personal or cultural systems of valuation where belief systems clash, such as when a judge or legislator is confronted with a choice between siding with one person who believes that an unborn fetus has an inherent right to be born or another who believes that a woman has an inherent right to reproductive autonomy, Levinas describes the intersubjective incommensurability between the "I" and the "Other"—"Me" and "You." For Levinas, incommensurability occurs when I use my structures of thought to think about You, who are the Other and entirely different from me. For Levinas, incommensurability, and our inability to respond properly to it, is a grave ethical problem, and I hope to provide an adequate explanation of his project in order to offer meaningful contrast and comparison between it and value incommensurability.

Currently, virtually no conversation between the two emerging fields of study exists, and in this comment I hope to begin the introductions. One reason Levinas has not been extensively discussed in legal scholarship might be his difficult and esoteric style that does not lend itself well to exegesis, and therefore one of my primary goals in this comment is to render Levinas' thought as simply and clearly as possible so that the reader can come to the rewarding, and often beautiful, insights that he offers.⁹ Although many faithful Levinas scholars might cringe at

9. For considerations of Levinas in legal academic literature, see DRUCILLA CORNELL, *THE PHILOSOPHY OF THE LIMIT* (1992); *DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE* (Drucilla Cornell et al. eds., 1992); J.M. Balkin, *Transcendental Deconstruction, Transcendent Justice*, 92 MICH. L. REV. 1131 (1994); Guyora Binder, *Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie*, 98 YALE L.J. 1321 (1989); Drucilla

the attempt to render his work complicitous to political tenets, since such a project risks subordinating the ethical and deconstructive nature of his project to a sterile set of axioms, I believe that his work, as well as that of other promulgators of deconstruction, can add a meaningful dimension to legal and political theory.

Value incommensurability theory and Levinasian deconstruction can be linked on two levels. First, both schools reject Platonic metaphysics that assume the existence of a unified "science" of universal value and ethics. Second, these recognitions of incommensurability lead both movements to embrace anti-authoritarian forms of politics. I hope Levinas scholars will be interested in value incommensurability as a possible alternative to the political impotency that results from Levinas' ethical theory. Value incommensurability theorists will find Levinas adds ethical force to their political deliberations. Understood in conjunction, the two intellectual movements come together in what I would like to call the "deconstructive ethos," and it is my contention that this deconstructive ethos can be translated into a set of positive democratic commitments. I hope this comment will persuade both schools to investigate, utilize, and welcome their trans-Atlantic counterparts.

I will begin by situating the current conversation of legal incommensurability within the Anglo-American philosophical tradition. As I introduce the cluster of concepts and opinions that have gathered under the rubric of legal incommensurability theory I will mention several different authors, and I will ally with and embrace the central tenets of this school of thought and its critique of monistic forms of valuation.

After the principles of legal incommensurability have been unpacked, I will attempt to bridge the seemingly untraversable distance between American legal theory and French deconstructive theory. I will sketch an overview of Levinas' project as a whole, and in order to do this I will discuss a dialogue that took place between Levinas and the other major figure of deconstruction, Jacques Derrida. This examination of Levinas and Derrida will help us get at exactly what is at stake for deconstruction,

Cornell, *Law and the Postmodern Mind: Rethinking the Beyond of the Real*, 16 CARDOZO L. REV. 729 (1995); Alain Pottage, *Law and the Postmodern Mind: A Unique and Different Subject of Law*, 16 CARDOZO L. REV. 1161 (1995); Richard K. Sherwin, *Law, Violence, and Illiberal Belief*, 78 GEO. L.J. 1785 (1990); Henry J. Staten, *The Deconstruction of Kantian Ethics and the Question of Pleasure*, 16 CARDOZO L. REV. 1547 (1995); Elizabeth Weed, *Reading at the Limit*, 15 CARDOZO L. REV. 1671 (1994).

ethically and politically, and we will see how the unusual and circuitous style of deconstruction makes its point.

After laying out deconstruction's ethical dimension, I will explain the difficulties of transposing this ethics onto politics. I will then compare Levinas' intersubjective incommensurability to the incommensurability of valuation described by legal theorists. Once the contrasts and comparisons are drawn, I hope the two schools of thought will come into focus as similarly rejecting both the attempt to formulate a single metric that would level and homogenize incommensurable and plural valuation, and the aspiration of Western thought to deny the "otherness" of the Other. Levinas and legal incommensurability theorists share the belief that the projects to commensurate value and alterity are misguided and violent since such attempts to totalize humans and their desires will always be, and always should be, ruptured by the irreducibility of humankind. Both Levinas and the thinkers of legal incommensurability dwell within the delicate and interminable attempt to welcome, respect, and co-exist with alterity while maintaining the necessary structures and constraints of a democratic order.

In summary, the argument and purpose of this comment will be to cross-pollinate value incommensurability theory and Levinasian deconstruction so as to begin to develop a social and legal theory that (1) is motivated by an ethical commitment to the irreducibility of human subjects, institutions, and goods and (2) negotiates between those incommensurable subjects and values through democratic procedural mechanisms. This hybridization of the two schools of thought will provide ethical grounding for legal incommensurability theorists, and political grounding for Levinasian critical theory.

B. *The Theoretical Climate*

While Anglo-American value theory, where we find the discourse of legal incommensurability, and Continental phenomenology, the stomping grounds of Levinas and deconstruction, emerge from quite disparate philosophical traditions and occupy opposite ends of the theoretical spectrum, in their current compositions the two schools share at least one important thing: a post-World War abhorrence for authoritarianism. In response to the horrific butchering and persecution of a variety of so-called marginal groups by totalitarian and authoritarian regimes, theorists of the mid- and late twentieth century have been preoccupied with the interrelated notions of difference, otherness, and incommensurability.

Several philosophers became acutely self-aware that their discipline had sought, since its pre-Socratic beginnings in Parmenides and others, and through Hegel and Heidegger, to render existence as a singular unified phenomenon.¹⁰ Philosophers and scientists of the Western tradition craved a final theory that could neatly systematize the world into an organized framework that could logically explain away all the aberrations and anomalies of existence. For these thinkers, nothing could exist outside of their understanding of the world and all "otherness" could somehow be related to and harmonized with their conception of the world.¹¹

Such monistic notions came to be challenged, for example in the context of the philosophy of science, where Thomas Kuhn coined the term "incommensurability" as he argued that certain historical changes in beliefs, such as the shift from a geocentric to a heliocentric model of our solar system, produce paradigms that are fundamentally incompatible.¹² This realization that even our most basic laws of science are fallible dealt a serious blow to attempts to explain experience in absolute terms, and this lesson, as well as that offered by Wittgenstein who sternly told philosophers that acontextual explanations of the essential structures of the world are futile and that we should resist such "cravings for generality," became extremely influential.¹³ In Richard Rorty's terms, the notion that philosophical thought could "mirror" the objective world became suspect.¹⁴

Continental philosophers similarly diagnosed that while the drive to control, define, and explain has produced great achievements in the natural and physical sciences, when this technological approach is applied to the "human sciences," the results can be disastrous. When thinkers deploy technological thought to evaluate, coordinate, and analyze individuals and societies, dom-

10. Parmenides is often credited, or charged, with being the first Western thinker to attempt to organize existence into a single unified and coherent narrative, and this occasionally earns him status as the first philosopher. See PARMENIDES, FRAGMENTS (David Gallup trans., 1984).

11. For classic continental examples of this conflation of otherness with a philosophical vision, see GEORGE WILHELM FRIEDRICH HEGEL, PHENOMENOLOGY OF SPIRIT (T.N. Findlay ed. & A.V. Miller trans., 1977); EDMUND HUSSERL, IDEAS (W.R. Boyce Gibson trans., 1931); MARTIN HEIDEGGER, BEING AND TIME (John Macquarrie & Edward Robinson trans., 1962); see also Jacques Derrida, *Violence and Metaphysics*, in WRITING AND DIFFERENCE 79 (Alan Bass trans., The University of Chicago Press 1978).

12. THOMAS S. KUHN, THE COPERNICAN REVOLUTION (1957); THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962).

13. LUDWIG WITTGENSTEIN, THE BLUE AND BROWN BOOKS 17 (1958). Wittgenstein similarly diagnosed "our contemptuous attitude toward the particular," *id.* at 18.

14. RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (2d ed. 1980).

ination will surely result, and thinkers such as T.W. Adorno,¹⁵ Hannah Arendt,¹⁶ Maurice Blanchot,¹⁷ Michel Foucault,¹⁸ J.F. Lyotard,¹⁹ Derrida, and Levinas leveled lucid attacks explaining how the desire to systematize will repress, marginalize, and in the worst cases, exterminate that which resides outside of the prescribed order. As Levinas explains this experience of the control of humanity with the tools of technology, "[t]he sciences of man . . . end . . . in the triumph of mathematical intelligibility, repressing the subject, the person, his uniqueness and his election, into ideology"²⁰

The projects of Levinas and, in a less exotic but nonetheless important manner, the value incommensurability theorists, resist and problematize unitary, and what they consider authoritarian, conceptions of human life and value. The purpose of this article is to explain how and why the respective schools of thought accomplish this resistance to the commodification and reduction of humanity to monistic or technological categories, and how their projects can be understood as politically parallel and supplementary.

II. VALUE INCOMMENSURABILITY IN LAW

A. *Definitions and a Variety of Examples*

Much of the interest in value incommensurability in jurisprudence has been generated by the work of Martha Nussbaum, which I discuss in Part IV of this comment as the most lucid commentary on the ethical dimension of the incommensurability

15. See T.W. ADORNO, *THE AUTHORITARIAN PERSONALITY* (1950); *HEGEL: THREE STUDIES* (Sheirry Weber Nicholson trans. 1993); *DIALECTIC OF ENLIGHTENMENT* (John Cumming trans., 1944); *MINIMA MORALIA* (E.F.N. Jephcott trans., 1974); *NEGATIVE DIALECTICS* (E.B. Ashton trans., 1973).

16. See HANNAH ARENDT, *EICHMANN IN JERUSALEM* (Viking Press 1963); *THE HUMAN CONDITION* (1958); *LIFE OF THE MIND* (1983); *THE ORIGINS OF TOTALITARIANISM* (Meridian Books 1958)(1951); *ON REVOLUTION* (Pelican Books 1977)(1963); *ON VIOLENCE* (1970).

17. See MAURICE BLANCHOT, *DEATH SENTENCE* (Lydia Davis trans., 1978); *SPACE OF LITERATURE* (Ann Smock trans., 1982); *THE WRITING OF THE DISASTER* (Ann Smock trans., 1986).

18. See MICHEL FOUCAULT, *THE BIRTH OF THE CLINIC* (Sheridan Smith trans., 1973); *DISCIPLINE AND PUNISH, THE BIRTH OF THE PRISON* (Alan Sheridan trans., 1977); *THE HISTORY OF SEXUALITY* (Robert Hurley trans., 1978); *MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON* (Richard Howard trans., 1965).

19. See J.F. LYOTARD, *POLITICAL WRITINGS* (Bill Reading and Kevin Paul trans., 1993); *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* (Geoff Bennigton and Brian Massumi trans., 1984).

20. Emmanuel Levinas, *No Identity*, in *COLLECTED PHILOSOPHICAL PAPERS*, *supra* note 8, at 144.

problem, and that of Michael Walzer in his 1983 *Spheres of Justice*.

Walzer, writing specifically within the field of distributive justice, believes that "principles of justice are themselves pluralistic in form; that different social goods ought to be distributed for different reasons, in accordance with different procedures, by different agents; and that all these differences derive from different understandings of social goods themselves—the inevitable product of historical and cultural particularism."²¹ Hence Walzer developed the notion of "complex equality," where different goods, such as love, wealth, or education, occupy discrete fields of evaluation. Hierarchies will form within each sphere according to relevant talents, fortunes, or needs, and goods will be distributed accordingly. The key, for Walzer, is to prevent one's status in one sphere from dictating one's position in another. If I am rich and powerful within the market sphere, this cannot translate into automatic political power. Value, for Walzer, is specific to each sphere and not across the entirety of goods, and therefore he asserts that "distributive justice is not—what utilitarianism certainly is—an integrated science, but an art of differentiation."²² As Walzer pulls apart the spheres of evaluation and blocks exchanges between them, goods that are valuable in one sphere might not carry their worth to another. Under Walzer's scheme, certain goods came to be recognized as incommensurable and non-exchangeable, and this description of complex equality nicely captures many difficulties experienced within the legal world.

Building upon Walzer's work, University of Chicago law professor Cass Sunstein provides a provisional definition of the phenomenon of value incommensurability when he writes, "[i]ncommensurability occurs when the relevant goods cannot be aligned along a single metric without doing violence to our considered judgments about how these goods are best characterized."²³ This idea opposes certain utilitarian doctrines that seek to legitimate decisions by collapsing the entirety of human values into a single quantifiable calculus. Although it might seem bizarre to refer to such algorithms in the decision making process, a simple cost-benefit analysis often utilizes this mentality. Bentham's utilitarian maxim that we pursue the greatest amount of good for the greatest number of people can be seen as the anthem of such attempts to distill value into a uniform mea-

21. *Id.* at 6.

22. WALZER, *supra* note 4, at xv.

23. Sunstein, *Incommensurability and Valuation in Law*, *supra* note 1, at 796.

sure.²⁴ Sunstein explains that "there is a distinguished tradition of thought, found in such diverse thinkers as Plato and Bentham, that insists that values should be seen as unitary and that human goods should be seen as commensurable."²⁵

Margaret Jane Radin describes this commensurability theory as a belief in "universal commodification," which holds that all human needs and desires can be considered a commodity.²⁶ According to Radin, the belief in commensurability commodifies "not only those things usually considered goods, but also personal attributes, relationships, and states of affairs. Under universal commodification, the functions of government, wisdom, a healthful environment, and the right to bear children are all commodities."²⁷ For commensurability theorists nothing stands above or beyond a quantifiable cost-benefit analysis.

Against this flat economizing line of thought Sunstein believes that "[d]ifferent kinds of valuation cannot without significant loss be reduced to a single 'superconcept,' like happiness, utility, or pleasure."²⁸ Such a reductive equation cannot account for a variety of qualitative differences in the decision making process. Sunstein further explains that, "human values are plural and diverse . . . we value things, events, and relationships in ways that are not reducible to some larger and more encompassing value . . . human goods are not commensurable. By this I mean that such goods are not assessed along a single metric."²⁹

Although this distinction between incommensurability and cost-benefit analysis might seem to be a politically irrelevant philosophical quagmire, it has demarcated a line of contention between the Reagan/Bush and Clinton administrations. In 1986 and 1988 then-President Reagan promulgated two executive orders that required all regulatory decisions to utilize a cost-benefit analysis.³⁰ Clinton, recognizing the inadequacy of a cost-benefit analysis in complex regulatory decision making that must consider disparate and incommensurable qualitative opinions, replaced these orders in 1993 with an order of his own that downplayed the use of cost-benefit analysis and called for a

24. For a classical discussion of Bentham's ideas see generally JOHN S. MILL, *UTILITARIANISM AND OTHER WRITINGS* (1962).

25. Sunstein, *Incommensurability and Valuation in Law*, *supra* note 1, at 781.

26. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1860 (1987).

27. *Id.*

28. Sunstein, *Incommensurability and Valuation in Law*, *supra* note 1, at 784.

29. *Id.* at 780.

30. Exec. Order No. 12,498, 3 C.F.R. 323 (1986), *reprinted in* 5 U.S.C. § 601 (1988); Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 (1986).

more differentiated consideration of the proposed action and its effects.³¹

Examples of incommensurability often occur in environmental issues. An economist, for instance, might understand a forest or the air as material that is to be used for human consumption and exploitation, and therefore can situate its value in financial terms.³² The economist would ask, "Is the forest and all of its creatures worth more, or does it maximize social utility, as a nature preserve or as raw timber and natural resources that can be sold and converted into other goods?" An environmentalist, on the other hand, might be appalled by framing the question in these terms, since she believes that nature has an intrinsic value and should not be subjected to our instrumental needs. Putting a cash value on nature violates the environmentalist's conception of how nature should be cared for and respected. Since the economist places ultimate value in wealth maximization, and the environmentalist believes that the forest has intrinsic worth that trumps any economic or utilitarian considerations, the value of the forest cannot be reduced to a single metric that might forge a compromise between the parties. Sunstein does not mean that the economist and the environmentalist simply disagree on how much the forest is worth—that the naturalist thinks it should be worth much more, valued with a much higher premium, than the economist. Rather he believes that their values are incommensurable and cannot be coordinated within a flat analysis of which option is more appealing since this would do "violence to our considered judgements about how these goods are best characterized."³³ This violence to our judgement would "elide certain qualitative differences that are important to both life and law."³⁴

We generally consider certain exchanges or transactions taboo or fundamentally misconceived: I offer you one thousand dollars to be my friend; you give me a Mercedes Benz so that I will vote for you in the next election; my factory can exceed emissions regulations if I make a substantial contribution to the seated political party; you sell me your newborn child; Robert Redford's *Indecent Proposal*.³⁵ All of these examples produce the evaluative violence that Sunstein believes makes uniform valua-

31. Exec. Order No. 12,866, 3 C.F.R. 638 (1994).

32. See, e.g., WILLIAM J. BAUMOL & WALLACE E. OATES, *THE THEORY OF ENVIRONMENTAL POLICY* (2d ed. 1988).

33. Sunstein, *Incommensurability and Valuation in Law*, *supra* note 1, at 796.

34. *Id.* at 797.

35. *INDECENT PROPOSAL* (Paramount 1993).

tion unattractive. The idea that I can buy friendship destroys the good that I seek and does not comprehend the qualitative dimensions of friendship. Once I pay someone to be my friend, the relationship no longer possesses the qualities expected of a friendship. Similarly, buying out the voting population undermines the purpose of a democratic vote. Although a cynic could say that "everything has its price," Sunstein is making the point, following Walzer, that certain goods have non-exchangeability as part of their cultural meaning, and because of this inability to establish a uniform measure for all values, different people will place different priority on aspects of human life. One person might gauge the value of life in relation to the success of her marriage, another person could think the preservation of endangered species gives meaning to her life, and yet another person might passionately desire to accumulate wealth in order to provide for her family. All of these people have different and possibly competing conceptions of what it means to live a valuable life. Their respective ideas of "the good life" cannot be melted down and molded into a uniform system of measure. Questions of value involve interpretation rather than simple quantification.

Radin discusses incommensurability regarding the commodification of the human body and its integrity. Radin resists the proposition that bodily integrity is a fungible object, which would mean that it could be "replaceable with money or other objects."³⁶ Radin claims that "[w]e feel discomfort or even insult, and we fear degradation or even loss of the value involved, when bodily integrity is conceived of as a fungible object."³⁷ Radin refuses to degrade bodily integrity by assessing it within the matrix of commodities, and therefore provides yet another example of a value that cannot be evaluated within a linear analysis.

Immediately we can begin to understand how this commitment to incommensurability poses a problem to our legal system. If such commodification of bodily integrity offends our perception of human life, what sort of damages could be properly awarded to a plaintiff who has been rendered quadriplegic because of the negligence of another? What type of compensation should be paid to a person who has lost her reproductive capabilities because of negligently manufactured birth control? Do compensatory damages, awarding X for the loss of one hand and 2X for the loss of both hands, express a belief by our legal sys-

36. Radin, *Market In-alienability*, *supra* note 26, at 1880.

37. *Id.* at 1881.

tem that our bodies and autonomy can be reduced to an item for sale at market cost? Or do we simply lack other remedial options? We will return to these questions.

For Sunstein, such valuation cannot be reduced to objective calculations due to the variety of beliefs that different people hold regarding intrinsic worth. He seeks to differentiate between "instrumental and intrinsic value."³⁸ Sunstein explains further,

Many problems of incommensurability arise because of a conviction that an event, a person, or a relationship is intrinsically good, or an end in itself, rather than something properly treated as a means to some other generalized end, such as wealth or utility or maximized value. It is easy to use a single metric when all human events are seen as instrumental to improvements along a unitary dimension. If we thought for example, that all acts were attempts to increase social utility—defined, say, as aggregate human happiness—then it would be utility that would be of intrinsic value, and all else would be instrumental to it.³⁹

Of course over the range of humanity there will exist a plurality of what different people consider intrinsically valuable, and some might even have a hierarchy of prioritized intrinsic goods, for example ranking the health of a child as more intrinsically good than the innate beauty of the Grand Canyon. A person's beliefs regarding what will improve their quality of life can be as original as their fingerprints. The task of dividing up a town budget will be difficult indeed if the town board is composed of a Catholic, a Libertarian, and a Marxist Democrat, since fundamental differences in competing value systems will clash regarding the allocation of funds.

We cannot meaningfully say that Ms. Environmentalist places "X" amount of value in the preservation of pristine waterways, and Ms. Oil-Rigger places "X 1" value in her business of transporting and sometimes leaking pollutants, so therefore Ms. Oil-Rigger's preference should be considered more important as we determine what regulation standards should be required of oil tankers. Such a quantification cannot begin to address the plurality of value systems that each person brings to the situation. If one person believes something is inherently valuable, that its worth cannot be traded or bargained for something else, then a cost-benefit analysis will run up against a wall. Sunstein provides an example of the codification of an inherent value

38. Cass R. Sunstein, *Conflicting Values in Law*, 62 *FORDHAM L. REV.* 1661, 1663 (1994).

39. Sunstein, *Incommensurability and Valuation in Law*, *supra* note 1, at 803-04.

over an opposing value with the Endangered Species Act,⁴⁰ which forbids the jeopardization of endangered species except in extremely rare circumstances.⁴¹

Another example of governmental recognition of such incommensurabilities can be found in § 7409 of The Clean Air Act, which permits an EPA administrator to set ambient air quality standards.⁴² The Act provides that the administrator should not consider issues of practicality or feasibility when setting the standard, and therefore the Act commits absolutely to the attainment of clean air regardless of cost. The Act recognizes incommensurability in valuation since it refuses to assess air quality along a quantitative metric. Air quality cannot be compromised regardless of price, and therefore the Act imparts intrinsic value to a stringent standard that ensures such environmental conditions.

B. *Intrasubjective Incommensurability*

Values may be incommensurate not only between people or cultures, but also intrasubjectively. I might experience evaluative incommensurability within myself, for example, if I lost an infant child due to illness and then immediately gave birth to a healthy child that lived a full life. We do not think of the second child as having "replaced" the first—to do so would make the first child fungible, and this is generally not how we want to understand human life.⁴³ Or in a more everyday example, I might be a music lover and asked "Whose music is more valuable: Beethoven's or Bach's?" The question would seem misguided to us, since we do not think it is meaningful to say that the music of Bach or Beethoven is more valuable, and we might respond with Elizabeth Anderson's definition that "[t]wo goods are incommensurable with respect to some scale if one is neither better, worse, nor equal in value to the other in respects measured by the scale."⁴⁴

Yet another definition of this type of incommensurability is offered by Joseph Raz when he writes, "A and B are incommensurate if it is neither true that one is better than the other nor true that they are of equal value."⁴⁵ For Raz, this predicament

40. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended principally at 16 U.S.C. §§ 1531-1544 (1988)).

41. Sunstein, *Incommensurability and Valuation in Law*, *supra* note 1, at 835.

42. 42 U.S.C. § 7409 (1990).

43. Sunstein, *Incommensurability and Valuation in Law*, *supra* note 1, at 799.

44. ANDERSON, *VALUATION IN ETHICS AND ECONOMICS*, *supra* note 1, at 55.

45. RAZ, *THE MORALITY OF FREEDOM*, *supra* note 1, at 322.

“marks the inability of reason to guide our action.”⁴⁶ The complex of emotions, psychology, and context makes valuation an incredibly dynamic and unpredictable process that cannot be calculated along a linear grid. The critical importance of this insight is that “[r]ationality must be understood to be a matter of interpretation and evaluation, not merely of aggregation and calculation.”⁴⁷

Examples of incommensurability often occur in almost every dimension of life. Imagine an economist bursting into the dating scene and declaring herself to be on the “marriage market.”⁴⁸ She shops around and compares two potential candidates. She interacts with her suitors as she would with her broker, and pitches herself as a product with certain appealing characteristics. Both of her beaux are eager to buy, and both propose marriage to her. She sits at her computer and designs a graph that compares each candidate’s assets and liabilities. Candidate A earns points for being healthy, an outdoorsman, a good cook, tall, dark, and handsome, but loses points for his unreliability and limited earning potential. Candidate B loses points for being a smoker and not enjoying sushi, but he tallies more points than Candidate A because of his Ivy League professional degree, his unwavering romantic flare, and his pending inheritance. She prints her graph, presents the results to Candidate B, and accepts his proposal.

In this example we can feel the absurdity of a cost-benefit analysis. Such robotic calculations have overlooked the entire range of human emotions and passion that are experienced in matters of love. Surely our dating economist can proceed in this analytic fashion, and most people might have deployed such scientific investigations at one point or another when faced with an important life choice, but Sunstein’s point would simply be that doing so fails to take into consideration the complex set of passions, psychology, interpretations, and beliefs that must be a part of a healthy and well-functioning life and legal system and therefore “[t]he problem with cost-benefit analysis is that it is obtuse.”⁴⁹ As Sunstein explains, “[a] great deal would be lost in such a world. A life with genuine commensurability would be flat and dehumanized. It would eliminate delight, bewilderment,

46. *Id.* at 334.

47. Pildes & Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, *supra* note 1, at 2142 (1990).

48. Sunstein, *Incommensurability and Valuation in Law*, *supra* note 1, at 816.

49. Sunstein, *Conflicting Values in Law*, *supra* note 38, at 1671.

and surprise."⁵⁰

Not only does our dating economist miss the subtleties of love, but she has also treated her suitors as commodities. Imagine if we were to conduct all of our interactions with others based on their value according to our set of calculations. Such a disrespect for human dignity, caring only for those possessing certain characteristics desirable for your purposes, is exactly the drive to marginalize and exterminate those different from you because they do not measure up to your standards. Eugenics, racial purification, homophobia, and other malicious treatment can be traced to this impulse to categorize and scientize others. These topics will be explored in Part III as we discuss the work of Levinas.

C. *Radical Incommensurability*

Sunstein continues to discuss what he calls radical incommensurability. He explains,

[C]hoices among incommensurable options are impossible on rational grounds, or relevant goods are so radically incommensurate that there is no process by which human beings can reasonably choose among them. Reason runs out . . . In some contexts, people who sharply disagree do seem to be close to the unhappy state of radical incommensurability. This is so in the sense that they appear to belong to different cultures, and the difference makes it hard for them to reason together. If two people value something in entirely different ways—a religious object, an act of apparent discrimination, a form of liberty, the free market—they may be unable to talk to one another.⁵¹

Radical incommensurability threatens to deny the possibility of consensus and even communication. Take the common and important example of the abortion debate. The public cleaves into factions based on differing value judgements, and these differences can be traced to even deeper incommensurable religious or political beliefs. Does it seem possible that pro-life and pro-choice groups will be able to work toward a consensus? As Elizabeth Mensch and Alan Freeman note in *The Politics of Virtue: Is Abortion Debatable*, the abortion debate might be stuck "in the grim and destructive fact of moral incommensurability."⁵² Pro-lifers believe an unborn fetus is inherently valuable and should

50. Sunstein, *Incommensurability and Valuation in Law*, *supra* note 1, at 854-55.

51. *Id.* at 810-11.

52. ELIZABETH MENSCH & ALAN FREEMAN, *THE POLITICS OF VIRTUE: IS ABORTION DEBATABLE?* (1993); see *id.* at 126-152 (asserting that *Roe v. Wade* unnecessarily polarized the abortion issue and truncated much of the debate).

not be subjected to the decision making process of the pregnant woman. Pro-choicers will disagree and counter with their own belief that a woman's right to make her own decision is itself inherently valuable. If the two groups sit and talk over their differences, does it seem likely that they will come to a compromise or one of the groups will be convinced to change their minds? Like Sunstein fears, the groups can hardly speak to each other. If one tries to fashion a cost-benefit analysis around the issue, we will have one group asserting that the fetus demands infinite value that should not be compromised, and the other group asserting that a woman's right to make her own choice demands infinite value. A stalemate. Their values are truly incommensurable, incompatible, and mutually exclusive.

D. *The Democratic Tenets of Value Incommensurability Theory Compared to Lukes' Marxian Social Theory*

In order to see how incommensurability plays out in social theory, we can look to Cambridge sociologist Steven Lukes' famous discussion of such a phenomenon and contrast his Marxist proclivities with the democratic pluralism that flows from value incommensurability theory.⁵³

Lukes uses the example of Matthew Crenson's study of Gary, Indiana before 1962.⁵⁴ Gary's financial well-being depended almost exclusively on U.S. Steel, a company that had harmed each member of the Gary community, some mortally, because of its refusal to abide by standards of coal emission and air pollution regulation. The citizens of Gary were aware of the danger this pollution posed, but they knew that if they were to lobby or complain, U.S. Steel would simply take its business elsewhere. The Gary citizens knew they would lose their jobs and would be unable to find similar employment if U.S. Steel relocated. Hence, the issue of air pollution in Gary became a non-issue. No one complained. U.S. Steel did not need to withhold information or openly threaten them with withdrawal. These conditions left the Gary citizens in unspoken submission to the power of U.S. Steel.⁵⁵

Lukes believes, in a strong Marxian sense, that if those involved in a political decision are completely aware of the entirety of objective conditions involved in the decision, they will

53. STEVEN LUKES, *POWER: A RADICLE VIEW* (1974).

54. MATTHEW A. CRENSON, *THE UN-POLITICS OF AIR POLLUTION: A STUDY OF NON-DECISIONMAKING IN THE CITIES* (1971).

55. LUKES, *supra* note 53, at 42-56.

choose correctly and progress toward emancipation. Lukes believes that if Gary's citizens were fully endowed with all the necessary information, including the health records and knowledge of the dangers and potential painful deaths, that they would have made U.S. Steel either relocate or reduce their emissions to an acceptable level. For Lukes, this is an objective fact arrived at through reason, and such facts can be arrived at for all such decisions. According to Lukes, U.S. Steel took advantage of the people of Gary and the health of the people should be considered more valuable than their jobs. Lukes believes the citizens of Gary live in a mode of false consciousness and will not truly understand their situation until they agree with his scale of valuation and consider their health more valuable than their jobs.⁵⁶

Value incommensurability theorists would understand Lukes to have made an evaluative error common to both Marxists and legal economists. Both Marxists and legal economists are under the delusion that if we comprehend the entirety of the circumstances surrounding the decision at issue we would then be able to analyze those factors and arrive at the correct answer. Each element would be assigned a weight and a scaled value, the amounts would be tabulated, and one side of the equation would indicate the more valuable option. Value incommensurability theorists would understand Lukes to be making the same error as legal economists, in that Lukes feels that he has uncovered the right answer by weighing the health of the workers in Gary against their financial well-being.

For Lukes, health outweighs financial stability, but for incommensurability theorists the problem is much more complex. Essentially, Lukes positions himself as a sort of legislator deciding between the health of the community and its financial well-being, and his assertions commensurate the two options within one evaluative metric. For incommensurability theorists, this type of analysis is undesirable, since the "goods" of health and financial stability are fundamentally different and cannot be quantified and compared against the same measure. How can Lukes tell the workers that their long-term health is more valuable than feeding their families and enjoying the self-esteem, solidarity, and other benefits that come from being gainfully employed in one's community? Such a choice depends upon a variety of personal and cultural convictions regarding the value of certain goods in relation to others, and not upon some sort of

56. *Id.*

Archimedean scale of pure qualitative judgement that claims to know the absolute worth of all such things. This is the very antidemocratic set of convictions that Sunstein fears. Values and personal beliefs are relative to their context, and we must ensure that individuals are allowed to make those choices within the realm of their personal well being without imposition.

In Sunstein's words, "[t]he state ought to allow a wide range of diverse valuations. The regulation of valuations can be a stifling matter."⁵⁷ Seemingly, Lukes would embrace restrictive legislation, thereby commensurating incommensurables and deciding the value of health over wealth. Sunstein believes that such decision making should be in the hands of those affected and not calculated by a third party legislator. Such a choice can only be made in consultation of the beliefs, preferences, and values of the individuals involved. Sunstein wants to avoid dictating evaluative judgements from the ivory tower of academia or administrative government. A choice so personal as one regarding your health in relation to what you can provide for your family cannot be calculated by a linear analysis. Such a decision depends upon a person's conviction regarding what makes her life valuable, and if I would rather live to fifty with a comfortable job than to eighty unemployed, then such a choice must be respected.

III. THE LEVINASIAN PROJECT

A. Prefatory Remarks

In the next parts I hope to (1) articulate Levinas' project and the charges raised against Levinas by Derrida in his *At This Very Moment in This Work Here I Am*,⁵⁸ (2) consider how the structure of Levinas' texts "performatively" make their arguments by embodying deconstructive strategies, (3) explain how Derrida's critical interrogation of Levinas recuperates the Levinasian ethical imperative, (4) relate the ethics of deconstruction to identity politics, and (5) dovetail this conversation of Levinas and Derrida back into the analysis of legal incommensurability. To do this I will walk through an exegesis of the fundamental concepts developed by Levinas, and I will then interject the charges raised against Levinas by Derrida and discuss the question: Why does Levinas employ the masculine pro-

57. Sunstein, *supra* note 1, at 818.

58. Jacques Derrida, *At This Very Moment in This Work Here I Am*, in *THE DERRIDA READER* 403, 410 (Peggy Kamuf ed., 1991).

noun to mark alterity, that which lies beyond and before sexual differentiation? Why does Levinas refer to the Other as "He" if alterity supposedly resides outside of such characteristics? At this point I will linger on Levinas' apparent subordination of the feminine, and consider how the structure of Levinas' argument "performs" this infraction. I can then disclose the method of deconstruction, and the purpose it serves, by explaining how Derrida's damaging interrogation of Levinas recuperates the Levinasian ethical imperative. Derrida is not claiming Levinas has erred, but rather Derrida furthers the ethical imperative of deconstruction by remaining faithful to the Levinasian ethic, and in so doing the deconstructive ethos is born in its conversation of Woman. I will then turn to Feminist and Queer theorists and describe how they too are confronted by the same ethical and strategic risk of reifying the very stereotypical categories that they wish to rupture by engaging in gender theory.

The exchange between Levinas and Derrida produces elliptical and evasive thinking, for as the theorists comment on each other they produce multiple, often contradictory, meanings as, in Levinas' terms, the "Saying," which can be understood as the act of speaking to an audience, takes precedence over and forever interrupts and problematizes the "Said," which can be thought of as the content of what is spoken. The interplay between the Saying and the Said is central for Levinas as he attempts to simultaneously assert and critique his own arguments, and because of this *modus operandi* the most profound assertions occur not only on the page, but also in the margins, in allusions to other works, and intratextually. The texts weave together only to pull away each thread, leaving behind an ephemeral trace of the memory of the script that has been performed. Deconstruction seeks to be uncanny and disorienting, both in its method and in the meaning it produces, and therefore it makes unusual demands of the reader as it poses an ethical challenge to one's most basic conventions of understanding and discourse.

B. *Ethical Phenomenology and Deconstruction*

According to Levinas, I live in a world where I experience entities that are wholly other—without any relation to me. How can I think of such a thing? I cannot compare it to anything that I know, because then it would be in a relation to me and denied its absolute otherness. Stated another way, the other, in order to maintain its otherness, must exist outside of, and exterior to, my compartments of thought. No matter how hard I try

to make the other somehow similar to me, it cannot "fit" within my systematic understanding of the world, or as Levinas refers to it, my egocentric totality. The other is not the opposite of me, my negation, nor does it present me with my alter ego, an entity that superficially differs from me in some respects but ultimately shares with me fundamental qualities. Levinas writes, "[i]f the same would establish its identity by simple opposition to the other, it would already be a part of a totality encompassing the same and the other."⁵⁹ As soon as I think in terms of the other's relation to me, I have stripped it of its other-ness since I attempt to locate it within my egocentric systems of comprehension. Levinas explains, "[t]he alterity of the Other does not depend on any quality that would distinguish him from me, for a distinction of this nature would precisely imply between us that community of genus that already nullifies alterity."⁶⁰ Once I attempt to impose a logical relation between myself and the other, I will have connected the other to me within my schematic thought. Once this connection, this grasping, is made, I hold the other hostage by denying its very qualities of otherness or alterity. I renounce its identity as other. In order to be other, it must be wholly other, without relation or connection to me. Once I introduce a relation to the other, I exterminate its identity as an other by rendering it an object or phenomenon within my world. In order to preserve alterity, the terms I and Other cannot be brought together. As diagnosed by John Wild:

My primary experience is definitely biased and egocentric. I take precedence over the various objects I find around me, and in so far as my experience is normal, I learn to manipulate and control them to my advantage, either as the member of a group that I identify with myself or simply as myself alone. In general, these objects are at my disposal, and I am free to play with them, live with them, live on them, and enjoy them at my pleasure . . . There is a strong tendency in all human individuals and groups to maintain this egocentric attitude and to think of other individuals either as extensions of the self, or as alien objects to be manipulated for the advantage of the individual or the social self. According to Levinas, neither of these egocentric views does justice to our original experience of the other person, and the most fundamental part of [*Totality and Infinity*] is devoted to the description and analysis of this experience—the phenomenology of the other,⁶¹ as we may call it.⁶²

59. LEVINAS, TOTALITY AND INFINITY, *supra* note 8, at 38.

60. *Id.* at 194.

61. For a discussion where Levinas himself hesitates at describing his work as a phenomenology of the other since even this formulation seems to indicate that the other appears before us as an apparent visual phenomenon, see LEVINAS, ETHICS AND INFINITY, *supra* note 8, at 85.

Philosophy, before Levinas, can be considered the alchemy of the transmutation of the Other into the Same. The Same, a term Levinas loosely equates with the ego, attempts to consume or digest absolutely alterity within its ontological bowels. The history of philosophy, as Levinas understands it, has consisted of various attempts, and failures, to create a system or cosmology that can contain otherness. According to Levinas, such projects are doomed. When I philosophize about the other, when I try to apprehend knowledge of its essence, it necessarily evades me. Any understanding I might have of the other, writes Levinas, "will not be a knowledge, because through knowledge, whether one wants it or not, the object is absorbed by the subject and duality disappears."⁶³ The other riddles our habits of comprehension, and Levinas renounces the consumptive nature of our thought process by showing us how "[t]otalitarian thinking accepts vision rather than language as its model. It aims to gain an all inclusive panoramic view of all things, including the other, in a neutral, impersonal light like the Hegelian Geist (Spirit), or the Heideggerian Being. . . . All otherness will be absorbed into this total system of harmony and order."⁶⁴

For Levinas, our chronic inability to respect the other testifies to the fact that we suffer from a fundamental ethical failure. The alterity of the other interrupts our realm of vision where we aspire to bring everything out into the light, in classic Platonic fashion, so we can poke at it, probe it, and document its essence. Our reliance on vision and light fails to account for alterity since "the same and the other would be reunited under one gaze, and the absolute distance that separates them filled in."⁶⁵ The other demands that I pause and question my imperialist habits that always seize and colonize that which is different from me. For Levinas, this calling into question of my habitual repression and denial of alterity is the site from which all ethics spring. He writes,

A calling into question of the same—which cannot occur within the egoist spontaneity of the same—is brought about by the other. We name this calling into question of my spontaneity by the presence of the Other ethics. The strangeness of the Other, his irreducibility to the I, to my thoughts and my possessions, is precisely accomplished as a calling into

62. John Wild, *Introduction to LEVINAS, TOTALITY AND INFINITY*, *supra* note 8, at 12-13.

63. LEVINAS, *TIME AND THE OTHER*, *supra* note 8, at 41.

64. Wild, *supra* note 62, at 15.

65. LEVINAS, *TOTALITY AND INFINITY*, *supra* note 8, at 36.

question of my spontaneity, as ethics.⁶⁶

This realization of the faultiness and violence of my relation with the other will cause me to question my spontaneity. I realize how I am at fault, how I fail ethically. For Levinas, philosophy has maintained a hierarchy of the knowledge of being or essence of something over the relationship with the entity, and he explains that this practice serves to "subordinate the relation with *someone*, who is an existent, (the ethical relation) to a relation with the *Being of existent*, which, impersonal, permits the apprehension, the domination of existent (a relationship of knowing), subordinates justice to freedom."⁶⁷ Levinas wants to invert this hierarchy.

Levinas describes how the other presents itself through the face of another person. As we come to the face of another person, in its naked uprightness, in its strange nature that conveys more than the color of the eyes, the shape of the jaw, the identity of being a man, a woman, a professor, a parent, a lover—before all of these things—the face presents us with a quality beyond perception. While we can see the face as the sum of its parts, for Levinas "what is specifically the face is what cannot be reduced to that."⁶⁸ In fact, Levinas believes that the "face signifies the Infinite."⁶⁹ In his annunciation of the face as the signifier of the other he explains,

[t]he way in which the other presents himself, exceeding the idea of the other in me, we here name face. This mode does not consist in figuring as a theme under my gaze, in spreading itself forth as a set of qualities forming an image. The face of the Other at each moment destroys and overflows the plastic image it leaves me, the idea existing to my own measure and to the measure of its ideatum—the adequate idea To approach the Other in conversation is to welcome his expression, in which at each instant he overflows the idea a thought would carry away from it.⁷⁰

As it exceeds any idea we might have of it, the face breaches our totality and ruptures our totalitarian thought processes which long to reduce other to one of our colonies. Levinas writes, "[t]he face resists possession, resists my powers. In its epiphany, in expression, the sensible, still graspable,

66. *Id.* at 43.

67. *Id.* at 45 (emphasis in original).

68. LEVINAS, *ETHICS AND INFINITY*, *supra* note 8, at 86.

69. *Id.* at 105.

70. LEVINAS, *TOTALITY AND INFINITY*, *supra* note 8, at 50-51.

turns into total resistance to the grasp."⁷¹ The other is, quite simply, irreducible and infinite. Levinas even goes so far as to say that "[i]n the access to the face there is certainly also an access to the idea of God."⁷²

Levinas' introduction of the face, a signifier of the infinite prior even to a phenomenology of the other, prior to our visual conceptualization of the face, evokes the question of ethics that does not reside within the compartments of philosophy which have tried to define ethics in substantive terms, but rather before them and in the very attempt to ask the ethical question. The question is: How does one speak of that which cannot be spoken of; how do I relate to the Other? This question does not ask "What is my relation to the Other?" but rather exactly "How do I, or ought I, relate?" How can I coexist with the other and still respect its otherness? Levinas formulates the problem in his most cited quote by asking dramatically, "[b]ut how can the same, produced as egoism, enter into relationship with an other without immediately divesting it of its alterity? What is the nature of this relationship?"⁷³ For Levinas, the ethical question (How should I exist?), precedes the ontological question (What is existence?). The gesture of the question, the questioning of myself, the looking to the Other as an interlocutor in a relationship, always presides over and intrudes upon the content of the question itself or what is being asked.

For Levinas, before I wonder what to say, how to act or respond to the other, I am responsible to speak. The possibility of redemption, of an ethical relation to the other, lies in language, as Levinas explains,

[T]he relation between the same and the other—upon which we seem to impose such extraordinary conditions—is language. For language accomplishes a relation such that the terms are not limitrophe within this relation, such that the other, despite the relationship with the same, remains transcendent to the same. The relation between the same and the other, metaphysics, is primordially enacted as conversation, where the same, gathered up in its ipseity as an "I," as a particular existent unique and autochthonous, leaves itself.⁷⁴

Levinas believes that through language and conversation the I, like Abraham, can leave the same without returning home in the typical Odyssean circular journey. For Levinas the way of

71. *Id.* at 197.

72. LEVINAS, ETHICS AND INFINITY, *supra* note 8, at 92.

73. LEVINAS, TOTALITY AND INFINITY, *supra* note 8, at 38.

74. *Id.* at 39.

language can meaningfully respond to the look of the other. When I extend myself in conversation I offer "an initial act of generosity, a giving of my world to him with all its dubious assumptions and arbitrary features," which might allow me to suspend my egotism.⁷⁵ Once I recognize my fallibility, and offer this suppliant realization in conversation, I have offered a gift of apology to the other. The offering does not acquit me of my violence, but I am now able to recognize my violence as such, and this is the crucial step that will inform each word I subsequently speak. Only within conversation do I comprehend the brutality of unquestioned freedom and feel the need "of justifying my egocentric attitudes, and of doing justice to the other in my thought and in my action."⁷⁶ Levinas further explains,

Conversation, from the very fact that it maintains the distance between me and the Other, the radical separation asserted in transcendence that prevents the reconstitution of totality, cannot renounce the egoism of its existence; but the very fact of being in a conversation consists in recognizing in the Other a right over this egoism, and hence in justifying oneself. Apology, in which the I at the same time asserts itself and inclines before the transcendent, belongs to the essence of conversation.⁷⁷

In this quotation Levinas makes note of several crucial elements of his ethical phenomenology: (1) conversation allows me to keep my distance from and not take hold of the Other and consume it within my totality; (2) still, however, conversation cannot atone for the violence I am bound to perpetrate; (3) by speaking to the Other I attest to a right possessed by the Other to be free from me; and (4) conversation serves the purpose of apologizing to the Other for the speaker's fallibility and inability to recognize the right of the Other. This notion of recognizing the right of the other over my freedom is emphasized by Levinas when he claims that "[m]orality begins when freedom, instead of being justified by itself, feels itself to be arbitrary and violent,"⁷⁸ and when he later indicates that "[t]o welcome the Other is to put to question my freedom."⁷⁹ Conversation allows me to interrogate the injustice of my freedom and spontaneity. This self-awareness and hyper-sensitivity to the implications of my speech upon the Other precedes the actual content of the conversation.

75. Wild, *supra* note 62, at 14.

76. *Id.* at 15.

77. LEVINAS, *TOTALITY AND INFINITY*, *supra* note 8, at 40.

78. *Id.* at 84.

79. *Id.* at 85.

As Levinas has explained, I am obligated to respond to the other through conversation, but how? How does this "apology" function? For Levinas, language is a discourse of faultiness, but also of offering and gift. I cannot avoid the perpetration of violence, since, according to Levinas, any words I speak will attempt to confine the other within my systems of thought. This is the risk of all discourse, the unavoidable danger that accompanies all uses of language. This is the impossibility of all conversations attending to the Other that so intrigues Levinas. The infinite (the other) always overflows the finite (my words and thoughts). The Other, that which is absolutely incommensurable, always beyond categories and resisting containment, at the same time obligates me to respond. Levinas writes: "[t]his responsibility is prior to dialogue, to the exchange of questions and answers, to the thematization of the said, which is superposed on my being put into question by the other in proximity, and in the saying proper to responsibility is produced as digression."⁸⁰ I must respond, yet I cannot avoid using the language of presence to refer to that which is always absent. And it is this very language that does violence to the Other, treats it unfairly, tries to contain it within its structures of sameness. How then, should I act? How should I respond? Can I somehow circumnavigate this aporia, by definition an irresolvable problem?

There is, of course, no way to both respond to the Other nonviolently and employ the language of categories. My imperialistic categories will colonize the Other within the empire of language. Each word I speak attempts to corral the incommensurable into my system of thought, thus grasping to contain and dominate its very alterity and to possess the Other with the instrumentality of my thinking. The Other is not merely inexhaustible but incommensurable, not merely too powerful for me, but beyond my power to represent or comprehend.

For Levinas, we are obligated to use this language as well as we are obligated to respond to the absolutely irreducible Other. We must, therefore, apologize. The apology already declares my own inadequacies and injustice in relation to the Other, while at the same moment testifying to my devotion to "Him." There is no resolution, so I must explain the difficulties of the circumstances, apologize for my inexcusable faultiness, and devote my efforts to interminable negotiation. "We propose to call 'religion' the bond that is established between the same

80. EMMANUEL LEVINAS, *Substitution*, in *THE LEVINAS READER* 89, 101 (Sean Hand trans., 1989).

and the other without constituting a totality," writes Levinas in describing the faith of apologetic conversation.⁸¹ Through humility, patience, and "[b]y offering a word, the subject putting himself forward lays himself open and, in a sense, prays."⁸² The Other, in its infinity, suspends the possibility of closure and inaugurates boundless responsibility.

According to Levinas I must reveal my uncertainties as the core of my attention and nevertheless be as attentive as possible. I must be tireless. In Levinas' words, "the saying is the fact that before the face I do not simply remain there contemplating it, I respond to it."⁸³ The Other obligates me to respond, commanding me to justify myself and asking the question: "Do I have the right to be?" Levinas writes, "[i]t is as though saying had a meaning prior to the truth it discloses, prior to the advent of knowledge and information it communicates, free of everything said, a saying that does not tell anything, that infinitely, prevoluntarily, consents."⁸⁴ While the said can be unsaid, revised, or erased, the silence of not saying cannot testify to the absolute responsibility that the occasion in the face of the interlocutor demands. Levinas explains candidly, "[i]n fact, for me, the said [*le dit*] does not count as much as the saying [*le dire*] itself. The latter is important to me less through its informational contents than by the fact that it is addressed to an interlocutor."⁸⁵

This is the labor of deconstruction, the unsaying of the said, the performative testimony to my ethical imperative to absolute alterity by speaking and relentlessly examining the inability of that very speech to relate nonviolently to the other. Therefore as soon as I speak, even with the most apologetic and self-conscious deconstructive attention, my effort will be self-canceling, auto-deconstructive and perpetrating new acts of violence, and I therefore will be no closer to fulfilling my ethical responsibility. One must not insist upon a final resolution, according to Levinas, but rather upon an interminable negotiation with this incommensurable, irreducible, and infinite Other. The negotiation brings the precariousness of one's work to the fore, relentlessly apologizes for one's lack, exposes and examines one's inability, and privileges uncertainty.

81. LEVINAS, *TOTALITY AND INFINITY*, *supra* note 8, at 40.

82. LEVINAS, *The Transcendence of Words*, in *THE LEVINAS READER*, *supra* note 80, at 149.

83. LEVINAS, *ETHICS AND INFINITY*, *supra* note 8, at 88.

84. LEVINAS, *No Identity*, in *THE LEVINAS READER*, *supra* note 80, at 146.

85. LEVINAS, *ETHICS AND INFINITY*, *supra* note 8, at 42.

C. *Levinas, Derrida, and Woman: The Ethical Becomes Political*

This preceding exegesis of Levinasian phenomenology with its considerations of alterity sets the backdrop for the question that brings the political dimensions of deconstruction to the fore: Why does Levinas employ the masculine pronoun when referring to the Other, that which lies beyond and before all identifying characteristics, including sexual differentiation? This question is originally posed toward the conclusion of Derrida's *At This Very Moment in This Work Here I Am*,⁸⁶ where Derrida accuses Levinas, as careful as he may be, of not being careful enough when thinking about and negotiating with the Other.

The infraction seems so obvious: Why does Levinas habitually mark the pre-differential Other with the masculine pronoun? If the Other is anterior to a secondary or derived sexual difference, then why has Levinas marked "Him" in sexual terms? This "illogical logic" leads Derrida to consider if the priority of the masculine in the work of Levinas may indicate an attempt to master the feminine, since the secondary quality of sexual difference is, in every case, signified by the subordinate quality of femininity.⁸⁷ Could it be that the derivation of sexual difference from a male Other connotes the reduction of irreducible difference? The persistent sexual marking of the Other in Levinas' work, and his seemingly inadequate defense of such a practice, is for Derrida a violence—a violence now sexually charged. How could Levinas, who is so compulsively sensitive to difference, violence, and subordination, be oblivious to the privileging of the masculine and the exclusion of the feminine within his own texts?

But now this set of questions, in its most basic formulation, will already turn on us in several senses. First, the entirety of Derrida's critical response to Levinas is motivated by a desire to be "faithful" to Levinasian ethics and its requirement of non-reciprocity. The recipient of the ethical gift of apologetic conversation plays a peculiar role for Levinas, since the manner in which the gift is received can either further my ethical offering or negate it. For the ethical work to truly "work" or be sincere, it must depart, extend beyond the circle of returning to itself. It must be given in radical generosity and without reciprocity. If I were to treat the Other with the types of respect called for by Levinas only because I expect the Other to do the same for me,

86. DERRIDA, *supra* note 58, at 432-38.

87. *Id.*

I would miss the point altogether since I would again be attempting to fit the Other into my instrumental and systematic understanding of the world. We must neither expect nor be motivated by reciprocity, and it must not be given to us. For the gift to be returned would signify the completion of the Odyssean circle within the self-same structure. Instead of going out to the other "from an 'at home' [*chez soi*] which we inhabit, toward an alien 'outside-of-oneself' [*hors-de-soi*], toward a 'yonder',"⁸⁸ the gift will be brought home, given back to the same. If the gift is returned to Levinas, the gift itself is nullified. In this sense, as Levinas gives to me, I must receive without completing the symmetry of the giving, and if I am unaware of the logic at hand, I possess the potential to negate his gift.

Levinas writes in *The Trace of the Other*, "[t]he Work, thought as far as possible, demands a radical generosity of the Same who, in the Work, goes toward the other. In consequence the Work demands an ingratitude of the other. Gratitude would be precisely the return of the movement to its origin."⁸⁹ The gratitude would complete, or produce the supplement to, the original ethical gesture, thus negating it in actuality by returning it to the giver. The gift must be sent out from the Same to the Other without ever returning to the Same.

The question then becomes: Does Derrida need to be, in order to fully receive Levinas' gift, ungrateful to him? In order to keep the Levinasian faith must he strike out at him, like Zarathustra hopes of his own disciples?⁹⁰ Must he actively express ingratitude, for to be ungrateful is not to be passive, to receive without response, but to recognize the gift as such, and to examine its inadequacies? What form could such an active ingratitude take? After he has received the gift ungratefully, where should he take it or send it? Must he also then give it, redirect it?

Imagine Derrida's haunting predicament upon the occasion of writing an essay for a collection entitled *Textes pour Emmanuel Levinas*.⁹¹ He is to write for Levinas, but such a project appears bound to betray Levinas by returning his work to him. The only way to write a text for Levinas is not to write it for Levinas, but for the Other. This is not to write against Levinas, or to critique him with external criterion, but rather to preserve

88. LEVINAS, TOTALITY AND INFINITY, *supra* note 8, at 33.

89. LEVINAS, EN DECOURVANT L'EXISTENCE AVEC HUSSERL ET HEIDEGGER 191 (1974).

90. See FRIEDRICH NIETZSCHE, THUS SPAKE ZARATHUSTRA (Walter Kaufmann trans., 1954).

91. TEXTES POUR EMMANUEL LEVINAS (Francois Laruelle ed., 1980).

his fidelity to the Saying to the absolutely Other. In Simon Critchley's words, "[i]ngratitude, faultiness, and violence are the necessary conditions of a fidelity to Levinas's work, a work which works precisely to the extent that it cannot be returned to the proper name of Emmanuel Levinas."⁹² Derrida must, therefore, "commit an ungrateful violence against Levinas' work: he must show how the work does not work."⁹³

With this structure of faithful honoring of the ethical gift in mind, we can see the logics at work between *Totality and Infinity* and *At This Very Moment* and how Derrida maintains a relationship of non-reciprocity. As Levinas' violent sexual transgression of the Other comes to fruition, Derrida explains, it is already guided by, and in response to, that very Other that has been violated. The attention of the apology then shifts to "Her." In this case, She, the feminine Other of Levinas, guides Derrida's charges and he writes, "[t]he other as feminine . . . far from being derived or secondary, would become the other of the Saying of the wholly-other."⁹⁴ She will have written the text, as absolute un-said alterity, from the other side. As Critchley explains,

If 'She' is the other to 'He,' and if 'He' is the wholly other, then 'She' is the other to the wholly other. The question then becomes: As the other to the wholly other, as a being that possess greater alterity than the wholly other, does 'She' not demand greater ethical respect and priority than 'He'?⁹⁵

In this sense, the interrogation of Levinas is an interrogation of his relation with the sexual Other, a relation guided by the Other and actually with a heightened respect for and awareness of sexual difference. How exactly do Derrida and Levinas transform this apparent subordination of the feminine into an ethical gesture given to "Her?"

Derrida begins with the phrase *Il aura obligé*, which can be read as "He will have obligated."⁹⁶ The *Il* refers to the masculine "He" of *Illeity*, which can be understood, as I have already attempted to explain, as my non-thematizable relation to the Infi-

92. CRITCHLEY, THE ETHICS OF DECONSTRUCTION: DERRIDA AND LEVINAS, *supra* note 6, at 112.

93. *Id.* at 117.

94. Derrida, *supra* note 58, at 433.

95. CRITCHLEY, THE ETHICS OF DECONSTRUCTION: DERRIDA AND LEVINAS, *supra* note 6, at 135.

96. DERRIDA, *supra* note 58, at 405; for an excellent exegesis of these maneuvers see CRITCHLEY, *supra* note 6, at 116-118.

nite, the Other, Transcendence, and God. Levinas gives his work to *Il*. Derrida will transform this pronoun, and in the process redirect the gift. He first substitutes "E.L." for *Il*, and the phrase now reads "E.L. will have obligated." Emmanuel Levinas will have obligated.⁹⁷ The E.L. later becomes *El*, a name for God in the Talmudic tradition, and then this *El* becomes phonetic, producing the pronoun which signifies the actual recipient of Derrida's work, that being the French third person singular feminine, *Elle*.⁹⁸ Derrida's last words are *elle aura obligé*.⁹⁹

The actual text of *At This Very Moment* is itself split into two distinct voices, one which articulates how Levinas' work works and goes unto the Other, and a second voice, a feminine voice, that interrupts the first, reminding it of Levinas' subordination of sexual difference to ethical difference by corralling both *Il* and *Elle* within the hierarchical economy of the Same. With this strategy Derrida avoids returning the gift to E.L. by giving it to the Other, to the wholly Other, that being "Her."

Derrida is hence able to both speak and be interrupted, allowing for the interruption of the Said by the Saying to deny his own closure within the essay, which itself creates both a new totalization and a new rupture. The Saying of the female interlocutor creates a break or fault line in the male voice or voice of the Same; the progression becomes folded and knotted, continually reminded of its own faultiness. The text becomes a concatenation of gaps which hold together only through the performance, or again, the Saying.

The masculine voice is that of commentary on Levinas, and it calls out to the feminine voice of interpretation. She speaks with great clarity, "I knew. In listening I nonetheless wonder whether I was comprehended myself, and how to stop that word: comprehended."¹⁰⁰ In a sentence she has spoken the deepest aporia of the ethical and the sexual. Allow me to bracket the second clause and pause on the first. She wonders if she has been comprehended, if she has at all been understood. She and the reader both know she has been violated and that the feminine has been dominated, subordinated, and misunderstood. The feminine has not been "comprehended,"¹⁰¹ and has also been violated in another sense by the very attempt to comprehend and thereby control and define her.

97. DERRIDA, *supra* note 58, at 420.

98. *Id.* at 438.

99. *Id.*

100. *Id.* at 428.

101. *Id.*

She speaks of two sites of violence in particular, the first being the work of Levinas' "son" in *Totality and Infinity*,¹⁰² and the second being Derrida's neglect of this issue (except for a brief, disclaiming footnote) in his own earlier essay on Levinas entitled *Violence and Metaphysics*.¹⁰³ For Levinas the notion of fecundity makes possible the break with the philosophical tradition of unity from Parmenides to Heidegger by introducing a "multiple existing" of the father and son, whereby I both am my son, and am not my son.¹⁰⁴ The son both comes from me, is my offspring, is a product of me, and is a wholly separate being. In the birth of a son, my identity becomes plural, and hence my Being is split, denying ontological unity.¹⁰⁵

The female interlocutor questions this phallogocentric phenomenology, asking why the mother and daughter do not do the same work. Levinas interchanges "the son" with "the child," revealing that the supposed sexually neutrality of "Il" and ethical difference is actually characterized by a priority of the masculine. Levinas considers neutrality and masculinity as synonyms, hence the secondary status of sexual difference to ethical difference involves the subordination of feminine to masculine.

But the most profound insight of her voice lies in the second clause of the original passage that I quoted ("and how to stop that word: comprehended").¹⁰⁶ The thought here wonders how to stop the word comprehended, for the drive for comprehension is the very drive to master the feminine (in this case), to define it, to locate and systematize it. The Woman is in a particularly difficult situation, as she has been both misrepresented and misunderstood and feels manipulated by these myths, and though she speaks to recover her voice herself and dispel the voice of the Same, her very speaking surely will occasion yet more attempts to "figure her." Her Saying will be reduced to Said in order to be analyzed in yet further hopes to comprehend her, to perpetrate further violence against her. Only her very speaking, her voicing of herself, can interrupt the unilateral text of the masculine's thinking, or not thinking, of her.

102. LEVINAS, *TOTALITY AND INFINITY*, *supra* note 8, at 254-304; for a more thorough discussion of Levinas' interpretation of the son see CRITCHLEY, *THE ETHICS OF DECONSTRUCTION*, *supra* note 6, at 131-32.

103. Derrida, *supra* note 11, at n.92.

104. LEVINAS, *TOTALITY AND INFINITY*, *supra* note 8, at 220.

105. CRITCHLEY, *THE ETHICS OF DECONSTRUCTION: DERRIDA AND LEVINAS*, *supra* note 6, at 131.

106. Derrida, *supra* note 11, at 428.

This aporia draws us into the parallel discourse of identity politics as it is being played out in the late twentieth century. A wave of identity discourses have come to the fore of political and academic forums, be it in regard to gender, orientation, race, or creed. Allow me to remain in the particular problems of gender and sexuality to communicate the issue to which I refer.

Academia is experiencing a proliferation of discourses regarding sex, sexuality, and Feminist and Queer Theory. Many post-structuralist thinkers work within these disciplines, including Judith Butler,¹⁰⁷ Drucilla Cornell,¹⁰⁸ Nancy Fraser,¹⁰⁹ David Halperin,¹¹⁰ Luce Irigaray,¹¹¹ Eve Kosofsky Sedgwick,¹¹² and Jana Sawicki.¹¹³ They are aware that their very theorizing runs a great risk, that being in regard to the question "What does it mean, politically, to do Queer or Feminist Theory?" To what end will the writing of feminist phenomenologies and "epistemologies of the closet" be used? The thinkers of gender and sexuality find themselves in a double bind, like the female voice in *At This Very Moment*, for as soon as they speak in the name of "The Feminist" or "The Queer," as soon as they think publicly about the issue, they have posited words, sentences, and thoughts that will already be used against them. As they ask "What is Queer or Woman?," even if only metaphorically in order to rupture old definitions and categories, they engage in the formations of new categories, and as Sedgwick notes, "every matter of definitional control is fraught with consequence."¹¹⁴

Now, what Levinas considers the absolute ethical imperative is seen to be of great political significance. As theorists like Halperin or Sedgwick write from their own sexually oriented perspective, marginalized by being either Queer or Woman, they have in a sense already undermined themselves, for they have essentially reified or reinforced the existence of a particularly

107. See JUDITH BUTLER, *BODIES THAT MATTER* (1993); JUDITH BUTLER, *GENDER TROUBLE* (1990); JUDITH BUTLER, *SUBJECT OF DESIRE* (1987).

108. See DRUCILLA CORNELL, *BEYOND ACCOMMODATION* (1991); DRUCILLA CORNELL, *PHILOSOPHY OF THE LIMIT* (1992); DRUCILLA CORNELL, *TRANSFORMATIONS* (1993).

109. See NANCY FRASER, *UNRULY PRACTICES* (1989).

110. See DAVID M. HALPERIN, *ONE HUNDRED YEARS OF HOMOSEXUALITY AND OTHER ESSAYS ON GREEK LOVE* (1990); DAVID M. HALPERIN, *SAINT FOUCAULT* (1995).

111. See LUCE IRIGARAY, *SPECULUM OF THE OTHER WOMEN* (Gillian C. Gill trans., 1985); LUCE IRIGARAY, *THIS SEX WHICH IS NOT ONE* (Catherine Porter trans., 1977).

112. See EVE KOSOFSKY SEDGWICK, *BETWEEN MEN: ENGLISH LITERATURE AND MALE HOMOSEXUAL DESIRE* (1985); EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* (1990).

113. See JANA SAWICKI, *DISCIPLINING FOUCAULT* (1991).

114. Eve Kosofsky Sedgwick, *Epistemology of the Closet*, in *THE GAY AND LESBIAN READER* 57 (David Couzens Hoy ed., 1993).

"Queer" or "Female" perspective that will subsequently be used to define and restrict them. People will say, in referring to Halperin's work, "So that is Queer Theory. That is what they think. That is who they are." These are the very problematic matters of "definition control" that Sedgwick fears.

What is Feminine? What is Queer? These are questions for which we absolutely do not want answers. Or is it better stated that we do want answers, but answers that we can repeatedly apologize for and go beyond? We have a certain need to overturn the answers that have historically been given, to falsify any attempt at universalizing categorization, to speak in such a way as to both deconstruct the categories and still be able to better understand and engage the infinite possibilities of the words "Queer" and "Woman." The ethical and political difficulties must not turn into silence, in the same way that I cannot turn into silence in the face of the Other. Sedgwick writes,

I have no optimism at all about the availability of a standpoint of thought from which either question could be intelligibly, never mind efficaciously, adjudicated, given that the same yoking of contradictions has presided over all thoughts on the subject, and all its violent and pregnant modern history, that has gone to form our own thought. Instead, the more promising project would seem to be a study of the incoherent dispensation itself, the indis severable girdle of incongruities under whose discomfiting span, for most of a century, have unfolded both the most generous and the most murderous plots of our culture.¹¹⁵

Sedgwick here has located, in her own sexually demarcated voice, a prescription for the marginalized that can aggressively challenge and "think through" the violence of historical subordination while maintaining a keen awareness (apology) of the ever present risk that she runs.

In *Beyond Accommodation*, Drucilla Cornell deploys a strategy, much like Sedgwick's, which resists entrenching gender categories by utilizing mimetic feminist writing that does not "try to reach the truth of Woman through metaphor," but rather attempts "to discover the possibility of the 'way out' from our current system of gender identity in which 'her' specifically opens up the unknown, in which sexual difference would not be reappropriated."¹¹⁶ This mode of writing and theorizing allows Cornell to "move within what has been prefigured so as to continually transfigure it,"¹¹⁷ since it is the nature of metaphors

115. *Id.* at 59.

116. CORNELL, *BEYOND ACCOMMODATION*, *supra* note 108, at 169.

117. *Id.*

that they "cannot be simplistically identified with creating a new stabilized 'representation' or concept of Women which just defines what she is, because metaphoric transference implies like and yet the not like that is the transference."¹¹⁸

On the one hand it seems that any discourse about the feminine or the queer should be eradicated, thereby putting a close to the asking of the essential question of "what is Woman?" But this is absolutely not the resolution, for the question must be both asked, and denied an answer. To stop asking the question of Woman because of the difficulties that the question invokes would be to eradicate her. Rather we must again bring the precariousness of our discourse to the fore, to turn the commentary into apologetic interpretation. Once we actively engage in the difficulty of the question of gender, both the answer and the question will become blurred, and this seems to be our hope. The divider between male/female and queer/straight will become transparent and porous, eventually disintegrating, which is where *At This Very Moment* concludes:

I no longer know if you are saying what this work says. Perhaps that comes back to the same. I no longer know if you are saying the contrary, or if you have already written something wholly other. I no longer hear your voice, I have difficulty distinguishing it from mine, from any other, your fault suddenly becomes illegible for me. Interrupt me.¹¹⁹

The speaker of this passage, most likely masculine (at this point it is difficult to say), no longer knows what to make of the other voice. He is confused by her, he cannot tell her voice from his own. The male and the female become interlaced in the text, forming a chiasm. He recognizes his fault and calls out to her: "Interrupt me." He does not know who she is, if she even exists partly within him, but he calls for her, nonetheless.

These difficult and confusing sentiments are voiced by Derrida in another text when he writes,

[W]hat if we were to reach, what if we were to approach here (for one does not arrive at this as one would at a determined location) the area of a relationship to the other where the code of sexual marks would no longer be discriminating? The relationship would not be asexual, far from it, but would be sexually otherwise: beyond the binary difference that governs the decorum of all codes, beyond the distinction masculine/feminine . . . As I dream of saving the chance that this question offers I would like to believe in the multiplicity of sexually marked voices. I would like to believe in the masses, this indeterminable number of

118. *Id.* at 110.

119. Derrida, *supra* note 58, at 438.

blended voices, this mobile of non-identified sexual marks whose choreography can carry, divide, multiply the body of each 'individual,' whether he be classified as 'man' or as 'woman' according to the criteria of usage.¹²⁰

Derrida envisions a discourse "beyond the binary difference" of masculine and feminine that will preserve the dynamism and intrigue of sexual identification.¹²¹ The "blended" individuals will be sexual without the repressive and compartmentalizing demarcations which have traditionally been leveled at a "feminine man" or a "masculine woman."¹²² Derrida hopes that individuals will be able to recombine, explode, and invent sexual identities without a second thought given to how they will be labelled. Any choice of allegiance, group formation, or descriptive identification would be the business of the actor and not an external observer.

One last interpretation is necessary here. For the divisions between male and female or queer and straight to disintegrate, or for us to hope for this outcome as a sort of release, suggests that the differences are not, finally, deep. Here we imagine that we can eventually free ourselves from having to respond to them by making changes within ourselves and how we handle the difficulties. We do not know, in fact, what these differences (themselves not to be assimilated) finally are, how deep they run, and what determinateness they signify. This makes the Derridean use of "she" no less problematic than the absence of Her in *Totality and Infinity*. Who is Derrida, who is a man (whatever that finally means), to speak as a woman? And why not? The more deeply he tries this voice, the more deeply he worries that, rather than hearing the Other, he has assimilated her into the male that he is. Indeed, he sees that he cannot tell the difference—that the difference is not his to tell. And so, he appeals apologetically to the Other: "Interrupt me."

D. *Deconstruction's Engaged and Ambiguous Politics*

In the previous parts, I attempted to "make use of Levinas' ethical philosophy by deploying deconstructive commitments within a conversation about identity politics."¹²³ The heart of

120. Jacques Derrida, *Choreographics*, 12 *DIATRIS* 66, 67 (1982).

121. *Id.*

122. *Id.*

123. I use the term "commitments" as opposed to maneuvers or practices since Derrida holds that deconstruction is not "a specialized set of discursive practices, even less the rules of a new hermeneutic method, working on texts or utterances in the shelter of

Levinas' work resists politics and system building, however, and therefore I run a great risk of misappropriating Levinas' doctrines. For Levinas, ethics stands in opposition to politics. He writes, "[t]he art of foreseeing war and winning it by every means—politics—is henceforth enjoined as the very exercise of reason. Politics is opposed to morality, as philosophy to naïvete."¹²⁴ Politics unavoidably attempts to master alterity by conflating it with the self and organizing and codifying the infinite with its instrumental strategies.

In Levinas' words, "[w]hat meaning can community take on without reducing difference?"¹²⁵ Does every form of politics deny alterity, or can we rather recognize this infinite danger in order to respond more ethically to the dilemma that the Other presents us with? Would it be possible to accommodate alterity politically, or is this to have already incorporated it into the technology of the same? In answering these questions, Levinas concludes that we will never be successful in designing a politics that would solve the aporia of incommensurability. Critchley writes,

politics is the primacy of the synoptic, panoramic vision of society, wherein a disinterested political agent views society as a whole. For Levinas, such panoramic vision, not only that of the philosopher but also that of the political theorist, is the greatest danger, because it loses sight of ethical difference — that is, of my particular relation to obligations toward the Other.¹²⁶

In fact, here we should notice just how little normative guidance Levinas actually offers us. For him, the ethical impulse of saying, of speaking, takes such precedence over the words spoken that he cannot differentiate between the content of any assertion, for example between "I love you, and I want to help you," and "I hate you, and I want to kill you." In a somewhat alarming passage he writes,

The other is maintained and confirmed in his heterogeneity as soon as one calls upon him, be it only to say to him that one cannot speak to him, to classify him as sick, to announce to him his death sentence; at the same time as grasped, wounded, outraged, he is "respected."¹²⁷

a given and stable institution." JACQUES DERRIDA, *THE CONFLICT OF THE FACULTIES: A MOCHLOS* (1984).

124. LEVINAS, *TOTALITY AND INFINITY*, *supra* note 8, at 21.

125. LEVINAS, *OTHERWISE THAN BEING*, *supra* note 8, at 154.

126. CRITCHLEY, *THE ETHICS OF DECONSTRUCTION: DERRIDA AND LEVINAS*, *supra* note 6, at 222.

127. LEVINAS, *TOTALITY AND INFINITY*, *supra* note 8, at 69.

Apparently any conversation with the other is preferable to silence, and although this imperative that we address the other initiates all ethical responsibility, it can offer little substantive guidance. Levinas provides a sort of communication-based procedural politics, in that he places a premium on intersubjective conversation, yet he cannot regulate the content of those conversations. Despite the fact that any political maneuver will fall short of Levinas' ethical expectations, this does not mean that we should not insist on interminable negotiation with alterity in the political arena.

Levinas claims that the political/ethical aporia is analogous to his notions of saying and said. He believes "that the saying must bear a said is a necessity of the same order as that which imposes a society with laws, institutions and social relations."¹²⁸ There must be positive political formation, like the content of the said that inevitably is spoken, but these concrete political axioms must always be problematized by the ethical in the same way that the said is ruptured and interrogated by the saying. The problem has been formulated by Levinas and Derrida to forever tantalize us and deny the possibility of reaching ethical or political finality. Derrida, who more eagerly than Levinas pursues the political difficulties presented by alterity, understands this negotiating to be the task of deconstruction, and he writes, "deconstructive practices are also and first of all political and institutional practices."¹²⁹ Derrida further writes that "deconstruction should not be separable from this political institutional problematic and should seek a new investigation of responsibility, an investigation that questions the codes inherited from ethics and politics. This means that while too political for some, it will seem paralyzing to those who only recognize politics by the most familiar road signs."¹³⁰ For Derrida, the ethical imperative is also a political imperative and deconstruction is, at every turn, a political practice.

Derrida attempts to justify these claims in his essay, *Force of Law: The Mystical Foundation of Authority*.¹³¹ Without deconstruction, Derrida asserts, law becomes confused with justice. Justice is infinite, beyond rationality, and undecidable, while law is calculable and immediate. Deconstruction unmasks the

128. LEVINAS, ETHICS AND INFINITY, *supra* note 8, at 88.

129. Jacques Derrida, *But Beyond . . . (Open Letter to Anne McClintock and Rob Nixon)*, 13 CRITICAL INQUIRY 155, 168 (trans. Peggy Kamuf 1986).

130. Derrida, *supra* note 11, at 104.

131. Jacques Derrida, *Force of Law: The Mystical Foundations of Authority*, in DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 3, *supra* note 9.

equivocation of law and justice. As Drucilla Cornell explains, "only once we accept the uncrossable divide between law and justice" do we understand how deconstruction produces the "undecidability which can be used to expose any legal system's process of self-legitimation as myth . . . [which] leaves us . . . with an *inescapable responsibility* for violence, precisely because violence cannot be fully rationalized and therefore justified in advance."¹³² For deconstruction it is the very undecidability, the very aporia of justice, which leaves us with ultimate responsibility. Again Cornell explains, "Derrida's text leaves us with the infinite responsibility undecidability imposes on us. Undecidability in no way alleviates responsibility. The opposite is the case."¹³³

With his usual clarity, Richard Bernstein agrees with Cornell's reading of Derrida. He explains that "[t]he danger with any political code is that it can become rigidified or reified—a set of unquestioned formulas that we rely on to direct our actions . . . No code can close the gap or diminish the undecidability that confronts us in making an ethical-political decision or choice."¹³⁴ Deconstruction problematizes political statements in order to bring to the foreground the dangers of codification. Every law should be questionable, and deconstruction engages in these interrogations. The deconstructive inquiry produces a heightened level of scrutiny that reveals normative assumptions to be contingent historical constructions that do not possess universal validity.

This impossibility of justice refers to the impossibility of a coercion or mending of law and justice, but not to the impossibility of drafting and endorsing meaningful laws. Adam Thurswell states the sought after effect:

The judge is called both to act according to justice—to "be just"—and to acknowledge that her act can never be truly just, since it is always limited by the actuality of her own understandings and context. Thus, the responsibility which Cornell calls upon the judge to exercise is abstract, since it does not require the judge to endorse any particular substantive outcomes or norms. It does not operate on the level of the substance or specific rules of law, because to do so would be to stay within the legal system itself at the level of law, not justice. Instead, this responsibility reminds the judge of the ethical weight of her task.¹³⁵

132. CORNELL, *PHILOSOPHY OF THE LIMIT*, *supra* note 9, at 157 (emphasis in original).

133. *Id.* at 169.

134. RICHARD BERNSTEIN, *THE NEW CONSTELLATION: THE ETHICAL-POLITICAL HORIZONS OF MODERNITY/POSTMODERNITY* 214 (1992).

135. Adam Thurswell, *On the Threshold of Ethics*, 15 *CARDOZO L. REV.* 1607, 1641 (1994).

Such critical self-awareness is indispensable to deconstruction, since, as Derrida writes, "[t]here can be no moral or political responsibility without this trial and this passage by way of the undecidable."¹³⁶

IV. EXTRACTING PRAXIS FROM THE DECONSTRUCTIVE ETHOS

A. *Nussbaum on Plato and Commensurability*

Classics scholar Martha Nussbaum provides one of the most searching and influential discussions of value incommensurability in her 1990 collection of essays gathered under the title of *Love's Knowledge*, and I will now relay her rendition of Plato's idea of incommensurability in order to bring to the fore exactly what is at stake, ethically and politically, in the distinction between understanding values as commensurable or incommensurable.¹³⁷ A person who recognizes incommensurability will view the world, and relate to it, much differently than a Platonist, and I will show how value incommensurability and Levinasian deconstruction unite in the rejection of Plato's homogenizing vision of experience.

Nussbaum describes Plato and his community as determined to order and gain control over "the ungoverned aspects of human existence."¹³⁸ For these Greeks, therefore, "[w]hat is measurable or commensurable is graspable, in order, good," while "what is without measure is boundless, elusive, chaotic, threatening, bad."¹³⁹ Thus, when faced with a matter as central and indeterminate as ethics and valuation, Plato was bound to ask whether the discipline "could be, or become, a science of measurement."¹⁴⁰

Nussbaum poses the important question, for our purposes, of exactly what is at stake in the distinction between understanding values as commensurable or incommensurable. She asks, "[i]f ethical values are all commensurable, differing from one another only in quantity, what difference does this make?"¹⁴¹ For Nussbaum the answer lies in the "emotional transformation" brought about by such a vision of the world as

136. JACQUES DERRIDA, *LIMITED INC.*, (Gerald Graff ed. & Samuel Weber trans. 1988).

137. NUSSBAUM, *supra* note 1.

138. *Id.* at 107.

139. *Id.*

140. *Id.*

141. *Id.* at 117.

homogenous.¹⁴²

To illustrate this emotional transformation, Nussbaum reminds us of the vivid imagery in Plato's *Symposium*, which walks us through one person's realization and embrace of the commensurability of value. She writes:

This person will begin by loving a single beautiful body—or, more precisely, the beauty and value (the *kalon*, a notion much broader than "beauty") of a single body. "Then he must see that the *kalon* in any one body is closely related (*adelphon*) to the *kalon* in another body; and that if he must pursue the *kalon* of form, it is great mindlessness not to consider the *kalon* of all bodies to be one and the same" (210A5). First, then, he sees only the beauty or value of his loved one's body. Then he is asked to notice a *similarity* or family-related *closeness* between that value and other comparable values. Then—and this is the crucial step—he *decides* that it is *prudent* to consider these related beauties to be "one and the same," that is, not just qualitatively close, but qualitatively homogeneous, interchangeable instances of some one inclusive value.¹⁴³

As the dialogue unfolds we are taught not just that all individuals are reducible to the same good, but also that we "must see the beauty or values of bodies, souls, laws, institutions, and sciences as *all* qualitatively homogeneous and intersubstitutable, differing only in quantity."¹⁴⁴ This belief in commensurability will "penetrate to the bottom of the soul, transforming the whole vision of the world."¹⁴⁵ Nussbaum asks us to think about the strangeness of Plato's ethical science: "this body of this wonderful beloved person is *exactly* the same in quality as that person's mind and inner life. Both, in turn, the same quality as the value of Athenian democracy; of Pythagorean geometry; of Eudoxan astronomy."¹⁴⁶

Plato believes that adopting an ethical science of commensurability will have a profound effect on our personality, development, and relations, and he goes so far as to say that it "is both necessary and sufficient for 'saving our lives,' that is, for giving human beings a life that will be free from certain intolerable pains and confusions."¹⁴⁷ An ethical science, for Plato, would allow us to take control of our lives and the vices of "[i]ndecisiveness, weakness of will, and neurotic conflict will dis-

142. *Id.*

143. *Id.* at 114 (citing PLATO, THE SYMPOSIUM 210A5- 210B).

144. *Id.* at 115 (citing PLATO, THE SYMPOSIUM 210DE).

145. *Id.* at 116.

146. *Id.* (emphasis in original).

147. *Id.* at 106.

solve if we come to view values as commensurable.”¹⁴⁸ A person faithful to value commensurability will equate “the love of nonhomogeneous particulars with tension, excess, and servitude.”¹⁴⁹ Alternatively, the love of the uniform “sea” promises to fill her with “health, freedom, and creativity” and her “unifying vision” will bring her life that is “livable,” whereas before it was wretched and slavish.¹⁵⁰ Such a person begins to sound like our dating economist, who, so long as she calculates the equation of love and courting properly, is insulated from the anxiety, neurotic conflict, or weakness of will that plagues the lives of those without a commensurating scale for measuring up their suitors. Nussbaum believes that this Platonic ethical science, and its offspring in certain proposals in ethics and economic theory, could actually lead, if followed and lived with severity and rigor, to the end of life as we know it. Here the parallels to Levinas are most arresting.

First, other people in the world will appear radically different for those looking through the lens of commensurating ethical science as compared to those committed to incommensurability. For the Platonist, “[a] body, a person, will seem to be nothing but a pure container or location for a certain quantity of value,” since to understand another person as anything more would be to raise “motivational complications that this scheme wishes to avoid.”¹⁵¹ For Levinas this total conflation of others into qualitative clones denies them any particularity or difference from me or each other, and the Other is thus stripped bare of any semblance of independent identity. This imprisonment of the Other within imperialistic cognitive categories is exactly the type of extermination of alterity that Levinas so passionately denounces and calls us to resist. As we have seen, the entirety of Levinas’ work searches for a way to respect difference in order to maintain an ethical relationship with the other, while Plato and other commensurability theorists think that the best way to make ethical and evaluative decisions is to distill everything to varying amounts of the same essential element, be it a mathematical equation, a sunny day, or the person across from you. Indeed, it is no accident that Nussbaum locates and abhors the most extreme version of commensurability in Plato, for it is

148. Richard Pildes, *Survey of Books Relating to the Law; VI. Legal Philosophy: Conceptions of Valuation in Thought*, 90 MICH. L. REV. 1520, 1546 (1992).

149. NUSSBAUM, *supra* note 1, at 115 (citing PLATO, THE SYMPOSIUM 211DE).

150. *Id.*

151. *Id.* at 118.

he who Levinas charges with initiating the philosophical impulse to control.

Second, and still more insidious from a Levinasian perspective, Plato calls for us to reduce Others in this way for our own mental hygiene, so that we are not bothered with the troubling complexities of relating to the "strangeness" of others. For Plato this violent commensurating of others frees us up from the agitating nature of alterity, and therefore "[i]t is mindless not to take the step . . . to homogeneity because this step is so helpful to the personality, relaxing tensions that have become difficult to bear."¹⁵²

Thus for Plato, my relation with the other should be guided by that which is easiest for me, simplifies my life, and saves me from the headaches of incommensurability. Levinas and Derrida could not disagree more wholeheartedly with this outlook, since deconstruction hopes to heighten our confusion, undecidability, and the tension we experience in ethical and political decision-making, for in Derrida's words, "[t]here can be no moral or political responsibility without this trail and this passage by way of the undecidable."¹⁵³ For deconstruction, apprehension causes us to feel the gravity of our ethical situations, and the very distress we feel in the face of an ethical decision is central to responsible relations. As I have noted, for Levinas "[m]orality begins when freedom, instead of being justified by itself, feels itself to be arbitrary and violent."¹⁵⁴ Levinasian ethics calls me to be accountable for and to resist my egocentrism, and I should be preoccupied with these responsibilities. Whereas Plato wants to "relax" our ethical deliberation, Levinas wants us to be deeply troubled by and concerned with the difficulties presented to us by the Other. In the name of certainty, conformity, and strength of will, Plato seeks to suppress genuine difference, and for Nussbaum and other incommensurability theorists, such "evasiveness is not progress."¹⁵⁵ Instead, such a systematic obliteration of alterity for the sake of uniformity invites authoritarianism.

Just as Plato believes that an ethical science of commensurability would transform our character and actions, incommensurability theorists believe that the recognition of the inability to respect alterity will similarly revolutionize our ethical and political behavior. As I have already laid out the types of ethical responsibilities and personal reformations that Levinas believes

152. *Id.* at 115.

153. DERRIDA, *supra* note 136, at 116.

154. LEVINAS, *TOTALITY AND INFINITY*, *supra* note 8, at 84.

155. NUSSBAUM, *supra* note 1, at 60.

are triggered by alterity, the conclusion of this note will bring into focus some legal and political strategies that supplement deconstruction and incommensurability theory.

B. *Distilling Positive Ethical and Political Commitments From Deconstruction and Value Incommensurability*

I want to further juxtapose Levinas' notion of alterity with the idea of value incommensurability. Although the two notions describe vastly different phenomena, it seems that they both adhere to and call forth similar practices, and an understanding of the forum in which incommensurability has been involved by problematizing legal and legislative concerns will provide us with insight into the conversations that might be sustained between politics and deconstruction.

With Levinas, we have seen that incommensurability occurs between the I, or the first person ego, and the Other. First he presents the other (*autre*), the non-personal other, which represents a sort of philosophical anomaly. It is the opposite of the same or the totality, but it is not simply their negation. The other serves a very similar pedagogical purpose to Heidegger's "nothing."¹⁵⁶ Nothing is not the opposite of something, but rather serves as a sort of thought experiment that makes us realize our inability to formulate the concept. The other does the same work for Levinas except for him the other challenges the idea of totality. However hard we try to achieve a complete set of thought, the other will always be left out. By definition it exists outside. For Heidegger, the opposition is between Being and Nothing. For Levinas, Totality and Infinity. Levinas begins here, with the concept of the other. As thought has historically sought to systematize the world so that everything falls within its scope, Levinas and Derrida meditate on this exteriority.

From the other, Levinas introduces us to the Other (*l'autrui*), the personification of the other. He teaches the alterity of the face of the person across from us. No longer is the other merely a linguistic peculiarity—the stakes have been raised. Through the face of the Other we must respond to alterity, infinity, and god. We no longer command Others in our categories of thought. The face debunks our totalizing systems and causes us to reconsider the way we speak, act, and think. For Levinas, the incommensurability is between my violent, presumptive ego that tries to objectify and reduce other people into

156. See Martin Heidegger, *What is Metaphysics*, in BASIC WRITINGS (David Farrell Krell ed., 1977).

a comprehensible unit, and the Other that defies and overflows those categories.

The legal community speaks of a different breed of incommensurability. As we have seen, this incommensurability exists not between the I and the Other but between value systems. We can compare this notion of incommensurability with Levinas' alterity. A meaningful parallel can be drawn between the attempt to formulate a single metric that could systematize incommensurable and plural valuation, and the project of Western metaphysics to totalize the Other. The projects to commensurate value and alterity are misguided and unproductive, according to value incommensurability theorists and Levinas respectively, because such attempts to totalize the essence of humans and their desires will always be ruptured by the irreducibility of humans and their valuative beliefs. Although Levinas and incommensurability theorists orient their claims in very different ways, a similar type of democratic praxis might flow from both.

Before I proceed further I want to note that some important differences between these claims cannot be overcome. For Levinas, we should not totalize—the urging is ethical and pre-ontological. The Other commands us to respond ethically. For value incommensurability theory, the idea is primarily epistemological—values are incommensurable and therefore we fail when we try to totalize them. Like incommensurability theorists, Levinas believes that the Other is, in itself, incommensurable, but the real substance of Levinas' challenge is found in the ethical calling rather than in the failure of philosophy to successfully or adequately essentialize alterity.

Having said this, we can see Levinas and value incommensurability theory bringing us to similar ground. We cannot and should not subordinate, standardize, and systematize the Other or her values into a singular calculus. Upon close examination, the claim not to totalize the Other, for Levinas, and the Other's values, for value incommensurability theory, look similar. When Levinas uses the term "Other," we might understand part of the other-ness of the Other to lie in the Other's beliefs and values, all of which resist my ability to identify with the Other as an entity that shares fundamental traits with me. For the Other to maintain its distance from me, I cannot conflate or even compare our beliefs in an attempt to render us kindred, since to do so would be to deny an aspect of alterity. In one sense, the Other's infinity and radicality must be signified and performed by her values since speech, the way in which the Other comes before us, flows from the Other's well of valuation. Everything the Other does or says will result from certain values she holds,

and this confluence of language and action that springs from value is precisely how the Other appears before us as the phenomenon that activates ethical responsibility. The incommensurability of the Other's values with mine represents at least one aspect of her alterity. While it does seem as if incommensurable values and alterity are intertwined, I again want to reinforce that Levinas would probably not approve of this formulation. For Levinas it is the Other, pre-differentiated and as other, that guides us to infinity. Assessing the values of an Other and how they are different from mine allows me to analyze and segment the absolute other-ness that stands before me. The distinction is subtle but important, yet we can continue, for our purposes, thinking of the Other either as Other or as a sort of location of incommensurable valuation embodied in the individual.

Now that we have seen the loose consanguinity between these two theories, and I have alluded to the difficulties of making Levinas' notion of alterity, and deconstruction generally, accord with political theory, how then do theorists such as Sunstein make use of their concept of value incommensurability in law? Can Sunstein offer insights into value incommensurability that might also be meaningful to followers of Levinas?

Sunstein explains that a thin one dimensional economic analysis of value that considers wealth maximization to be the normative telos of legal rules and decision making is problematic because "the word wealth elides qualitative distinctions among the different goods typically at stake in legal disputes."¹⁵⁷ Generally, the law assumes that a monetary award can compensate for damages of a non-economic nature. The most obvious reason for this is the crude nature of the awards that the court can provide: if my arm is lost due to the negligence of another, the court cannot make the guilty party provide me with a new arm. If you call me bad names, or discriminate against me, the court can decide that you must provide me with back pay and a check for compensatory damages, but it cannot otherwise heal me of those injuries. The options available as an award cannot account for the qualitative value of the injury. Sunstein writes, "[t]he tools of the legal system lack sufficient refinement fully to take account of diverse kinds of valuation,"¹⁵⁸ and further explains, "[t]he legal system usually insists on an award of damages for the infliction of harm; a damages award appears to reflect a judgement in favor of commensurability."¹⁵⁹ Because of

157. Sunstein, *supra* note 1, at 852.

158. *Id.* at 820.

159. *Id.*

the tools available to it, the legal system tends to reduce incommensurable values into dollar figures.

Against this reduction of values, Sunstein believes "[i]nstead of cost-benefit analysis . . . what is desirable is a disaggregated picture of the effects of different courses of action, so that officials and citizens can see those effects for themselves."¹⁶⁰ In opposition to the Platonic and Benthamic practice of unifying values into a quantifiable grid, Sunstein proposes that we bring to the foreground of our considerations the diverse and incommensurable qualitative differences that riddle the legislative process. With these qualitative concerns articulated, Sunstein prescribes that "in the face of diverse kinds of valuation, it is best to permit people to value as they like."¹⁶¹ For Sunstein, this is a fundamental tenet of the liberal democracy, and he writes, "[p]erhaps most dramatically, the liberal insistence on social differentiation—markets, families, religious groups, politics, and more—is best justified as an attempt to make a space for distinct kinds of valuation and to give each of them its appropriate place in human life."¹⁶² This anti-Platonic commitment to place the valuation and decision making power in the hands of the populous is shared by liberal democrats, and though Levinas is silent on the matter, it seems as if he too would reluctantly embrace this anti-totalitarian form of governance.

Sunstein is careful not to slip into value relativism when he writes, "[t]he state has to make decisions about how to allocate rights and entitlements . . . and these decisions inevitably will take some sort of stand on appropriate valuations."¹⁶³ These decisions are themselves crafted by the people, but they are filtered through the procedural mechanisms of the democratic system of governance. Through the representative democratic process we regulate pollution, sustain a National Parks system, debate abortion, and continuously edit and revise these activities.

Sunstein takes the expressive dimension of the law, that being "the law's role in reflecting and communicating particular ways of valuing human goods," very seriously.¹⁶⁴ Sunstein explains that legal statements promote certain standards of appropriate and inappropriate valuation. He writes,

160. *Id.* at 860-61.

161. *Id.* at 849.

162. *Id.* at 860.

163. *Id.* at 819.

164. *Id.* at 780.

if the law says the act of murder can or cannot be met with the death penalty, social norms may be influenced. If the law wrongly treats something—say, reproductive capacities—as a commodity, the social kind of valuation may be adversely affected. If the law mandates recycling, subsidizes national service, or requires mandatory pro bono work, it may have healthy effects on social valuations of the relevant activities.¹⁶⁵

Sunstein recognizes that the way we value is “not a pre-social given, but a product of a complex set of social forces, including law,” and therefore opinions expressed by the legal system play an important role in the formation of our culture’s interpretation of the proper respect for and evaluation of a variety of things. Sunstein provides several examples of how the law communicates such ideas, including its stance on issues such as capital punishment, school prayer, and discrimination.¹⁶⁶ “A society might protect endangered species,” for example, “partly because it believes that the protection makes best sense of its self-understanding, by expressing an appropriate valuation of what it means for one species to eliminate another.”¹⁶⁷ In this respect the law can espouse and promulgate a belief in incommensurability by resisting the types of comparisons and equations drawn by utilitarians and law and economics scholars. As Radin describes,¹⁶⁸ the law currently blocks exchanges that are considered inappropriate, and such political statements asserting that one thing cannot be traded for another denounce and repudiate universal commodification and the assertion that all things are merely the substantiation of a single good.

Although these prescriptive gestures by Sunstein do not amount to even the seedlings of a comprehensive political theory, with these commitments in mind we can begin to hint at a set of general themes that are shared by deconstruction and value incommensurability theory.

First, in all of these thinkers we find a general critique of the pathological enterprise of thought that glorifies and pursues totality, uniformity, unification, and systemization. This totalizing tendency has caused the domination and marginalization of various types of incommensurability, multiplicity, conflict, and difference. This critique against the essentialist urge is raised by Levinas in its ethical dimension as he describes the violence of reducing the other to the same, and by Sunstein and others who doubt the very ability of thought to achieve a com-

165. *Id.* at 820-21.

166. *Id.* at 823.

167. *Id.*

168. *See supra* notes 26-37 and accompanying text.

prehensive universal framework. From the Platonic tradition philosophy seeks to "essentialize," to define, and to absolutize. Such idealist aspirations have been debunked epistemologically and ethically. Western philosophy obliterates and normalizes alterity, and these practices must be reformed in order to reduce the parallel forms of political domination, renew ethics, and promote a more tolerant Democracy.

Second, and in close relation to the first commitment, these theorists hold that the marginalizing tendencies of Western civilization result from more than an insufficient or flawed logical systemization that fails to accommodate difference and can be self-adjusted. Rather the critique takes us to places where instrumental reason is an inadequate tool. Reason is not incomplete on the subject such that we can edit or revise our logical theories, but rather we are navigating terrain where instrumental reason cannot be our guide. We are problematized by both our incessant failure to treat the other ethically, and with the possibility that we might never be able to understand this other and her incommensurable values.

Third, these beliefs do not culminate in relativism but instead demand a sensitivity that causes us to realize the precariousness of the position in which we find ourselves: We have knowledge of the existence of alterity and difference, but we cannot know the true nature of this difference. Alterity and incommensurability resist us. We must be sensitive to the other in its otherness while recognizing the tenacity of our dominating habits. We must rethink and understand the nature of our ethical and political bind. Bernstein articulates this point well when he writes,

[T]he response to the threat of this practical failure—which can sometimes be tragic—should be an ethical one, i.e., to assume the responsibility to listen carefully, to use our linguistic, emotional, and cognitive imagination to grasp what is being expressed and said in "alien" traditions. We must do this in a way where we resist the dual temptations of *either* facily assimilating what others are saying to our own categories and language without doing justice to what is genuinely different and may be incommensurable *or* simply dismissing what the "other" is saying as incoherent nonsense.¹⁶⁹

Fourth and most importantly, all of these commitments that I have claimed to be shared by Levinas and valuative incommensurability theorists call forth the democratic axioms of conversation and participation among a community of pluralistic

169. BERNSTEIN, *supra* note 134, at 65-66 (emphasis in original).

and irreducible actors. In the face of the Other, Levinas commands us to speak and respond to alterity. For him, silence bespeaks the ultimate violence, and we can only begin to interact responsibly once we engage Others while respecting their alterity and difference from us. Confronted with divergent systems of valuation, Sunstein calls for public discussion and deliberation in order to appreciate the disaggregate affects of social decisions. In both cases, the thinkers seek to deny authoritarian assertions of truth, either as reached via economic analysis or the reduction of alterity, and they believe that value can and should be reached only through democratic channels of human interaction that recognize human plurality and irreducibility. Both schools resist objective claims to comprehension of human subjectivity, and rather prescribe rigorous conversation, interpretation, and respect for the Other. For them, truth has been democratized and lifted from the desk of the economist and the human scientist. This sentiment is echoed by Richard Pildes and Elizabeth Anderson when they write, "[i]ndeed, so potent has democracy's justificatory power become that even the grounds of truth itself are now commonly justified by placing democratic processes of debate and agreement at the core of the truth finding process."¹⁷⁰ This movement should be forwarded and fortified in any way possible, and legal and political thinkers must continue to promulgate these axioms by constructing and implementing structures that will promote such democratic decision making processes.

In summary, we need to resist: (1) assimilating alterity into ourselves, thereby denying its very otherness; (2) repressing alterity by dismissing it as contingency or fallacy; (3) seeking a final resolution to this aporia; and (4) removing claims to truth and value from democratic processes.

The ethos born from the recognition of incommensurability can guide us as we learn to live with and among alterity, and it is only once we recognize and appreciate otherness that we can begin to face its radicality without wanting to exterminate it. While this fragile and interminable attempt to welcome and co-exist with alterity is the promising project shared by deconstruction and liberal democracy, the science of commensurability, in the name of uniformity, aggressively purges difference from its analysis and then denies that such otherness ever existed. The choice between these ethical viewpoints, and the practices that flow from them, is ours to make.

170. Pildes & Anderson, *supra* note 1, at 2123.

