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INTRODUCTION:
UN CYGNE NOIR

Peter Goodrich*

I have made a brief study of the law review genre of epitaphs. Or if that is perhaps too coherent a description, as it probably is, for what are usually miscellaneous brief prefatory statements in memoriam for departed colleagues they could equally be called brief encryptions or eulogies of disembarkation. They follow, in a necessarily muted style, the form of classical encomia or funeral orations. They praise the departed pedagogue for insight and character, wit and wisdom, generosity and vision. They offer intimate anecdotes, private affections shared in and around the law school, but because the deceased was, in the end, simply a law professor it would be unseemly and improper to lavish too great a degree of laudation upon the pedagogue’s past. The classical themes of public virtue, of political adventure or heroic deeds hardly conform to the quiet death of a teacher. A law professor is not a statesman, legal academics are fairly marginal to the growth of scholarship, and the Socratic lecture is peripheral on the best of counts to the advancement of educational ideals or practices. Where legal scholars have achieved public recognition they have tended to leave the academy and having lived their lives elsewhere they garner their encomia in other spaces less idiosyncratic and obscure than the student-edited law review.

If the epitaphs printed in law reviews are local and brief, this is doubtless because it is the home institution that publishes the terse array of recollections. The law review is a peculiar publishing forum, a strange artifact of legal education. It is supposedly a scholarly journal

* My thanks diversely and fulsomely to the participants in the Derrida/America Conference held at Cardozo School of Law, February 20-21, 2005. Especial thanks and amicable recognition to my co-organizer and the intellectual driving force behind the event, Anselm Haverkamp. Thanks to Brandy Warren for admirable organizational efforts, to Michel Rosenfeld for advice on the French, and to Simon Critchley for his political intelligence. Thanks for full, frank, and finely honed comments from Neil Duxbury, Pierre Legrand, Tom Mitchell, Chris Stone, Adam Thurschwell, and Cornelia Vismann. Thanks, if thanks were not so much less than her due, to Linda Mills for extraordinary insight and for the coruscating wit of her diagnoses of motive. This volume makes peace or at least reckoning with two earlier events. The first a conference held in 1989 and its progeny Deconstruction and the Possibility of Justice published in 11 Cardozo L. Rev. 919-1726 (1990). The second a symposium held at N.Y.U. in 1995 and published as Deconstruction is/in America (Anselm Haverkamp ed., 1995).
but it is edited by youthful students. We can note immediately that the law review epitaph is already in this sense hard to classify rhetorically. There is first off a certain youthful discomfort, an unease that accompanies too long a sojourn with the emotions of the elderly staring into the face of what is inevitably also their own demise. As with its other products, the law review here invents its own curious norms of genre. The eulogies, and they are almost without exception eulogies, are light, affective, strangely nostalgic and closer to literary portraits than to scholarly evaluations. If there is a dominant narrative theme it is that they strive to capture an existence that exceeded the legal, stories of exceptions, incidents of a life before the law that made the deceased something other than merely and unexceptionally a law professor.

The epitaph steps outside the genre of doctrine and law. It is more interesting and if attended closely it probably teaches more than the usual run of unread policy statements or second order law reporting that the reviews are prone to publishing. If examples can be forgiven, we learn in a short epitaph for Dean Eugene Rostow of Yale Law School—I am starting at the top—that he “was fond of saying that, as dean, the only things he could decide were the placement of portraits and the gender designation of lavatories—and that, even as to these, it was not all that clear.”1 Which is an interesting insight into a somewhat gloomy self-perception but not obviously the stuff of law review scholarship. It might have been had Rostow been of firmer metal and inverted his decenal project to the gender designation of portraits and the placement of lavatories, but he did not and the anecdote remains fond and incidental.

Stay with *Yale Law Journal* if you will and we can turn to the tributes paid on his passing to Myres S. McDougal, “a big, handsome man.”2 The only woman to contribute does note that Myres was “white, male, and from a Southern Methodist background—hardly a minority icon” but she goes on immediately to corroborate the general view of the deceased subject of the memorial inscriptions as being an iconoclast, a virtuoso and lifelong friend who even while “writing path-breaking volumes of great importance . . . was nonetheless always available to his students.”3 Or when Kellis Parker, the first tenured African-American law professor at Columbia University died, suddenly and much too young, it was his humanism, his everyday aesthetics, the trombone in his office, the music down the corridor, the jazz that got remembered.4

Life is short, law is long. Life departs, law remains. Mindful of that perhaps, the epitaphic narrative is formulated to capture the life that left, not the law that lives on. It is as if there is no time for analysis of writings or critical evaluations of work as the law professor’s literary coffin is lowered. Great books, bestsellers or casebooks that went into multiple editions, genre changing law review articles gain a mention, but in economical terms, because they were numerous, because they survived, because of their intimate impact upon the memorialist’s ego, and not, or not here in any sustained or critical sense, because of their argument or content.

There is something peculiar about the law review memorial. It briefly upsets the genre of law and it does so in multiple ways. Consider the norms of law review style—the unpublishable dispatches from *The Bluebook*—as well as the customary norms, the “tacit and illiterate consensus” of the law review office. The “books,” and it is significant of a certain misrecognition that the issues of the law review are so termed, are student selected and edited, sometimes fiercely so, but the epitaphs are clearly symposia generated and edited by or for the faculty. They represent, in the face of death, in a state of exception, a momentary truce in the citation manual wars, an instance of cessation of the violence of editing, a surprising glimpse of an editorial no man’s land. Of the other norms that are broken the most obvious comes in the form of an influx of the personal and nominate, of the first person singular and its subjective reminiscences, its autobiographical and affectionate recountings.

The stylistic rule of objectivity, of the impersonal, of the fully and tangibly referenced, of the epistemologically justified is suddenly displaced by the incursion of memory and experience. The gold standard of *The Bluebook*, the law of solid foundations that requires that every proposition have a visibly available prior source, a citation, a tangible or at least printable support, a photograph of origin, is waived in favor chimeric glimpses of a liminal individuality. And to this we should add that the genre of the epitaph also flouts the substantive rule of law review content, namely that what is published is about law. Sometimes, some would say all too often, the much prized object of the review or journal or quarterly, the fetish law, is honored by a merely conjunctive presence—pieces on “Tina Turner and law,” “Semiramis

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and law” or some metaphor for legal theory, say “baseball” or just possibly “The Big Fear”—but law, the “objet petit a,” the strange subject of love, is always also there, co-present, consubstantial. In the epitaph, however, that presence is subordinated to life, to literature, to the face and figure, the prosopopoeia of the departed. Again, law and specifically the law of genre is flouted. The epitaph offers a moment of mixing of the literary and the juridical, an instance of the suspension of law, and that is a good moment to introduce the subject of this symposium, the critical appreciation of the late Jacques Derrida and of his contribution to legal studies in the Anglophone world.8

There is an element then of the epitaphic to this venture as well. It too comes with black borders to the pages, it too says adieu, farewell, well done. We cannot and should not ignore that context of mourning, that sense of what Jacques termed “all-out friendship” that comes ironically or sadly enough when the time of the friend has passed.9 Not only should that affective and amicable context not be ignored, it is a signal virtue, an exemplary moment of incongruence, of internal limitation or deconstruction which comes very close to capturing the curious dissonance between Derrida and law. And that is my preliminary point, a properly paradoxical initial gesture. This symposium looks back critically and fondly upon the work of a non-lawyer, it re-evaluates the oeuvre of a philosophical aesthete who tirelessly sought if not to avoid the law at least to waive or suspend it.


8 I have lingered on this theme of genre long enough. Some day I will publish a fuller study but it is worth also briefly noting that the tributes published in U.S. law reviews are somewhat distinctive, counter even to their European peers, by dint of the importance of the authors of the tributes as well as their subjects. In Europe, the tributes are often unsigned and seldom have anything to do with the life or work of the author of the epitaph, the celebrant or obituarist. In the U.S. law review there is a star system operative that seems to require that the big name of the deceased gain recognition from big names. And if you are a big name it must be really hard not to mention yourself as well. That is how it goes. The measure of greatness is, after all, not only a matter of your influence, your place in the polls. It is also, in the U.S. at least, and at a more personal level a question of the stature of those who follow and applaud you. Their greatness allows them to recognize your importance, and without marking that dubious equality, the continued circulation of the insignia of status might well be a little threatened.

legal professoriat, it was that of a nomos, of a system of grammar, a scripture that preceded and determined subsequent or secondary institutions and laws.10 His theme was that of a prior instance or work, a politics that came in advance of law, a conceptual space or even justice before the law. In his later work, just to follow the theme through in this initial depiction, it was the politics of friendship, Aristotle’s concept of an amity prior and superior to law, Cicero’s lex amicitia or law of friendship that precedes and stalls the cold calculus, the dead hand of legality. Derrida deferred here and throughout to the poetic and literary that precedes and eventually will dictate the moment of legal judgment and the mode of its development.

We can begin then by saying quite confidently that Derrida made no contribution to law. He had nothing to say about positive law. He was commendably silent with respect to the regime of norms that passes for a system of legal doctrine. Even or especially toward the end, in condemning the death penalty in particular, his opposition was philosophical and political. He endeavored to understand the penalty, he addressed death in terms of the theater of cruelty, and even when speaking to lawyers he made no concessions to legal argument. And that in its way was a touch subversive and potentially a little hedonistic. It offered a halcyon possibility, the positive academic freedom to vacate the drudgery of policy, the diktat of precedent in favor of more liberated forms of writing, in pursuit of other norms.11 Critical jurists could not of course go outside the text, but they could slip away from positive law. Not hors de texte of course, but hors de loi. That was quite enough to annoy a disparate set of disciplinary conventions and the literary norms of the academic genres. The Anglophone philosophical establishment certainly didn’t welcome him. Unsurprisingly many lawyers also believed it to be inappropriate to think outside their discipline or to address the presuppositions, the linguistic and other norms that comprise the before of law. It was a little bit threatening, a touch too critical. It was hard enough work learning law without having to become scholars versed in rhetoric, linguistics, or semiotics as well. It would make the tenure track a lot harder, it would dethrone the epistemic solipsism of legal analysis, it might also eat up much of the

10 FRANÇOIS CUSSET, FRENCH THEORY: FOUCALUT, DERRIDA, DELEUZE & CIE ET LES MUTATIONS DE LA VIE INTELLECTUELLE AUX ÉTATS-UNIS 136 (2003), for example, in discussing “the Derrida effect” in literary and cultural studies, goes on to say: “In a wholly other domain, one can easily see the importance of Derrida’s symposium contributions on ‘deconstruction and law’ at Cardozo Law School in New York in 1990-1991, for the development of the ‘critical legal studies’ movement.”

marginal time devoted to consultancy or practice. It was in sum a style that seemed to the uninitiated at least to threaten indeterminacy, what the early common lawyers were wont to term a miserable state of things, a vague and uncertain law, and that of course cannot be a good thing.\footnote{Most notably the maxim res est misera ubi ius est vagum et incertum. ROGER COKE, JUSTICE VINDICATED 42 (London, Newcomb 1660) (2 Salk. 512).} Indeed it is best left to epitaphs, to margins, prefaces and other doctrinally penumbral spaces.

So Derrida had nothing to say to lawyers. He said nothing directly about the law that lawyers practice. He was not interested in the juristic rush to judgment, the arbitrary \emph{arbitrium} of legal decision. He kept deferring discussion of law, suspending the moment of judgment, asking prior questions about the \emph{nomos} that comes in advance of decision. Such questioning of the origin, the prior, the roots could seem a trifle academic. Indeed it was and is somewhat evasive if all that deconstruction did was to set up and pull down the binary opposition of law to non-law. The “Derrida effect” would then be no more than an opaque mystery, a campus leisure drug for addicts of “derridium [and] le lacanum,” as Bruno Latour wittily put it in a discussion of the Sokal Affair.\footnote{Bruno Latour, \textit{Y a-t-il une science après la guerre froide?}, LE MONDE, Jan. 18, 1997.} But beware of denunciations of difference, of the discounting of the unfamiliar, of satirical regression. They will generally have political roots and will depend less upon evaluation or even knowledge of the work denounced as upon a prior and unthought desire to exile and exclude. Simon shows that well in his review in this volume of the travesty of the philosophical responses to Derrida’s death.\footnote{Simon Critchley, \textit{Derrida: The Reader}, 27 CARDOZO L. REV. 553 (2005).} They hadn’t read his work. They denounced him because of an image of his work. Because of the work they hadn’t done themselves. There was something unfamiliar, a political threat generated by this philology, this alien yet clearly significant continental erudition authored, one might add, by an African Jew.\footnote{For discussion of several of these themes in a legal context, see the elegantly digressive Peter Goodrich, \textit{Europe in America: Grammatology, Legal Studies, and the Politics of Transmission}, 101 COLUM. L. REV. 2033 (2001).}

Derrida’s encounter with law, his deference to and deferral of the juridical, his non-encounter with legal forms of analysis—the technical subjects of doctrine—was both pivotal and emblematic. It marks, paradoxically, the last and most political stage of his work and of his life. It was only after encountering the common law school, Cardozo to be precise, a school incidentally that was too young and too lowly in rank to have any history of law review epitaphs of its own, only after raising explicitly the question of the possibility of justice, that Derrida turned directly to the political. There were other events and other headings, of course, but the dramaturgical setting of the law school and
the question of justice raised by lawyers signaled an all-important shift in his work towards the political, towards the justice that, as he pointed out, precedes and exceeds mere law. It was not law that interested him but rather justice and injustice, the between the lines, the exception that marked something more and other than mere law. It was after the conference on law, after his bravura performance of “deconstruction and the possibility of justice,” after subsequently and attentively sitting through days of papers by critical legal scholars, after listening to the ex-teamster Drucilla Cornell addressing the “violence of the masquerade,” and former brewery lawyer Chuck Yablon undressing legal forms—they are “boring”—that he entered the most engaged and interventionist stage of his career.16

Derrida died, and we are inscribing here a curious and critical epitaph. Note then that the question of injustice, of the possibility of justice, inevitably starts with the litany of improper deaths, of death before its time, of the simple injustice of death itself. The epitaph is in that sense strictly legal. The inscription in memoriam records the archetypal injustice, the injustice that is now Jacques’s as well, the injustice that he increasingly spoke to in his later years, as if in premonition, in protest, and always in a political manner. These were the years of Specters of Marx, of the work in South Africa against apartheid with Nelson Mandela, his opposition to the death penalty and his politicization of friendship as the theme that underpins the possibility of justice and the practice of law. I guess one could say that law school, his encounter with law professors, was a galvanizing moment, a sudden and terrible reminder of the urgency of the question of justice, of the enormity of what remained to be done in his lifetime, in the scarce fifteen years he had left, the remaining time in which to inscribe how he would live-on, or in his own words:

[N]ot toward death but toward a living-on [sur-vie], namely, a trace of which life and death would themselves be but traces and traces of traces, a survival whose possibility in advance comes to disjoin or dis-adjust the identity to itself of the living present as well as of any effectivity. There is then some spirit. Spirits. And one must reckon with them . . . the more than one/no more one.17

The question of justice was too important for law school and lawyers. It was urgent and active, human and living, in a way that law could never be, if only because the passage of property and the structuring of death are law’s primary tasks. That, or as the early common lawyers were

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wont to put it, law is pristine, it speaks to posterity, abstractly, across
generations and not to the nominate, not to living.\textsuperscript{18} So first then the
question of injustice and the necessity of reckoning, of naming,
acknowledging, accounting—providing epitaphs, keeping ethical and
political records. The theme is central to Derrida’s account of justice
and it is his first and final interruption of the blandness of legal
discourse. Citing Levinas, he argued in \textit{Force of Law} that justice is a
relation to others, “to the faces of otherness that govern me,” and most
forcefully of all there has to be “an equitable honoring of faces.”\textsuperscript{19} No
escaping it, if there is to be equity, if injustices are to be undone. It is in
this vein, in the dedicatory passage to \textit{Specters}—a work of specters and
for specters, for faces seeking visibility, demanding to be named—
Derrida remembers a fallen opponent of apartheid:

\begin{quote}
But one should never speak of the assassination of a man as a figure,
not even an exemplary figure in the logic of an emblem, a rhetoric of
the flag or of martyrdom. A man’s life, as unique as his death, will
always be more than a paradigm and something other than a symbol.
And this is precisely what a proper name should always name.\textsuperscript{20}
\end{quote}

\textit{Specters of Marx} was marked by a verbal frontispiece, a shadow
portrait—the ghost of Chris Hani.

Defiant words, a demand even that faces be put to historic acts of
resistance, that intellectuals take up their responsibilities and oppose
injustice, name its causes and put faces to its perpetrators. The
equitable honoring of the face requires that much. It requires that
scholars take a stand, that they make their own decisions, that they
accept an authority and equity that comes before the law, the merely
human and positive shadow of spirit, of “the more than one/no more
one.” The face contests the realm of the no more one, just as the
epitaph challenges the amorphousness of death and offers one last
adventure in naming, a final glimpse of the face. And here we can
pause in silent and critical recollection. Derrida sought to name most
openly in the face of death. This act of nominating, this “all-out
friendship” for the deceased plays a pivotal role in his work. It is most
obvious and evident in his funeral orations but the theme of the face, the
equity of attention to the face is a figure—an allegory—that suffuses all
his work. It is there, maybe not loud enough, not evident enough, but
nonetheless present, covertly intruding, riling and stinging the arbiters
of convention and the promulgators of law.

If one could say one thing of Jacques, it would be that he had a

\begin{footnotes}
\item[18] \textsc{Sir John Doderidge, The English Lawyer 51} (1631); \textsc{Sir John Fortescue, In Praise
1997).
\item[19] \textsc{Jacques Derrida, Force of Law: The “Mystical Foundation of Authority”}, 11 Cardozo L.
Rev. 919, 959 (Mary Quaintance trans., 1990).
\item[20] \textsc{Derrida, supra} note 17, at xv.
\end{footnotes}
style. It was “not without opacity,” indeed it was frequently tortured, often prolix, inevitably French. It was also his, first person singular, indelibly individual, a calligraphy that constantly traced a unique name and face. In my view the style was itself a *prosopopoeia*, an inscription as unintended as it was accurate of an authorial face. It was a hesitant but very personal mode of taking a stand, of being counted, of facing off. Derrida was always inserting himself, making appearances in his own writing, playing with images, showing his face. He was constantly making up words, inventing neologisms such as phallogocentrism, circumfession, incompossibility, *différance*, the archetrace, destinerrance, or even deconstruction as a variant form of Heidegger’s term *destruktions*. He advocated free play with words and was constantly punning, twisting from ambiguity to metaphor to metonymy and back. He loved to interpret slips, typographical errors, philological elisions. He even published his love letters, his postcards, in *La Carte Postale*. He attended to the frivolous while also giving inordinate weight to the work of mourning and making the genre of the encomium peculiarly his own. And he would turn up. For all his philosophy of the impossibility of self-presence, he was never a “no-show,” he was serious about his engagements, committed to his seminars around the globe, grateful for the opportunity and attention, and generous, inordinately generous of his face time.

It is possible that one of the secrets of his success, the mystery of his fame, lies in the attraction of his face. Not just that he was beautiful. Well kempt, a little narcissistic. Here was a man, a famous man, who was willing to spend time listening, who was attentive to texts and to questions, who hadn’t yet always already made up his mind. Such was a signal and feminine virtue, this willingness to wait, this attention to detail, this demand that we suspend the moment of judgment, calculus and law. One could even recollect in a somewhat Derridean style that his commitment to suspending or waiving the law has its etymological root in a legal designation of the feminine. To waive comes from medieval Latin. *Waivaria* was the outlawry of a woman, *waivaria mulieris*, to be exact, meaning that because her husband had been outlawed she too was forsaken and abandoned. She became faceless, friendless, in the early definition of *utlagary* or outlawry and was neither to be conversed with nor given food in Rastell’s definition. In Bracton’s elaboration, the waive was also *caput lupinum*, subject to

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21 CUSSET, supra note 10, at 118.


23 JOHN RASTELL, THE EXPOSICIONS OF THE TERMS OF THE LAWES OF ENGLAND (1567) (under the word *utlary*); JOHN COWELL, THE INTERPRETER: OR BOOKE CONTAINING THE SIGNIFICATION OF WORDS (1607) (under the word *utlagaria*).
immediate death, not *homo* but one might say here *mulier sacer*. She existed in a state of exception, an outlaw by association, and so in a personal state of *iustitium* in which the law had also been suspended, by contiguity or association, as regards her.

The crucial subject of recognition is not of course the medieval root of the suspension of law but rather the choice whereby Derrida took up the position of the waive or feminine outlaw because of his suspicion that there was something amiss in this designation of friendlessness or bestiality, in this savage state of exception, in this non-recognition of the face of the other. So think of it this way: The political thread that runs through the work and with increasing force or directness is that of championing that which has, and then those who have been separated, set aside, or subject to apartheid. He took the side of the separated, the excluded, the waived, the outlawed and he did so in multiple forms. He began with marginal texts, with absent presence, with traces, supplements, prefaces and all the other liminal sites where those who have been set apart press against the barrier of their repression. He introduced rhetoric into philosophy, aesthetics into epistemology, and addressed the politics of friendship in the production of truth and did so in his own radical if tentative way. He focused one might say almost exclusively upon the genres of the excluded, the literary, the poetic, the painted, the postcard. Then in the radicalizing instance of his confrontation with law, he addressed not law but the before of law, the question of injustice, the possibility of justice, the *nomos* extant before legality intrudes. Then apartheid itself, its specters, its outlaws, its dead.

It is a long list that also included many attempts to bring the separated to visibility and into amity in work on hospitality, mourning and the democracy to come. But still the constant theme of exclusion, of exile, of experiencing life, as Barbara elucidates in her contribution, as an exile from his mother tongue, and also one suspects from himself. He had hopes, no question of that, but he was also always traveling, abroad, away and on his own special counterpath. He was

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26 CATHERINE MALABOU & JACQUES DERRIDA, *COUNTERPATH* 4 (David Wills trans., 2004): In one way or another the Western traveler always follows in the steps of Ulysses. For Derrida, the Odyssey is the very form of an economy, literally the “law of the house” (*oikonomia*, from *oikos*, “house,” “residence,” and *nomos*, “law”). It is as if, according to what is a paradox in appearance only, the voyage that is the Odyssey signified in the first instance the possibility of returning home.
an exile from home and he was fond of saying that it will end badly or,
in a more philosophical mode he devoted an entire book to the
elaboration of an immense rumor generated by a fragment attributed to
Aristotle by Diogenes: “Oh my friends, there is no friend.”27  Here I
would read that fragment as a plea, in the vocative and expressive of a
hope: there is no singular and authoritative friend, no God or law, only
the future and active possibility of friendship with the friendless, the
democracy to come as he liked to call it, the coming community built
around the ethics of honoring the face, founded on and governed by its
relationship to the other, to the more than one. If the face is the index of
the soul, a law without face, without attention to the face, is a law
without soul, a medium of injustice, not a minor nihilism but an active
principle of annihilation.

That takes me to my second point. Like Aristotle, Derrida believed
that friendship is more important than law.28  He believed that amicitia
preceded lex. That priority of the lex amicitia means that law is
unthinkable without first thinking friendship. It is not just that law
needed friends, the aid of those outside the law, prior to law, before
calculus and decision. That is one meaning, a humanist interpretation of
the classical fragment. But it connotes much more. If one cannot think
law without first thinking friendship then the viscera of amity, the
secrets and intimacies of friendship are internal to both the jurist and the
juridical. In this sense, the philosophical project as such is one of
commitment to the spirit of amity, to friendship, to the building of
personal relationships. And these are surprising intimacies, unusual
disclosures, when and if they come. Not least the confession of
intimacy, the appearance of the person, which necessarily makes
discourse a touch more equivocal because intimacy and feeling are
relational, and more precisely because these affects relate meaning to
the instance of amity that precedes and defines law. At an etymological
level that is certainly one root of the Greek word philosophy. It is made
up of philein or friendship, and sophia or wisdom and joined they mean
either friendship for wisdom, or the wisdom of friends. Benveniste
makes those links in an authoritative way and points out not only that
friendship and citizenship are homonyms but also that philein had the
further meaning of “to kiss,” and kissing brought with it the
connotations of affiliation, family, and fraternity. These are the figures
of belonging, of having somewhere to return to when all is said and
done. All of which is to say that in his quiet and lengthy manner
Derrida was very concerned not with law but with the instance of amity,

27 JACQUES DERRIDA, POLITICS OF FRIENDSHIP 1 (George Collins trans., 1997).
28 Rather than repeat references and themes, I will refer here to Peter Goodrich, The Immense
Rumor, 16 YALE J.L. & HUMAN. 199 (2004), where I discuss these etymologies and the
arguments that can be drawn from them at length.
the affect and bond that preceded and dictated law in democratic polities.

Take, for example, Derrida’s most literary work, *The Postcard*, of which I am inordinately fond. Here he offered an analysis of his own itinerary, he published his postcards, his *billet doux*, his love letters, notes from his diaries, snippets of phone conversations, and numerous other gallant and amatory gestures. If this was not a work of pure distraction, an exercise in exhibitionism, a narcissistic self-immolation, there had to be a logic to these glimpses of self-exposure, of amity and *amour*. The easy answer is that the trajectory of the work was governed by what François Callières termed *La Logique des amans*—the logic of lovers—and which dates back to a *lex amatoria* or law of love that was separated, set apart, outlawed in the early modern formation of common law.29 There is what Foucault termed a positive unconscious to science and to legal science, *scientia legalis*, as well.30 Amongst the exclusions that went into the constitution of the early modern juridical tradition was the signal annexation of the jurisdiction of love. The choice of jurisdiction, as antique as the law itself, between amity and judgment, between love and law was eradicated. The twelfth century rule, encoded in the laws of Henry I that agreement conquers law and love judgment (*pactum enim legem vincit et amor iudicum*) was erased from memory or at best exiled within an insouciant and imperialistic rhetorical tradition of exclusively juridical governance by means of positively enacted norms.

Consciously, or perhaps more likely also unconsciously Jacques was engaged already and early on in reviving an antique *lex amicitia*, a gay science, a rhetorical law that had long been in abeyance, hidden obscurely and antithetically within. So here again he was busy honoring the faces of the excluded, building a relationship with the other, taking his time and attending to distant traces of affect, long forgotten names, philological fragments, unattributed remains. But start with this paradoxical notion of a lovers’ logic: “The logic of love is the art of discerning true love from false, and of reasoning justly in relation to all that happens to the lovers.”31 So here is a glimpse again of a root or before of the law, a veiled origin whose source, according to Callières, is a “philosophe sans barbe,” a philosopher who,

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29 The wonderful text referred to is FRANÇOIS CALLIÈRES, *LA LOGIQUE DES AMANS OU L’AMOUR LOGICIEN* (1668).
exceptionally, is without a beard. It is an apposite attribution of authorship because it means that the philosopher of love is beardless, of feminine appearance, a woman. Diotima in Plato. Here Derrida amongst the moderns. But whatever image one chooses, it has to be said that the face of the feminine, beauty and all that it connotes, had been absent from the modern Western legal tradition more or less, with a few exceptions, from its inception. Even where the feminine did appear in public, according to the humanist Jan Luis Vives, she had to be shamefaced (shamefast), meaning veiled and looking away.32

Note also that Callières’s concern was with a justice between lovers, with what Derrida termed an equitable honoring of the face, and so connotes a public attention to private emotions, an address of serious speech toward the most intimate of spaces, the heartland of amity, the relation between lovers, the friendship between husband and wife. This space, according to Callières, is distinctly aesthetic—a question of passion, beauty and imagination—and the justice appropriate to it is literary, a matter he continues “of the ardent desire to write and to transform myself into the object that gave birth to my love.”33 That could almost be Jacques writing, echoing almost 300 years later to the day the sentiments of a philosopher of love who lived during the great era of the birth of the novel amongst the proto-feminist cells of the Parisian précieuses of the 1650’s. And certainly there is something precious, linguistically and legally, in Derrida’s work, in his ethics of language, in his imaginative divagations, in his flights of fantasy. There is no question but that he was calling up a feminist spirit, a female “more than one,” and that he introduced that logic of love into his writing, and into his thinking of law. He was very much a “philosophe sans barbe,” Democritus and not Heraclitus, a thinker in a feminine key.

Returning finally to Derrida’s (non) contribution to law we can now place it in a trajectory that mirrors his project and counterpath as a whole. The paradox of his work, its central tenet and key, was a literary resistance to law, a refusal of the anti-intellectualism of lawyers, and yet his most famous conceptual innovation, the neologism and practice of deconstruction eventually comes to be defined as justice. Deconstruction is justice. Which entails of necessity that deconstruction is dependant upon law, defined by legality and of course by the endless deferral of the moment of passage from justice to law, from thought to decision. He was indeed very rigorous. He never got to talk about law, he never seemed to want to, he held off. What he did do, however, was take lawyers to task, directly and more likely

33 CALLIÈRES, supra note 29, at 150.
indirectly, by reintroducing what law has historically separated itself from: amity, community, femininity, felicity. And as a discipline its conceptual apartheid or setting apart has encompassed rhetoric, aesthetics, literature and love. He resided with these specters of an earlier law, these imaginary beings, and he allowed them to be seen. His work thus called up the most historic of juridical specters, that of justice, a woman, a spirit not so far from law and yet separate from it and never visible enough. He offered the most radical of opportunities, by virtue of his fame, by virtue of his difference. For legal scholars he proffered the option of taking scholarship seriously, the possibility of writing as someone other than a lawyer, in a different genre and yet not without relation to justice, not without import for law.

His success, his fame and his notoriety, has also frequently been a puzzle. But in relation to legal studies it is not really such a surprising phenomenon. Cusset, in his study of the reception of French intellectuals in the United States, suggests that their appeal was a combination of their difference and their aura of exile.34 They were granted an exotic form of theoretical asylum by means of which American intellectuals, and their campus cohorts could return vicariously to the theater of their roots and re-enact their own exile, their own passage to the New World. Their success was in this sense a product of the fact that they offered a displaced stage upon which to act out the drama of American identity, its endless translations, its deconstructive mode of becoming. The same is probably true in law. Derrida’s work provided a theatrical staging, a dramatic presentation of the trauma of American law. It is after all more obviously foreign, more evidently imported and translated, younger and so visibly closer to its European roots than is English common law which long ago determined to disguise its continental origins, its Roman parents. The concept of deconstruction in part legitimated and in part allowed for critical analysis of what was very obviously a disparate and foreign transplantation of law. Derrida allowed legal scholars to listen to the specters of law, the displaced, transplanted and exiled internal voices. He appealed to the excluded, to the submerged figures of gender and politics. He made available the invisible traces of class, of racial and sexual exclusion, the hidden injuries upon which the dominant figures of law were built. That appealed and also enraged. It still does. It is not over. He lives-on.

At a broader cultural level the success of Derrida in legal scholarship is also explicable in fairly immediate terms. The last century of American jurisprudence began and ended with the importation of continental theories of language. The great scholarly

34 Cusset, supra note 10, at 27, 344.
excitements of the twentieth century were equally occasioned by importations of theory. It was a constant theme. The signal moments were those of German historicism and its critique of verbal abstraction, of magical rights, of legalese, then English analytic philosophy of language, and finally, third moment, the return of philology, continental theory, deconstruction. The specter of Europe hung over American legal studies and the more that the U.S. legal academy sought to proclaim its originalism, its uniquely American identity, the discrete character of its common law, the more the specters of its European roots rose to visibility. The figure of legal nationalism is after all a very common one. It is frequently stated and just as frequently disproved by the very language of its enunciation, by the foreign terms and concepts that are claimed as “ours,” by the specters of history, the pain and injustice of death. Derrida, more than any other theorist, controversial, complex, appealing in being exotic, attractive because foreign, infuriating yet amicable, was the pure witness, the best available thinker of those worrying specters, those haunting injustices of both memory and method.

And finally, closing statement, envoi: un cygne noir—a black swan. The reference is to a comment of Kant’s, namely that a true friend, a moral friendship, is as rare as a black swan. Which is more descriptive than melancholic, more celebratory than lachrymose, more colorful than nocturnal. Black swans are rare birds but they can be seen, they do exist, they make their presence felt, if rarely and tentatively. And one can go further, find other and more dangerous supplements. Juvenal, from whom the reference derives, and as Derrida notes, used this figure of avian rarity to depict the impossibility of true friendship with a woman, with a wife. The figure raises another, and Juvenalian specter. It is that of the engendering of friendship, the emotional immediacy of amity, the quixotic reality of the presence of the friend that even Jacques found hard to acknowledge. He cautioned incautiously against the challenging fraternity, he acknowledged his love of his family of brothers and so kept his feelings, his personal history away from his texts, his knowledge, his law.

35 The precise reference is IMMANUEL KANT, THE DOCTRINE OF VIRTUE: PART II OF THE METAPHYSICS OF MORALS § 46-47 (Mary Gregor trans., 1991). Kant himself is quoting JUVENAL, SATIRES, at vi, 170 (Hubert Creekmore trans., 1963)—“a rare bird on this earth, as rare as a black swan” [rara avis in terris, nigroque simillima cygno]. As for the German version, courtesy of my correspondence with Pierre Legrand, grand philologue qu’il est, “Diese (blos moralische Freundschaft) ist kein Ideal, sondern (der schwarze Schwan) existirt wirklich hin und wieder in seiner Vollkommenheit.” I am taking the comment here from an interesting essay by the late Hans-Georg Gadamer, Amitié et Solidarité, in L’AMITIÉ 233 (Jean-Christophe Merle & Bernard Schumacher eds., 2005).

36 Derrida’s discussion of Kant’s reference to the black swan is contained in DERRIDA, supra note 27, at 258.

37 Away at least from direct expression. Thus the warning against challenging the brothers
Avital took this up in her presentation.38 She challenged that silence, that said of the unsaid, and mixed in the confession of secrets, the play of intimate anecdotes, the deeply personal encounters that mark the life of a friendship, the binding and unraveling of amity, the pleasures and failures of emotional presence. There is an engendered and embodied amity that underpins the theater of truth and law. It rarely gains expression. It frightened Derrida in the same way that the unconscious disturbs, in the same way that emotions unsettle our preconceptions, in the same way that the shadow of a bird seen out of the corner of the eye portends. And Avital, phonetically à vie, to life, and so to friendship, is also identical with avis, Latin for a bird, and perhaps a black bird, a swan even, and there too a curious and pleasing play of the sign, un signe noir one might say.

So that is not all. It never is. To be explicit about it, un cygne noir is the phonetic equivalent of un signe noir or black sign, an epitaph or memorial. That very Derridean play upon the sign, that “derridanse” allows us to acknowledge the death that this symposium recognizes, the black border, the liminal non-presence that lies at its origin. A black sign may be a marker of the failure of friendship, of death, even of plague or radical demise, but it also carries further and less melancholy meanings. For example, the clergy wears black, so Dr. Taylor informs us, and he notes that the law requires it, that it tends to the good. Thus the black monks or Benedictines, harbingers of faith and sanctity. Black vestments mark the man—quia habitus virum ostendit—or so apparently the doctors variously say. Black garments, dark signs, are good for the soul, because there is religion in the color, in the black.39 A black sign then as the marker of the extremity of all color and by that figure a sign of the soul, the harbinger of spirit, the no more one, of the more than one.

To this we can add all the later uses of black signs and most notably in law. The Gothic typeface or black letter became a synonym for legal documents, and the black letter rule came eventually and ironically to refer to the ipsissima verba or very words of command. Like the black rod they ushered in the majesty of legality, the person of the ruler. And that is just a start, a little play upon the possible meanings of a phrase that is phonetically identical in the original French with the title chosen to mark the epitaph of an Algerian Jewish philosopher and litteratus. In the old sense of the term, a cleric, a

39 JEREMY TAYLOR, DUCTOR DUBITANTUM, OR THE RULE OF CONSCIENCE 291 bk. III, ch. 4, R. 15 n.7 (1660).
scholar, an *eruditus*. It is a start. And black is also and more physically a marker of race, of Africa, of Derrida’s itinerary there and back, a constant reminder one might say of his return, his embrace of the black specter of both origin and of demise. What he offered is what he left us with. Isn’t that always in some sense the case. He left us with his spirit. He left us with his sense of injustice, with the spirits, the revenants or remembered specters with which he had so determinedly confronted authority and law. He always said it would end badly and in a sense it always must. But he also lives on. He knew he would. And herewith, black letters, black borders, *in memoriam*, his epitaph, a living on and fifty reasons why.