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Consolations of the Law: Jurisprudence and the Constitution of Deliberative Politics

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Initially, deliberative politics offers a failure of self-identity in that the literature dealing with it divides between its determinate elevation in terms of reason, and such, and its dissipation in response to the diversity of interests pressing on it. Next, drawing on the resources of poststructural jurisprudence and by way of locating law at a defining limit of deliberative politics, a similar divide is found in law itself. Then, more productively, law is shown to be constituted with-in that divide and to take characteristic content from it. Finally, the analysis is returned to deliberative politics where the divide found in the literature can now be seen as offering this politics possibilities of effective constitution and distinctive content.

Introduction

There is a sharp and intriguing division in the literature on deliberative politics, a division which informs my whole argument here. This is not an immediately propitious opening since the division, in its persistence, would seem to be fundamental, even insuperable. Essays are, after all, meant to achieve some resolution. Yet it will be resolution itself, its necessity yet impossibility, which will preoccupy me here - and especially the resolution which is said to come from

deliberative politics or from decisions supposedly reached by deliberation.

I will, however, be exploring the irresolution of resolution not just in deliberative politics but also, and mainly, in relation to law. Law marks and compensates for the limits of deliberative politics, and perhaps by looking through law at the limits of deliberative politics we may discern what is within those limits and learn something of what deliberative politics "is." The consideration of what such a politics positively or singularly "is" returns me to the divide in the literature on deliberative politics since my concern with that divide is not, or is not only, a concern which would negatively deconstruct that literature but, rather, one which would seek to identify a dynamic with-in the divide constituent of deliberative politics itself.

To bring this over-allusive synopsis within range, let me now begin to identify this divide in the literature. I will do so with instances taken from the recent collection edited by Jon Elster on *Deliberative Democracy* (Elster ed. 1998). For ease of frequent reference, I will call the two sides of the divide the sanguine and the sceptical. The sanguine, as it would have to be, is the predominant view and it can be illustrated in Elster's "Introduction" (Elster 1998). Here we find that "deliberative democracy" is "decision making by discussion among free and equal citizens" (Elster 1998, 1). The main patron saint invoked is Habermas with his idea of "the ideal speech situation," although some place is given to Rawls and his paradoxical ability to be situationally deracinated. There are also, in the liberal tradition, invocations of reasonableness, the spirit of compromise and abstracted proceduralism. In this kind of company, it seems possible to present deliberative politics as something uncoerced, impartial, rational, and wholistic. Like other invocations of the quasi-transcendent in

modernity, this one is endowed with content negatively. Deliberative argument is set against the crudities of "aggregation" - that is, of deciding by the votes of people not connected in deliberation. And its supposed attributes of encompassing impartiality and calm reason stand opposite force, rhetoric, interest, faction, "bias and distortion" (Elster 1998, 13).

Deliberative politics does, however, have a quiddity more palpable than the assertion that it is not something else. It exists, for example, in time and as definite action. So, Elster recognizes that "time always matters," and that "political deliberation is constrained by the need to make a *decision"* (Elster 1998, 6, 9 - his emphasis). He contrasts this to the scientific realm in which "scientists can wait for decades and science can wait for centuries" (Elster 1998, 9). The implication here of an attainable and "undistorted" scientific truth, to say nothing of its leisurely unfolding, is engagingly antique. But there is more going on here. The invocation of science in this way posits a perfectible truth which deliberative politics simply has a little more difficulty in attaining. So, when Elster comes, in his own substantive chapter, to consider particular histories of constitution making, he has inevitably to put more emphasis on the derogations from perfectible truth - on the price to be paid for the existent decision and for the putatively resolved.[1] There is now a seeming inevitability to the distortion of both - a dissipating "internal heterogeneity," a varying "interplay of reason, interest, and passion," more a nomadic truth (Elster 1998, 14, 105; cf. Blanchot 1993, 125).[2] The vocabulary of evaluation changes.

[1] It seems to be aptly impossible for even a sympathetic, but acute, instantiation of deliberative politics to avoid the recognition of its incompleteness (cf. e.g., Hilson 2000, 79-83, 98-9).

[2] ``External" heterogeneity can, however, provide a protective dissipation. For example: ``A more fully democratic polity would be one in which the aspirations, interests, values, and beliefs of all citizens could be asserted fully, in all their richness and variety, in many different kinds of processes of deliberation and decision [_]" (Cotterrell 1994, 34). Engaging as such

There is now a more evanescent world where the attributes of deliberative politics are “more” or “less likely” to be present; they operate as part of a “continuum” along with their defining opposites, and so on (e.g. Elster 1998, 109-10).

There is a redemptive Habermasian legacy which could come into play here, but which Elster makes nothing of except for its passing mention, and that is the notion of the ideal, as in Habermas’s “ideal speech situation” for example.[3] In such a situation we cannot discern an ultimate truth and endow it with any specific content. Nor can we ever certainly know what is properly rational, impartial and uncoerced. Yet the search for truth, the efficacy of reason, and so on, all operate still as impelling ideals. They may be unattainable but they can somehow still have an always anticipatory operation in the here and now. They act as if an autonomous impartiality were possible, as if everything relevant could be brought to bear on the decision - could be “taken into account.” All of which places Habermas in the tradition of an anomalous but convenient liberal political philosophy where an ideal which simply cannot be can nonetheless have a potent and pervasive existential purchase.[4]

The sceptical side of the divide would dissipate but not destroy the sanguine.[5] There are in Elster’s collection two strong instances of the

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advocacy is in other ways, pockets of privileged power could nonetheless nestle happily in such a promiscuity of ``deliberation and decision.'' Constitutional Law could be called on to provide some surpassing accountability but now it also is not immune to the blandishment of deliberative politics (cf. Morison 1998).

[3] For a compact statement of Habermas's thought on this and a scrupulous critique, see Pettit 1982.

[4] Dworkin's Law's Empire is a stark and ardent example of the influence of perfection on deliberation: see Dworkin 1986.

[5] There are other grounds for scepticism besides those extracted here. For example, the generalized resolution often associated with deliberative politics is not entirely remote from the participatory claims once made for nation: see Renan 1990.

sceptical. These are provided by Stokes (1998) and Johnson (1998). Stokes presents us with “pathologies of deliberation.” A pathology affirms a healthy norm, of course, but it is difficult to see how the labyrinthine stratagems Stokes so graphically describes do not simply put the resulting decisions beyond the range of any effective deliberative politics. Again and again she instances the overriding or destruction of “deliberative democracy” by interest. Interest shapes or creates power over information and its communication in the process of ostensible deliberation. It disseminates information quite contrary to the real situation, generates deceptive “pseudo-preferences” among people supposedly in deliberation, and generally seeks to manipulate both them and the issues involved. It even creates powerful participants in the process, - by “manufacturing pseudo-grassroots movements,” for example - so as to orient deliberation and outcomes in its own terms (Stokes 1998, 133). What is even more outrageous, however, is that all this is done in terms of deliberative democracy itself when the whole exercise has been nothing but a mockery of it. Still, Stokes ends her compelling account of the nemesis of deliberative politics with a sustaining faith not only in its existence but also in “some of the good effects theorists attribute to it” (Stokes 1998, 136).

Even though they do have a considerable cumulative impact, Stokes does no “more than offer some instances of public communication with pathological results,” whereas Johnson’s chapter, my second sceptical instance, is more analytically elaborated (Stokes 1998, 125; Johnson 1998). The main “message” of this chapter would accord with Stokes in seeing deliberative politics as an infinitely manipulable carrier of interest. Johnson argues cogently that there cannot be an unlimited plurality of participants in deliberation. As against the view

that an “unrestricted domain” is necessary for deliberation, Johnson not only suggests that this is impossible but finds that in fact “advocates of deliberation regularly … impose substantial prior constraints either on the behavior of parties to deliberation or on the range of views admissible to relevant deliberative arenas” - a restriction which such apologists justify “by reference to some standard of reasonable behaviour or discussion” (Johnson 1998, 164-5). In deliberative politics, as seen by Johnson, the politics and political disagreement are primary and persistent. Indicatively, this is a politics incapable of consensual resolution when, as will often be the case, parties seek to undermine each other’s “worldview” (Johnson 1998, 167). Indeed, if we add Stokes’s examples to Johnson’s analysis, we may conclude that deliberative politics so-called would elevate and comprehensively assert a particular worldview as a generalized consensus (cf. Hilson 2000, 79-80 n.56). Johnson also makes several telling points of detail, such as his observation that deliberation is oriented towards conformity as well as or rather than consensus. Or there is his intimation “that the outcome of deliberation depends heavily upon the sequence in which participants speak and the point at which debate is terminated” (Johnson 1998, 176). Instances of the inscrutability of deliberation could doubtless have been multiplied. Still, Johnson would support deliberative politics. Not only does he find it “intuitively appealing” but he ends by detailing the “challenges…deliberation must meet” if it is to be more truly itself (Johnson 1998, 173, 177).

Given the insistence of deliberation in the face of these significant onslaughts, we may return with some sympathy to the sanguine side of the divide, and I will now do so but still accompanied by Johnson’s sceptical arguments, taking firstly the idea of the “unrestricted

domain" as necessary for deliberation. True, any restriction will detract from the perfection of deliberation, yet there has to be *some* restriction of participants and issues and, further, *some* commonality between them for deliberation to *be*. Deliberation can neither extend to everybody nor fully accommodate an unlimited diversity of issues. Looked at another way, there has to be a restricted domain, and not an infinite dissipation, if people are to relate at all. The restriction needed to *make* deliberation work will inevitably mean that deliberation cannot be a force-free field. Interest is also inextricable from the impelling focus of each participant. But the mere assertion of one particular interest is itself incompatible with relation to another assertion of interest. What is more, the solitary assertion of interest is a futility. Relation and assertion require a responsiveness in and between those who affirm differing interests. Interest and relation are, in short, inextricable.

Johnson does raise a compromise formula put forward by advocates of deliberative politics which is particularly pertinent here. This is the notion of "reasonable pluralism" as it nestles in the argument "that public deliberation need not be responsive to 'the fact of pluralism' per se but only to 'the fact of reasonable pluralism'" (Johnson 1998, 168). Johnson then patiently presents the counter-argument that this formula, in situating pluralism in the name of the reasonable, accommodates the surpassing assertion of particular criteria of relevance or "reasonableness." There is, admittedly, a tinge of the oxymoron to "reasonable pluralism" but, again, we may have some sympathy with its sanguine assertion. With an operative pluralism - a pluralism where the parties are in relation - there can be neither complete separation between them nor their complete fusion in terms of surpassing criteria. It is the very separation involved in a plurality combined with relation

which demands that the parties have some-thing in common, something shared. Being reasonable - adjudging things as more or less, weighing and balancing contrary imperatives - thence becomes apt.

Let me now try to take matters further by returning to my opening prospectus and considering what deliberative politics may be in the light of its limit. Contrary to Elster's equating deliberative democracy with "decision making by discussion," no amount of discussion or deliberation produces the decision. The decision and, in Johnson's terms, its "legitimating, binding" quality is always something more (Elster 1998, 1; Johnson 1998, 177). I will now explore what that more may be and how it refracts on the nature of deliberative politics.

The proximity of law

The "legitimate, binding" form of what is always more than deliberation, the form of the decision which has to supervene if deliberation is to be any more than interminably unresolved - that form is the law. The law is at the limit of deliberation not just in a way which is simply disjoint or apart, not just as a marking of what is beyond deliberation, not just negatively or differently, but also as the contiguous limit *of* deliberation. As deliberation's own limit the law touches it and shares its ambivalence. Law, in short, compensates or consoles for the irresolution of deliberation, whilst affirming in its own matching irresolution the failure of "all effort of consolation" (cf. Levinas 1991, 20).

I will try to indicate generally what this resort to law entails or suggests for deliberative politics. The apparent conflicts in deliberative politics, or in accounts of such politics, are reflected *in* law and legal decision, and this happens not in a way which resolves matters by elevating one side in conflict over another or by subsuming both in

some *tertium quid*. Rather, each side of the conflict retains its distinctness whilst being oriented towards the other in a mutually constituent relation. I have already intimated how this is so for deliberative politics in the introductory analysis of some of the literature on it. Perhaps the general approach there could be distinguished in a preliminary way by contrasting it to more monadically robust approaches. One approach, itself long associated with law, would elevate the determinative power of reason in complete and constant opposition to reason's ruin or deformation in the passions, force, and such. Another approach would see the elevation of reason in writings such as Elster's as quaintly pre-Freudian. That is, critical social theorists and others have shown abundantly that reason is an expression of passion, force or interest, and that reason has in its own terms at best a tenuous existence as their mask and legitimation.

For a more elaborated bringing of law into proximity with deliberative politics now, I will begin with the rule of law and a chasmic division within it - a division of enormous significance but rarely remarked, van de Kerchove and Ost providing an important exception (1994). The predominant view of the rule of law drapes it in a secular solidity. Countless histories and juridical affirmations would have us believe that the rule of law is characterized by certainty, predictability, and order. As against the vagaries of an arbitrary and discretionary power, the rule of law clearly marked out an area of calculability in which the individual could now purposively progress. In order for this law, and "not men," to rule, it had to be coherent, closed and complete. If it were not coherent but contradictory, something else could be called on to resolve the contradiction. If it were open rather than closed, then something else could enter in and

rule along with law. If it were incomplete and not a whole *corpus juris*, and if it were thence related to something else, then that something else could itself rule or share in ruling with law. For all of which, law had to be self-generating and self-regulating because if it were dependent upon something apart from itself for these things, then, again, those things would rule along with or instead of law.

We can, however, take each of these imperative qualities of the rule of law and evoke their opposite "in" the rule of law itself. For law to rule, it has to be able to do anything, if not everything. It cannot, then, simply secure stability and predictability but also has to do the opposite: it has to ensure that law is ever responsive to change, otherwise law will eventually cease to rule the situation which has changed around it. So, how could the rule of law be complete if it must ever respond to the infinite variety of fact and circumstance impinging on it? How could it be closed when it must hold itself constantly responsive to all that is beyond what it may at any moment be? And how could law, in extending to what is continually other to itself, avoid pervasive contradiction? Law cannot be purely fixed and pre-existent if it is to change and adapt to society, as it is so often said that it must. Its determinations cannot be entirely specific, clear and conclusive if it has integrally or at the same time to exceed all determination, to assume a quality of "everywhereness" (Carty 1991, 196). And every tale of law's bringing order to disordered times and places in the triumph of modernity or capitalist social relations, and such, can be matched by others where it created uncertainty and inflicted massive disorder in the same cause.

We can also see modern law similarly stretched between stable determination and responsive change in the persistent squabbles that so enliven jurisprudential thought. These intractably polarized debates

alternate between law's being autonomous and its being dependent. Taking the latter first, it is readily said that law is dependent on society, politics, the popular spirit, scientistic administration, the economy, and so on. More recent variants would have law taking identity from the discourses or narratives in which it is embedded. In a more diachronic vein, we are told incessantly that law has to change along with society or history, otherwise it becomes increasingly irrelevant and eventually obsolete. The contrary claims for autonomy, although a little more venerable, have not lost any of the force of their assertion. With them law somehow has to stand apart from the remorseless demands of society, history, and so on, and even to exclude its "own history" (Derrida 1992b, 190; 1994, 194). In being so placed, "absolute and detached from any origin," law not only stands distinctly apart from, say, society, but also orders, shapes, or even creates society - to adopt long-enduring and standard formulations (see Kelley 1984, 42-5; Lieberman 1989, 281; and for the quotation see Derrida 1992b, 194). To the extent that society does not so conform, law yet retains its hold as the measure against which that "failure" and passing imperfection are to be measured. In this, and indeed in all the various applications and changes throughout its history, a law remains insistently that law. Law's autonomous binding force cannot be contained by what it is or has been, by its history, but extends to all that it will be. Law is eternally present.

Yet for all the enduring dissension, this seemingly chasmic division between conceptions of law erupts within the solitary pursuit of what law may be, in the search for its resolved or resolving unity. When some entity is always attended with opposed perceptions of it, the tempting resolution is to say that these perceptions point to different aspects of that same entity. This is certainly done with law but, more

typically, dissension continues but with some mutual and more or less marginal recognition as between the two dimensions of autonomy and dependence. Nowadays, even the most resolute proponents of dependency would accord law some distinctiveness even if they would, in turn, seek to explain that very distinctness in, say, social or economic terms. None would argue, however, that the text of the law could be changed simply as an effect of that dependency. And of late, even the most ardent legal positivists would not say that their posited law can remain in a settled stasis but must, rather, give way, and give a way, to what is beyond it. That is, law must provide a way for what is other to it to enter the never complete or enclosed, always fungible boundary marked out by its own determinative assertion. An easy solution often adopted in both camps is to say that law is, discretely, autonomous and dependent. In this light, part of any law will be enduringly secure but in other respects the law will be uncertain and subject to change. The poverty of this expedient can be summarily seen in the failure to distinguish between the domains of autonomy and dependence in law, either generally or in any particular instance of it.

Perhaps then the enquiry should be diverted. Rather than seeking law in that which simply conforms to either side or both sides of the opposition, perhaps we could seek a law which “is” in-between the opposed dimensions, which “is” the experienced combination of them, and which has its being because each dimension is inexorable yet unable to be experienced by itself. And perhaps these dimensions are equivalent to the divide between law’s autonomy and law’s dependence. If so, then it would seem that the condition of being in law is always unresolved and calling for incessant decision and judgement. Nonetheless, we may find prospects for resolution in these

dimensions being not only opposed but somehow integral to each other. Clearly, completeness of position and responsiveness to what is beyond position are antithetical things. Yet there can be neither position without responsiveness to what is always beyond it nor responsiveness without a position from which to respond.

So, even though law has to assume an effective position it must also be incipiently ever beyond position. It could be said that law must attach to a reality but it cannot be fully identified with or lost in that reality if it is to integrally evoke and prehensively orient what is ever beyond that reality. Law is, to borrow Cain's pointed phrase, "necessarily out of touch" (Cain 1976, 226). Law, that is, must take on a quasi-transcendence and stand apart from the profane, yet if it becomes too "out of touch" with society it ceases to be effective. I will now try to convey something of law's subsisting in-between these two prerequisite demands by looking at a much discussed text of Derrida's.

The exigencies of law.

That text is his "Force of Law" (Derrida 1992a). The legal act - say, a legal decision - somewhat paradoxically entails a "dissociating ….from activity" in its integral extraversion towards the other (Derrida 1997, 14). And that extraversion is elicited in "Force of Law" *as* justice. Derrida would want to "make explicit or perhaps produce a difficult and unstable distinction between justice and *droit*, between justice (infinite, incalculable, rebellious to rule and foreign to symmetry …) and the exercise of justice as law or right, legitimacy or legality, … calculable, a system of regulated and coded prescriptions" (Derrida 1992a, 22).

For Derrida we come to law via justice. Justice imports an unlimited responsiveness to the other. The very singularity or specific finiteness

of the other calls for an infinite regard. But the illimitable demand of justice without more, or without less, is impossible and even inexpressible, always beyond attainment and ever "to come" (Derrida 1992a, 27). To be effective, to be made possible, justice must be given operative force and for this it must, in a sense, be denied. The limitless expanse of justice, that is, must be "cut" into, reduced and rendered expressible. An obvious contradiction now emerges: justice can only be made just in a way that is unjust.

Law, or more precisely the legal decision, is that which cuts into and assures justice (and less than justice). In this, "law is the element of calculation" (Derrida 1992a, 16). It imports a stability and regularity. If codifies, prescribes and determines. It lends its intrinsic force and enforceability to justice. It cannot, however, be accounted for in terms of justice. And justice, in any case, is unlimiting and cannot account for anything. So, Derrida frequently contrasts justice and the just decision with the legal decision which "simply consists of applying the law," or in which "the judge is a calculating machine," or in which "we placidly apply a good rule to a particular case, to a correct subsumed example, according to a determinate judgement" (Derrida 1992a, 16, 23). Yet, despite Derrida's assertion that these things "happen" - an assertion which, as we will now see, is untenable in terms of his own argument - he also recognises that matters are more mixed, that law is not "simply" to be distinguished from justice but must integrally be more (Derrida 1992a, 22-3).[6]

[6] Some careful readers of the argument which follows claim that it does not accurately portray Derrida's idea of law. For Derrida, so it is said, law is the element of calculation or determination, and so on. Doubtless Derrida does identify law with such things but, in my understanding, he is also making justice intrinsic to law. Where Derrida seems to be saying that calculation and application can ``happen" by themselves, I have to confess to being simply puzzled. My grateful engagement with Derrida here is an abbreviated version of Fitzpatrick 2001, 73-9.

Law may be necessary for the enforcement of justice, but that justice which lies ever beyond determination is also necessary for the enforcement of law. A living law, to borrow the phrase, is not containable in some terminal stasis but is incipiently and ever oriented beyond what it may at any moment be. There is then, “an ordeal of the undecidable” which is not only anterior to but also inhabits and persists in and beyond the legal decision: “the undecidable remains caught, lodged, at least as a ghost - but an essential ghost - in every decision, in every event of decision”; and, “each case is other, each decision is different and requires an absolutely unique interpretation, which no existing coded rule can or ought to guarantee absolutely” (Derrida 1992a, 23, 24). The persistently undecidable in law, its constant “inadequation”, opens law to justice or, put another way, the undecidable brings justice into law (Derrida 1992a, 20). In all, the act of legal decision combines law as the calculable with justice as the incalculable response to the “absolutely unique” beyond determined calculation, exchange or reciprocity. Justice, in its turn, is effected through law as calculable. Each is necessary for the operation of the other yet each is necessarily distinct from the other. There is a relation of “difference and … co-implication” between them (Derrida 1994, 177).

“In” this relation “justice exceeds law and calculation” but law is also seen by Derrida as “exceeding” justice (Derrida 1992a, 28). We must, Derrida emphasises, calculate and we must negotiate “the relation between the calculable and the incalculable”: “this requirement does not properly belong either to justice or law. It only belongs to either of these two domains by exceeding one in the direction of the other” (Derrida 1992a, 28). Law, then, as calculation can only “properly belong” to itself, by exceeding itself “in the

direction of" justice (Derrida 1992a, 28). Calculation, in short, goes to as well as against justice. Or inversely, as we have already seen, justice is operatively integral to law, to the legal decision. The question of how just is the decision, of how far it goes "in the direction of" justice, is another matter. Law orients the decision in a relation to justice, in an "inclination" towards the other (cf. Nancy 1991, 3-4). Neither illimitable justice nor law - law which is not beholden to anything "before" it - can be contained in some notion of the just as ideal or as the Good. Justice always sits "very close to the bad, even to the worst for it can always be re-appropriated by the most perverse calculation" (Derrida 1992a, 28).

As to the "other" side of the equation, justice exceeding itself in the direction of law, we have also seen that, to have effect, justice depends on law: "incalculable justice *requires* us to calculate" (Derrida 1992a, 28 - his emphasis). If "I" am to be in a relation to the other, to say nothing of relating to a diversity of others, then justice must be delimited in the act of legal decision. Without a limit, there can be no relation to the other. Giving my-self to the other in the unalloyed demand of justice is inherently unachievable. It could never form or resolve into a relation. Or, in a more apocalyptic vein, once the giving were achieved, there would be a simultaneous dissolution of the very "I" which was to relate to the other.

Law, in summary, becomes the combination of determination with what is ever beyond determination. It cannot be simply or solely the principle of calculation, that which cuts into and renders the responsiveness of justice operative. Justice, responsiveness, responsibility - responsability to adopt an archaic usage - also renders law operative. The legal decision must:

… be both regulated and without regulation: it must conserve the law and also destroy it or suspend it enough to have to reinvent it in each case, rejustify it, at least reinvent it in the reaffirmation and the new and free confirmation of its principle. (Derrida 1992a, 23)

Again, “no existing, coded rule can … guarantee absolutely” what will be decided (Derrida 1992a, 23). And what has been decided, judicially or legislatively, cannot stand apart in a determined or determining isolation. The decision cannot “be” in the world if it seeks merely to affirm or be affirmed in itself - if it has no connection, no relation to anything else. To maintain its “place” it must ever go beyond its own bounds and relate to all circumstance and possibility that would come to or be brought to it (Derrida 1977; 1992a, 38). Hence, law or the legal decision has constantly to destroy itself to stay itself. It has always to decompose in order to be composed. There is always something “rotten” in law (Derrida 1992a, 39).

Such a responsiveness “in” law can never, then, be satisfied in terms of what can be cognitively brought to bear. No decision could ever “furnish itself with infinite information and the unlimited knowledge of conditions, rules or hypothetical imperatives that could justify it” (Derrida 1992a, 26). Inversely, a determination based on knowledge cannot ever be complete in some final isolated resolution. Even if it could, we, being “within” knowledge, could never know it to be complete. Something could always come from beyond, something “more,” and reveal our over-confident conclusion to be not so. We could begin to grasp that “more” in its relation to law by looking at it negatively. If determination were adequate or complete, there would be no place or call for decision or for judgement. Alternatively, there will always “in” the legal act be something beyond any particular or

possible determination. There will always and at every moment (that is, at every point of impinging difference) be a demand for "fresh judgement" (Derrida 1992a, 26). It is in the very absence of determination, or in the presence of irresolution, that there is a demand for law and for legal judgement. The responsibility, or the responsability (again the archaic use), involved in judgement and the decision cannot be accommodated within the determined or the known. There is always "in" it a "secret," a mystery, a "madness" (Derrida 1992a, 26; 1995, 65).

The violence of law

This accounting for law's force can be made more pointed in that quality of "violence" which Derrida deems necessary for legal action – more pointed in that violence can return our focus to deliberative politics since violence could be taken as encapsulating that which is said to stand opposed to the integrity of deliberation as reasonable: surpassing force, the assertion of interest, and so on. Writing of the "terrifying … violence that founds," the violence of revolutionary origin, Derrida remarks that it "appears savage" in its unrestrained illegality, but he makes the point so as to show that this is a violence indistinguishable from the ordinary operation of the law (Derrida 1992a, 35, 40). "Violence is not exterior to the order of *droit*. It threatens it from within"; and so we must "recognize meaning in a violence that is not an accident arriving from outside law" (Derrida 1992a, 34-5). The "meaning" of this violence subsists in what is ever "undecidable" in law itself. With the act of legal decision, no pre-existing rule or dictate can determine *its* outcome. There is always a "madness" in the moment of decision. And, it could be added, with law's whole existential orientation, there is always an in-dwelling

responsiveness and “undecidability” in the face of what lies beyond and constantly challenges law’s determinations. So, this violence “threatens the entire judicial order itself,” yet “that which threatens law already belongs to it” (Derrida 1992a, 33, 35).

To refine that somewhat precipitate introduction of violence and to bring it to bear on deliberation, I should try to clarify the concept of violence adopted here. The usual conception of violence is quite literally conservative. What is being conserved is the irenic condition which violence destroys from without. That condition is one of a given “world” of shared values, shared language, the restful domain of reason and pacific order, ever complete in itself. With this numbed normality, violence can only be justified in the maintenance or restoration of the concordant world. And in occidental myth, this justified violence is the preserve of law. Law thence, as it is so often put, has the monopoly of violence and, along with that endowment, violence outside of law becomes transgressive and illegitimate. In this, law is not simply confined to some supporting role, however. It has, somehow, to be both violent and intrinsically associated with non-violence. It is pervasively placed in the ordered world and operatively integral to it. Yet law’s violence must be co-extensive and more than co-extensive with this ordering. The violence and the incipient violence of law must constantly support the ordered world in and beyond its full range, support it against the violent and disintegrating forces of disorder within or hovering ever beyond that range. In its quality of expectant and responsive violence, law must extend further than and encompass the world it sustains. Law, in its turn, must forever chase and mark itself against a transgressive violence beyond - “the outside into which…[law] is always receding” (Foucault 1987,

34). Yet this transgressive violence in *its* turn emanates from and is in thrall to that determined norm which is the law.

There is, then, *in* the violence of law a contrary combination of determining force and responsive expectancy. How may this dichotomy be overcome? Put another way, how may the dissipation of responsiveness be contained so as to secure the palpably determinant? The usual occidental mode of doing this is to compromise each of these two elements by cross-cutting them in a delimiting generalization about violence itself and its contained, determinant being. The standard expedient is the rendering of violence as the painful infliction of physical force. Where may this marking apart, this cutting classification of violence come from, if not itself from an arbitrary violence? The answer is usually a naturalist assumption about pain's being observable as distinctly physical, supplemented by the "naturally" easy observation of physical force being inflicted. Such simple meaning now has its rivals. A standard story of the West connects a decline in "physical" violence with the progress of its civilization, but revisionist histories would typify such civilization as itself a tentacular violence, not just in its suppression and exclusion of others who do not accord with its norms, but also in the deeply disciplinary application of those norms to those who do conform (e.g. Foucault 1979). Violence, in this refinement, is often given content by another variety of naturalist assumption, no longer now an ascription positively corresponding to the violence but, rather, the assumption of a primal entity negatively opposing it. Foucault's occasional espousing of "the body" and "the pleb" would provide instances (e.g. Foucault 1981, 96).

Another, and more thoroughly radical departure from the conventional view of violence would reject a putative resolution in

naturalist terms and accommodate the dichotomy between responsiveness and determination located in the violence of law. This entails “a more embracing structure of violence which refuses the logic of opposition” between violence and non-violence (Beardsworth 1996, 21). This “more embracing structure” can be intimated and illustrated in Blanchot’s disturbing *aperçu* on torture:

Torture is the recourse to violence - always in the form of a technique - with a view to making speak. This violence, perfected or camouflaged by technique, wants one to speak, wants speech. Which speech? Not the speech of violence - unspeaking, false through and through, logically the only one it can hope to obtain - but a true speech, free and pure of all violence. This contradiction offends us, but also unsettles us. Because in the equality it establishes, and in the contact it reestablishes between violence and speech, it revives and provokes the terrible violence that is the silent intimacy of all speaking words… . (Blanchot 1993, 42-3)

This relation between torture and language indicates that in deliberation there can be no placid normality apart from violence. There cannot, that is, be an “expelling of the violence of Being” (Levinas 1996, 11). There is always something, something “other,” infinitely disrupting what is, as it were, within - what is seemingly known and what is held to. Violence, therefore, cannot be denied a priori and excluded from some detached and placid domain.

More pointedly, deliberation, for example, cannot rest secure in some *soi-disant* completeness, cannot be “fully self-present…immediate and transparant” (Derrida 1976, 119). It cannot subsist in an “impossible purity” whence a violence from without

"would come to pounce upon it as a fatal accident" (Derrida 1976, 110, 135). Or, rather, in its operative assertion as complete, deliberation cannot be just that. It can only endure in a continuing relation to what is necessarily and constantly denied, suppressed or adapted to *make* it complete. Put in a other perspective, deliberation cannot exist and endure in a solitary stasis. The distinctive affirmations of its putative integrity, of its still reason for instance, are themselves indistinguishable from the myriad of decisions needed "to deal with" what-ever would impinge upon it. This dealing-with involves and invokes, in the very violence of its exclusions and assimilations, a responsiveness to what-ever would impinge, a responsiveness that is quite other to the violence of decisive assertion, a responsiveness which is non-violent. This responsiveness, in turn, cannot effectively *be* without the violent assertion of position, a position from which it may depart and a position to which it may return. So, violence and non-violence are each necessary for the operative existence of the other. To be so, each must also be different from the other - there is something after all to the logic of "opposition" (Beardsworth 1996, 21).

There is point, then, to both the standard story of law's intrinsic opposition to violence as well as to those not-unusual revisionist claims that law itself is violent. In its stable, determined state law is and must be against any violence which would disrupt such a condition. Yet, it goes on, law's determined state itself results from the violent, decisional "cutting" into that justice which insistently comes from beyond it. And, it still goes on, to sustain its putative determination, law must be non-violently responsive. That is, it must accommodate, give way to and give a way to, what comes from beyond it. At the same time, that justice which demands

accommodation, the active alterity beyond, cannot simply be placid and expectant. It must have some bearing on, some complicitious connection with the violence of decision bringing it into law.

There is an irresolution to decision also, as we saw, and the constituent inadequacy of the decision does not merely afflict its initial making but must extend to its continued assertion. There has to be, that is, a constant remaking of the decision as it encounters situations which are inevitably new. To stay "the same" the decision must alter in its relation to what is ever different. In its sustained existence, then, the decision cannot endure as a settled stasis but must enable what is other to it to enter repeatedly the never complete or enclosed, and always fungible boundary marked out by its own determinative assertion. The seeming paradox, then, is that the decision is continually "conserved" *and* "destroyed"; it has to be, again, "regulated and without regulation" (Derrida 1992a, 23). It is in this absence of finality that there is the expectation of an unending law which ever seeks and ever fails to overcome the irresolution.

Deliberation

The companiate parallels between law and deliberation are not yet fully drawn. Deliberative politics in its sanguine solidity may match law's determinative assertion, and the dissipation of uncontainable interests perceived by the sceptics may match law's indeterminate responsiveness. Yet there are also ways of being in-between these two ultimate conditions. And there have to be. Each condition is existentially unsustainable in itself. To identify such a way of being pertinent to deliberative politics, I will persist a little longer with the oblique approach through law as the limit of deliberative politics, taking now law's generality as a mode of thus being in-between. Law

seeks some constant identity in its generality. As general, law would apply to persons or situations in "the abstract" or "universally" and so much so, some would add, that a decision (ostensibly) confined to the particular does not count as law (e.g. Rousseau 1968, 82; Locke 1965, 409 - para. 142). Yet, as we have seen, the legal decision "applying" a rule cannot simply and deductively do that. No pre-existent rule can determine a decision made "under" it. The decision, with its ineliminable specificity or particularity, always demands "fresh" judgment (e.g. Derrida 1995, 65). So, in responding to the specific and always unique case presented to it, the decision reaches beyond what is already set and given. Through engaging with what cannot be pre-set and contained, the decision is oriented towards the universal. In its generality, then, the legal rule accommodates this dimension. The general rule "applied" in the decision cannot be reduced to the sum of its determined applications. It extends in an ever incipient responsiveness towards all its future possible applications. But in so doing, it cannot be completely and self-destructively responsive. The rule, to be a rule, cannot simply and potentially apply to everything but must be expectantly applicable in an orientation towards something of the determinedly particular. It marks out its own ground. The "general" is, in short, an occupying of the space in-between the responsive and the determined "in" law, a space conceived now as in-between law's orientations towards the universal and towards the particular.

Returning to the literature of deliberative politics, reason could be seen as occupying the same space in-between in accounts or legitimations of such politics. Reason was, as we saw, readily adduced in sanguine accounts. And it was just as readily rejected in sceptical objections. These went on to reveal reason's dissipation in interest.

But even the sceptics were not prepared to regard deliberation itself as so debased that it could serve merely as the carrier or mask of interest. Apart from advocating its redemption, however, the sceptics did not endow deliberative politics with a content substituting for reason. However, along with law, there may be consolations to be had in another form of prescription - in meaning. To deliberate, using Skeat's synopsis, is to carefully weigh and consider (Skeat 1963, 134). Without extracting all the etymological detail, the term imports a weighing and balancing. It evokes or is inclined towards resolution without asserting resolution explicitly or finally. The etymology would also demand that in this weighing or balancing there be consultation, something ever inclined beyond any ready resolution. But not only so inclined. Deliberation is deliberate.

A similar trajectory can be followed "with reason." Here we could perhaps bring together two sets of meaning distinguished by Williams (1988, 253-4). We have encountered one set when looking at the optimistic notion of "reasonable pluralism" in the literature of deliberative politics. In this setting, being reason-able involved a weighing or balancing, evoking that "*reasonable* [which] developed a very early specialized sense of moderation or limitation" (Williams 1988, 253 - his emphasis). The other set of meaning may be more immediately difficult. Here reason can be both a transcendent mode of thought or argument and a determinate specificity as in "[having] *a* reason for believing" something (Williams 1988, 253 - his emphasis). Obviously, I am suggesting that in an operative way the two seemingly distinct sets of meaning can be combined in the same dimensions as those found in the analyses of law and deliberative politics.

Deliberative politics would nonetheless remain insistently unresolved. Our very starting point was that such a politics cannot be encompassed by some determined or determining quasi-transcendence - by the ideal, by reason, by an elevating commonality. Yet neither can it be accommodated in responsiveness to a dissipation of particular interests. What *is* constituent of a deliberative politics is the space in-between these two impossible dimensions and the way in which that space is occupied.

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