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Law, Postmodernism and Resistance: Rethinking the significance of the Irish hunger strike, part II

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the protestors' imprisonment contravened provisions of the European Convention on Human Rights.²³² The Commission issued its decision in May of 1980. Although it gently chastised the British Government for its intransigence,²³³ the Commission denied the legitimacy of the prisoners' claims. The decision is important in that its deconstruction indicates four things: first, that legal authorities, in making decisions, not only delegitimize some practices, they legitimize others; secondly, that the Commissioners operated upon a liberal humanist conception of the "subject", and that this resulted in a "blame the victim" approach; thirdly, that the Commissioners subjected the plaintiff prisoners to what Lyotard has called the injustice of the "double bind"; and fourthly, that the Commissioners exercised a gratuitous "will to power" that served to silence the "other."

First, I will consider the argument that juridical decision-making is a form of legitimation and delegitimation. Conventionally, when commentators approach decisions of human rights organizations, the framework of analysis tends to be that such bodies serve an essentially regulative role, that is, that their function is to operate as a check upon the abuse of power by states against their citizens. In other words, the assumed paradigm is that the function of human rights organizations is the delegitimation of states that infringe human rights. However, as Hegel notes:

What is "familiarily known" is not properly known, just for the reason that it is "familiar." When engaged in the process of knowing, it is the commonest form of self-deception, and a deception of other people as well, to assume something to be familiar, and to let it pass on that very account.²³⁴

Drawing on this insight, I will argue that the conventional assumption reveals only half the story, because the effect — if not the intention — of a determination by a human rights organization such as the Commission against a plaintiff is to legitimize repressive state practices.

To be more specific, when, for example, the European Commission was discussing the standard of "inhuman and degrading treatment" within the meaning of Article 3 of the Convention, it emphasized that to be sanctionable, the "ill-treatment must attain a minimal level of severity ... a particular level" which was "relative" depending upon "all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim."²³⁵ It seems to me that such propositions not only signal an embracement of flexibility that allows for a great deal of leeway in statist

232 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature, Nov. 4th 1950, 213 U.N.T.S. 221, reprinted 1950 *Y.B.H.R.* 418. Application No. 8317/78.

233 McFeely, *supra* note 151 at 86.

234 G.W.F. Hegel, *The Phenomenology of Mind*, trans. J.B. Baillie (New York: Harper and Row, 1967) at 127.

235 McFeely, *supra* note 151 at 79, 88, 89.

abuse, it also positively legitimizes any abuse up to that elusive level.²³⁶ It sanctifies an acceptable level of state violence and, in so doing, has the effect of encouraging continued state domination and abuse.²³⁷

Moreover, in this case not only did the Commission legitimize certain practices of domination, it helped to undermine the integrity of at least one plaintiff by gratuitously referring to his past: "In 1974 the applicant ... blasted his way out of Portlaoise prison, near Dublin."²³⁸ What, precisely, is the relevance of a plaintiff's prior history of escape in a different country (Ireland) when the complaint is one of abuse by the British state? The only function that such an unnecessary reference can serve is to reinforce the juridical construction of the "terrorist" — the modern day folk devil — and therefore to justify his or her criminalization and incarceration.

Secondly, the Commission rested its decision on a liberal humanist conception of the subject and therefore issued a "blame-the-victim" type decision. Much of the plaintiffs' argument was based upon Article 3 of the Convention, claiming that the physical conditions of their imprisonment constituted "inhuman and degrading treatment." The trump card played by the Commission in dismissing the claim was the rather obvious assertion that the conditions of which they complained were freely chosen by the prisoners,²³⁹ that they were "self-imposed deprivations",²⁴⁰ "self-inflicted debasement and humiliation",²⁴¹ in short "their own responsibility."²⁴² From the perspective of the Commission, the prisoners were masters of their own destiny.

This is an important argument, also often applied to the hunger strike: that it was suicide. However, to analyse the Commission's ascription of responsibility, it is necessary to temporarily depart from the juridical level to address the issue at the ontological level.

As I will argue in Part IV, B, there are at least three competing conceptions of the self: the sovereign (or liberal) self; the situated (or relational) self; and the saturated (or postmodern) self. The postmodern or saturated conception of the self will not be addressed at this point. A liberal humanist ontology, premised as it is upon the idea of a sovereign and solitary individual, argues that "man [sic] is the master and possessor of the totality of his actions and ideas."²⁴³ A situated or relationalist ontology argues that the subject is a dynamic and self-reflexive potential influenced, though not determined, by a matrix of societal and cultural forces.²⁴⁴

236 For example, the Commission acknowledges that a "restrictive diet...though harsh does not amount to a sufficiently rigorous punishment...amount(ing) to inhuman or degrading punishment", *id.* at 89. The analysis adopted by the Commission is highly reminiscent of Diplock's legitimization of abuse during interrogation. *Diplock Report*, *supra* note 145.

237 It should also be noted that the Commission uncritically endorses the recommendations of the *Gardiner Committee*, *supra* note 147, on several occasions, *id.* at 81, 100.

238 *Supra* note 151 at 47.

239 *Id.* at 84.

240 *Id.* at 80.

241 *Id.* at 81.

242 *Id.* at 83.

243 L. Ferry & A. Renaut, *French Philosophy of the Sixties: An Essay on Antihumanism*, trans. M. Cattani (Amherst: University of Massachusetts Press, 1990) at xvi.

244 See *infra* Part IV, B.

These competing conceptions of the self engender alternative conceptions of the self's "responsibility" for its actions. Within the liberal humanist approach, given that the self is an autonomous and self-possessed individual, the question of responsibility is relatively straightforward: the sovereign self is responsible for his or her actions, subject, perhaps, to certain very limited exceptions such as insanity or infancy.²⁴⁵ Clearly, this dovetails with the Commission's response to the prisoners' claims: it was their choice; responsibility was grounded in and emanated from the total self.

The situated or relational approach considers the question of responsibility to be much more complex because it demands a contextual inquiry into both the self and the circumstances that give rise to his or her actions. Thus, responsibility does not inhere, or automatically originate, in the *a priori* subject. Rather, responsibility is a cultural, social, moral and juridical attribution *following upon* the weighing of all the relevant circumstances. Consequently, in relation to the prisoners' claim that the conditions of their imprisonment were "inhuman and degrading", I would argue that it is crucial to consider their subjectivities, their "legal sensibilities" as well as the "legal sensibility" of the state. In this light, I would then propose that responsibility lay with *both* sides, that it was "shared." Such an approach recognizes the agentic capacities and responsibilities of the self, but at the same time avoids a legal formalism and vulgar ontology that blinds us to people's existential realities. Moreover, a relational approach to responsibility may help to avoid zero-sum thinking²⁴⁶ which encourages the kind of polarization that can lead to such tragedies as the hunger strike. And it certainly enables us to avoid blaming the victim.²⁴⁷

Thirdly, the foregoing discussion of the prisoners' "choice" leads to a consideration of the Commissioner's decision as a manifestation of the Lyotardian "double-bind." As discussed earlier, Lyotard rejects ideas of consensus or the feasibility of a *grundnorm*. He considers justice to be the proliferation of mini-narratives and multiplicity, the embracement of disputation and dissensus, the acceptance of paralogy.²⁴⁸ Injustice, in

245 It might be noted that such an approach makes juridical decision-making relatively uncomplicated: there is a *prima facie* and *a priori* assumption of individual responsibility unless extenuating circumstances indicate otherwise.

246 The Commissioners determined that, "they [the prisoners] *alone* must bear responsibility for the choice they have made." McFeely, *supra* note 151 at 84 [emphasis added]. Two further points may be worth noting. Sinn Féin, translated into English, means "ourselves alone", and why not, one might ask, given such juridical antipathy? Secondly, such a unilateral ascription of responsibility inevitably encouraged the British government as to the righteousness of its intransigence. As a consequence, I would argue, in accordance with my relational thesis of responsibility, that the Commissioners' decision makes them, in part, responsible for the subsequent fast and deaths. This is also why I talk about "the Commissioners" rather than some abstract "Commission".

247 At a minimum, such a proposal would prevent the Commissioners from solipsistically endorsing the recommendations of the *Gardiner Committee*, *supra* note 147 at 81, 100, and instead, inquire to what extent such a Report constitutes part of the problem, rather than part of the solution.

248 See *supra* note 68.

Lyotard's account, is the assumption that the claims of "the other" can be translated into the "language game" or "genre" of the dominant narrative, thereby excluding as irrational, unfounded or unbelievable that which is not translatable. In such a situation, the plaintiff is deprived of a narrative, the right to tell her or his story:

This is what a wrong [*tort*] would be: a damage [*dommage*] accompanied by the loss of the means to prove the damage. This is the case if the victim is deprived of life, or of all his or her liberties, or of the freedom to make his or her ideas or opinions public, or simply of the right to testify of the damage, or even more simply if the testifying phrase itself is deprived of authority.... In all of these cases then, to the privation constituted by the damage there is added the impossibility of bringing it to the knowledge of others, and in particular to the knowledge of a tribunal. Should the victim seek to bypass this impossibility and testify anyway to the wrong done to him or her, he or she comes up against the following argumentation: either the damages you complain about never took place, and your testimony is false; or else they took place, and since you are able to testify to them, it is not a wrong that has been done to you, but merely a damage, and your testimony is still false.²⁴⁹

Thus, we encounter one aspect of "the dilemma of difference",²⁵⁰ the double bind in which "the defining feature of a wrong is that it cannot be proven"²⁵¹ because it is unintelligible within the dominant adjudicative model. Lyotard explains:

Either you are a victim of a wrong, or you are not. If you are not, you are deceived (or lying) in testifying that you are. If you are, since you can bear witness to this wrong, it is not a wrong, and you are deceived (or lying) in testifying that you are the victim of a wrong. Let *p* be: you are the victim of a wrong; *not-p*: you are not; *Tp*: phrase *p* is true; *Fp*: it is false. The argument is: either *p* or *not-p*; if *not-p*, then *Fp*; if *p*, then *not-p*, then *Fp*. The ancients called this argument a dilemma. It contains the mechanism of the *double bind* as studied by the Palo Alto school, it is a linchpin of Hegelian dialectical logic.... This mechanism consists in applying two contradictory propositions, *p* and *not p*, two logical operators: exclusion (*either... or*) and implication (*if...then*). So, at once [(*either p or not-p*) and (*if p, then not-p*)]. It's as if you said both, *either it is white, or it is not white; and if it is white, it is not white*.²⁵²

Applying these propositions to the *McFeely* decision, the double bind within which the Commission entrapped the prisoners was that if the latter

249 *Differend*, *supra* note 70 at 5.

250 *Supra* note 227 at 20.

251 G. Bennington, *Lyotard: Writing the Event* (New York: Columbia University Press, 1988) at 143.

252 *Differend*, *supra* note 70 at 5-6.

wanted to remain consistent with their political ideology by claiming to be political prisoners or prisoners of war, then they could not come within the parameters of the European Convention. Thus, in order to secure the protective mantle of the Convention, they would have to abandon their political convictions and acknowledge that they were “ordinary decent prisoners.” However, in that case, they would have nothing to complain about because they would then simply be unruly and disruptive prisoners whose punishments were “necessary in a democratic society for the prevention of disorder or crime”,²⁵³ and justifiable “in the interests of public safety.”²⁵⁴ Like *troscad/cealathan* the prisoners’ claims were simply “untranslatable” into the dominant juridical discourse. In short, “[i]tis in the nature of a victim not to be able to prove that one has been done a wrong.”²⁵⁵ The Commissioners failed to heed the appeal to alterity, they refused to listen.

Fourth, and finally, the Commissioners’ decision manifests a juridico-bureaucratic “will to power.” In many ways, the core of the prisoners’ demand was contained in their invocation of Article 9 of the Convention which provides, in part, that “everyone has the right to freedom of conscience and religion.”²⁵⁶ But, by inverse logic, this is the argument to which the Commission gives the shortest shrift. The prisoners argued that their conscience and belief in their prisoner of war status should be recognized as protected under this provision through a recognition of “special category status.” The Commissioners’ response is dazzling in its certitude:

The Commission is of the opinion that the right to such a preferential status for a certain category of prisoner is not amongst the rights guaranteed by the Convention or by Article 9.²⁵⁷

Reasons given: none. Justification: none. The prisoners’ convictions, their conscience, their beliefs — convictions for which their colleagues would, within months, fast to the death for — were summarily dismissed.

However, several pages later, perhaps somewhat discomfited by their overhasty disregard of the prisoners’ sense of their self identity, the Commissioners return to the question of political prisoner status; but with a vengeance. Although the issue was raised neither by the plaintiff prisoners nor the defendant British government, the Commissioners went out of their way to pontificate, again without further elaboration, that “the Commission does not consider that such an entitlement [political prisoner status] in the present context can be derived from the existing norms of International Law.”²⁵⁸ I interpret this as the invocation of a masternarrative — International Law, with a capital I and a capital L — to assert a will to

253 McFeely, *supra* note 151 at 90.

254 *Id.* at 91.

255 *Differend*, *supra* note 70 at 8.

256 *Supra* note 232.

257 McFeely, *supra* note 151 at 77.

258 *Id.* at 80.

power on the part of international bureaucrats.²⁵⁹ By invoking the foundationalist, reified and legitimizing discursive regime of International Law, the Commissioners could feign positivist formalism. By claiming that their hands were tied, they could justify a gratuitous mandarin antipathy to the marginalized, and categorically silence the claims of the colonized who have the upstart audacity to challenge their colonizers.²⁶⁰

Le Différend has its critical-political goal the uncovering of *différends* where they have been repressed or supposedly resolved; it argues for the necessity of listening to the idiom not given its day in court, to the silence imposed on the victims of oppression and injustice. It attacks all mechanisms of repression, all courts, institutions, systems of thought that perpetuate the injustice of universal judgment and thus do not recognize the silence imposed on their victims.²⁶¹

Within six months of this silencing, the prisoners resorted to their own, local, indigenous and embodied legal claim: the fast.

V. THE POLITICAL AMBIVALENCES OF POSTMODERNISM²⁶²

In Part III, I drew on the critical analytical insights of postmodernism and deconstruction to provide a re-interpretation of the juridical politics of the hunger strike. Specifically, I proposed that there was a valid legal foundation for the prisoners' claims that could be justified either by reference to ancient Irish Brehon law, or to contemporary legal theory in the

259 This strategy is not unprecedented. In 1532 Franciscus de Victoria invoked the "Law of Nations" in defence of Spain's colonization of "the Americas." See *supra* note 7 at 97-108.

260 In fact there were several possible grounds upon which the prisoners could have chosen to argue their claims in international law. First, they could have relied on Common Article Three, Protocol I, to the Geneva Conventions of 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287. Second, they could have invoked Protocol II to the Geneva Conventions of 1949 *opened for signature* Dec. 12, 1977, *reprinted in* 16 I.L.M. 1442 (1977). Third, they might have looked to the European Convention on the Suppression of Terrorism *opened for signature* Jan. 27, 1977, *reprinted in* 15 I.L.M. 1272 (1976). While some commentators have expressed skepticism as to the potential success of such arguments "Boyle *et al.*, *Ten Years*, *supra* note 149 at 94-95; J.M. Spillane, "Terrorists and Special Status: The British Experience in Northern Ireland" (1986) *Hastings Int'l. & Comp. L. Rev.* 481," my main point remains that no such arguments were ever made to the Commissioners. Therefore, for the Commissioners to pontificate *ex cathedra* without the benefit of argument from the parties and without giving reasons for their determination is arrogant, conceited and downright oppressive.

261 D. Carroll, "Rephrasing the Political With Kant and Lyotard: From Aesthetic to Political Judgements" (1984) 14:3 *Diacritics* 74 at 78.

262 It may be appropriate to forestall a possible objection at this point. Some might argue that this essay asks of deconstruction and postmodernism something that is fundamentally alien to their perpetually critical disposition — reconstructive possibilities — and therefore that they are being subjected to instrumental standards. In reply, this essay adopts an anthropomorphic stance and argues that in politics and law the benchmark is the diminution or exacerbation of domination and subordination. This point will be elaborated in Part IV, A.

form of “destabilization” or “solidarity” rights, or, Lyotardian injustice. However, further consideration suggests that postmodernism and deconstruction, if left unmodified, can cause some serious problems for, and may even compromise, those who believe in progressive political practice. To substantiate this essay’s “attractive aversion”²⁶³ to postmodernism and deconstruction, these possible limitations will be discussed under the headings of: power, the text, practice and (in)justice; agency, power and (un)truth; language and power; and, identity politics. In the course of my arguments, I will attempt to rebut the potential postmodern accusation that I, too, am caught with my modernist hands in the till.

A. Power, the Text, Practice and (In)Justice

Postmodernism and deconstruction have implemented a dramatic transformation in the analyses and discourses of social theory, literary criticism, philosophy, political theory and jurisprudence. Within modernist and humanist approaches the analytical paradigm was very much organized on the conceptual bases of “the author”, “the individual”, “intention”, “will”, “consciousness”, “subjectivity”, “choice”, “freedom”, “autonomy” and “rights.” With the arrival of postmodernism, and its decomposition of the “subject”, the analytical paradigm has shifted to become preoccupied with “language games”, and in particular the ideas of “interpretation”, “narrative”, “translation”, “dialogue”, “inscription”, “meaning”, and “hermeneutics.” So, for example, Lyotard argues that in order to “understand social relations” what is needed is “a theory of games which accepts agnostics as a founding principle”, an “‘atomization’ of the social into flexible networks of language games.”²⁶⁴ Or, in Derrida’s [in]famous phrase, “There is nothing outside of the text.”²⁶⁵

In so far as this latter proposition is understood as a pithy encapsulation of the claim that the possibility of interpretation — indeed interpretations — is always present, that essentialist and non-negotiable stances are indefensible, then it is a salutary thesis. However, insofar as the discourse of the “text” tends to become hegemonic, even a neo-metanarrative,²⁶⁶ and not just a supplement to traditional modes of social, political and juridical

263 This oxymoronic idea is culled from Theodor Adorno, see M. Jay, *Adorno* (Cambridge: Harvard University Press, 1984) at 14.

264 *Condition*, *supra* note 19 at 16-17.

265 *Grammatology*, *supra* note 19 at 158-159.

266 Tendencies in this direction are to be found, I would suggest, in Derrida’s self-proclaimed “generalization [of the concept of text] almost without limit, in any case without present or perceptible limit...” Derrida, “But Beyond”, *supra* note 25 at 167. Note also his faith in “a general law of *différance*”. Derrida, *Margins*, *supra* note 99 at 15.

To be clear, my suggestion is not that Derrida is a textual reductionist; rather it is that he over-emphasizes the possibilities of interpretation. Thus my critique avoids his accusation that:

Every week I receive critical commentaries and studies on deconstruction which operate on the assumption that what they call ‘post-structuralism’ amounts to saying that there is nothing beyond language, that we are submerged in words — and other stupidities of that sort.

Derrida, *supra* note 51 at 123.

analysis, we encounter the problematic issue of the relationship between texts and practices, or, more specifically, the relationship between structure and agency. To concretize these quite abstract suggestions, I will focus my discussion on Lyotard's and Derrida's respective conceptions of "justice" and inquire as to what contribution they might make to understanding the plight of the hunger strikers.

I will discuss Lyotard first because his work provides us with an opportunity to consider one of postmodernism's suggestions for reconstructive reconsideration: the proposition that "justice as a value is neither outmoded or suspect", that what is required is an "idea and *practice* of justice that is not linked to that of consensus."²⁶⁷

As we have seen, to achieve a refurbishing of "justice" Lyotard advocates "justice as paralogy"²⁶⁸ and "the multiplication of small narratives."²⁶⁹ His conception of justice embraces the conflictual pluralism of language games in which "to speak is to fight, in the sense of playing, and speech acts fall within the domain of a general agnostics."²⁷⁰ Or, as he continues, "this does not necessarily mean that one plays to win."²⁷¹

In the abstract, this conception of justice as "just gaming", as dissensus, as the perennial play of incommensurability, sounds vaguely attractive. Its pluralism and heterogeneity would appear to foster the flourishing of difference and tolerance. However, when we think of justice in its concrete and socially embodied form — that is, as law — what are the practical consequences for a reconstruction of law? It is at this point that Lyotard's use of "language games" or "narratives" as metaphors or analogies for the forms of social interaction becomes shaky. Law is different.

Although Lyotard makes much of the claim that each micro-discourse has its own internal system of rules and norms,²⁷² he very rarely analyses in detail the spheres of social interaction to which these micro-narratives might pertain, or more importantly, what the particular rules of a specific micro-narrative might be. This omission is crucial for understanding the difference of law because the very purpose of the rule of law is, literally, to rule, that is, to determine the legitimacy of competing narratives, to valorize some and to exclude others. In this light, it is important to revisit the way in which Lyotard introduces the concept of "the *différend*":

[A]s distinguished from a litigation, a *différend* would be a case of conflict, between (at least) two parties, that cannot be equitably resolved for lack of a rule of judgement applicable to both arguments. One side's legitimacy does not imply the other's lack of legitimacy.²⁷³

But within the current politico-historical conjuncture, it falls to law to

267 Lyotard, *Condition*, *supra* note 19 at 66 (emphasis in original).

268 *Id.* at 60.

269 *Gaming*, *supra* note 70.

270 *Id.* at 10.

271 *Id.*

272 *Id.* at 96.

273 *Differend*, *supra* note 70 at xi.

provide "a rule of judgement", to be the final arbiter of disputes, to determine in an authoritative and authoritarian way when the play of narratives should cease. The rule of law, as the final source of legitimacy, is the classic master narrative, even more so perhaps than science which was Lyotard's favoured example.

Now it may be that there is something of the prescriptive at work here, that Lyotard is proposing that law, like every other narrative, *should* curtail its hubris and thereby abdicate its determinative role. Again, at first blush, this might seem pluralistically attractive, but further consideration gives rise to concern. To posit that law should respond to, and respect the plurality of, narratives assumes that different narratives have an equal opportunity to articulate themselves, and to be understood. But surely this is a formal conception of equality that ignores the inequalities of differently situated "language games." The "narrative" of fasting based on the Brehon legal tradition is simply "untranslatable" and unintelligible within a discursive regime that has been colonized by a common law juridical psyche. To call on law to surrender its hegemonic position is like asking a monopoly to voluntarily surrender the marketplace pre-eminence that is its very *raison d'être*.

Thus, it seems that somewhere along the way power — or at least a certain type of power, the old-fashioned, relatively unsophisticated, instrumentalist form of power as coercion, duress and violence — has been factored out of the Lyotardian formula. How else is one to explain his curious equation of fighting with game playing,²⁷⁴ rather than domination, force and death. Law is a language game like no other: winning is all important when the stakes are life or death.

To avoid this problem Lyotard attempts to delimit the scope of his thesis of "language games." However, it is a limitation that, as I shall point out, is unjustified within even his own terms of reference:

I am excluding the case in which force operates by means of terror. This lies outside the realm of language games, because the efficacy of such a force is based entirely on the threat to eliminate the opposing player, not on making a better "move" than he [sic]. Whenever efficiency... is derived from a "Say or do this, or else you'll never speak again," then we are in the realm of terror, and the social bond is destroyed.²⁷⁵

Exactly. Law, in the current politico-historical conjuncture, is about the efficiency of dispute resolution when the social bond is destroyed. Law is a medium for the imposition of order when the incommensurability of social practices can no longer be controlled by other means. Law is but the constitutionalization of violence.²⁷⁶ The more problematic question,

274 *Condition*, *supra* note 19 at 10.

275 *Id.* at 46.

276 See Devlin, *Law's Centaur*, *supra* note 8. See also as Poulantzas points out:

State monopolized physical violence permanently underlies the techniques of power and mechanisms of consent, it is inscribed in the web of disciplinary and ideological devices; and even when it is not directly exercised, it shapes the materiality of the body upon which domination is brought to bear.

N. Poulantzas, *State, Power and Socialism* (London: NLB, 1978) at 8.

however, is: on what basis does Lyotard ground his claim that terror cannot be just another language game, or one of the rules of a particular narrative? Surely, this exclusivist stipulation is begging the question, packing the rules, so that Lyotard's conclusions are prefigured by his definition. Thus, it seems to me that a discussion of justice that promises to talk about "the practice of justice"²⁷⁷ but then fails to address the nature and role of law is of little assistance to those who are the victims of law because, overcome by juridical vertigo, it unpersuasively defines the problem out of existence.

This ambivalence in Lyotard's position manifests itself in more concrete forms elsewhere in his work, and has (potential) lessons for those who might look to (his version of) postmodernism in support of their progressive practice. In *Just Gaming*, Lyotard indicates that both the Vietnamese and Algerians had "the right to rebel"²⁷⁸ because the forces of occupation denied them entitlement to their own narratives. It would seem, then, that his theory of justice countenances a right of rebellion against terror. But surely rebellion, as war — and we are all somewhat familiar with the brutality of the Vietnamese and Algerian wars — seeks to eliminate the "other", to have as its primary concern that which Lyotard excludes from his theory of language games: the aspiration to win.²⁷⁹ Given that "terror" is integral to war and rebellion, what is the basis of the Lyotardian "right" to rebellion for an indigenous narrative?

Moreover, in his later book, *The Différend*, Lyotard appears to retreat from his thoughts on a right of rebellion when he asserts that, "proud struggles for independence end in young reactionary states."²⁸⁰ This is a very large empirical and normative claim, for which he provides no argument. But even if it is true, the question remains: What are the colonized to do? Talking it out — or agreeing to disagree — might be an attractive strategy for the philosopher, but it is a feckless strategy for decolonization.²⁸¹

Viewed in this light, Lyotard's conceptions of justice and injustice may be useful insofar as they help to reinforce the critique of authoritative power, and of the legitimizations that are offered for such power. However,

277 *Condition*, *supra* note 19 at 66.

278 *Gaming*, *supra* note 70 at 70.

279 *Id.* at 10.

280 *Differend*, *supra* note 70 at 181. For further indications of his ambivalences in relation to Algeria, see Lyotard, *Peregrinations*, *supra* note 60 at 26-27.

281 A similar concern seems to underlie Derrida's thinking when he argues that:

[N]ot only is there no kingdom of *différance*, but *différance* instigates the subversion of every kingdom. Which makes it obviously threatening [to] and infallibly dreaded by everything within us that desires a kingdom.

Margins, *supra* note 99 at 22. It seems to me that both Lyotard and Derrida have a legitimate concern: the perennial danger that the oppressed will, in turn, become an oppressor. While I would not want to argue that two wrongs make a right, politics is always a dangerous affair, and the colonized are, unfortunately, tainted by the power of the oppressor and therefore rarely innocent. (For example, during the course of the prisoners' protests, several prison officers were killed by the I.R.A.). But to leave colonization in its place because there are no guarantees hardly seems to be progressive or "revolutionary". And besides, historically, it is difficult to find a colonizer who has voluntarily surrendered its power.

they do not enable Lyotard to empower the dispossessed with a normative discourse or practice to advance their vision.

Derrida, in my opinion, fares somewhat, but not enormously, better. While it would be both a mistake, I think, and unfair, I am sure, to read Derrida as arguing that there are no extra interpretive practices,²⁸² his work in the main (and in spite of himself) remains hostage to the *metaphor* of the textuality of social relations and, as a consequence, is both enigmatic and distant from pressing practical engagements.

In a recently published essay — *Force of Law: The "Mystical Foundations of Authority"*²⁸³ — Derrida directly addresses the questions of law and justice. Derrida divides his analysis into three sections. The first is a discussion of the interaction between justice, violence, law and deconstruction. The second performs a deconstructive reading of an essay by Walter Benjamin²⁸⁴ by means of which Derrida further interrogates the relationship between law and violence. The third section, a postscript, considers the relationship between Benjamin's essay and Nazism.

There is much in Derrida's essay that is commendable in its "problematization of the foundations of law, morality and politics."²⁸⁵ Central to Derrida's argument is the disassociation of "law" and "justice" on the basis that the former is deconstructible whereas the latter is not:

1. The deconstructibility of law ..., of legality, legitimacy or legitimation ... makes deconstruction possible.
2. The undeconstructibility of justice also makes deconstruction possible, indeed is inseparable from it.
3. The result: deconstruction takes place in the interval that separates the undeconstructibility of justice from the deconstructibility of *droit*....²⁸⁶

Or, as he states more pithily, "deconstruction is justice."²⁸⁷ The justification for this proposition is to be found in Derrida's vision of justice which he variously conceptualizes as "an aporia", "the incalculable", "the undecidable", "an experience of the impossible", "infinite" and "heterogeneous and heterotropic."²⁸⁸ In short, for Derrida, justice is an always already deferred, an ungraspable yearning, a "yet-to-come (avenir)."²⁸⁹

The advantage of this sundering of the conventional identification of law with justice is that it enables him to advance the proposition that "law [is

282 Derrida has claimed that deconstruction is a "practico-political" stance, J. Derrida, *The Post Card: From Socrates to Freud and Beyond*, trans. A. Bass, (Chicago: University of Chicago Press, 1987) at 508 and he has explicitly recognized that there is "a field of non-discursive forces". *Margins*, *supra* note 99 at 329. See also Norris, Derrida, *supra* note 100 at 122, 142.

283 *Force*, *supra* note 10.

284 W. Benjamin, "Critique of Violence" in P. Dementz, ed., *Reflections: Essays, Aphorisms and Autobiographical Writings* (New York: Schocken Books, 1986) at 277.

285 "Force", *supra* note 10 at 931.

286 *Id.* at 945.

287 *Id.*

288 *Id.* at 947, 959, 963.

289 *Id.* at 993.

a] violence without ground",²⁹⁰ or, as one commentator has more graphically suggested, "law is a masquerade of violence."²⁹¹ At times, and seemingly at odds with Lyotard, he even appears (obliquely) to believe in a right to revolution.²⁹² Moreover, and as against those who charge deconstruction with nihilism, throughout the essay Derrida is at pains to emphasize the connection between deconstruction and "intervention", "transformation" and "emancipation."²⁹³ He even suggests that deconstruction can engender a "sense of responsibility without limits."²⁹⁴

However, despite the fact that Derrida's essay serves reasonably well as a "critique of juridical ideology, a desedimentation of the superstructures of law",²⁹⁵ it seems to me that the self-confessed "guardedness"²⁹⁶ of his approach renders him incapable of justifying any of these responsible, interventionist, transformative and emancipatory activities. Even more importantly, I fear that aspects of his argument preclude the oppressed from adopting a discourse by which they can justify their resistance, their revolutionary behaviour.

As a logical consequence of his always and already deferred conception of justice (his thesis that justice is a future possibility always presently impossible) Derrida argues that "one cannot speak *directly* about justice...say 'this is just' and even less 'I am just', without immediately betraying justice."²⁹⁷ Now, in one sense, given the forum and the audience²⁹⁸ (as well as the principle of charity in interpretation), what Derrida is arguing has merit in that it appears to be an attempt to curtail the self-righteous conceit and arrogance of the already powerful. But (perhaps unintentionally) excluded from his analysis when he advances such a claim is "an/other" constituency: the disempowered. So what are the victims of oppression to do if they cannot directly appeal to justice? Can they provide any *justification* for their anti-colonial struggles that would not be subject to the *tu quoque* argument? Thus, ironically, it seems that the powerful come out ahead even when they are the subject of Derridean critique because their hegemony enables them to structurally determine the terrain of his discourse. In his haste to thwart the powerful, Derrida, with an excessive stroke of his deconstructive pen, may further disempower the already oppressed.

Furthermore, there is a curious — or perhaps more accurately, disturbing — process at work in Derrida's thesis that deconstruction is justice. It seems to me that in order to retain the integrity of his favoured (non)concept, "deconstruction", Derrida makes it a cognate of "justice." "Justice" — like

290 *Id.* at 943.

291 D. Cornell, "The Violence of the Masquerade: Law Dressed Up as Justice" (1990) 11 *Cardozo L. Rev.* 1047.

292 "Force", *supra* note 10 at 993.

293 *Id.* at 931, 933, 954.

294 *Id.* at 953.

295 *Id.* at 941.

296 *Id.* at 929.

297 *Id.* at 935, 963.

298 J. Derrida, "Force of Law: The 'Mystical Foundations of Authority'" (Paper presented as keynote address, Benjamin Cardozo Law School, Yeshiva University, New York).

deconstruction — is then said to be “undeconstructible.” But in order to maintain this stance, “justice” is then blessed with an elusive and evasive quality, reified almost (transcendental even?), so that it cannot be “betrayed.”²⁹⁹ The consequence is that “justice” is beatified; it is given a value superior to that of those who might need to invoke it: the dispossessed. Such seems to be the logic of what might be called “the fear of besmirchment.”

To be fair to Derrida, he is aware of the problem of immediate political praxis and he counsels that an adoption of his conception of justice “cannot and should not serve as an alibi for staying out of juridico-political battles, within an institution or a state or between one institution or state and others.”³⁰⁰ But how is one to know that s/he is doing the right thing in the absence of justice? How is one to determine if one’s acts are interventionist, transformative and responsible? The only direction we receive from Derrida that appears to go beyond this formalistic call to participate is his comment that “[n]othing seems to me less outdated than the classic emancipatory ideal.”³⁰¹ But, in a sense, this only further complicates matters for even the most superficial familiarity with the history of political thought recognizes that “emancipation” is a profoundly indeterminate term, invoked, for example, by Marxists and conservatives, colonizers and the colonized. To replace the concept of “justice” with the essentially contested concept of “emancipation”, without any substantiation of what the latter term might mean, seems to be an unfortunate shell game.

These concerns are intensified when we review Derrida’s deconstruction of Benjamin’s *Critique of Violence*. The primary focus of Derrida’s deconstruction is the distinction Benjamin draws between “founding” (law-giving) and “conserving” (law-preserving) violence, the former which Benjamin appears to justify, the latter which he appears to condemn. Derrida’s familiar point is that such a sharp distinction is indefensible in that each form of violence contaminates the other³⁰² and, consequently, that it is impossible to categorically justify one but not the other. Derrida’s argument seems to be that the quest for origins or foundations is but a manifestation of the *bête noir* of western thought: logocentrism, the metaphysics of presence. But surely, those who are involved in anticolonial struggles need to be able to point to an alternative origin, a competing discourse (in this case Irish self-determination) to justify their revolutionary practices.³⁰³

Derrida, however, seems to suggest that this is an illegitimate position to adopt because if such movements are truly revolutionary then their

299 “Force”, *supra* note 10 at 935.

300 *Id.* at 971.

301 *Id.* at 971.

302 *Id.* at 997, 1007.

303 “Origins” in this sense is not to be understood as essential or foundational in a philosophical sense. Origins, as used here, is a historicized concept, as part of an oppositional discourse, as a dangerous politicizing supplement: “as a revolutionary chance in the fight for the oppressed past.” W. Benjamin, *Illuminations* H. Arendt, ed., trans. H. Zohn (New York: Brace and World Inc., 1968) at 253-264.

discourse and violence depend upon the achievement of that which they aspire to, something that is not yet. Justification, Derrida argues, can only be *ex post*:

A "successful" revolution, the "successful foundation of a State (in some what the same sense that one speaks of a "felicitous" performative speech act) will produce *après coup* what it was destined in advance to produce, namely, proper interpretive models to read in return, to give sense, necessity and above all legitimacy to the violence that has produced, among others, the interpretive model in question, that is, the discourse of self-legitimation. Examples of this circle, this other hermeneutic circle, are not lacking ... whether it's a question of what happens from one neighbourhood to another, one street to another in a great metropolis or from one country or one camp to another around a world war in the course of which States and nations are founded, destroyed or redesigned. There are cases in which it is not known for generations if the performative of the violent founding of a state is "felicitous" or not.³⁰⁴

I think that this is where Derrida's reliance on hermeneutic metaphors encounters profound problems. Revolutionary practice is worlds away from "performative speech acts." Revolutionaries, in order to have any chance of success, require an immediate — even if contaminated — discourse to mobilize support for their emancipatory practice. Revolutionaries have to know, and they have to be able to convince their potential supporters, that they are justified in their actions. People who go on hunger strike may require the discourse of justice not only to galvanize solidarity with their communities, but also to reflect upon the appropriateness of their own decisions. They need to be able to directly argue that their acts are "just." The oppressed need justice in a multitude of ways.³⁰⁵ Derrida's elusive theory of justice denies them that resource.

The foregoing references to "solidarity" lead to a final potential problem with Derrida's essay. At several points, Derrida argues that the concern of justice is with "singularity" and "individuals"³⁰⁶ which, in my opinion, is problematic for two reasons. First, it fits very uncomfortably with Derrida's propositions elsewhere that seem to underplay the concept of "the subject." This is a point I shall return to in the next section. Second, the valorization of singularity tends to exclude group-based concerns (for example, nationalism) and therefore potentially devalues solidarity.³⁰⁷ This will be discussed further in Part V, D.

In sum, as a method of understanding, explanation and politicization, I

304 "Force", *supra* note 10 at 993.

305 See also V. Havel, "The Power of the Powerless", J. Keane, ed., *The Power of the Powerless* (White Plains: M.E. Sharpe, 1985).

306 "Force", *supra* note 10 at 949, 955.

307 In one of these references to singularity, Derrida does in fact mention "groups", but qualifies it with the modifier "irreplaceable", without elaborating on the significance of such a term, *id.* at 949. It does suggest that groupism or groupist-based claims in and of itself or themselves is/are not a concern of justice.

would argue that while the characterization of socio-legal relations in literary terms may have its strengths, it also has its weaknesses. Having put "the Word in its place",³⁰⁸ both Derrida and Lyotard seem to have become trapped in the metaphor of the text, allowing it to take on a dynamic of its own, conceding to it a potentially canonical status, thereby infusing their analyses "with the ethico-political ambiguity" of which Derrida accuses Benjamin.³⁰⁹ In other words, while discourse is a manifestation of power, it is not the only manifestation of power, and indeed is, in many ways, circumscribed and constituted by instrumental and institutional power. Accordingly, while supplements may be dangerous to the dominant discourse, they may be even more dangerous for those who articulate them; for, the price of speaking as "the other" may be the destruction of the speaker. The differential play of "endless ... reversals and counter-reversals"³¹⁰ comes to an abrupt halt when one of the reversals becomes too dangerous. In short, death makes a difference.

B. Agency, Power and (Un)Truth

There is, of course, an obvious postmodern response to the critique I have advanced: that my argument privileges consciousness and therefore smacks of a revivalist and revolutionary voluntarism that is dependent upon an idealistic and nostalgic humanism. Nationalism, after all, is but a by-product of modernity and modernist thinking³¹¹ and its embracement can lead to a crude nativism.³¹² More specifically, the postmodernist counterargument might suggest that the fasting prisoners were but the "effect",³¹³ "site",³¹⁴ determination or symptom of the various discourses and structures of Irish Republicanism: "slave(s) of language."³¹⁵ They were inscriptions of a deviationist subtext, not authors of their destiny. De Man would call my reversal of cause and effect metalepsis.³¹⁶

Derrida may be particularly skeptical of the sort of argument which I am attempting to advance given that he has been quite explicit in his displacement of "the subject." For example, at one point, he argues that "the subject" is but "the play of linguistic or semiological *différance*"³¹⁷ and, at

308 D. Hebdige, *Hiding in the Light: On Images and Things* (New York: Routledge, 1988) at 226.

309 "Force", *supra* note 10 at 1025.

310 "Deconstructive Practice", *supra* note 24 at 764.

311 See e.g., J. Lyotard, "Rudiments Papiers" (1977) at 145 quoted in Bennington, *supra* note 251 at 52-53.

312 T. Niranjana, *Siting Translation* (Berkeley: University of California Press, 1992) 166-169.

313 Derrida, for example, posits that consciousness is "a determination" or an "effect", *Margins*, *supra* note 99 at 16. For a similar construction of the subject see *Positions*, *supra* note 94 at 122 and *Speech*, *supra* note 99 at 147. Foucault argues that "the man described for us, whom we are invited to free, is already himself the effect of a subjection much more profound than himself." M. Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Pantheon Books, 1977) at 30.

314 Ferry & Renaud, *supra* note 243 at 209; Schlag, "Le Hors", *supra* note 24 at 1671.

315 J. Lacan, *Écrits: A Selection*, trans. A. Sheridan (New York: Norton, 1977) at 148.

316 P. De Man, *Allegories of Reading: Figural Language in Rousseau, Nietzsche, Rilke and Proust* (New Haven: Yale University Press, 1979) at 274.

317 *Speech*, *supra* note 99 at 146.

another, he posits that "the authority of representation constrains us, imposing itself on our thought through a whole dense, enigmatic and heavily stratified history. It programs us and precedes us."³¹⁸ More expansively:

[T]he subject (in its identity with itself, or eventually in its consciousness of its identity with itself, its self consciousness) is inscribed in language, is a 'function' of language, becomes a *speaking* subject only by making its speech conform — even in so-called 'creation', or in so called 'transgression' — to the system of the rules of language as a system of differences, or at the very least by conforming to the general law of *différance*.³¹⁹

And, with admirable antilogocentric consistency, Derrida confesses his own lack of agency by denying that he chooses interpretations, rather "the interpretations select themselves."³²⁰

In relation to something like the hunger strike, this espousal of structural determinism, this deconstructive effacement of the distinction between subject and object, is an attractive thesis in that it seems to explain that which is apparently so eccentric as to be inexplicable: the self-sacrifice of the self in full knowledge of the likelihood of death. However, the problems with an adoption of this postmodern approach to the question of the subject are twofold. First, it is insufficiently oppositional in its politico-juridical orientation because it fails to analyse the ways in which even the oppressed can find room to manoeuvre, and therefore resist. Second, by trivializing oppositional agency it potentially reinforces continued oppression. I will elaborate on both of these arguments in turn.

1. Explaining Room to Maneuver

My first concern about an excessively passive theory of the subject suggests that, in its best light, postmodernism provides little account of how the oppressed actually determine their condition, make choices and resist domination.³²¹ In its worst light, it considers the oppressed to be dupes or

318 J. Derrida, "Sendin: On Representation" (1982) 49 *Social Research* 294 at 304.

And Baudrillard harmonizes:

Far from the individual expressing his needs in the economic system, it is the economic system that induces the individual function and the parallel functionality of objects and needs. The individual is an ideological structure, a historical form correlative with the commodity form (exchange value) and the object form (use value). The individual is nothing but the subject thought in economic terms, rethought, simplified and abstracted by the economy. The entire history of consciousness and ethics (all the categories of occidental psychometaphysics) is only the history of the political economy of the subject.

J. Baudrillard, *For a Critique of the Political Economy of the Sign* (St. Louis, Mo.: Telos Press, 1981) at 133.

319 *Margins*, *supra* note 99 at 15. See also *Positions*, *supra* note 94 at 28-29.

320 J. Derrida, "Interview" (1980) 14 *Literary Rev.* 21.

321 For further discussions of resistance see e.g., B. Moore Jr., *Injustice: The Social Bases of Obedience and Revolt* (New York: Pantheon Books, 1978); Scott, *supra* note 127; P. Ewick & S. Silbey, "Conformity, Contestation and Resistance: An Account of Legal Consciousness" (1992) 26 *New Eng. L. Rev.* 731; A. Sarat, "'The Law is All Over': Power, Resistance and the Legal Consciousness of the Welfare Poor" (1990) 2 *Yale J. Law & Hum.* at 343.

automatons. The sort of propositions advanced by Derrida run the risk of oversimplifying the relationship between agency and structure, of merely inverting the humanist hierarchy of agency over structure and, therefore, simply mimicking it.³²² But perhaps this goes too far and what is required is mediation between structure and agency, so that Liberal humanism's ontological fetishization of the sovereign subject is not replaced by an excessive and reactive anti-humanism,³²³ thereby causing postmodernism to slip into an anti-theory of self-hood and agency.

There is a difference between a "sovereignself", a "situated self" and a "saturated self." The sovereign vision of the self endorses an *a priori* conception of subjecthood, where a person is assumed to be solitary, unified, rational and voluntaristic: "man [sic] as the master and possessor of the totality of his actions and ideas."³²⁴ Such an ontology dovetails with a liberal humanist philosophy. The saturated conception of the self endorses a concatenated vision of subject, where the person is assumed to be a forcefield of structural determinants and discursive practices.³²⁵ Such a postmodernist ontology calls into question the possibility of self-reflective, self-constitution. The situated vision of the self advocates an embedded conception of the subject which allows for the possibility of consciousness and self-constitution in the context of the matrix of societal and cultural influences. This vision of the subject — which might also be called a "protean subject" — acknowledges the significance of structural factors in the "development" of the subject, but still maintains a sense of the subject as a potential, "the infinite within the finite."³²⁶ Such a reconstructed conception of the subject has no necessary substantive characteristics (and in that sense it can be said to be ontologically thin) and is responsive to formative discourses (and in that sense it can be understood as non-individualistic and relational) but can still be understood as potentially agentic.³²⁷

In other words, what is required is a relational and historicized theory of the subject and a relational and historicized conception of agency. Such an ontology envisions the subject as neither the centre of the universe, nor a mere pastiche of social forces, but a subject who is both constituted and constitutive.³²⁸

322 It also suggests a return to a dualistic either/or which is normally anathema to deconstructive thought.

323 Ferry & Renaut, *supra* note 243.

324 *Id.* at xvi.

325 For example, Baudrillard argues that so pervasive is the power of the object, all our options are precoded or predetermined, *Simulations*, *supra* note 42 at 111-117.

326 R.M. Unger, *Passion: An Essay on Human Personality* (New York: Free Press, 1984).

327 But see *contra*, "Le Hors", *supra* note 24 at 1668-1674 for a critique of what Schlag calls "the relatively autonomous self".

328 Seyla Benhabib posits that, "vis a vis our own stories we are in the position of author and character at once", "Feminism and Postmodernism: An Uneasy Alliance" (1991) 11 *Praxis International* 137 at 140.

For the sake of completeness it should be pointed out that, on occasion, Derrida hints at such a situated conception of the subject. See e.g., his proposition that "(t)he subject is absolutely indispensable. I don't destroy the subject, I situate it", E. Donato & R. Macksey, eds., *The Structuralist Controversy: The Languages of Criticism and the*

These abstract propositions may have some concrete purchase. There is little doubt that Republicanism as a discourse is an important factor in Irish life, but it is not so determinative or constraining as postmodernists might have us believe. Republicanism in the late 1970s and early 1980s underwent a significant transition from its traditional politically abstentionist and exclusively militaristic form, to a politically participatory and more social movement. Postmodern methodology might enable us to track this transition by encouraging us to look at the microdetails of this development. In particular, we would have to analyse the changing subjectivities and emerging ideologies of actors such as Gerry Adams³²⁹ and Bobby Sands³³⁰ — Irish, Belfast-reared, male, working class, (a)religious — and the differences of opinion within the Army Council of the IRA. Most particularly, we can learn from “the comms” that were smuggled out of the H-Blocks prior to, and during, the fast. These are perhaps the classic postmodern deviationist microtexts in that as much as 4,000 words³³¹ could be written with a biro refill tube on one cigarette paper or “stamped government property toilet roll.”³³² These “hidden transcripts”³³³ would then be smuggled to the outside world through bodily orifices — themselves penetratingly surveilled³³⁴ — thereby enabling the prisoners to implement a change of direction and determine a future agenda for Republicanism.³³⁵ By means of these “comms” the prisoners disseminated an alternative political vision for the IRA and even outlined the most appropriate strategies of mobilization, from massive poster campaigns to the nomination of fasting prisoners as election candidates.³³⁶

Sciences of Man (Baltimore: Johns Hopkins Press, 1970) at 271. The problem, as I have noted in the text, is that the preponderance of his analyses — many of which were written after this comment — cut in the other direction.

329 In recent years, Adams has become increasingly explicit about the socialist orientation of Sinn Féin. “We believe that a system of socialism in Ireland should be tailored to meet Irish needs”, interview with Magill, March 1989, Dublin. See also, Keena, *supra* note 126.

330 Feldman, *supra* note 138 at 162-163, 213 makes some efforts in this direction.

331 *Id.* at 199.

332 Sands, “Things Remain the Same — Torturous”, *Skylark*, *supra* note 1 at 131.

333 Scott, *supra* note 127 at xii, 25.

334 So creative were the prisoners that they also smuggled in tobacco, biro pen refills, flints, quartz crystal radios, cameras and even a gun (suitably broken down) via their orifices. The parts of their bodies adapted to these practices of resistance included their ears, nose, mouth, navels, foreskins, pubic hair and, most commonly, anus. See Bishop & Mallie, *supra* note 123 at 276 and Beresford, *supra* note 3 at 63.

335 Feldman, *supra* note 138 at 161-163, 219-222.

336 See for example, the “comm” reproduced in Clarke, *supra* note 154, Appendix I at 242. Another point may also be worth noting. Like many revolutionary organizations, traditionally, the IRA has been highly centralized and undemocratic in its structure. “Volunteers”, as passified subjects, take orders; they do not set policy. So, too, do prisoners. But the imprisonment period of the 1970’s engendered a transformation of the form of the organization and the prisoners became more agentic. Through their conversations, debates and reflections on “the struggle”, the prisoners rejected the idea that the vanguard elite of the Army Council of the IRA in its conventional militaristic wisdom knew best. Consequently, the IRA became more open, democratic and participatory, enabling the prisoners to envision new strategies, creating in embryonic form an innovative political structure. This would eventually filter out and up to the leadership and eventually re-orient the political strategy and reconfigure the political processes of the republican movement.

As the late 1970s wore on, it became increasingly apparent to the prisoners that, despite some outside support, their various protests were not going to change the British state's determination to impose criminalization, nor generate further support for "political status" in the nationalist community. The terrain of struggle was significantly enlarged when the prisoners, against the advice of the Army Council, decided that by means of a hunger strike there could be a galvanization of the nationalist community around republicanism. In other words, it was determined by the prisoners that the traditionally sanctified unidimensional military campaign could not succeed. Although the first couple of weeks of the fast expanded the support network, the majority of the nationalist community remained leery. The key breakthrough occurred when it was decided (once again by the fasting prisoners)³³⁷ that the traditional republican position of abstentionism from political campaigns should be abandoned and it was proposed to run Bobby Sands as the candidate for the British Parliament in the constituency of Fermanagh-South Tyrone. This strategy forced the issue within the nationalist community as to whether it would split the vote between the republican, Sands, and the Social Democratic and Labour Party (SDLP) candidate,³³⁸ and thereby let the single Unionist candidate win. The SDLP backed down, giving the full nationalist stage to Sands. The result was that on April 9th, 1981, a self confessed IRA volunteer was elected to the British Parliament with 30,492 votes. There was a boomerang effect. Criminalization as a strategy of delegitimization was in shambles, and the British could no longer credibly claim that the IRA had no local support.³³⁹

Furthermore, the election of two more of the fasting prisoners in a general election in the Republic of Ireland a few months later was crucial to the defeat of the governing party, Fianna Fail.³⁴⁰ Moreover, with Sands' election to Parliament, international attention was focused not only on the strike, but on the whole issue of Britain's occupation of Northern Ireland.³⁴¹ Finally, the strike and the events around it indicated that the traditional Republican stance of political abstentionism in deference to militarism was

337 Bishop & Mallie, *supra* note 123 at 291.

338 The S.D.L.P. is the preferred party of liberal nationalists. It advocates a constitutional route to a re-unification of Ireland.

339 British interpretations have always attempted to portray the IRA as marginal to the nationalist community of Northern Ireland, devoid of popular support. See e.g., P. Jay, Letter to the Editor, *Washington Post*, (November 1978), describing the IRA as a "small group of armed terrorists", quoted in Coogan, *Blanket*, *supra* note 157 at 171. Or again, even after Sands' election to the British Parliament, the British Foreign Secretary, Lord Carrington, continued to protest, "Do not tell me the IRA represents people in Northern Ireland. ... They have no status, they are not accepted by anyone", quoted in Beresford, *supra* note 3 at 97. At the same time, however, the Foreign Office, through an agent called Mountain Climber, was clandestinely negotiating with the leadership of the IRA to see if a resolution to the hunger strike could be achieved. *Id.* at 3-5, 225-230, 249-254.

340 Kelley, *supra* note 165 at 341; Coogan, *IRA*, *supra* note 159 at 631.

341 Curtis, *supra* note 167. For a more detailed account of international support and media coverage, see Feehan, *supra* note 166 at 20-23, 139. It might also be worth noting that during the hunger strike, financial support for the IRA from the United States is estimated to have increased from approximately \$160,000 per year to \$888,000. Bishop & Mallie, *supra* note 123 at 235.

misconceived. The fast served as a catalyst for Sinn Féin to participate in subsequent local, general and European elections where it obtained between 10.2% and 13.4% of the overall vote, or between 25% to 40% of the Nationalist vote in Northern Ireland.³⁴² Small wonder then that the British foreign office, when briefing young diplomats on Irish history, considers the hunger strike to be "an unmitigated disaster."³⁴³ The prisoners negated the negation.³⁴⁴ Resistance though marginal, suitably engendered, can erupt in phenomenal ways.³⁴⁵

This apprehension about the progressive political utility of deconstruction and postmodernism is intensified when one reviews some of the more explicitly "political work" of Derrida and Baudrillard: the former is disturbingly equivocal as to the political ramifications of his own project and the latter endorses a dangerous political quietism. Because of their passive conception of the subject, neither theorist seems to be sufficiently attuned to what I would describe as the noisy agency of the subjugated, but not totally erased, subject.

It might be contended that it is unfair to complain about Derrida's political progressivism, given that in 1983 he wrote a short essay which challenged not only apartheid but also the West's complicity in its perpetuation.³⁴⁶ Moreover, apparently in reply to those who have voiced concerns about the political insignificance of deconstruction, he has argued (with uncharacteristic clarity) that:

[W]hat is somewhat hastily called deconstruction is not, if it is of any consequence, a specialized set of discursive procedures, even less the rules of a new hermeneutic method, working on texts or utterances in the shelter of a given and stable institution. It is also, at the very least, a way of taking a position, in its work of analysis, concerning the political and institutional structures that make possible and govern our practice, our competencies, our performances. Precisely because it is never concerned only with signified

342 For discussions of Sinn Féin's subsequent electoral forays see Clarke, *supra* note 154 at 211-219; Coogan, *IRA*, *supra* note 159 at 632-633; Keena, *supra* note 126 at 106, 109, 120, 127, 132-134.

343 Beresford, *supra* note 3 at 331.

344 This account of the mobilization of nationalists also challenges Baudrillard's assertion that, "indifference of the masses is their true, their only practice ... the brute fact ... of a refusal to participate in the recommended ideas, however enlightened". Or again, his proposition that "at no time are the masses politically or historically engaged in a conscious manner. They have only ever done so out of perversity, in complete irresponsibility", *Shadow*, *supra* note 42 at 14, 38.

345 The costs are, of course, potentially very high. Not only did ten prisoners die, four of the organizers of the National H Block/Armagh Committee were assassinated and three others were seriously wounded. Nine prison officers were killed by the IRA in the latter half of the 1970's.

346 J. Derrida, "Racism's Last Word" (1985) 12 *Critical Inquiry* 290. This essay generated a critical response from A. McIntock & R. Nixon, "No Names Apart: The Separation of Word and History in Derrida's 'Le Dernier Mot du Racism'" (1986) 13 *Critical Inquiry* 140. In turn, this received a very harsh — even vicious — response from Derrida: "But, Beyond..." (1986) 13 *Critical Inquiry* 155 [hereinafter "But Beyond"]. This last essay is particularly confusing in that Derrida invokes and relies upon concepts such as "truth", "countertruth", "reality", and even a most curious "most evident meaning", *id.* at 166, 156, 160.

content, deconstruction should not be separable from this politico-institutional problematic and should seek a new investigation of responsibility, an investigation which questions the codes inherited from ethics and politics. This means that too political for some, it will seem paralyzing to those who only recognize politics by the most familiar road signs.³⁴⁷

While this seems to be an unequivocal articulation of the political ramifications of deconstruction, it is, in my opinion, vitiated in two ways. First, the comment lacks any specificity as to what might qualify as an acceptable "position" or appropriate "responsibility." The abstraction of the argument renders it indeterminate and therefore potentially as supportive of oppressive political practices as liberationist political practices. Second, on what basis are we to justify any "position" that we might "choose" — or is it that such positions might "choose" themselves³⁴⁸ — if deconstruction has as its primary purpose displacement and the proliferation of multiplicity?

Indeed, despite these claims of deconstruction's political relevance, on other occasions Derrida has also expressed reservations: "I must confess that I have never succeeded in directly relating deconstruction to existing political programmes."³⁴⁹ But, he then proceeds to argue that this does not require inaction or non-commitment:

But the difficulty is to gesture in opposite directions at the same time: on the one hand to preserve a distance and suspicion with regard to the official political codes governing reality; on the other, to intervene here and now in a practical and *engaged* manner whenever the necessity arises. This position of dual allegiance, in which I personally find myself, is one of perpetual uneasiness. I try where I can to act politically while recognizing that such action remains incommensurate with my intellectual project of deconstruction.³⁵⁰

And to be fair, it must be acknowledged that Derrida the interventionist³⁵¹ has taken some progressive political positions. For example, in 1981 he visited Prague to meet with some dissident intellectuals. For his troubles he was arrested and jailed for three days. But what did Derrida the deconstructionist philosopher make of his experience? As one commentator reports, Derrida:

347 Quoted in R. Bernstein, *The New Constellation* (Cambridge: Polity Press, 1991) 186-187. See also Derrida, *Positions*, *supra* note 94, where he proclaims, "I have always insisted on the value practice", *id.* at 89.

348 See *infra* V, B.

349 Dialogue with Jacques Derrida in R. Kearney, ed., *Dialogues with Contemporary Continental Thinkers: The Phenomenological Heritage* (Manchester: Manchester University Press, 1984) at 119.

350 *Id.* at 120. The last sentence of this quotation displays a couple of interesting and contestable assumptions. First, the posposition "I try where I can" seems to resurrect the voluntaristic sovereign subject. Second, Derrida also seems to assume that there is a sharp distinction between the political and the non-political, that his philosophy is apolitical. Much of contemporary progressive theory would reject such a distinction and endorse the maxim "that it is all politics".

351 "Deconstruction, I have insisted, is not *neutral*. It *intervenes*". Derrida, *Positions*, *supra* note 94 at 93 (emphasis in original).

insisted on the difficulty there is in making an ethico-political gesture (supporting the resistance of the Prague philosophers, who demand respect for human rights ... and articulate that with a philosophy of the subject, the person, individual liberty etc.) coincide with a philosophical labour governed by the necessity of deconstructing precisely such philosophemes.³⁵²

Viewed in this light, political prisoners in British occupied Northern Ireland could expect little in the way of support from "revolutionary" deconstruction, except perhaps a passing mention in a law review article.³⁵³

Nor is Derrida alone in his quietism, in the retreat from the discussion of praxis.³⁵⁴ Baudrillard, too, has suggested that given the pervasiveness of hyperreality and hyperconformity,³⁵⁵ "withdrawing into the private could well be a *direct defiance of the political*, a form of actively resisting political manipulation."³⁵⁶ For Baudrillard "indifference", inertia and non-participation are the only available "counter-strategies".³⁵⁷

This revolution by involution ... proceeds by inertia and not from a new and joyous negativity. It is silent and involutive — exactly the reverse of all speechmaking and consciousness raising. It has no meaning, it has nothing to say to us.³⁵⁸

Yet again, events in the H-Blocks problematize the validity and utility of such a celebration of the politics of silence. It was not that the prisoners had "nothing to say"; rather, it was that they had "no say."³⁵⁹ As pointed out

352 T. Keenan, "Reading Foucault on a Bias" (1987) 15 *Political Theory* 5 at 19.

353 "Force", *supra* note 10 at 997.

354 Consider the following quotation from Lyotard on his thesis of "justice as paralogy":
And the idea that I think we need today in order to make decisions in political matters cannot be the idea of totality, or of the unity, of the body. It can only be the idea of multiplicity or of a diversity. Then the question arises: How can a regulatory use of this idea of the political take place? How can it be pragmatically efficacious...? Is a politics regulated by such an idea of multiplicity possible? Is it possible to decide in a just way in, and according to, this multiplicity? And here I must say that I don't know.

Lyotard, *Gaming*, *supra* note 70 at 94.

355 Baudrillard, *Shadow*, *supra* note 42 at 41.

356 *Id.* at 39 (emphasis in original).

357 *Id.* at 105.

358 *Id.* at 49. And, with perfect consistency, he has made this apolitical project his personal stance, freely admitting his own political disaffection, disenchantment, marginality and irrelevance, J. Baudrillard, "Intellectuals, Commitment and Political Power" (1984-85) 11 *Thesis Eleven* at 166.

On occasion, Derrida also espouses the embracement of silence. For example, in his support of Art Against Apartheid, he concludes, perhaps a little melodrammatically:

Beyond a continent whose limits they point to...the paintings gaze and call out in silence. And their silence is just. A discourse would once again compel us to reckon with state force and law.... This silence calls out unconditionally; it keeps watch on that which is not yet, and on the chance of still remembering some faithful day.

Derrida, *But Beyond...*, *supra* note 346 at 299.

359 M. Henderson, "Speaking in Tongues: Dialogics Dialectics, and the Black Woman Writer's Tradition", *Theorize*, *supra* note 52, 144 at 151. As a father of a fasting prisoner said, prior to his son's death, "My son is no dupe, he understands clearly what

previously, one reason the British government sought to enforce the cell system of incarceration was to undermine the collectivism and solidarity fostered in the dormitory-type cages of Long Kesh. The H-Blocks were originally designed to accommodate one prisoner per cell and prisoners, on entering, for the first year or so, were subjected to a rigorous regime of silence:³⁶⁰ communication with their colleagues was prohibited. Such a strategy of isolation and individualization was tailored to reinforce the project of criminalization. "Solitude", as Foucault reminds us, "is the primary condition of total submission."³⁶¹ But rather than being "dumb like beasts",³⁶² the prisoners resisted, both instrumentally and structurally. Instrumentally, they began to communicate with each other by tapping on the heating pipes, exchanging "comms" at the weekly mass (one of the few opportunities for interaction) and by gradually reviving the Irish language. Structurally, the nature of the "dirty protest" forced the prison authorities to periodically hose down the cells to prevent diseases. Consequently, one of the arms of the H had to be kept vacant in order to relocate the prisoners to that section while the other was being cleaned.³⁶³ This, in conjunction with the very high imprisonment rates generated by the Diplock court system,³⁶⁴ created an overpopulation problem for the prison administration which was "solved" by putting two prisoners in most cells. The result was to undermine the original plan for a regime of silence. It was this reconsolidation of collectivism that engendered the group solidarity necessary to sustain the "blanket", "no wash" and "dirty" protests and, eventually, to plan and pursue the hunger strike. It was only during the fast itself that the silence re-emerged, for, as one ex-prisoner has put it:

The slagging and practical joking stopped during the hunger strike. I minded Bobby [Sands] saying the joking shouldn't decrease. But it was dead artificial. There was no fucking singsongs. We tried but it wouldn't work. Bobby had asked us not to get into the silence. We were all in mourning for the duration.³⁶⁵

Moreover, and as a further example of how the prisoners refused to be passive, we can consider how they mobilized time against space.³⁶⁶ As previously pointed out, imprisonment generally, and the H-Blocks

he is doing and the consequences of his action", quoted in Clarke, *supra* note 154 at 184.

360 Feldman, *supra* note 138 at 157.

361 Foucault traces the importance of isolation to English penological thought as far back as 1775. M. Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Pantheon Books, 1972) at 123-124, 237.

362 Baudrillard, *Shadow*, *supra* note 42 at 315.

363 Feldman, *supra* note 138 at 186.

364 *Supra* note 150.

365 Feldman, *supra* note 138 at 247. This is not to deny that there may be situations when silence may be the most appropriate and effective way of resisting, for example, during interrogation. See *id.* at 138. But to counsel, as Baudrillard seems to, the adoption of silence as an overall strategy would, I believe, be disastrous for progressive political practice.

366 For a further discussion of the relationship between time, space and resistance, see Sarat, *supra* note 321 at 347-348.

specifically, attempted to construct the prisoners' space in such a way as to undermine their capacity for resistance and to cut them off from the outside world. In partial response, the prisoners turned to time, or more precisely a lack thereof, to undermine this process of atomization. By embarking upon a hunger strike the prisoners mapped out a period of time, between sixty and seventy days, in which they were able to breach the enclosure of space to focus the attention of the outside world on their cause. As against a bureaucratic colonial space, they opposed human time, or more accurately, its finitude. As de Certeau points out³⁶⁷ the powerful "privilege spatial relationships ... [and] reduce temporal relations to spatial ones." Again, the prisoners inverted this hierarchy and asserted their power, if only temporarily, to indicate that even "total institutions"³⁶⁸ can be cracked open to politics.

Thus, to summarize my first reservation about postmodernism's conception of the subject, I would suggest that it is so theoretically flimsy that it is incapable of bearing the explanatory weight that is imposed upon it. Therefore, it is proposed that a more robust theory would see agency and discourse as mutually constitutive. However, one can only understand the degree and extent of that mutuality by actually studying specific situations in particular politico-historical conjunctures.³⁶⁹ A general theory of personhood will only reveal partial answers.

2. Complicity Through Trivialization

The second problem with the postmodern process of the "aestheticization of politics"³⁷⁰ is that it potentially may be complicit in the continuation of oppression in so far as it trivializes both experiences of injustice and acts that seek to remedy such injustices. In particular, I am concerned that Baudrillard's espousal of "hyperreality" and "simulation" may accrue to the

367 M. De Certeau, *The Practice of Everyday Life*, trans. S. Rendell (Berkeley: University of California Press, 1984).

368 E. Goffman, *Asylum: Essays on the Social Situation of Mental Patients and Other Inmates* (Chicago: Aldine Pub. Co., 1961).

369 This historicized and situated conception of agency dovetails with Marx's famous statement that:

[m]en [sic] make their own history, but they do not make it just as they please; they do not make it under circumstances chosen by themselves, but under circumstances directly encountered, given and transmitted from the past....

Supra note 9 at 300. See also, the feminist postmodernist, Scott's, proposition:

Treating the emergence of a new identity as a discursive event is not to introduce a new form of linguistic determinism, nor to deprive the subject of agency. It is to refuse a separation between "experience" and language and to insist instead on the productive quality of discourse. Subjects are constituted discursively, but there are conflicts among the discursive systems, contradictions within any one of them, multiple meanings for the concepts they deploy. And subjects have agency. They are not unified autonomous individuals exercising free will, but rather subjects whose agency is created through situations and statuses conferred upon them. Being a subject means being "subject to definite conditions of existence, conditions of the endowments of agents and conditions of existence." These conditions enable choices, although they are not unlimited.

J. Scott, "Experience" in *Theorize*, *supra* note 52, 22 at 34.

370 C. Norris, *The Truth about Postmodernism* (Cambridge, Mass.: Blackwell Publishers, 1993) at 17 [hereinafter *Postmodernism*].

benefit of those who wield dominant political power.³⁷¹

By portraying the hunger strike as merely a particular manifestation of hyperreality,³⁷² by interpreting it as yet another manifestation of “ubiquitous simulacra, pseudo-events”,³⁷³ Baudrillard may trivialize the commitment and political consciousness of the subject hunger strikers. Death, through starvation for over sixty days, is more than simulation; it is more than game playing; it is more than a spectacle in the politics of illusion. Death, I would argue, is an authentic³⁷⁴ and absolute act of resistance in which agency draws on its final resource to transgress against a pseudo-hegemonic politico-juridical regime.³⁷⁵ In other words, postmodernism unmodified may suggest too much complicity and not enough critique, an inability to distinguish between domination and resistance.³⁷⁶ It may be accurate to argue that we cannot know whether what the fasting prisoners sought was true in any transcendental sense, but that means neither that “truth... [has] ceased to exist,”³⁷⁷ nor that we should consider subjects as paralysed by “the spell of indecision,”³⁷⁸ nor that we have “nowhere to go.”³⁷⁹

371 Hartsock articulates another criticism that straddles both of my concerns when she argues:

Somehow it seems highly suspicious that it is at the precise moment when so many groups have been engaged in “nationalisms” which involve redefinition of the marginalized Others that suspicions emerge about the nature of the “subject”, about the possibilities for a general theory which can describe the world, about historical “progress”. Why is it that just at the moment when so many of us who have been silenced begin to demand the right to name ourselves, to act as subjects rather than objects of history, that just then the concept of subjecthood becomes problematic?

N. Hartsock, “Foucault on Power: A Theory for Women?” in Fraser & Nicholson, *supra* note 65, 157 at 163.

372 Smyth is getting at the same idea when he comments, “it might even be possible, in the ultimate post-modern scenario, to turn West Belfast into a theme park featuring staged riots and gun battles”, *supra* note 10 at 150. In fact, in my experience, this has already happened. In the North Belfast community where I grew up during the mid 1970’s there were frequent accounts of how American journalists, not alone but in particular, would pay children £5 to throw petrol bombs at the British army patrols just to get a good “shot”. In British occupied Northern Ireland, the throwing of a petrol bomb is considered to be causing utmost danger to the soldiers which entitles them to shoot back with plastic, rubber and lead bullets.

373 Hassan, *supra* note 40 at xvi.

374 For a discussion as to the ethical and political importance of salvaging the authenticity of anti-colonialist resistance from “the paralysing cynicism of post-structuralism”, see Binder, *Nazism*, *supra* note 20 at 1364-1372.

375 To be clear, my suggestion here is not a euphoric valorization of sacrifice and death, as Baudrillard occasionally verges on in both his “Symbolic Exchange and Death” in *Writings*, *supra* note 42 at 119-148, and his discussion of the Tasaday peoples of the Philippines in *Simulations*, *supra* note 42 at 13-17.

376 For an interpretation of postmodernism as a manifestation of the paradox of “complicity and critique”, see L. Hutcheon, *The Politics of Postmodernism* (London: Routledge, 1989).

377 Baudrillard, *Simulations*, *supra* note 42 at 6. In a sense, both modernism and postmodernism may misconceptualize the nature of truth. The former may be unduly optimistic in its identification of truth with progress, emancipation and autonomy. The latter unduly glib in its claim that truth is inaccessible. Truth may be domination, subordination and death.

378 On this latter point, see Baudrillard, *id.* at 127 and F. Moretti, “The Spell of Indecision” in C. Nelson & L. Grossberg, eds., *Marxism and the Interpretation of Culture* (Urbana: University of Illinois, 1988) at 339.

379 Schlag, “Normative”, *supra* note 24.

3. (Un)Truth Revisited

In order to escape the political quandary engendered by postmodernism's embracement of a saturated subject awash in hyperreality, I would suggest that we can draw on, but adapt to the present context, the work of the sociologist Margrit Eichler. In relation to issues of gender, Eichler argues that in a world based upon (male) domination, we cannot know what (gender) equality might look like, and consequently, we should refocus our sights on what we do know, namely inequality, and make our task one of modifying and minimizing these inequalities.³⁸⁰ Similarly, it can be argued that although we cannot know what pristine truth might look like, we can know those things that are manifestly untrue, and so our task becomes one of minimizing the pervasiveness of these untruths. And, as I have argued, it is clearly untrue that the fasting prisoners were merely "ordinary, decent, criminals." The motivations for their alleged crimes were manifestly political.³⁸¹ They were arrested, detained, interrogated, tried and convicted under a statute³⁸² that characterized them as "terrorists" and defined

380 M. Eichler, "The Elusive Ideal Defining Equality" (1988) *Can. Hum. Rts. Y.B.* 167. A homologous conceptual move is made by Shklar in relation to the idea of justice when she argues that "we simply cannot know enough about men (sic) or events to fulfil the demands of justice" and then proceeds to argue that we are a great deal more familiar with injustice and therefore that we should make our task the minimization of injustice. J. Shklar, "Giving Injustice its Due" (1989) 98 *Yale L.J.* 1135. There are also hints of such an approach in the recent work of the feminist postmodernist, J. Flax, "The End of Innocence", *Theorize*, *supra* note 52, 445 at 459. See also, B. Moore Jr., *The Social Bases of Obedience and Revolt* (New York: Basic Books, 1987).

381 Sands, *Skylark*, *supra* note 1.

382 A study of these laws, commissioned by Amnesty International, summarized the impact as follows:

It has been shown in the first two parts of this analysis how the emergency legislation has affected every stage of the criminal justice process linked to the "Diplock" courts. The police and the army have been given extremely wide and *de facto* unchallengeable powers of arrest and detention. "Forceful", "decisive" and "persistent" interrogation is allowed, in which the right to silence is implicitly denied. Interrogation is not under effective (*i.e.*, contemporaneous) judicial control; unlawful treatment of prisoners does not give rise to the remedy of *habeas corpus*. At no stage of the pre-trial proceedings has the defence any effective opportunity to challenge the prosecution case. The availability of bail is limited. At the trial, statements obtained by "oppressive" methods are admissible, as long as these methods did not amount to torture, or to inhuman or degrading treatment, or unless there is evidence of physical ill-treatment.

Trial by jury has been abolished: the single judge has taken over the function of the jury as tribunal of fact and "weighs" the evidence in a legal framework (set by himself) which is much less strict than in ordinary trials. In most cases the evidence against the accused consists solely of his own (alleged) confession made during police interrogation. In such cases, the "weighing" of the evidence is in fact subsumed under the judge's ruling on the admissibility of the confession: confessions, once admitted as evidence, are not in practice tested further on their reliability. The scope of appellate review is limited, at least as regards the crucial issues of the exercise of judicial discretion in ruling on the admissibility of a confession, and of the "weighing" of confessions by the judge acting as tribunal of fact.

A number of these aspects of the special system of criminal justice, such as the absence of safeguards against arbitrary arrests and detentions, and the non-availability of *habeas corpus* against unlawful treatment in custody, by themselves raise serious issues concerning human rights. But the analysis of the law has shown that, for the purpose of determining the fairness of trials in "Diplock" courts, the single most important issue regards the reliability of confessions obtained during interrogation. As was shown above:

terrorism as "the use of violence for *political* ends."³⁸³ Their "confessions" were admitted in circumstances which allowed for physical abuse³⁸⁴ and their treatment in prison was politically motivated, particularly the beatings.³⁸⁵ More broadly, what is one to make of the fact that between 1969 and 1980 the prison population of Northern Ireland increased by almost 500%,³⁸⁶ except by acknowledging — as both a former Northern Ireland premier (Major Chichester Clark) and British Secretary of State (Reginald Maudling) have done — that the Northern Ireland and the British states are at "at war" with the IRA?³⁸⁷ And finally, why else would the British government derogate from its responsibilities under the European Convention on Human Rights?³⁸⁸ In short, there is a radical

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- the rules on interrogation are not aimed at obtaining reliable confessions and indeed allow for methods of interrogation which can seriously affect their reliability;
 - the pre-trial investigation carried out on behalf of the Director of Public Prosecutions is not aimed at ensuring that only *prima facie* reliable confessions are tendered in evidence;
 - the tests applied by the judges in the "Diplock" courts in ruling on the admissibility of confessions do not as a rule extend beyond ensuring that confessions tendered in evidence by the prosecution were not obtained as a result of physical ill-treatment;
 - although these tests leave out many aspects of interrogation which can seriously affect the reliability of confessions, the courts in practice subsume their "weighing" of the reliability of a confession under their ruling on its admissibility.

The "Diplock" courts convict in the vast majority of cases in which a confession (allegedly) made by the accused in the course of police interrogation is the only evidence of his guilt, as long as there was no evidence that physical ill-treatment (or worse) was used to obtain that confession. In doing so, the courts implicitly assume the reliability of confessions obtained as a result of interrogation in which such treatment did not occur. It was already pointed out that it is surprising, in view of the evidentiary problems arising out of the private nature of interrogation, that the courts so often hold that it has been established beyond reasonable doubt that nothing untoward has occurred which might have affected the reliability of a confession.

But even if that is left aside, there must be serious doubt about the assumption that confessions obtained as a result of "forceful", "decisive" and "persistent" interrogation are reliable even if nothing untoward occurred.

D. Korff, *The Diplock Courts in Northern Ireland: A Fair Trial?* (Utrecht: Netherlands Institute for Human Rights, 1984) 77-78.

383 *Northern Ireland (Emergency Provisions) Act*, *supra* note 142, s.28.

384 *Supra* note 147.

385 For an account of the beatings see *e.g.*, Bishop & Mallie, *supra* note 123 at 279. For a close documentation see *e.g.*, Feldman, *supra* note 138 at 147-217.

386 Coogan, *Blanket*, *supra* note 157 at xi. The actual figures are: 1968: 727; 1970: 944; 1974: 2,650; 1980: 2,500. See also Feldman, *supra* note 138 at 148-149; T. Hadden, "Who are the Terrorists?", *Fortnight* 6 (7 May 1976).

387 Clark said, "Northern Ireland is at war with the Irish Republican Army Provisionals" and Maudling stated that the British government was "now in a state of open war with the IRA," quoted in Feehan, *supra* note 166 at 68-69.

388 Britain has, on several occasions, exercised its derogation powers under Article 15 of the European Convention for the Protection of Human Rights (*supra* note 232):

- (1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligation under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
- (2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
- (3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which

incommensurability between the juridical construction of the prisoners as "odcs" and the incontrovertible existence of a specifically tailored legal process that simply cannot fit within the frame of that legal construct.

Thus, it seems to me that if we re-orient our inquiry from the quest for Truth, to the minimization of untruths, we can adopt the postmodern virtue of self-reflexivity and modesty without necessarily being forced to embrace its vice of being self undermining.³⁸⁹ As Bernstein, echoing Habermas, points out, "[v]iolence and distortion may be uneliminable, but they can be diminished."³⁹⁰

C. Language and power

The foregoing reflections on postmodernism and deconstruction, law and truth, agency and death also suggest a reconsideration of the relationship between language and power through an analysis of the politics of language.

In recent years, a significant number of North American and European academics, each in their own way inspired by what is sometimes called "the interpretative turn", have begun to espouse a faith in the reconstructive potential of "discourse," "dialogue," or "conversation" as a way to mediate societal and juridical polarization.³⁹¹ In response, this article suggests that those who chase the hare of dialogic democracy have a relatively "shallow" conception of societal difference. Their optimism leads them to over-emphasize the rehabilitative power of "discourse," "interpretation" and "intersubjectivity" and, therefore, perhaps ironically, to underestimate just how profound "deep diversity" can be. Specifically, I would draw attention to the question of the politics of language in Ireland.

Like every good colonial power, the British recognized the importance of eliminating local languages, because the erasure of language can play a

it has taken and the reasons therefore. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

See 1955-1957 *Y.B. Eur. Conv. on H.R.* 50 (Eur. Comm'n on Human Rights); 1969 *Y.B. Eur. Conv. on H.R.* 72-74 (Eur. Comm'n on Human Rights); 1971 *Y.B. Eur. Conv. on H.R.* 32 (Eur. Comm'n on Human Rights); 1973 *Y.B. Eur. Conv. on H.R.* 24-28 (Eur. Comm'n on Human Rights); 1975 *Y.B. Eur. Conv. on H.R.* 18 (Eur. Comm. H.R.); 1978 *Y.B. Eur. Conv. on H.R.* 22 (Eur. Comm.H.R.).

389 Indeed this shift of focus parallels, to some extent, Norris' recent attempts to argue that Derrida cannot be lodged in the same camp as the levelling and relativistic postmodernists because, in certain selected passages in his work, Derrida does posit that there are precise standards of interpretive truth such as argumentative rigour and consistency, Norris, "Afterward", *Deconstruction*, *supra* note 13 at 145-158. My point is that Britain's approach to the prisoners is riddled with inconsistencies and therefore indefensible.

390 Bernstein, *supra* note 113 at 205.

391 See e.g., J.S. Fishkin, *Democracy and Deliberation: New Directions for Democratic Reform* (New Haven: Yale University Press, 1991); J. Habermas, *The Theory of Communicative Action*, trans. T. McCarthy, (Boston: Beacon Press, 1984); R. Rorty, *Philosophy and the Mirror of Nature* (Princeton: Princeton University Press, 1979) at 373; M. Waltzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983); J.B. White, *Justice as Translation* (Chicago: University of Chicago Press, 1990); A. Cook, "Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King Jr." (1990) 103 *Harv. L. Rev.* 985 at 1044.

vital role in the elimination of a culture.³⁹² Despite revivals, Irish has been relegated to a peripheral and ritualistic role in Irish society. However, at the very margins of the British state, in the prison camp — which at the same time represents Britain's colonial heart — many of the prisoners discovered the Irish language for the first time.³⁹³ Having come to terms with "jailic", they advanced with their programmes of political reflection and future vision.³⁹⁴ And more particularly, it was through their Irish language classes that they disinterred the pre-colonial Brehon law system, the practice of *troscéad* and an alternative juridical landscape. But though they translated this juridical claim into English as "hunger strike", it was not understood as a legal claim because the jurisprudential and historical framework from which it emerged remained incomprehensible to the English juridical psyche. To say that something was lost in the translation would be an understatement.

When legal cultures collide, it is not simply a conversation and the exchange of mutually transparent interpretations.³⁹⁵ Law and politics are a great deal more messy than discoursing. Juridical "conversations", as Robert Cover reminds us, take place on "a plain of pain and death",³⁹⁶ and it is that reality that is the vital difference of law. To occult that distinction, to suggest that the assertion of legal rights is a matter of spelling it out, is to create a false sense of optimism for the achievement of solutions to what are frequently intractable problems of diversity. And the losers will be "the other", those who cannot — or will not — speak the dominant discourse. As Foucault comments, "the history which bears and determines us has the form of war rather than language."³⁹⁷ Moreover, to manifest an excessive faith in dialogue may, in fact, be to the disadvantage of those who are dispossessed because it may give rise to "a dictatorship of the articulate."³⁹⁸ Therefore, I would suggest that in relation to "jurispathic"³⁹⁹ legal cultures such as those of western liberal democratic societies, the hunger strike demonstrates the tragic extent to which the "other" will have to go to their identity.

392 In 1492, Antonio de Nebrija is reported to have justified his *Gramatica* to Queen Isabella of Spain on the basis that "(l)anguage is the perfect instrument of empire." See Williams *supra* note 7 at 74.

393 It might be noted here, in support of the earlier argument as to the importance of agency, that the prisoners used their feces-covered walls as a type of "chalkboard" when learning to speak and write Gaelic. Sands, *Life*, *supra* note 157 at 53. It has also been reported, in order to challenge the glum monotony of the cells, one prisoner created patterns with his feces: of palm trees! Coogan, *Blanket*, *supra* note 157 at 209.

394 Sands, "Training Camp", *Skylark*, *supra* note 1 at 150.

395 To be clear, my point is not that the struggle over the meaning of signifiers is unimportant. Certainly, there is no doubt the difference between "odc" and "hac" on the one hand, and "political prisoners" and "freedom fighters" on the other, is strategically essential. It is just that political engagement requires more than the power to determine the terms of discursive practice. As Marx notes, "(m)aterial force can only be overthrown by material force", F. Bender, ed., *Karl Marx: The Essential Writings* 47 (Boulder: Westview, 1986).

396 R. Cover, "Violence and the Word" (1986) 95 *Yale L.J.* 1601.

397 M. Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977* (New York: Pantheon Books, 1980) at 114.

398 W. Kymlicka, "Liberal Individualism and Liberal Neutrality" (1989) 99 *Ethics* 883 at 900.

399 Cover, *supra* note 23 at 16.

D. Identity Politics and Postmodernism⁴⁰⁰

For some who subscribe to postmodernism and deconstruction, my foregoing criticisms may appear to deradicalize and domesticate the subversive insights of these approaches.⁴⁰¹ More importantly, it might be suggested that this essay is premised upon a vision — my espousal of a jurisprudence that is based upon the identity politics of Irish nationalism — that is subject to the withering gaze of deconstruction. In short, I have sawn off the branch upon which I am sitting.

In other words, it might be argued that, insofar as my conception of jurisprudence converts a “conception of identity into a ground of politics”,⁴⁰² it is necessarily subject to the deconstructive insight that such a strategy is dependent on a point of contradiction: in this case the British law. Deconstruction, I am likely to be reminded, demands more than a simple reversal of hierarchy for that merely reproduces binarism without subverting the very concept of hierarchy; displacement engenders a multiplicity that cannot be reduced to (nationalist) identity.⁴⁰³ It may be argued that the valorization of identity — an Irish jurial other — reinforces and perpetuates the very system of domination that it seeks to transgress — British juridical colonialism — achieving what Schlag suggests is only a “suicidal reinscription of precisely the sort of hierarchical dualities ... that deconstruction seeks to subvert and displace.”⁴⁰⁴ Moreover, given postmodernism’s commitment to anti-essentialism, the very idea of an Irish identity is (in its best light) a delusive artifact, a quaint ethnocentric sentimentality, and therefore incapable of bearing the juridical weight that I would wish to impose upon it.⁴⁰⁵ In its worst light, identity jurisprudence smacks of “national aestheticism” and a zealous patriotism that, historically, has done more harm than good.⁴⁰⁶

400 Alexandra Dobrowolsky has encouraged me to think about the relationship between law, postmodernism and identity, see e.g., A. Dobrowolsky, *The Stakes of Struggle: Democracy, Constitutionalism and Collective Actors in Canada* (1992) [unpublished] [hereinafter *Stakes*]; A. Dobrowolsky, “The Charter and Mainstream Political Science: Waves of Practical Contestation and Changing Theoretical Currents” in K. Sutherland & D. Schneiderman, eds., *Charting the Consequences: Impact of the Charter of Rights on Law and Politics in Canada* (Toronto: University of Toronto Press, 1995).

401 See e.g., “Le Hors”, *supra* note 24.

402 J. Butler, “Gender Trouble: Feminist Theory and Psychoanalytic Discourse” in Fraser & Nicholson, *supra* note 65, 324 at 327.

403 For an uncompromising analysis and rejection of Derrida’s deconstruction of Jewish identity politics, see Binder, *supra* note 20 at 1372-1383.

404 “Le Hors”, *supra* note 24 at 1649.

405 Baudrillard might formulate the criticism differently. He would probably argue that identity politics is a form of representational politics, but in a world of simulacra there is no origin to re-present, for we subjects are always already reproduced.

406 As Mohr argues:

Much of what has been termed postmodern has been viewed as destructive and nihilistic. The pathway barely sketched here examines only what ought to be clear in any case, that the overwhelming amount of the nihilism and destructiveness in this century arose from the notion of sovereignty, the legally constituted national state. Despite this experience, we are still a long way from being able to resist the seduction to reconstitute this kind of state and the legal form that is said to flow from it, but in fact makes its nihilism possible. One ought to rejoice when such efforts are rejected by the majority of a people, even if the reasons given for their negation sound awful.

Mohr, *supra* note 24 at 379. See also, M. Edelman, *Constructing the Political Spectacle*

By definition, identity constrains and excludes; therefore, what is required is "a liberation from identity."⁴⁰⁷

In response to these potential arguments, three points might be made. First, although I recognize that identity politics is incapable of having an essentialist base, that does not mean that it is nothing, and it certainly does not mean that it is necessarily reactionary. Rather, we can recognize the inevitably artifactual nature of a perspective — and can even countenance the dynamic nature of such identities⁴⁰⁸ — but still operate in a self-reflexive and politically engaged way on the basis of such

(Chicago: University of Chicago Press, 1988) at 8; R. Walker, *One World, Many Worlds* (Boulder: Lynne Rienner, 1988); J.H. Miller, "Deconstruction and Cultural Criticism" (1991) 13 *Cardozo L. Rev.* 1255. See also Derrida's critique of the "desire for Kingdom" *supra* note 281.

- 407 N. Fraser, "False Antithesis: A reply to Seyla Benhabib and Judith Butler" (1991) 11 *Praxis International* 166, 175. The issue of identity politics has come to the fore most notably in relation to issues of gender and, in particular, the feminist tendency to rely on the category of "woman" as a basis for their critique of patriarchal power and the quest for gender equality. Derrida, for example, perturbed by the tendency for distributing "sexual identity cards", Derrida & C. McDonald, "Choreographies" (1982) 12:2 *Diacritics* 66, 69, has argued that such an espousal of identity not only operates as a mere inversion and therefore a failure to displace, but also smacks of essentialism and naturalism:

Perhaps ... the "woman" is not a determinable identity. Perhaps woman is not some thing which announces itself from a distance, at a distance from some other thing.... Perhaps woman — a non-identity, a non-figure, a simulacrum — is distance's very chasm, the out-distancing of distance, the interval's cadence, distance itself....

Feminism is nothing but the operation of a woman who aspires to be like a man. And in order to resemble the masculine dogmatic philosopher this woman lays claim — just as much claim as he — to truth, science and objectivity in all their castrated delusions of virility. Feminism that seeks to castrate.

J. Derrida, *Spurs: Nietzsche's Styles — Eperons: Les styles de Nietzsche*, trans. B. Harlow (Chicago, Ill.: University of Chicago Press, 1978) at 49, 65.

Subsequently, he has cooled the rhetoric but re-asserted the same point:

This is the risk. The effect of the Law is to build the structure of the subject, and as soon as you say, "well, the woman is subject and this subject deserves equal rights," and so on — then you are caught in the logic of phallogocentrism and you have rebuilt the empire of the Law. So it seems that women's studies can't go very far if it does not deconstruct the philosophical framework of this situation, starting with the notion of subject, of ego, of consciousness, soul and body, and so on.

Quoted in S. Hekman, *Gender and Knowledge: Elements of a Post-modern Feminism* (Boston: Northeastern University Press, 1990) at 68.

Such positions have generated critiques from several feminists who argue that a (suitably revised) category of "woman" is absolutely necessary to ground feminist praxis. See *e.g.*, L. Alcoff, "Cultural Feminism Versus Post-Structuralism: The Identity Crisis in Feminist Theory" in M. Malson *et al*, *Feminist Theory in Practice and Process* 295, 322 (Chicago: University of Chicago Press, 1989); C. Di Stephano, "Dilemmas of Difference: Feminism, Modernity and Postmodernism" in Fraser & Nicholson, *supra* note 65, 63, 75-76. For a defence of Derrida by a feminist, see D. Cornell, *Beyond*, *supra* note 19 at 77-117.

- 408 For an attempt to make this type of argument in relation to gender identity see, T. DeLaurentis, *Feminist Studies/Critical Studies* (Bloomington: Indiana University Press, 1986) at 8. See also, Alcoff's concept of "positionality" which conceives of "human subjectivity as an emergent property of a historized experience", where identity is "relative to a constantly shifting context, to a situation that includes a network of elements involving others, the objective economic conditions, cultural and political institutions and ideologies and so on", Alcoff, *id.* 407 at 321, 323.

identities. Irish Republicanism of the 1970s and 1980s may illustrate this. As I have indicated previously,⁴⁰⁹ in the 1970s and particularly within the "Republican university", Long Kesh, Republicanism underwent a significant transition from being militaristic and abstentionist in its orientation, to becoming politically participatory and self-consciously socialist. This transformation of identity was confirmed at the Ard Fheis (Annual Conference) of Sinn Féin in 1985 when the political and ideological leadership of the organization was transferred from the conservative purists of the south of Ireland to the leftist pragmatists of the north of Ireland.⁴¹⁰ To argue that identity has no natural, essential or absolute significance, to accept the impossibility of "a rigorously pure self-identity"⁴¹¹ does not necessarily commit one to the sclerotic claims that identity politics is misconceived or that it is a simple reaffirmation of vulgar traditionalism. It simply allows us to recognize that difference and identity are constitutively interlocking, to be conscious of the inevitability of political change, and to forewarn us not to expect or impose closure. Nationalism, no less than law or language, is a protean and contested terrain, with both negative and positive implications.⁴¹²

The second point relates to empowerment. Postmodernist reservations about identity politics are intertwined with its conception of the subject. It is argued that because the self is constructed to the core it is a mistaken essentialist quest to seek out *an* identity. Rather, the subject may have multiple and often potentially conflicting identities that are so fluid and unstable that they cannot be constrained within, for example, a nationalist identity. This is an important insight into the complexity of subjecthood. However, I fear that it can potentially lead to a radically individualized politico-ontology in which there is an excessive focus on each person's particular circumstances. If so, this might well have the effect of marginalizing the group aspects of a person's identity thereby fostering singularity rather than solidarity.⁴¹³ As a consequence, postmodernism may devalue that aspect of ourselves that many value highly: our group membership.⁴¹⁴ For the subordinated this experience of group identity may act as a form of empowerment and solidarity.⁴¹⁵ Once again the H Blocks

409 *Supra* note 136.

410 Clarke, *supra* note 154.

411 Ryan, *supra* note 171 at 10.

412 Furthermore, it might also be noted that recently (Sept. 1994) and after 25 years of "the troubles" the IRA and Sinn Féin have gone even further in their restructuring of Irish republicanism by unilaterally declaring a ceasefire. Gerry Adams has been a central player in this re-orientation of Irish nationalism. For similar attempts to rethink identity see Dobrowolsky, *Stakes*, *supra* note 400 at 12; D. Boyarin & J. Boyarin, "Diaspora: Generation and The Ground of Jewish Identity" (1993) 17 *Critical Inquiry* 693.

413 *Stakes*, *supra* note 400 at 11-12.

414 I.M. Young, "Polity and Group Difference: A Critique of the Ideal of Universal Citizenship" (1989) 99 *Ethics* 250 at 251.

415 As Max Weber notes, "[f]reedom and democracy are possible only where the resolute will of a nation not to allow itself to be ruled like sheep is permanently alive" in M. Weber, *From Max Weber: Essays in Sociology* ed. by H. Gerth & C.W. Mills, (New York: Oxford University Press, 1946) at 71. Barrington Moore suggests, "pure moral autonomy in the form of lone resistance to an apparently benign authority is very rare. With support from peers, on the other hand, the same kind of resistance increases

provide an example of how empowerment is achieved through what one commentator has described as "the solidarity of collective vocality",⁴¹⁶ in this case, Gaelic.

Third, and this is a more negative and clearly strategic argument, it is not as if identity politics is always the "chosen" terrain of struggle by the disempowered. Those who oppress do so, in part, because of the "identity" of "the other," because of differences in race, gender or nationality. The "criminalization" project of the British government was very much driven by the question of identity; by encoding the prisoners as criminals its aim was to efface the nationalist liberation context for their alleged acts. The protests and the fasts were an attempt to re-assert their Irish identity and their legal rights as prisoners of war on the basis of that identity. Identity politics can be operative not only when identity is explicitly invoked, but even when it is denied. In other words, identity is a terrain of political struggle that the oppressed simply cannot afford to abdicate.

E. One Step Forward, One Step Back, One Step to the...

I find myself in a curious situation in this essay. On the one hand it seems that postmodernism and deconstruction — through their critiques of hierarchy, subordination and oppression — are analytically and strategically valuable in enabling dissidents to identify fissures that offer emancipatory potential in a dominant social order. On the other hand, postmodernism and deconstruction may undermine dissident practices by positing that they are but simulacra with no necessary connection to reality, truth or justice, or at least no connection that would make a difference. I only want to go part way, to acknowledge that postmodernism and deconstruction can be forms of resistance⁴¹⁷ but without having to purchase their unremitting guardedness. I want to employ their insights as modes of politico-juridical analysis to facilitate a reconfiguration of Anglo-Irish relations, to deconstruct Britain's juridical hegemony. However, as Linda Hutcheon says of feminist encounters with postmodernism, "exposition may be the first step; but it cannot be the last."⁴¹⁸

To maintain this position, and to avoid this sense of one step forward, one step back, it will be necessary (as a preliminary move) to draw a distinction between postmodernism as a political philosophy and deconstruction as a method of interpretation. By means of this disassociation it may be possible to argue that an embracement of deconstruction as a mode of analysis does not require a correlative commitment to

enormously.... What the data reveal is the significance of social support for correct moral reasoning", *Moore, supra* note 321 at 97. See also, *Fantasia, supra* note 202.

416 Feldman, *supra* note 138 at 216-217. For accounts of the importance of group solidarity in maintaining the "dirty protest", see Sands, *Life, supra* note 157, and Clarke, *supra* note 154 at 78, 122.

417 H. Foster, *Re-Codings: Art, Spectacle, Cultural Politics* (Port Townsend, Wash.: Bay Press, 1985) xii at 121. See also, S. Lash, *Sociology of Postmodernism* (London, England: Routledge, 1990) at 37, 52 distinguishing between "mainstream" or "reactionary" postmodernism, and "oppositional" or "progressive" postmodernism.

418 Hutcheon, *supra* note 376 at 152-153.

postmodernism with its eschewal of political practice and its predilection for relentless sceptical indifference.⁴¹⁹ It is the spectre of Baudrillard that makes me hesitate. In a discussion that has haunting relevance to the concerns raised by this article he argues:

If being nihilist is to take, to the unendurable limit of the hegemonic systems, this radical act of derision and violence, this challenge, which the system is summoned to respond to by its own death, then I am a terrorist and a nihilist in theory as others are through arms. Theoretical violence, not truth, is the sole expedient remaining to us.

But this is a utopia. For it would be admirable to be a nihilist, if radicality still existed — as it would be admirable to be a terrorist if death, including that of the terrorist, still had meaning.

But this is where things become insoluble. For opposed to this nihilism of radicality is the system's own, the nihilism of neutralisation. The system itself is also nihilist, in the sense that it has the power to reverse everything in indifferenciation, including that which denies it.⁴²⁰

This, I think, goes too far. Beyond being a hyperbolic academic appropriation of experiences, discourses and practices of "terrorists", it callously undermines the final hopes of those who seek to resist in what appear to be impossibly oppressive conditions. It overemphasizes the power of contemporary social structures and underanalyses the potential for transgressive praxis.

However, an uncoupling of postmodernism and deconstruction is only a first step. In order to avoid the conclusion that death by fasting has no meaning, it seems to me that it is not enough to simply trash Baudrillard, for that may only be a form of scapegoating for a tendency that is latent in a deconstructionist mode of analysis. Therefore, as a second step, deconstruction, too, will have to be reconsidered, dereified and deflated. It must be shorn of its pretensions to be "a general law",⁴²¹ a generalization "without present or perceptible limit",⁴²² "a general, theoretical and systematic strategy"⁴²³ or a canonized cognate of "justice."⁴²⁴ Regardless of what Derrida — the author — might say,⁴²⁵ deconstruction itself is prob-

419 I gain some support for this strategy in the work of Christopher Norris. See e.g., Norris, *Postmodernism*, *supra* note 370 at 52; and Norris, *Deconstruction*, *supra* note 13 at 148-156.

420 J. Baudrillard, "On Nihilism", (1984) 6 *On The Beach* 38.

421 Derrida, *Margins*, *supra* note 99 at 15.

422 Derrida, *Beyond*, *supra* note 25 at 167-168.

423 Derrida, *Positions*, *supra* note 94 at 68.

424 Derrida, "Force", *supra* note 10 at 945.

425 Consider, for example, that Derrida, in faithful reified deference, argues that, "deconstruction...has never presented itself as a method...." *Beyond*, *supra* note 25 at 168. Or again, his proposition that:

Deconstruction takes place, it is an event that does not wait the deliberation, consciousness or organization of a subject, or even of modernity. It deconstructs itself. It can be deconstructed.

ably best understood as a rigorous methodology⁴²⁶ that enables one to critically interrogate those propositions that aspire to be universal, authoritative and incontrovertible; to demonstrate how they are, in fact, contingent, ambiguous and contestable. In this way, deconstruction can expose the pervasiveness of power rather than reason. And that, I believe, is productive.

VI. (In) Conclusion

For some, particularly those of a conservative and repressive political bent, my re-presentation and revalorization of the marginalized fasting prisoners as having a well founded jurisgenerative claim will reconfirm the moral bankruptcy of postmodern analyses. For such critics it will appear that added to the disreputable pantheon of Nietzsche the totalitarian "proto-Nazi", Heidegger the "Nazi",⁴²⁷ and Paul De Man "a Nazi collaborationist, ... propagandist"⁴²⁸ and "antisemite",⁴²⁹ is Bobby Sands the "terrorist criminal."

Two responses may be appropriate to such a challenge. The first is a clarification of my argument; the second, is to destabilize conceit and to parry the reproach of immorality. First, conservative moralism misses the point. This essay (as part of a larger enterprise to construct a critical consciousness and articulate a radical jurisprudence) takes as its starting point the problem of human suffering, and has as its end point the diminution of such suffering. It is an attempt to disempower the empowered, and to juridically empower the disempowered as they struggle against domination. Consequently, the article is neither an attempt to legitimize the military campaign of the IRA against the continued British occupation of Ireland, nor the installation of yet more heroes in the pantheon of Irish martyrdom. Rather, I have considered how the repressive state apparatuses operate at a pervasive ideological level to impose one interpretation through the erasure of another, and to illustrate how those who would appear to be almost completely disempowered can resist, struggle and re-affirm their agency. Law, I have argued, is an integral element in this struggle between colonization and decolonization. My aim (as a member of the Irish diaspora) has been to re-present the unrepresentable, to argue that the prisoners quite literally embodied law, and thereby, to facilitate "the return of the repressed."⁴³⁰

J. Derrida, "Letter to a Japanese Friend" in R. Bernasconi & D. Wood, eds., *Derrida and Différance* (Evanston, IL: Northwestern University Press, 1985) 1 at 4.

426 See also, C. Norris, *The Contest of the Faculties* (New York: Methuen, 1985) at 18.

427 For discussions see V. Farias, *Heidegger and Nazism* (Philadelphia: Temple University Press, 1989); R. Wolin, *The Politics of Being: The Political Thought of Martin Heidegger* (New York: Columbia University Press, 1990); P. Lacoue-Labarthe, *Heidegger, Art and Politics: The Fichon of the Political* (Oxford, England: B. Blackwell, 1990).

428 A. Austin, "A Primer on Deconstructions 'Rhapsody of Word Plays'" (1992) 71 *N.C.L. Rev.* 201, 212.

429 D. Lehman, *Signs of the Times: Deconstruction and the Fall of Paul De Man* (New York: Poseidon Press, 1991); W. Hamacher et al, eds., *Responses: on Paul De Man's Wartime Journalism* (Lincoln: University of Nebraska Press, 1989).

430 F. Jameson, *Postmodernism, Or, The Cultural Logic of Late Capitalism* (Durham: Duke University Press, 1991) at 199.

Second, it is important to confront the juridical smugness of moralistic conservatism head on. The assumption underlying such an approach is that law is the antithesis of violence. But, as I have argued elsewhere,⁴³¹ critical reflection requires a destabilization of "our" cherished convictions. This leads us to rethink law's position in the "economy of violence",⁴³² in the "economy of death",⁴³³ and to recognize with Benjamin that "there is something rotten at the heart of law."⁴³⁴ As Ryan suggests:

[t]errorism can be judged to be outside the law only if the law is itself deemed innocent and untouched by violence.... The recognition that one's own theoretical position is contaminated by the practice one condemns removes the grounds of normative judgment.⁴³⁵

It is through vigilance, through the questioning of law itself, that jurisprudence can best fulfil its responsibility.⁴³⁶

Viewed in this light, deconstruction and postmodernism can be understood as responsible practices. Insofar as they provide us with the critically empowering strategy of destabilizing preconceptions and prejudices, they can allow for alterity and the possibility of the insurrection of "subjugated knowledges."⁴³⁷ My turn to postmodernism and deconstruction is designed to generate an "impudent" re-reading of events in British occupied Northern Ireland, to articulate a radical alterity. As Derrida quips, "(t)he fact that law is deconstructible is not bad news. We may even see in this a stroke of luck for politics, for all historical progress."⁴³⁸ My aim has been to hang on to the critical Derridean proposition that we try:

to recognize and analyze [violence] as best we can in its various forms: obvious or disguised, institutional or individual, literal or metaphoric,

431 Devlin, "Law's Centaur", *supra* note 8.

432 "Violence and Metaphysics" in *Writing*, *supra* note 107 at 117.

433 *Margins*, *supra* note 99 at 4; *Writing*, *supra* note 107 at 102.

434 *Supra* note 284 at 286.

435 Ryan, *supra* note 171 at 121.

436 A third point may also be worth addressing: the question whether Sands was a "terrorist"? The debate as to whether dissidents like Sands are "terrorists" or "freedom fighters" is perennial and probably irresolvable. What is of greater importance are the circumstances of Sands' imprisonment. Between 1972, when he was eighteen, and his death at the age of twenty seven in 1981, Sands spent all but six months of that time in jail. The first arrest and imprisonment was made on the basis of some guns that were found in a house where he was staying. No evidence was adduced to demonstrate that he knew about, or had ever been in contact with, these weapons. For this he spent three years in Long Kesh with political prisoner status. Six months after his release, he was re-arrested, this time for allegedly being involved in a bombing operation. The judge found that there was no evidence linking Sands to the bombing. However, because one revolver was found in a car in which Sands and several others had been travelling at the time of the arrest, the judge gave each of them fourteen years — fifty six in total — for possession of one revolver. On both occasions, Sands only "crime" was possession of firearms in what were hardly clear-cut circumstances.

437 B. Hooks, *Yearning: Race, Gender and Politics* (Toronto: Between the Lines, 1990) at 8.

438 Derrida, "Force", *supra* note 10 at 943-945.

candid or hypocritical, in good or guilty conscience. And if, as I believe, violence remains in fact (almost) ineradicable, its analysis and the most refined, ingenious account of its conditions will be the least violent gestures, perhaps even non-violent, and in any case those which contribute most to transforming the legal-ethical-political rules....⁴³⁹

And yet, at the same time, I have felt a significant circumspection in the embracement of postmodernism. In its reluctance to engage with concrete social relations,⁴⁴⁰ in the fickleness of its "paralogic" conception of justice,⁴⁴¹ and its misdiagnosis that "*law and order themselves might really be nothing more than a simulation*",⁴⁴² it can leave us disempowered in our attempts to modify oppression, enraptured and ensnared by its own theoretical purity.

To paraphrase an (Italian) political prisoner: as against the (French) "pessimism of the intelligence" of an unmodified postmodernism and deconstruction, the story of the hunger strike illustrates an (Irish) "optimism of the will."⁴⁴³

439 J. Derrida, *Limited Inc.* (Evanston, Ill.: Northwestern University Press, 1989) at 112.

440 *Supra*, Part V, A.

441 Lyotard, *Condition*, *supra* note 19 at 60.

442 Baudrillard, *Simulations*, *supra* note 42 at 38.

443 A. Gramsci, *Selections From Prison Notebooks* (New York: International Publishers, 1977) at 175.

