

I. Introduction

Much has changed in the ten years since I argued for Levinasian alternatives to the Law and Economics movements in one of the first articles on Levinas to appear in a U.S. law review.¹ Levinas scholarship has expanded considerably, especially with respect to the practical applications of his purposefully impractical philosophy. Despite his well-known aversion to the subject, Levinas' political philosophy now receives considerable attention.² This seems inevitable given his status as one of the great thinkers of Judaism in an age in which Zionism plays such an enigmatic role in global affairs. Our desperation for a light to pierce the ethical fog of modernity and its imperialist wars also makes Levinas' unyielding challenge to violence a welcome beacon. And as this volume, the spirited conference that gave rise to it, and Desmond Manderson's *Proximity, Levinas, and the Soul of Law* demonstrate, Levinas now also provides inspiration for many legal theorists.³

I should warn readers that my previous enthusiasm for Levinas' importance for law has waned somewhat. I recently discussed my general concerns about Levinas and Levinasianism at some length, evaluating the disagreements between his writings and those of T. W. Adorno.⁴ The kinship between Adorno and Levinas is incontrovertible and has received some attention in recent years.⁵ At root, they share: (1) a personal confrontation with National Socialism, the horrors of which motivated both to define their theoretical positions negatively against authoritarianism; (2) a critique of (a) the ubiquity, (b) the inadequacy, and (c) the violence of instrumental reason; (3) a similar understanding of that which is occluded by abstract thinking as auratic concrete particulars, what Adorno names the "non-identical" and Levinas marks as the "other"; (4) a claim that the conceptual subsumption of the particular to the universal amounts to an ethical failure; (5) an engagement with the possibility of rerouting philosophy toward a highly self-reflective mode of thinking as an attempt to relate to what is exterior to thought non-violently; (6) an ultimate appreciation of the impossibility of sustaining a non-instrumental relationship with the particular; (7) a demand that this difficulty regarding a non-violent relationship to the other remain at the fore of thinking, making philosophy an inherently ethical undertaking; (8) a belief that this ethical task of philosophy is interminable and that all acts of philosophizing become complicit with the violence they seek to eradicate; and (9) an elevation of actual concrete things into a dialogical relationship with philosophy despite our damaged relationship with the world, making the face for Levinas and the modernist work of art for Adorno bearers of exclusive truths.

I argued in that paper that we should understand Levinas' assertion of the transcendence of the face as the most telling point of departure between his and Adorno's critiques of instrumental reason. I attempted to explain why Adorno might understand Levinas' notion of illeity—the property of the other that endows her with an infinite positive ethical charge and thus elevates her from the normative cipher of the absolutely unknown—as a potentially dogmatic byproduct of a culture desperate for non-instrumental meaning. Adorno's historical and sociological account of the disenchantment of the world and the destruction of aura within a culture fully administered by scientific rationality and economic reductionism sharply contrasts to Levinas' transcendental phenomenology, and I explained why I find Adorno's dialectical methodology and close attention to cultural forces driving instrumental rationality ultimately more compelling.

I also share many of the concerns enumerated by Simon Critchley in his 2004 essay on the difficulties facing a Levinasian political theory.⁶ In addition to the occasional sexism, racism, monotheism, extolling of the "marvel of the family," and uncomfortable relationship with Zionism that Critchley flags in Levinas' work, I explained why I find Levinas' speciesism both telling and disturbing.⁷ Many contributors and readers of this volume will disagree with my arguments in that paper, and I admit that I offered those rather uncharitable interpretations in response to the dangers that I see in over-sympathetic readings of Levinas. Although we might occasionally need to be more Levinasian than Levinas himself, I wonder which aspects of his work we can alter without undermining the spirit of his critique. That paper questioned whether we can easily amend his views on art and non-human animals, for instance, and therefore I want to be forthcoming about my uneasy relationship with Levinas and my preference for Adorno's materialist critiques.

Having said that, for the purposes of this volume—which considers Levinas' contribution to debates regarding law and justice—I think Levinas and Adorno share the same problem. Levinas and Adorno both refuse to translate their stringent ethical convictions into a programmatic social theory

because translating their theories of non-identity into models of governance would necessarily perpetrate, en masse, the very subsumptive violence they denounce.⁸ Although Levinas and Adorno have come to provide ethical guidance to Continental philosophers, their outright refusal to be drawn into applied theory has caused innumerable difficulties for progressive theorists compelled by their critiques of instrumental reason but handcuffed by their skepticism toward practical reform. I do not mean to suggest that Adorno and Levinas were not personally engaged with political causes or that numerous interpreters have not extrapolated political content from their work, but rather that Levinas and Adorno expressly blocked the conversion of ethics into political and legal programs on ethical grounds. This paper outlines the procedural and substantive questions that I find most worrisome for a “Jurisprudence of Alterity” motivated by Levinas or Adorno.

II. Levinas, Adorno, and the Depracticalization of Philosophy

Attempts to glean applied ethics, political philosophy, or legal theory from Levinas or Adorno face a serious problem. At root, what I find most distinctive and important about their thought is its challenge to philosophy *as instrumental rationality*. Levinas and Adorno keep alive the idea of meaning beyond the purview of the modes of thinking that lead us to evaluate and understand everything from the egocentric perspective. Because they question the limitations and transgressions of cognitive habits that relate to the world exclusively in terms of its worth within our instrumental totalities, Levinas and Adorno present a difficulty if we hope to *use* them as a means to achieve some social, political, or legal end. As soon as we speak of the instrumental value of their critiques of instrumentality, we seem to offend the basic spirit of their contribution. We can look to many philosophers for theories of justice, but both Levinas and Adorno thought that their contributions lay elsewhere. Problems of justice, for both of them, were more fundamental than legal and political systems. Violence begins in the subsumption of the particular to the universal, and pretensions otherwise only allow the roots of injustice to grow deeper.

I imagine readers of this volume are familiar with Levinas’ critique of the sorts of practical philosophy common to legal and political theory. Other commentators have made these difficulties clear, and I will not rehearse those arguments here other than to remind us of the nature of the dilemma. For Levinas, I lose the experience of the radical particularity of the other as I shift my attention away from my immediate responsibilities to her and toward abstract considerations regarding the well-being of the community. As soon as I think of my responsibilities to the many before those to the singular second person, I cannot sustain my level of attentiveness to the other.⁹ Law deals in rules and legal principles that apply across time, places, and populations and requires us to evaluate the demands of the many, but Levinas insisted that ethical responsibility originates in the confrontation with the singularity and incommensurability of the other. Law, in other words, operates at the level of abstract universals but ethics can only be found in the singular relationship with concrete particulars. Regardless of their content, theories of justice appear inextricable from totalizing viewpoints that categorize, organize, and codify alterity. The other becomes one generic citizen among many, and we revert to a unified ontology: “Political totalitarianism rests on an ontological totalitarianism.”¹⁰ Hence Levinas’ most often-repeated missive against politics: “The art of foreseeing war and winning it by every means, politics . . . is opposed to morality, as philosophy to naïveté.”¹¹ We can therefore distinguish several interrelated sorts of problems for a Levinasian theory of justice. Law, by its customary definition: 1) reduces the other according to a given onto-political totality; 2) diminishes attention to the singular other; 3) denies the radical particularity of ethical responsibility by relying on the practical maxims provided by laws and legal principles; 4) introduces a new authoritarianism with such laws, regardless of their self-reflexivity and revisability; and 5) enables the most brutal forms of instrumental rationality.

Similar challenges face those hoping to practicalize negative dialectics, which levels its critique of instrumental rationality with a materialist and sociological methodology rather than from Levinas’ phenomenological approach. Adorno’s abstinence from politics extends Lukács’ diagnosis of the reification of proletariat consciousness. To summarize, Marx’s expectation that the contradictions of capitalism would generate class resistance became suspect as the objective conditions for revolution divorced from the subjective conditions. Adorno attributed this to the decerebrating tendencies of the culture industry: as inequalities grow and technoscience extirpates traditional sources of value, commodity fetishism numbs the mind. Exchange value supplants the values that should drive revolutionary action. Desperately in need of a transfusion of new lifeblood, humans “must act in order to change the present petrified conditions of existence, but the latter have left their mark so deeply on people, they have deprived them of so much of their life and individuation, that they scarcely seem capable of the spontaneity necessary to do so.”¹²

For Adorno, true reform would require a transformation of the modes of cognition that dominate modernity. Until we can interrelate beyond the pure instrumentalities of identity thinking, all social, political, and legal reform will sacrifice the concrete particular to the abstract universal. For Adorno, “even the best intentioned reformer who uses an impoverished and debased language to recommend renewal, by his adoption of the insidious mode of categorization and the bad philosophy it conceals, strengthens the very power of the order he is trying to break.”¹³ Until the enlightenment becomes enlightened about *how* it thinks, *what* it thinks about justice will necessarily lead to the violence of totalizing thought. We cannot speak of justice, in other words, within a conceptual framework that views the world in strictly instrumental terms.

Under these conditions, the public can only muster “the feeble resistance which that very industry has inculcated in it.”¹⁴ The crippled protest itself becomes integrated into the system, as the culture industry “embraces those at war with it by coordinating their consciousness with its own. . . [because] what subjectively they fancy as radical, belongs objectively to the compartments reserved for their like.”¹⁵ What appears critical, today exemplified by all of the forms of “alternative” life, merely diversifies the products bought and sold. Identity thinking and its practical apotheosis in global commodification go effectively unchallenged. The illusion of resistance gives culture a placebo that leads its members to believe they are treating their condition when in fact the dose of consumerism coated with false negativity further degenerates them.

As an heir to the Marxist emancipatory project, Adorno’s skepticism for practical reform created predictable animosity amongst his revolutionary-minded colleagues. Lukács famously castigated Adorno for taking up residence at “‘The Grand Hotel Abyss’ . . . equipped with every comfort.”¹⁶ Hans-Jürgen Krahl, an activist in the German student movements denounced by Adorno, found Adorno incapable “of translat[ing] his private compassion for the wretched of this earth into a . . . theory for the liberation of the oppressed.”¹⁷ This notion that Adorno’s negative dialectics cannot constructively engage theories of justice has become the standard reading over past forty years, as Drucilla Cornell summarizes:

For Adorno, the ‘end of philosophy,’ which must come with the full acknowledgment of the horror of the holocaust, left him only with “negative dialectics” To try to abstractly portray the conditions of redemption, to give form to the hope of reconciliation as if it existed now, only promotes accommodation of a fallen world. As a result, Adorno does not reflect on the conditions of justice and the relation of these conditions to positive law, either through quasi-transcendental inquiry or through empirical analysis. . . . [E]ven if his negative dialectics carries with it an ethical message that can be decoded, this message cannot be translated into an account of justice and its relation to law.¹⁸

The pretensions of theories of justice “accommodate” the status quo by treating the symptoms of identity thinking rather than addressing the underlying cognitive disease. In addition, political movements depend upon the abstract classification of peoples, and these classifications indubitably result in categorization, repression, and domination.¹⁹ Whatever advance is won in substantive reform comes with a regression in the struggle against identity thinking.²⁰

For both Levinas and Adorno, we cannot salvage theories of justice from their practices of reducing the other by classifying concrete particulars into abstract, generic, and lifeless institutional beings. The transition from the ethical to the legal and political codifies collective violence, and therefore both raise the bar of political justification beyond the range of any legislation by enforcing the uncrossable divide between law and justice. Thus while non-identity theory problematizes the vanity of all theories of justice, it abstains from determining substantive policies. This refusal to collude with the violence of law relegates non-identity theory into a position of *permanent* dissent regarding theories of justice.

The costs of Levinas and Adorno’s sacrifice of immediate practical concerns to more fundamental critique are high considering their popularity for post-Marxists. Leftist critics of economic injustice, commodification, essentialism, and other issues inclined to look to Levinas and Adorno are mired in what has been called the “postsocialist condition,” a period Habermas describes as devitalized by “the exhaustion of [leftist] utopian energies” since 1989.²¹ While neo-liberalism circles and digests the globe, the left struggles to identify principles around which to mount a unified opposition. All of this helps to explain both the awkwardness and the importance of the contributions in this volume. It also discloses my own reservations about the questions I am about to ask.

III. Procedural and Substantive Questions

A. Procedures of Alterity

Although it often proves difficult to sustain such distinctions, theories of alterity have tended to speak to procedural rather than substantive issues of justice. Since the influential volume *Deconstruction and the Possibility of Justice*, the bulk of Levinasian and deconstructive critiques of law emphasizes the tenuous relationship between law and justice.²² Although this may seem like a rather banal contribution to legal theory, I find this shift in cognitive and emotional disposition quite profound because Levinas and Adorno remind us of the fragility of all decisions. Incommensurable loss accompanies all choice, regardless of our purported justifications. We minimize these losses in order to fortify our resolve, and Levinas and Adorno incessantly press us to confront our lack of justification.

In this respect, theories of alterity provide a counterbalance to binary determinations that dominate law by imparting much needed humility to considerations of justice. Adversarial legal systems reframe the competitive tendencies of capitalism into contests for justice where we are guilty or innocent, winners or losers. Unlike normative theories that vie to out-fundamentalize others and pronounce determinations of justice with absolute certainty, ethical phenomenology and negative dialectics bring about the anxiety of radical open-mindedness. Certainty becomes the enemy of justice, and both recent and ancient examples corroborate the belief that a lack of humility, facile moralism, inattention to nuance and context, and unwillingness to revise one's beliefs leads to authoritarianism. This is especially poignant when we contrast the interruptive capacities of theories of alterity with the methodological commitments of the Law and Economics movement, which unflinchingly reduces all human value to an economic metric and provides a powerful example of the totalizing ideology of capitalism digesting the entirety of existence.

We can also notice how Levinas and Adorno might shift the source of authority in law from abstract moral principles and legislation to concrete particulars, which might prove pioneering in several respects. First, reorienting the normative source of law in this way would address the deficiency in the motivational structures of Kantian theories of morality. Enlightenment rationalism vacates our motivations for obeying moral laws because it becomes unclear why we should care about justice once we adopt the disinterested perspective to realize its nature. When we empty ourselves of all of our self-interest in order to become unbiased rational agents, what remains to motivate us to honor principles of justice?²³ Instead of being compelled by the immediate suffering of a being, the Kantian's duty is to the moral law rather than to the person in need. If this seems backwards, Levinas and Adorno reorient the foundations of justice toward the actual suffering of a particular other. According to J. M. Bernstein, only "the normative authority of the factual" can fill the motivational deficit resulting from our reliance on moral argumentation rather than the force of unique suffering things.²⁴ Hence the experience of the other triggers a kind of moral insight in the sense that a painting provides a moving experience of beauty. Just as we cannot experience the full beauty of a painting through a verbal description of it, we cannot experience the force of justice without confronting the intricacies of individual injuries. Given this, legal disputes generally seem better suited to reflection on concrete particulars than political theory. Whereas political thought tends to consider populations from a macrological distance, legal thinking must tarry with the micrological details of individual cases. Judges must develop the *phronesis* to mind the infinite particularities of justice because every case invokes the intuitions of reflective judgment rather than the rote application of law to fact, and this seems amenable to a jurisprudence of alterity.

Continental philosophers of law often sound as if they prefer the untamed version of law to the more predictable varieties, but I worry about the dialectic swinging too far in either direction. What, for example, is the significance of the rule of law within such an un-ruly conception of justice? Do we trust judges to exercise their reflective judgment on the merits of radically particular cases, as if methodologically oriented by Kant's *Third Critique* rather than their nation's constitutional code? Likewise, should *stare decisis* remain a guiding principle or should we abandon the practice of "treating like cases alike" for one that emphasizes their absolute difference? Although allowing incommensurability and non-identity to guide legal judgment may sound like a cornerstone of progressive jurisprudence, we would doubt the prudence of affording such latitude to a court if it drifted from the favored ideology. An emphasis on concrete particularity, in other words, can serve all points on the political spectrum.

The belief that reorienting law by incommensurable particulars will result in a less violent justice system rests on the notion that the other holds a positive ethical charge and its influence will pull law toward responsibility. If law genuflects before the other, we might think, it will show us the way toward justice. But how can we know that the other exerts such normative gravity? Can we be certain that the other—that which is beyond all categorization—belongs to the category of things of ultimate meaning and

authority? If that which is beyond our concepts is *unknowable*, how can we *know* that it triggers infinite ethical responsibility?²⁵

As I have written elsewhere and Critchley and Caygill have discussed in some detail, Levinas' conception of responsibility seems inextricable from his notion of illeity.²⁶ Illeity refers to the "He-ness" of the other, interesting not only because of its gender but because it describes something like the presence of god. I do not wish to overstate this point, but Levinas' use of illeity causes me to worry about the role of god in any Levinasian jurisprudence. Illeity endows the other with its "absolute" force, and he often derives the authority of the other from its relationship with god despite his attempts to think beyond onto-theology. Does the force that shines from the other and pulls us toward responsibility ultimately emanate from god? Does god give the other its normative authority? Consider the following passage from "Meaning and Sense":

To be in the image of God does not mean to be an icon of God but to find oneself in his trace. The revealed God of our Judeo-Christian spirituality maintains all the infinity of his absence, which is in the personal "order" itself. He shows himself only by his trace, as is said in Exodus 33. To go toward him is not to follow his trace, which is not a sign; it is to go toward the Others who stand in the trace of illeity. It is through this illeity, situated beyond the calculations and reciprocities of economy and of the world, that being has a sense. A sense which is not a finality.²⁷

It becomes evident that the Other's ultimate significance does not arise from of the enigmatic nature of its concrete particularity, as it does for Adorno, but instead results from a supplement added to its trace from on high.²⁸ Although Levinas did not strictly identify the Other with god, he does not deny that the normative power of the Other is generated by god. The emphatic redundancy from *Entre Nous* leaves little room for doubt in this regard:

When I speak to a Christian, I always quote Matthew 25; the relation to God is presented there as a relation to another person. It is not a metaphor: in the other, there is a real presence of God. In my relation to the other, I hear the Word of God. It is not a metaphor; it is not only extremely important, it is literally true. I'm not saying that the other is God, but that in his or her Face I hear the Word of God.²⁹

"God is personal," Levinas continues, "insofar as He brings about interpersonal relations between myself and my neighbors."³⁰ Adriaan Peperzak summarizes how there can be no path to transcendence for Levinas without God leading the way: "The only chance of contacting God, the only possibility for 'transcendence,' is walking in the trace he or it left, a trace that always leads to a human face."³¹

As an agnostic philosopher, this makes me uneasy. I appreciate Levinas' challenge to prevailing models of normativity, and I am genuinely moved by his challenge to rethink the relationship of ethics and theory to the infinite. Levinas wrests questions of ultimate meaning away from the debate between the dueling dogmas of reductive scientism and religious fundamentalism, and his alternative can transform our basic understanding of the relationship between thought and value. Indeed, I often wonder about the presence of a god in the quiet moments when I look into the faces of loved ones and I find devout atheists as dogmatic as those who unquestioningly affirm monotheism. For me, the relationship between god and the infinite remains an open question.

It seems more troublesome, however, to shift from private considerations of the role of god in a phenomenology of the other to a public "Jurisprudence of Illeity." How, for instance, would a jurisprudence of illeity respond to those unmoved by the face? How would it arbitrate between those who invest the Other with infinite authority and those who do not? Does an assertion of ethics as first philosophy, even prior to the dialectics between cognition and violence that Adorno prefers, risk preaching to the converted? Might a "Law of Levinas" lend authority to the most unsavory aspects of his philosophy or to those who adopt his views unreflectively? Perhaps my concerns are unwarranted, but I find these to be important questions to ask.

Even if we could imagine a justice system controlled by Levinasians, could there be a prevailing jurisprudence of alterity? Or is it better suited to occupy a minority position, offering a kind of regulative ideal against which we measure all other legal theories and actions? If Levinas provides a kind of regulative ideal for law, what can we say about the substantive commitments that such a view would entail?

B. Substance of Alterity

With these procedural concerns in view, we can wonder if a jurisprudence of alterity would advocate particular substantive doctrines. Here we first run up against Levinas and Adorno's shared inability to compare the relative merits of laws and legal systems. Notice, for example, how little practical guidance Levinas offers given his prioritization of the saying over the said. According to Levinas, "the saying is the fact that before the face I do not simply remain there contemplating it, I respond to it."³² We can understand the saying as the ethical *event* of speaking to another, and the said as the content of any saying. For Levinas, the "said does not count as much as the saying itself," because "[t]he latter is important to me less through its informational contents than by the fact that it is addressed to an interlocutor."³³ "It is as though," Levinas writes, "saying had a meaning prior to the truth it discloses, prior to the advent of knowledge and information it communicates, free of everything said, a saying that does not tell anything, that infinitely, prevoluntarily, consents."³⁴ The "unsaying of the said" testifies to my ethical imperative to alterity by speaking and relentlessly examining the inability of that very speech to relate nonviolently to the other. Thus the saying, or the very gesture of response to the other, takes priority over the said, or the content of any cognitive insight.

Because the said always reduces the other regardless of its content, Levinas offers no means to determine which saids fail less. All substantive claims totalize, so we are left to wonder how to differentiate between the content of any assertions. In a rather alarming passage, Levinas writes:

The other is maintained and confirmed in his heterogeneity as soon as one calls upon him, be it only to say to him that one cannot speak to him, to classify him as sick, to announce to him his death sentence; at the same time as grasped, wounded, outraged, he is "respected."³⁵

If calling the other to the gallows can offer a saying that "respects" her, I wonder if Levinas can make any substantive distinctions relevant for law. Does he allow us any means of evaluating which substantives are less ethically impoverished? Remaining with the example of punishment, can Levinasians distinguish between executing, incarcerating, or rehabilitating? Although Levinas claims that the other commands us not to kill, can he advise us regarding whether imprisonment or torture is necessarily better than death? Adorno's infamous declarations that everything is equally bad present the same difficulty. Any legal systems and judicial decisions, from the most barbaric to the most progressive, appear to arrive at the same ethical dead end by their standards. How, then, can we evaluate the comparative merits of competing forms of governance or principles of law? How might legal actors—whether legislators, judges, attorneys, probation officers, litigants, or others—apply theories that go to such extremes to resist application? Their disengagement from the concrete world of pain and suffering seems inapposite to the very ethos of non-identity thinking. Both Levinas and Adorno attempt to reorient thought toward the normative force of particulars, yet they cannot speak to the concrete suffering of individuals within our legal institutions. Thus they advocate for concrete particulars *in the abstract* but say little regarding *actual* concrete and particular ethical situations.

Here we can wonder if the aversion to rule-making, abstraction classification, and commensuration disable attempts to dissolve repressive identifications within law? Surely even if all legal institutions are woefully totalitarian and we cannot draw a bright line between democratic and fascist practices on this ground, we should not consider them ethically equivalent. Two orders of reduction appear to be at issue. First, we can call the initial reduction of objects to concepts "formal reduction." Levinas and Adorno meditate on the ethical and cognitive difficulties that arise in this first order. The second order of reduction concerns the undesirable social, political, and legal consequences of the use of reductive categories. Second order reduction necessarily requires first order reduction. The question receiving far too little attention is whether the first order necessarily, and to what extent, entails the second order. A jurisprudence of alterity should be sensitive to the interplay between first and second order reductions, considering how reductive concepts result in domination and suffering.

Neither Levinas nor Adorno, however, can reform the reductive tendencies of law without differentiating between grievous and hateful reductions and their comparatively benign counterparts. Although all legal concepts perpetrate a reductive violence, they are not all equally repressive. As Nancy Fraser understands this dilemma, indiscriminating forms of deconstruction or negative dialectics that denounce all identity concepts, like indiscriminating forms of multiculturalism that celebrate all identities,

fail to connect critique with social justice.³⁶ If all identity concepts are equally insidious, we lose the ability to differentiate between the concepts and their social-political consequences. We must differentiate, for example, between concepts utilized to promote economic equality and those that are openly exploitative and degrading. Without this ability, theories of alterity become, in Fraser's terms, a night in which all cows are gray: "all identities threaten to become equally fictional, equally repressive, and equally exclusionary."³⁷

Critchley attempts to avoid this danger by arguing that that Levinas' slogan that "politics begins as Ethics" means that "political space is based on the irreducibility of ethical transcendence, where community takes on meaning in difference without reducing difference."³⁸ Such a claim, however, seems rather unhelpful unless it can distinguish between policies that respect difference and those that exterminate it. Legal and political concepts are indeed reductive, and perhaps such violence is never justified in any simple sense. Yet are not some concepts, such as those identifying classes of people in need of special protections from the law, appropriate considering the dangers of not using such concepts? Guyora Binder and Robert Weisberg have stated this need frankly: "How human beings should be represented in social thought is a pressing moral question, but whether they should be represented is not."³⁹ *How* to represent can be addressed with sensitivity to the shortcomings of representation as such, and this would be a welcome alternative to writing off all theories of justice as hopelessly reductive. Yet the problem remains: how can we distinguish between justifiable and unjustifiable violence in law without reverting to the traditional moral theories that Levinas and Adorno find so problematic?

Consider, for instance, the difficulties of weighing the dangers and benefits of a notion like "equality" in law. Given the centrality of this abstract generalization to so many progressive programs, how can we determine whether social justice warrants the continued use of a commensurating byproduct of Enlightenment rationalism? If notions of equality reduce others to the same, should we continue to honor them? Recent history tells the story of the parallel ascendance of democratic forms of governance and free markets wherein formal equality—as in the equality to compete in the global marketplace—becomes a justification not only for treating humans as interchangeable commodities but also for the material inequality between them. The notion of equality can thus be a means of repression as well as liberation, and it seems unclear whether a jurisprudence of alterity can distinguish between these uses. Critchley claims that although "my ethical relation to the Other is an unequal, asymmetrical relation to a height that cannot be comprehended," it also "opens unto a relation to the third and to humanity as a whole—that is, to a symmetrical community of equals."⁴⁰ Because of this ultimate equality, Critchley writes, "I can feel myself to be an other like the others—that is, one of a community that can demand its rights regardless of its duties."⁴¹ Critchley further claims that "[d]emocracy is the form of society committed to the political equality of all its citizens and the ethical inequality of myself faced with the Other," but what does he mean by this rhetorically powerful but often ambiguous term?⁴² *Who* deserves equality and of *what* do they deserve equal proportions? Can Levinas or Adorno help us to determine whether notions of equality hinder or advance our "openness to the other" or to distinguish between repressive and responsible conceptions and uses of the term?

Notice the extent of these difficulties for matters of legal identity and distributive justice.⁴³ Rather than adopting the multicultural position that celebrates group identity, for instance by recognizing and ennobling diverse racial classifications, a jurisprudence of alterity would presumably favor antiessentialist conceptions of personal identity that understand individuals as radically particular. If we deny the particularity of the other by categorizing her according to racial indicia, this would appear to violate the particularism advanced by Levinas and Adorno. Instead of reinforcing totalizing identity concepts, antiessentialists attempt to overcome such identifications by deconstructing their meanings and exposing them as fallout from totalizing narratives. Radical otherness exists beyond the binary classifications of personal identity, and philosophers of alterity therefore appear to support a kind of "politics of non-identity."

Where does this leave the antiessentialist committed to social and economic justice? If we should dissolve our reductive racial categories, for example, how can we advocate for those who suffer from the legacy of such discrimination? How do we improve the economic status of racial minorities if race requires an illusory metaphysics? Should we instead respond to the individual demands of each radically distinct other and thereby look past racial concepts? It seems that we cannot think in terms of structural violence and structural reform without adopting a totalizing view, but should we anyhow considering the potential benefits? A jurisprudence of alterity would surely resist the sorts of reductive identifications used in racial profiling, but what about those necessary for affirmative action programs? How can we maintain

antiessentialism without abandoning the ability to redress the harms visited upon those subordinated because of their historical classification within disfavored groups? When advocating for equal pay for women, for example, how can we provide special protections and remedies for women without reifying essentialist gender categories? Neither Levinas nor Adorno provide guidance regarding how an antiessentialist legal orientation can sustain its recognitive position while working toward redistributive and other remedial ends. From their perspective, the current methods of achieving social justice in law are always Pyrrhic victories.

I imagine that Levinas would be much more helpful for the analysis of contemporary social and legal issues if we could supplement his insights with something like Adorno's materialist sensitivities. Although other commentators may disagree and cite Levinas' occasional references to economic injustice, I find his transcendental phenomenology unsatisfying when compared to Adorno's refusal to consider the non-identical outside of its sociological environment.⁴⁴ For Adorno, identity thinking is an anthropological practice that originates in the drive for survival and develops into universal commodification. While Levinas offers a largely ahistorical and transcendental critique, Adorno engages the gritty details of the central features of life in a post-Holocaust culture increasingly ordered by capitalism: meaning is lost as cosmological narratives deflate, scientific rationality piles on reasons why our lives and suffering are irrelevant, and the money economy makes the most insidious forms of abstract classification global and compulsory. This account of the relationships between identity thinking, instrumental rationality, and domination contextualizes alterity in a manner largely unavailable to Levinasian ethical phenomenology despite his appreciation of the specific difficulties presented by the "famished stomach that has no ears, capable of killing for a crust of bread."⁴⁵ In my view, a jurisprudence of alterity would be compromised without an acute sensitivity to the contours of legal culture within modern economic structures. Perhaps we should supplement Levinas with Marx, and Adorno with even more Marx.

Levinas and Adorno create obstacles on certain paths toward economic reform, yet economic justice seems like an essential means to the ends they envision because their ethical demands are far more practicable when supported by favorable social and political conditions. Hunger, repression, and war are considerably less likely to foster the type of non-instrumental relations they advocate because of the instrumental demands individuals under such circumstances face. Although both Adorno and Levinas argue that we should not subordinate ethical responsibility to survival itself, the motivations underlying repressive identification are strongest in times of fear and competition. It will be most difficult, but perhaps most critical, to genuflect before and bracket instrumentalizations of another when her boot is on my throat. Economic and political circumstances condition cognitive habits, and, as current events have made clear, a perceived threat from members of a class will reinforce rather than dissolve repressive identifications. Constitutive feedback reverberates amongst economic conditions, legal frameworks, and the cognitive behavior of citizens, and any hope to reform ethical habits should be mindful of this dialectic.

Most generally, I fear that the problems for law created by the indiscriminate critique of traditional normative theories risk stalling all progressive legal reform. Of all the problems that face contemporary legal reformers, I wonder whether we can consider Levinas and Adorno allies with respect to any particular issues. In addition to the concerns related to redistributive justice, for instance, what might a jurisprudence of alterity contribute to theories of punishment as mentioned earlier? Although they undermine the confidence of all justifications for punishment, does this entail that Levinas and Adorno would support a complete abolition of all punitive activity? Should we adopt a radical passivity toward all offenders, from corporate tax evaders to war criminals? Would this prohibit even rehabilitative punishment? And although we might extrapolate a Levinasian position on any number of debates, this may lead toward potentially unwelcome conclusions. Given his clear advocacy for non-violent relations with the other and his disdain for liberal conceptions of freedom, for example, I suspect that extending Levinas' views to abortion or assisted suicide would require us to denounce both. Or how would Levinas address French immigration policy, especially considering his surprising claim that that the war with Germany was justified "in order to defend the French language"?⁴⁶ Moreover, Levinas was quite clear that non-human animals did not deserve the sort of ethical considerations afforded to humans.⁴⁷ Should we look to his philosophy when regulating industrial slaughterhouses? Perhaps these questions are generally outside the scope of theories of alterity, but they seem difficult to avoid if we are serious about applying philosophers like Levinas and Adorno to law. Of course Levinas' own statements and misstatements need not be the last word on Levinasianism. Just as we can bracket Kant's sexist and racist remarks as we take Kantianism forward, we can correct Levinas on his own terms. But as many now argue that Kant's unsavory remarks point to deeper flaws in his system—for instance that his racism and speciesism reflect a bias for the white European male as the

prototype of the rational agent—we should be open to engaging in a similarly critical relationship with Levinas.

IV. Conclusion

These are sobering questions for me. I find the challenges that Levinas and Adorno pose to modernity and the history of philosophy quite powerful, yet their resistance to practical philosophy is deeply frustrating. Surely not all philosophers must satisfy our desire to put philosophy to use, but Levinas and Adorno seem to have relinquished their ability to judge legal and political activity. This seems far from an apolitical, pre-political, or meta-political position. I cannot help but think that no politics is bad politics—politics stripped of evaluative thought. This worries Fraser as well because such a position

is tantamount to surrendering any possibility of distinguishing emancipatory and oppressive identity claims, benign and pernicious differences. Thus, deconstructive antiessentialists evade political questions of the day: Which identity claims are rooted in the defense of social relations of inequality and domination? And which are rooted in a challenge to such relations? Which identity claims carry the potential to expand actually existing democracy? And which, in contrast, work against democratization? Which differences, finally, should a democratic society seek to foster, and which, on the contrary, should it aim to abolish?⁴⁸

Although “we are not now in a position to envision a full-scale successor to socialism,” Fraser encourages us to “try nevertheless to conceive provisional alternatives to the present order that could supply a basis for a progressive politics.”⁴⁹ There may be no leftist utopia, and all campaigns claiming otherwise should be treated with deep suspicion. We will not overcome identity thinking in grand political reformations, but we can fight it in the minutiae of each conflict, policy, and practice. Laws do identify and categorize, but they do not all do so with equal violence and disregard for particularity. Levinas and Adorno, however, deny us any means of drawing comfortable distinctions between the justifiable and unjustifiable.

Given the current state of law and politics, the prospects of achieving reform through non-identity thinking seem quite grim. Even if we could—against Levinas and Adorno’s spirit—activate a coherent program of reform around theories of alterity, I doubt they could match the powers promoting their antithesis. Prevailing instrumental institutions gain momentum and crush or integrate theories of alterity, and the strategy of abstaining from political life in order to preserve the protest against instrumentality seems more desperate than ever. Our objective should not merely be to use thought to remember the non-identical, but rather to safeguard the thought of the non-identical while acting to release it from blind domination. Without both a practical orientation toward transforming material conditions and a tolerance for the organizational categories necessary to implement such reform, deconstruction and critical theory seem severed from their radical traditions. Pretending that these critiques provide a form of resistance when they live harmlessly in their academic niche only reinforces the status quo.

As Adorno and Marx recognized, reason struggles to navigate a course that gives it effect in the concrete world without sacrificing it to the instrumentalities of that world. I like to think that law is an ally in this project, but I now wonder if there is any practical upshot for a jurisprudence of alterity. Any attempt to discover legal praxis in Levinas and Adorno will traverse such heights that the reformer, if not forced to turn back, will ultimately find herself in air so theoretically rarified that one might doubt if any community could survive at its altitude. From this perspective, a jurisprudence of alterity seems most relevant as a regulative ideal for all legal activity. Yet for those of us inclined to seek guidance for law in Levinas or Adorno because we are moved by the threats of authoritarianism and consumerism, we find ourselves on strangely familiar ground as we stand on this summit. Though separated by miles of conceptual elevation, we arrive at the familiar practical values recognized by the traditions we seek to overcome: dignity, respect, difference, non-violence, dialogue, participation, etc. Did we find these practical principles at the height of Levinas and Adorno’s works, or did we bring them with us interpretive biases? It seems odd, for instance, to rely on a radical critique of Western metaphysics to support rather pedestrian arguments against racial profiling, capital punishment, violations of human rights, or the recent wars in Iraq. We can make such arguments with much less controversial premises, and hence I am suspicious of myself. Am I, as Adorno accused Lukács, “guilty of smuggl[ing] back the most pitiful clichés of the conformism to which the critique had once been directed?”⁵⁰ Can law ever be more than such a cliché?

¹ Nick Smith, "Incommensurability and Alterity in Contemporary Jurisprudence," *Buffalo Law Review* 45 (1997): 503-553.

² For recent discussions of Levinas' relevance to political theory, see Bettina Bergo, *Levinas Between Ethics and Politics: For the Beauty that Adorns the Earth* (Pittsburgh: Duquesne University Press, 2003); Howard Caygill, *Levinas and the Political* (New York: Routledge, 2002); and Simon Critchley, "Five Problems in Levinas' View of Politics and a Sketch of a Solution to Them," *Political Theory* 32 (2004), 172-185.

³ Desmond Manderson, *Proximity, Levinas, and the Soul of Law* (Montreal: McGill University Press, 2007).

⁴ Nick Smith, "Adorno vs. Levinas: Evaluating Points of Contention," *Continental Philosophy Review* 40/3 (2007).

⁵ See, for example, Hent de Vries, *Minimal Theologies: Critiques of Secular Reason in Adorno and Levinas*, trans. Geoffrey Hale (Baltimore: Johns Hopkins University Press, 2005); C. Fred Alford, *Levinas, the Frankfurt School, and Psychoanalysis* (Middletown: Wesleyan University Press, 2003); Josh Cohen, *Interrupting Auschwitz: Art, Religion, Philosophy*, (New York: Continuum Press, 2003); Asher Horowitz, "'By a Hair's Breadth': Critique, Transcendence, and the Ethical in Adorno and Levinas," *Philosophy and Social Criticism* 28/2 (2002), 213-48, 221.

⁶ Critchley, "Five Problems in Levinas' View of Politics."

⁷ *Ibid.*

⁸ For recent discussions of Adorno's relevance to political theory, see Espen Hammer, *Adorno and the Political* (New York: Routledge, 2005); Lorenz Jäger, *Adorno: A Political Biography*, trans. Stewart Spencer (New Haven: Yale University Press, 2004); Lambert Zuidervaart, *Social Philosophy after Adorno* (New York: Cambridge University Press, 2007); and Russell Berman, "Adorno's Politics," in *Adorno: A Critical Reader*, eds. Nigel Gibson and Andrew Rubin (New York: Blackwell, 2003).

⁹ See Simon Critchley, *The Ethics of Deconstruction: Derrida and Levinas* (New York: Blackwell, 1992), 222: "politics is the primacy of the synoptic, panoramic vision of society, wherein a disinterested political agent views society as a whole. For Levinas, such panoramic vision, not only that of the philosopher but also that of the political theorist, is the greatest danger, because it loses sight of ethical difference—that is, of my particular relation to obligations toward the Other."

¹⁰ Levinas, *Difficult Freedom: Essays on Judaism*, trans. Sean Hand (Baltimore: Johns Hopkins University Press, 1997), 206-07.

¹¹ Levinas, *Totality and Infinity*, trans. Alphonso Lingis (Pittsburgh: Duquesne University Press, 1969), 21.

¹² Max Horkheimer and T. W. Adorno, *Dialectic of Enlightenment*, trans. John Cumming (New York: Continuum, 1972), 275.

¹³ *Ibid.*, xiv.

¹⁴ *Ibid.*, 145.

¹⁵ Adorno, *Minima Moralia*, trans. E. F. N. Jephcott (New York: Verso, 1974), 46.

¹⁶ Lukács, *The Theory of the Novel*, trans. Anna Bostock (Cambridge, MA: MIT Press), 22.

¹⁷ Hans-Jürgen Krahl, "The Political Contradictions in Adorno's Critical Theory," in *The Frankfurt School: Critical Assessments* 4, ed. Jay Bernstein (New York: Routledge, 1994), 117.

¹⁸ See Drucilla Cornell, *The Philosophy of the Limit* (New York: Routledge, 1992), 181.

¹⁹ *Ibid.*, 39. Cornell states: "twentieth century experience has presumably taught us that the appeal to community ineluctably slides into an appeal to totality, closure, and exclusion."

²⁰ Iris Marion Young has followed Adorno's critique of the inadequacy and violence of political concepts. See Young, "The Ideal of Community and the Politics of Difference," *Social Theory and Practice* 12 (1986): 1-2: "I criticize the notion of community on both philosophical and practical grounds. I argue that the ideal of community participates in what. . . Adorno calls the logic of identity, a metaphysics that denies difference. The ideal of community presumes subjects who are present to themselves and can understand another as they understand themselves. It thus denies the difference between subjects. The desire for community relies on the same desire for social wholeness [and] identification that underlies racism and ethnic chauvinism, on the one hand, and political sectarianism, on the other."

²¹ Jürgen Habermas, "The New Obscurities: The Crisis of the Welfare State and the Exhaustion of Utopian Energies," *Philosophy and Social Criticism*, 11-2 (1986), 1-18.

²² Drucilla Cornell, Michel Rosenfeld, and David Gray Carlson, eds., *Deconstruction and the Possibility of Justice* (New York: Routledge, 1992).

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- ²³ See Smith, "Adorno vs. Levinas" and Smith, "Making Adorno's Ethics and Politics Explicit," *Social Theory and Practice* 29-3 (2003) (reviewing J. M. Bernstein, *Adorno: Disenchantment and Ethics* (New York: Cambridge University Press, 2001).
- ²⁴ See Bernstein, *Adorno: Disenchantment and Ethics*.
- ²⁵ For similar concerns, see Espen Hammer, "God Squaddy," *Radical Philosophy*, 134 (2005) and Rudi Visker, "Is Ethics Fundamental?" *Continental Philosophy Review* 36-3 (2003).
- ²⁶ See Caygill, *Levinas and the Political*, 31 and Critchley, "Five Problems in Levinas' View of Politics," 174.
- ²⁷ Levinas, "Meaning and Sense," in *Emmanuel Levinas: Basic Philosophical Writings*, eds. Adriaan Peperzak, Simon Critchley, and Robert Bernasconi (Bloomington: Indiana University Press, 1996), 64.
- ²⁸ Levinas' assertion that "the enigma comes to us from Illeity" contributes to this sense of the force of the Other being channeled from above. See Levinas, "Enigma and Phenomenon," in *Basic Philosophical Writings*, 75.
- ²⁹ Levinas, *Entre Nous: Thinking-of-the-Other*, trans. Michael B. Smith and Barbara Harshav (New York: Columbia University Press, 1998), 110.
- ³⁰ *Ibid.*
- ³¹ Adriaan Peperzak, "Illeity According to Levinas," *Philosophy Today* 42 (Supp) (1998), 45.
- ³² Levinas, *Ethics and Infinity*, trans. Alphonso Lingis (Pittsburgh: Duquesne University Press, 1985), 88.
- ³³ *Ibid.*, 42.
- ³⁴ Levinas, "No Identity," in *The Levinas Reader*, trans. Sean Hand (Oxford: Blackwell, 1989), 146.
- ³⁵ Levinas, *Totality and Infinity*, 69.
- ³⁶ Nancy Fraser, *Justice Interruptus: Critical Reflections on the Post-Socialist Condition* (New York: Routledge, 1996), 175.
- ³⁷ Critchley, *The Ethics of Deconstruction*, 253.
- ³⁸ *Ibid.*
- ³⁹ Guyora Binder and Robert Weisberg, *Literary Criticisms of Law* (Princeton: Princeton University Press, 2000), 462.
- ⁴⁰ Critchley, *The Ethics of Deconstruction*, 226.
- ⁴¹ *Ibid.*, 231.
- ⁴² *Ibid.*, 239.
- ⁴³ I consider these issues at length in "Social Justice and Antiessentialist Legal Identity," *Continental Philosophy Review* (forthcoming).
- ⁴⁴ Levinas once claimed that "justice can have no other object than economic equality." See Levinas, "The Ego and the Totality," in *Collected Philosophical Papers*, ed. Alphonso Lingis (Pittsburgh: Duquesne University Press), 44. On page 39 of this essay he also claims that "'earthly morality' is rightly suspicious of every relation between beings which has not first been an economic relation."
- ⁴⁵ Levinas, *Totality and Infinity*, 118.
- ⁴⁶ François Poirié, *Emmanuel Levinas: Qui êtes-vous?* (Lyon, France: La Manufacture, 1987), 74 (cited in Critchley, "Five Problems in Levinas' View of Politics," 177).
- ⁴⁷ See Smith, "Adorno vs. Levinas." For discussions of Levinas' position on animals, see Peter Atterton, "Face to Face with the Other Animal?" in *Levinas and Buber: Dialogue and Difference*, eds. Peter Atterton, Matthew Calarco, and Maurice Friedman (Pittsburgh: Duquesne University Press, 2004), 262-81; Matthew Calarco, "Deconstruction Is Not Vegetarianism: Humanism, Subjectivity, and Animal Ethics," *Continental Philosophy Review* 36 (2004), 175-201; David Clark, "On Being 'The Last Kantian in Nazi Germany': Dealing with Animals after Levinas," in *Animal Acts: Configuring the Human in Western History*, eds. Jennifer Ham and Matthew Senior (New York: Routledge, 1997), 165-98; John Llewelyn, "Am I Obsessed by Bobby? (Humanism of the Other Animal)," in *Re-Reading Levinas*, eds. Robert Bernasconi and Simon Critchley (Bloomington: Indiana University Press, 1989), 234-45.
- ⁴⁸ Fraser, *Justice Interruptus*, 182.
- ⁴⁹ *Ibid.*, 4.
- ⁵⁰ Adorno, "Extorted Reconciliation: On Georg Lukacs' Realism in Our Time," in *Notes to Literature I*, trans. Shierry Weber Nicholsen (New York: Columbia University Press, 1991), 217.