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STARE DECISIS:
(FOREVER) LOST IN TRANSLATION

WITH BOTH A TRAGIC AND SERENDIPITOUS SENSE OF TIMING, just before the nation listened to John G. Roberts testify before the Senate Judiciary Committee last September, the levees of New Orleans gave way to death and chaos previously thought impossible in the United States. Designed to keep storm and sea at bay, those great earthen, steel and concrete barriers were a physical and psychic barrier, providing shelter from the storm and testifying to the modern ability to manipulate the earth to our own ends. And in Roberts' confirmation hearings, an institution was facing a tidal surge of its own, in the form of presidential judicial appointments. Judicial nominees, however, are usually so well-rehearsed that it is the senators' lines of inquiry that are more interesting. This time the conceptual star was an oblique Latin phrase; *stare decisis* was raised as something of a legal levee, to keep the floodwaters of partisanship and change at bay.¹ It was invoked as a measure of hope during those hearings, proffered as an assurance that no law will suddenly be overturned, most especially *Roe v. Wade*. The doctrine of *stare decisis* was used to suggest that our democracy will not (*could* not, ever) backtrack from its seemingly-inevitable progress; that nothing will happen too quickly; that the high court will not contradict its previous rulings. Indeed, Democratic senators deployed *stare decisis* as a sort of oath for Roberts to swear by ("You won't *really* reverse previous decisions of the court, will you?") and in so doing hoped to buttress against change and, in a sense, the chances of radical legal or cultural revolution by conservatives. Through such usage *stare decisis* emerged in terms of a polarity reversal: those wishing to "conserve" the current legal code as much as possible were on the left, while the right quietly hoped to place something of an "activist" justice in place to do their jurisprudential bidding.

¹ *Stare decisis*, "to let the decision stand, to adhere to precedents and not to unsettle things which are established" (*Black's Law Dictionary*), was used at least seventy seven times in the four-day hearings. See "Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States." <http://www.gpoaccess.gov/congress/senate/judiciary/scourt.html>

Despite Roberts' supportive testimony about "settled law" and respecting the precedents of earlier court rulings, these evangelists of *stare decisis* knew quite well that this is much more a rhetorical stratagem than a workable legal philosophy. Liberals used *stare decisis* to express their agreeability toward a particular interpretation of law than to make general observations about judicial philosophy. These politicians know very well that bad laws should be reversed, or they could not celebrate the great departures from precedent that brought about great social change, such as *Brown v. Board of Education* (1954).² Clearly, "progress" (whether constitutional or cultural) is a notion that must itself be interpreted, and would have to contain the willingness both to retain and to depart from precedent.

How do we interpret this? At least three figures can inform and provoke our thinking. First, the senators' use of *stare decisis* brings to mind what Jean-Paul Sartre calls "bad faith" (*mauvaise foi*), which he defines as telling a lie to oneself. Sartre's discussion of bad faith in *Being and Nothingness* centers on self-negation and an effort to deny. Such self-negation, or "self-deception," is often coupled with falsehood. We say that "she is lying to herself," or that "he is in denial"; but if bad faith is a lie to oneself, then this sort of lie must be distinguished from lying in general.³ Sartre sees lying as a fascinating dance of truth and fiction, never the simple replacement of one for the other. The one who lies is always "in complete possession of the truth which he is hiding." So ignorance is not a lie, and neither is the propagation of errors or mistakes. Instead, the lie always already contains both truth and falsity within itself. Sartre writes: "The ideal description of the liar would be a *cynical consciousness*, affirming truth within himself, denying it in his words, and denying that negation as such."⁴ So this double negation of the lie, for Sartre, always rests on a transcendent (and therefore hidden) truth.

The truth of the lie is transcendent because it surpasses any outward negation by means of words, oaths, testimonials, confessions, and so on. The inward negation which justifies the outward is an affirmation, a positive affirmative judgment. "The liar intends to deceive," Sartre writes, "and he does not seek to hide this intention from himself nor to disguise the translucency of consciousness; on the contrary, he has recourse to it when there is a question of deciding secondary

² The Supreme Court has overruled itself in approximately 174 cases, with a substantial majority of those cases involving constitutional, not statutory, issues. See opening statement by The Hon. Sen. Samuel Brownback (R-KS) in "Senate Committee on the Judiciary: S. Hrg. 109-158, Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States," <<http://www.gpoaccess.gov/congress/senate/judiciary/sh109-158/browse.html>>, p. 47.

³ Jean-Paul Sartre, *Being and Nothingness: A Phenomenological Essay on Ontology*, trans. H. E. Barnes (New York: Washington Square, 1956), 87.

⁴ *Ibid.*, 87. Italics mine.

behavior.”⁵ The liar must know the truth which determined the lie, the truth of the lie that was told, and must be able to, on the spot, create new truth-lie combinations whenever necessary. In its simplest terms, the outward lie, and its accompanying attestations to telling the truth, may take on whatever form is necessary to achieve the goal of inward consciousness, but the inward itself *is never truly in play*.

So the lie turns not on an *epistemological* axis, since a truth underwrites the lying itself, but rather on a *tactical* or *strategic* one.

If bad faith is a lie to oneself, then it must be different than the straightforward lie to another person. It is still true that bad faith means hiding some truth or “presenting as truth a pleasing untruth,” and in many ways it still appears to function as a falsehood. The difference, however, between bad faith and the lie is that for bad faith, the “Other” to which the lie is told, is *myself*. It is from myself that I hide the truth. Any distinctions of deceiver or deceived, of inward or outward, fail in this situation. “How can we believe by *mauvaise foi* in the concepts we forge expressly to persuade ourselves?”⁶ Or, what lie can I tell myself that still remains a lie?

Second, Slavoj Žižek revises Sartre’s sense of cynical consciousness and calls it “disavowal”; the term serves as a fundamental concept for both his *The Sublime Object of Ideology* (1989) and *For They Know Not What They Do* (1991). Informed by Lacanian psychoanalysis and Marxian ideology critique rather than by Sartre’s *mauvaise foi*, Žižek builds his discussion upon a two-fold assumption: First, the classical formulation of ideology critique tells us that *if* we know or are made aware of something (a troublesome habit, an oppressive condition, all the way up to economic subjugation), *then* we will stop doing it. Knowledge leads directly to action—an ethical imperative going back at least to Plato. However, the second half of his framework is that *this line of reasoning, as an “ideological corrective,” is no longer effective*:

So now we have made a decisive step forward; we have established a new way to read the Marxian formula “they do not know it, but they are doing it”: the illusion is not on the side of knowledge, it is already on the side of reality itself, of what the people are doing. [...] What they overlook, what they misrecognize, is not the reality but the illusion which is structuring their reality, their real social

⁵ Ibid., 88.

⁶ Sartre, *Being and Nothingness*, quoted by Herbert Fingarette, *Self-Deception* (London: Routledge & Kegan Paul Ltd., 1969), 93.

activity. They know very well how things really are, but still they are doing it as if they did not know.⁷

In other words, knowledge no longer (always) controls behavior. Thus, Žižek carves out a space for *desire* to function dynamically and disruptively alongside knowledge. Today, one can be well aware of the cynical motivations for an action and yet go ahead and do it anyway. Žižekian disavowal is an extension of ideological fantasy, and is structured in this way: “they know very well what they are doing, but still, they are doing it.”⁸ His list of examples illuminating this is, as one would expect, long and varied: anti-Semitism, the “close-door” elevator button, democratic electoral politics, consumerism and shopping, customs, laws and courts, textuality, language, books, film, and democracy itself.

As so many now know for themselves with his great rise in popularity, much of Žižek’s most interesting and provocative writings work at pointing out such disavowals (alongside other ways we blind ourselves to the structuring power of ideological fantasy): the nearly magical power we give over to our own ideas, things, practices, and institutions. Recall the manifold layers of fetishistic disavowal he detects in our relationship to money: as a real and virtualized unit of universal exchange; as a symbol of social contracts and customs; as a mystical power devoid of time-labor; and as that which the terms “commodity,” “exchange,” and “contract” can never fully encapsulate.⁹ As such, we take it to function mysteriously and autonomously, rather than as the product of human networks or concrete decisions.

For this reason, *stare decisis* as heard in the Roberts hearings was yet another case of disavowal on many fronts. First, the senators disavowed the ways that *stare decisis* cannot in itself be the sole logic of Law. (“I know very well there will be cases I will want overturned rather than upheld, and yet I will ignore that during these hearings...”) Nor does a return to history—in the form of precedent or tradition—mean that that return is automatically *just*. Next, its use by (the now) relatively powerless liberal senators became transparently political, since the only real context for its discussion was Roe. (“I know very well that this doctrine cannot be upheld at all times, and yet I will demand Roberts to swear to it...”) In many ways we could see that the doctrine was put to use not for epistemological

⁷ Žižek, *The Sublime Object of Ideology* (London: Verso, 1989), 32.

⁸ Žižek, *Sublime Object of Ideology*, 33.

⁹ See in particular Žižek’s discussion of money in *Sublime Object of Ideology*, 18. See also Derrida, *Given Time, I: Counterfeit Money*, trans. Peggy Kamuf (Chicago: Univ. of Chicago Press, 1991). It is significant that Derrida’s most significant excursion into the philosophy of law draws upon the “mystical” as well. See Derrida, “Force of Law: The ‘Mystical Foundation of Authority,’” *Deconstruction and the Possibility of Justice*, Drucilla Cornell, Michael Rosenfeld, and David Gray Carlson, eds. (New York: Routledge, 1992).

or theoretical reasons, but for tactical and strategic ones expressing a particular set of desires.

But to only note such typical, bald political moves would be to miss the greater lesson. Rather, we should (following Žižek who is following Lacan) interpret the use of *stare decisis* last October symbolically, as a marker for something else: namely, the rippling edge of inevitable change and iteration, the cut of remembering and forgetting, as the rupture of that change, as “becoming” itself. To put it in Derrida’s terms, *stare decisis* is precisely a reminder that Law, like institutionality, is already *in deconstruction*. This is a subtle deception of the term, since “standing by precedent” would seem to indicate *not* changing, *avoiding* change, keeping the *status quo*, and the like. However, reliance upon “precedent” does not mean reliance upon something absolutely solid and unchanging. Does not adding a new case to precedent (by adhering to *stare decisis*) now mutate the very precedent upon which it is grounded? The precedent has now grown. It now exceeds its former self, and in this process can only grow increasingly top-heavy to the point of either ambiguity or self-contradiction. If Law is already *in deconstruction*—if it is always-already disassembling, fragmenting, exceeding and overcoming itself—then part of the work of theory is to point out such attempts to fix it through fetishistic disavowal. Such hypostases occur whenever we believe Law to be timeless (since it is always changing), pure (as if it emerged from no-place), stable (as if Law were not irretrievably linked with institutionality), univocal (could not the “obvious” reading of Law be equivocal rather than univocal?¹⁰), or certain (since it must always be translated). Perhaps this also occurs whenever we take it to be “natural,” since that term too masks over the manifold processes by which it is generated.

And yet, this is not all negative. There is in fact something we *need* in the fetish, something positive exposed in the structure of disavowal, which is precisely where we return to Žižek’s notion of ideological fantasy as the “overlooked, unconscious illusion.”¹¹ That is, we must to some degree take Law to be all these things (timeless, pure, stable, univocal, certain, natural) and more. Since the fetish works as a “misrecognition,” “misidentification” or “displacement” (by substituting one thing for another) it has the potential to be constructive. In *The Fragile Absolute* we read that “the ultimate paradox of the strict psychoanalytic notion of *symbolic* identification is that it is by definition a misidentification, the *identification with the way the Other(s) misperceive(s) me.*”¹² Playing off of

¹⁰ Here I borrow from J. Hillis Miller’s essay “The Critic as Host,” found in the seminal *Deconstruction and Criticism* (New York: Continuum, 1979), 218.

¹¹ Žižek, *Sublime Object of Ideology*, 33.

¹² Žižek, *The Fragile Absolute* (London: Verso, 2000), 49.

misidentification has the potential for not only negative but also positive consequences. Žižek offers an interpersonal and interpsychic example:

... as a father, I know I am an unprincipled weakling; but, at the same time, I do not want to disappoint my son, who sees in me who I am not: a person of dignity and strong principles, ready to take risks for a just cause—so I identify with this *misperception* of me, and truly “become myself” when I, in effect, start to act according to this misperception (ashamed to appear to my son as I really am, I actually accomplish heroic acts).¹³

Here is an excellent example of the positive displacements—and misidentifications—of fetishism, showing how they are a part of an ideological fantasy structuring the situation. Through it, *I can see what does not seem to be there*. The father takes on the misperception such that he essentially *forgets* or *disavows* his former self-perception and lives into the fantasy. Unlike a simple mask, however, this symbolic identification is not comprised just of the difference between the “contrived” external and “genuine” internal appearance of the self:

[symbolic] identification occurs when the way I appear to others becomes more important to me than the psychological reality “beneath my social mask,” forcing me to do things I would never be able to accomplish “from within myself.”¹⁴

Thus the subject lives out a new emphasis on action in the contrived external. In so doing, Žižek pushes the argument one step further, beyond ideological fantasy: it is no longer just a *wish* that I would act a particular way. *I go ahead and act that way*, stepping into the shoes of the misperception and forgetting how contrived the whole thing was to begin with.¹⁵

The third figure I have in mind is Derrida, who also recognized both aspects of this structure. The double logic of fetishistic disavowal, unfolding as an “at-once,” as he calls it, is written within an economy of undecidability. He writes in *Glas*:

the structure, the construction (*Aufbau*) of the fetish rests *at once* on the denial [*déni*, *Verleugnung*] and on the affirmation (*Behauptung*), the assertion or the assumption of castration. This at-once, the in-the-same-stroke, the *du-même-coup*

¹³ Žižek, *Fragile Absolute*, 49.

¹⁴ Žižek, *Fragile Absolute*, 49-50.

¹⁵ Conscious disavowal of this type is also reminiscent of the project of “active forgetting” Nietzsche calls for in his second *Untimely Meditation*, “On the uses and disadvantages of history for life” (1874). Such forgetting is not only positive for Nietzsche, but perhaps the only means of escape for an era too deeply entrenched in history. It is therefore a release to allow thinking in new ways, along new lines, and is thus a critically constructive effort. Unfortunately, at no place does Nietzsche outline precisely what this project of “active forgetting” would look like, whether one can forget *too* much, or by what criteria one can be assured that she has adequately forgotten.

of the two contraries, of the two opposite operations, prohibits cutting through to a decision within the undecidable. This at-once constitutes an economy of the undecidable ...¹⁶

We should remember that much of Derrida's writing hoped to unearth the fetishes and hypostatizations within the Western tradition—concepts, traditions, figures, methodologies, genres, tropes—so that they might be recognized as separate from, but necessary in seeking, the that which the subject loves.¹⁷ Philosophy's disavowals are propped up on such terms and defended by those like Jürgen Habermas, who make no distinction between the central hope for which they labor and the tissue-like nature of the concepts they manufacture.¹⁸ What is left in the end for Derrida is *undecidability*—not nihilistic or fearful, but undecidability prepared to confess its ultimate detachment from and inaccessibility to ontic Truth. And so the very invocation of *stare decisis*—as if we can always lean back on precedent—reveals that precedents are not quite as solid as we would like and will never finally settle any argument.

¹⁶ Derrida, *Glas* trans. R. Rand and J. Leavey, Jr. (Lincoln: Univ. of Nebraska Press, 1986), 210a (brackets mine). Note the French *déni* Derrida uses. He continues:

[...] not that the undecidable interrupts there the efficacy of the economic principle. The at-once puts itself in the service of a general economy whose field must then be opened. There is an economic *speculation* on the undecidable. This speculation is not dialectical, but plays with the dialectical. The feint consists in pretending to lose, to castrate oneself, to kill oneself in order to cut [*couper*] death off. But the feint does not cut it off. One loses on both sides, in both registers, in knowing how to play all sides [*sur les deux tableaux*]. On this condition does the economy become general. A fetishism also unfolds itself without limit, within which the contours of a *strict* fetishism will have to be delimited: the strict fetishism in which metaphysics as such always struggles.—Far from generalizing the *Ersatz* or the simulacrum, strict fetishism takes an *Ersatz* for the thing itself.—Strict fetishism desires (nothing but) the thing itself and the *Sa* of the thing itself.

It should not go unnoticed that Derrida's awareness of and sensitivity to matters psychoanalytical is substantial; and while he avoids playing therapist to the thoughts and habits of the world (in the mold of Žižek), or even to philosophy itself, he nevertheless understands that to ignore the experiences of the individual and psychoanalytical perspectives into those experiences would be to overlook a powerful descriptive vocabulary and tool for insight. See Derrida, "How to Avoid Speaking: Denials"; *Glas*; *Psyché: Invention de l'autre*; *Archive Fever: A Freudian Impression*.

¹⁷ Here I have in mind John D. Caputo's narrative of deconstruction as a "love story": for the Secret, impossible, *tout autre*, etc. See Caputo, *On Religion* (New York: Routledge, 2001).

¹⁸ See Christopher Norris, *Deconstruction: Theory and Practice*, 3rd ed. (New York: Routledge, 2002), 138; and Norris, "Deconstruction, Postmodernism and Philosophy: Habermas on Derrida," *Praxis International* VIII:4 (January 1989): 426-46. He writes:

What Habermas simply cannot entertain—for reasons connected with his analysis of the modern "public sphere" of differential truth-claims, discursive practices, languages "specialized" for the various purposes of argument, critique, normative value-judgment, aesthetic expression, etc.—is the notion that philosophy can *both* engage seriously with these issues *and* conduct its arguments in a style that on the face of it belongs more to "literature" than to "philosophy." In fact, as I have argued at length elsewhere, Habermas is virtually predestined to misread Derrida in so far as he makes it a requirement for enlightened or emancipatory thought that criticism should respect this *de jure* separation of discursive regimes, and not allow itself to become mixed up with the poetic (or "world-disclosive") function properly served by metaphorical or literary language. [See Norris, *Deconstruction*, 138.]

The greater significance of disavowal for understanding *stare decisis* is how it also functions as a confession. Positive or “future-oriented” disavowal necessitates a certain kind of forgetfulness because it too is trying to live into ideological fantasy. If we are *sevrée de la vérité*, cut off from the Truth, from the Secret, then there is no pure mystical core to the “book,” “prayer,” “institution,” “law,” and so forth. So, while disavowing the constant rupture, instability and undependability of law, *stare decisis* simultaneously confesses the desire to find solid, reliable benchmarks for establishing law itself; it envisions a world where such timeless structures help organize our behavior. This is a risky operation: illusion is the energetic core of disavowal, but *any* illusion or construction *always risks* being fixed as somehow “natural,” and being mis-recognized as something other than the construction it is.

Textual, conceptual and legal levees must be constructed to inhabit new terrain; however, the *telos* of any such construction is failure. Why will they fail? The forgetfulness of disavowal encourages taking what is “artificial” as though it were “natural.” While participants in every discourse claim access to or work toward the “truth” or “meaning” of that discourse, they intentionally forget that these are not naked, self-presencing phenomena, but rather emerge only from their situated-ness within social networks. Truth has been worked-through and worked-over before it ever gains status as such. For example, theology is just such a social network, and the “truths” it produces emanate from that network. Yet all too often, its proponents have forgotten the discursivity of the discipline itself, its back-and-forth, emerging nature. So when literalist hermeneuts of a sacred text (or so-called “originalist” readers of the Constitution) recognize that text as true, they have consciously forgotten that interpretation, translation, redaction, canonization, “history” and language itself all rest on human convention and social networks for their authority and meaning.¹⁹

Why must such levees be constructed in the first place? Because stepping into such illusions—*going ahead and acting that way*—is necessary: the most constructive aspects of disavowal are its generative projections of ideological fantasy. Here the subject frees herself from history and precedent, forging a consciousness capable of indexing desire alongside knowledge. Law and

¹⁹ Within the example of law, this requires what Bruce Ackerman calls a “repudiation” enacted by means of a “myth of rediscovery of a distant golden age, when the Founders got things right for all time. To build a new constitutionalism for the 21st century, originalists call on America to rediscover the true intentions of its 18th-century Founders, which magically coincide with their own vision of the future.” (See Bruce Ackerman, “The Stealth Revolution, Continued,” *London Review of Books*, vol. 28 no. 3 [9 Feb. 2006], 18.) This could apply just as well to the case of biblical literalism, in which the myth centers on “returning” to an older way of reading and understanding (ensconced within and supported by “faithfulness”), which is, again, another form of fetishistic “mis-recognition.”

scholarship in the academy *must* in many regards forget themselves in this way by forgetting their own past. (To be concrete, will scholars ever retire from writing the new “definitive text” on any given subject?) Likewise, religious theory and the humanities in general must forget themselves and forget what is expected of them, in a sense, a process which requires this duality of disavowal and confession. The next generation’s contributions do not render the former generation’s work obsolete, but nevertheless mutate the pattern of thinking (precedent) in such a way as to change how it will be read. While disavowal is problematic in its obfuscation of what is “natural” versus what is “produced,” this conscious misrecognition provides the means for thinking continually to transcend itself. As a journal intent on exploring the notion of “religious theory,” the *JCRT* welcomes such constructive efforts: the reconfigurations, renegotiations, and the potentially fruitful mis-recognitions emerging in the wake of critical engagements between culture, philosophy, history, and religion.

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