

Rethinking Legal Ideals after Deconstruction

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In this essay I seek to challenge a reading of “deconstruction,” and postmodernism more generally, that has been proposed by its friends and its foes in legal circles. Deconstruction and postmodern genealogies inspired by Nietzsche are often read to expose the nakedness of power struggles and indeed of violence masquerading as the rule of law. With this exposure, the jurisprudential intervention of these philosophical positions supposedly comes to an end.¹ The enemies of deconstruction challenge this exposure as itself an act of ethical irresponsibility that leaves in its stead only the “right” of force, which, as a result, levels the moral differences between legal systems and blurs the all-too-real distinctions between different kinds of violent acts within legal systems. But I will also argue that even friends of deconstruction or postmodernism reach mistaken conclusions about what kinds of programs of legal, political, and ethical reform can still be philosophically defended. Most significant, I defend the philosophical and ethical significance of ideals in legal, moral, and political philosophy. By *ideals* I mean the way in which individuals and movements make vivid the challenges to their oppression and their aspirations to a transformed society. We all know the great ideals associated with the democratic revolutions in the West, beginning with the French Revolution: the ideals of equality, freedom, and democracy. By now, the critiques of feminists, critical race theorists, and postcolonial thinkers of how these ideals were modeled on the white middle-class, heterosexual, European male as the paradigm of humanity have been widely circulated along with those labeled deconstructivist and postmodernist.

I defend ideals in the broad sense that social and political move-

ments need to imagine and represent the conditions of a changed world for which they are fighting. To defend ideals at the millennium is a risky undertaking precisely because of the convincing nature of the critiques. But it is also a necessary undertaking in the face of the paralysis and cynicism that have followed in the wake of the proclaimed victory of liberal capitalism with the defeat of its purported challenger, socialism. History has supposedly truly come to an end now. Or so the ideologues of advanced capitalism insist again and again. Of course, there are lessons to be learned from the attempts to institutionalize socialism at the levels of state, government, and economic organization. But the lesson is not that history has ended or can end, nor that capitalism has won. One lesson for me is that the *we/they* mentality implied in the proclamation of the final victory is itself part of the imperialist heritage that is now being challenged throughout the world. In the United States, the increasing challenge to dominant, Eurocentric models of modernization has been implicated in the fierce debates over multiculturalism. The role that ideals such as freedom, equality, and justice can continue to play has to be reexamined in the light of the dramatic political events that have shaken the world.

At first glance, the title of Jacques Derrida's essay, "Force of Law: The 'Mystical Foundations of Authority,'" ² seems to confirm the interpretation that deconstruction debunks the possibility of configuring ethical, moral, or legal ideals. This interpretation of deconstruction, for example, informs Dominick LaCapra's subtle and thoughtful commentary on this issue, ³ which evidences his concern that Derrida's essay may—in our obviously violent world—succumb to the lure of violence, rather than help us to demystify its seductive power through an appeal to ideals in a given legal system. I refer to LaCapra's text because it so succinctly summarizes the political and ethical concern that deconstruction is necessarily "on strike" against established legal norms as part of its refusal to positively describe justice as a set of established moral principles.

To answer that concern we need to examine more closely the implicit position of the critics on the significance of right as established, legal norms that "deconstruction" is accused of "going on strike" against. This becomes extremely important because it is precisely the "on strike" posture—not only before established legal norms, but also in the face of the very idea of legal norms, rights, and ideals—that trou-

bles LaCapra. Undoubtedly, Derrida's engagement with Walter Benjamin's text "The Critique of Violence"⁴ has been interpreted as further evidence of the inherent danger in upholding the position that *law*, and legal and moral ideals, are always deconstructible. It is this position that makes *possible* the "on strike" posture toward any legal system.⁵ But it is a strike that supposedly never ends. This worry is a specific form of the criticism that deconstruction⁶ can only give us the politics of suspicion. I, on the other hand, have continually argued that deconstruction, understood as the philosophy of the limit, gives us the politics of utopian possibility. The philosophy of the limit, and more specifically the deconstruction of the privileging of the present, protects the possibility of radical legal transformation, which is distinguished from mere evolution of the existing system. But we still need to reexamine the stance on violence, which inheres in Derrida's exposure of the mystical foundations of authority if we are to answer his critics satisfactorily. To do so I will turn to the ethical, political, and juridical significance of his critique of positivism. The case I will examine here is *Bowers v. Hardwick*.⁷ But let me turn first to Derrida's unique engagement with Benjamin's text.

Walter Benjamin's text has often—and to my mind mistakenly—been interpreted as erasing human responsibility for violence, because the distinction between mythic violence (the violence that founds or constitutes law, or right) and the divine violence that is its "antithesis" (since it destroys rather than founds, expiates rather than upholds) is ultimately undecidable for Benjamin. The difference between acceptable and unacceptable violence as well as between divine and mythic violence is ultimately not cognitively accessible in advance (we return to why this is the case later in this essay). Lawmaking or founding violence is then distinguished, at least in a preliminary manner, from law-preserving or conserving *force*. We will see the significance of this further distinction shortly. If this undecidability were the end of the matter, if we simply turned to God's judgment, there would be no *critique* of violence. Of course, there is one interpretation already suggested and presented by LaCapra that Benjamin—and then Derrida—does erase the very basis on which the critique of violence proceeds.⁸ But this interpretation fails to take notice of the opening reminder of Benjamin's text, to which Derrida returns us again and again, and which structures the unfolding of Benjamin's own text. To quote Benjamin:

The task of critique of violence can be summarized as that of expounding its relation to law and justice. For a cause, however effective, becomes violent, in the precise sense of the word, only when it bears on moral issues. The sphere of these issues is defined by the concepts of law and justice.⁹

Critique, in this sense, is hardly the simple glorification of violence *per se*, since Benjamin carefully distinguishes between different kinds of violence.¹⁰ Indeed, both Benjamin and Derrida question the traditional positivist and naturalist justifications for violence as legitimate enforcement for the maintenance of an established legal system or as a necessary means to achieve a just end. In other words, both thinkers are concerned with rationalizations of bloodless bureaucratic violence that LaCapra rightly associates with some of the horrors of the twentieth century.¹¹ Benjamin's own text speaks more to the analysis of different kinds of violence, and more specifically to law as law conserving violence, than it does to justice. But Derrida explicitly begins his text, "The Force of Law," with the "Possibility of Justice."¹² His text proceeds precisely through the configuration of the concepts of justice and law in which the critique of violence, understood as "judgment, evaluation, examination that provides itself with the means to judge violence,"¹³ must take place.

As I have shown throughout *The Philosophy of the Limit*,¹⁴ it is only once we accept the uncrossable divide between law and justice that deconstruction both exposes and *protects in the very deconstruction of the identification of law as justice* that we can apprehend the full *practical* significance of Derrida's statement that "deconstruction is justice."¹⁵ What is missed in the interpretation I have described and attributed to LaCapra is that the undecidability, which can be used to expose any legal system's process of the self-legitimation of authority as myth, leaves us—the "us" here being specifically those who enact and enforce the law—with an *inescapable responsibility* for violence, precisely because violence cannot be fully rationalized and therefore justified in advance. The "feigning [of] presence"¹⁶ inherent in the founding violence of the state, using Derrida's phrase, disguises the retrospective act of justification and thus *seemingly*, but only seemingly, erases responsibility by justification. To quote Derrida:

Here we "touch" without touching this extraordinary paradox: the inaccessible transcendence of the law before which and prior to

which “man” stands fast only appears infinitely transcendent and thus theological to the extent that, so near him, it depends only on him, on the performative act by which he institutes it: the law is transcendent, violent and non-violent, because it depends only on who is before it—and so prior to it—on who produces it, founds it, authorizes it in an absolute performative whose presence always escapes him. The law is transcendent and theological, and so always to come, always promised, because it is immanent, finite and so already past.

Only the yet-to-come (*avenir*) will produce intelligibility or interpretability of the law.¹⁷

Law, in other words, never can catch up with its projected justification. Therefore, there can be no insurance of a metalanguage in relation to the “performativity of institutional language or its dominant interpretation.”¹⁸ For LaCapra this lack of insurance means that we cannot in any way whatsoever *justify* legal principles of insurance. If we cannot justify legal principles and ideals in this strong sense, then, for LaCapra, we will necessarily be left with an appeal to force as the only basis for justification. To quote LaCapra:

A second movement at least seems to identify the undecidable with force or even violence and to give to violence the power to generate or create justice and law. Justice and law, which of course cannot be conflated, nonetheless seem to originate in force or violence. The extreme misreading of this movement would be the conclusion that might makes right—a conclusion explicitly rejected at one point in Derrida’s essay but perhaps insufficiently guarded against at others.¹⁹

For LaCapra, in spite of his clear recognition that Derrida explicitly rejects the idea that might makes right, there is still the danger that undecidability will lead to this conception of law and the role of legal argument and justification within legal interpretation. But, indeed, the opposite position is implied. Might can never justify right, *precisely* because the establishment of right can never be fully rationalized. It also does not lead to the replacement of legal argument through an appeal to principle or ideals with violence, as LaCapra seems to fear it might, if taken to its logical conclusion.

To emphasize once again why deconstruction does not reduce itself to the most recent and sophisticated brand of legal positivism devel-

oped in America, which, of course, asserts that might does indeed make right, it is useful to again contrast “deconstruction” as the force of justice against law with Stanley Fish’s insistent identification of law with justice.²⁰ Fish understands that as a philosophical matter law can never catch up with its justifications, but that as a practical reality its functional machinery renders its philosophical inadequacy before some of its own claims irrelevant. Indeed, the system sets the limit of relevance. The legal machine, in other words, functions to erase the mystical foundations of its own authority. My critical disagreement with Fish, a disagreement to the support of which I am bringing the force of “deconstruction,” is that the legal machine that he celebrates as a marvel, I abhor as a monster.

In the case of law, there is a reason to be afraid of ghosts. But to see why I think the practical erasure of the mystical foundations of authority by the legal system must be told as a horror story, let me turn to an actual case that embodies the two myths of legality and legal culture to which Fish consistently returns us. For Fish, contemporary American legal interpretation, both in constitutional law and in other areas, functions primarily through two myths of justification for decision.²¹ The first is “the intent of the founding fathers,” or some other conception of an original foundation. The second is “the plain meaning of the words,” whether of the relevant statutes or precedent, or of the Constitution itself. In terms of “deconstruction,” even understood as a practice of reading, the second can be interpreted as the myth of full readability. These myths, as Fish well recognizes, conserve law as a self-legitimizing machine by returning legal interpretation to a supposed origin that repeats itself as a self-enclosed hermeneutic circle. This, in turn, allows the identification of justice with law and with the perpetuation of the “current” legal system.²²

To “see” the violence inherent in being *before the law* in the many senses of that phrase which Derrida plays on in his text, let us imagine the scene in Georgia that sets the stage for *Bowers v. Hardwick*.²³ Two men are peacefully making love, little knowing that they were *before the law* and soon to be proclaimed guilty of sodomy as a criminal offense. Fish’s glee is in showing the impotence—and I am using that word deliberately—of the philosophical challenge or political critique of the legal system. The law just keeps coming. Remember the childhood ghost story “Bloody Bones” to help you envision the scene. The law is

on the first step. The philosopher desperately tries to check the law—but to no avail—by appealing to “outside” norms of justice. The law is on the second step. Now the feminist critic tries to dismantle the law machine, which is operating against her. Again, the law simply wipes off the criticism of its masquerade, and here, heterosexual bias is irrelevant. The law defines what is relevant. The law is on the third step. It draws closer to its victims. Fish admires precisely this *force of law*, the so-called *potency*, to keep coming in spite of its critics and its philosophical bankruptcy, a bankruptcy not only acknowledged, but continually exposed by Fish himself. Once it is wound up, there is no stopping the law, and what winds it up is its own functions as elaborated in the myths of legal culture. Thus, although law may be a human construct insofar as we are all captured by its mandates, there are no “consequences” of its constructibility and therefore its potential deconstructibility.²⁴

In *Bowers* we do indeed see the force of law as it makes itself felt, in spite of the criticisms of “the philosophers” of the opinion. Justice White concludes and upholds as a matter of law that the state of Georgia has the right to make homosexual sodomy a criminal offense.²⁵ Some commentators, defending the opinion, have relied precisely on the myth of the intent of the founding fathers. The argument is that there is no evidence that the intent of the founding fathers was to provide a right of privacy or any other kind of right for homosexuals.

The arguments against the philosophical justification of this position repeated by Fish are obvious. The concept of intent is problematic even when speaking of living writers, for all the reasons discussed in writing on legal interpretation. But in the case of interpreting dead writers who have been *silent* on the issue, the subtle complexities of interpreting through intent are no longer subtle, but are manifestly ludicrous. The process of interpreting intent *always* involves construction once there is a written text that supposedly introduces the intent. But here, there is only silence, an absence of voice, simply because the *founding* fathers never addressed homosexuality. That this silence means that there is no right of homosexuality, that the founding fathers thought it so self-evident as never to speak of it, is clearly only one interpretation and one that can never be clarified except in the infinite progress of construction. Since the process involved in interpreting from silence clearly entails construction, the judge’s own values are involved. In this case

we do not even need to go further into the complexities of readability and unreadability of a text, because we are literally left with silence, no word on homosexuality.

But in Justice White's opinion we are, indeed, returned to the problem of the readability or the unreadability of the text of the Constitution and of the precedent that supposedly just "states" its meaning. Justice White rejects the Eleventh Circuit's²⁶ holding that the Georgia statute violated the respondent's fundamental right "because his homosexual right is a private and intimate association that is beyond the reach of state regulation by reason of the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment."²⁷ The Eleventh Circuit relied on the line of precedent from *Griswold*²⁸ through *Roe*²⁹ and *Carey*³⁰ to read the right of privacy to include "homosexual activity." Justice White rejects this reading. He does so, as we will see, by narrowly construing the right supposedly implicated in this case and then, by reading the language of the holding of each case in a "literalist" manner, implicitly relying on "the plain meaning of the words." Do we find any language in these cases about homosexuality? Justice White cannot find any such language. Since he cannot find any such language, Justice White concludes that "the plain meaning of the words" did not mandate this extension of the right of privacy to "homosexual activity." To quote Justice White:

Accepting the decisions in these cases and the above description of them, we think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent.³¹

We do not need to develop a sophisticated philosophical critique to point to the flaw in Justice White's "literalist" interpretation of the cases. We can simply rely on one of the oldest and most established "principles" of constitutional interpretation: the principle that in cases associated with the establishment of the "right of privacy,"³² the reason none of these cases "spoke" to homosexuality was that the question of homosexuality was not before them. Judges under this principle are to decide cases, not advance norms or speculate about all possible exten-

sions of the right. When and how the right is to be extended is dependent on the concrete facts of each case. In spite of what he says he is doing, Justice White is interpreting from a silence, a silence that inheres in the principle that constitutional cases in particular should be construed narrowly. Need I add that if one is a homosexual, the right to engage in homosexual activity might have everything to do with “family, marriage, or procreation,”³³ even though Justice White argues the contrary position? As a result, his very interpretation of the “privacy” cases—as being about “family, marriage, or procreation”—could be used against him. Can White’s blindness to this obvious reality be separated from his own acceptance of an implied heterosexuality as legitimate and, indeed, the only right way to live?

Justice White’s opinion does not simply rest on his reading of the cases, but also rests on an implicit conception of the readability of the Constitution. For White, the Constitution is fully *readable*. Once again, he does not find anything in the Constitution itself that mentions the right to homosexuality. Therefore, he interprets the Eleventh Circuit as creating such a right out of thin air, rather than based on a reading of the Constitution and of precedent that understands what is *fundamental* and necessary to privacy as a right “established” by the Constitution. For Justice White, to simply create a “new” fundamental right would be the most dangerous kind of activism, particularly in the case of homosexuality. And why is this true for Justice White? As he explains:

Proscriptions against that conduct have ancient roots. Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 states when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults. Against this background, to claim that a right to engage in such conduct is “deeply rooted in this Nation’s history and tradition” or “implicit in the concept of ordered liberty” is, at best, facetious.³⁴

For White, not only is the danger of activism always to be guarded against, but it must be specifically forsaken in a case such as this one. Again, the *justification* for his position turns on his implicit conception

of the readability of the Constitution. To quote Justice White, "the Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."³⁵

I have critiqued the charge of judicial activism elsewhere as a fundamental misunderstanding of the inevitable role of normative construction in legal interpretation³⁶ once we understand that interpretation is also evaluation.³⁷ Fish has his own version of this critique. The point I want to make here is that for Fish, the power of law to enforce its own premises as the truth of the system erases the significance of its philosophical interlocutors, rendering their protest *impotent*. The concrete result in this case is that criminal sanctions against gay men are given constitutional legitimation in that it is now proclaimed to be legally acceptable for states to outlaw homosexual love and sexual engagement.

Is this a classic example of the conserving violence of law? The answer, I believe, is unquestionably yes. But more important, given the analysis of Justice White, it demonstrates a profound point about the relationship, emphasized by Derrida, between conserving violence and the violence of foundation. To quote Derrida, and I quote in full, because I believe this quotation is crucial to my own response to LaCapra's concern that Derrida yields to the temptation of violence:

For beyond Benjamin's explicit purpose, I shall propose the interpretation according to which the very violence of the foundation or position of law (*Rechtsetzende Gewalt*) must envelop the violence of conservation (*Rechtserhaltende Gewalt*) and cannot break with it. It belongs to the structure of fundamental violence that it calls for the repetition of itself and founds what ought to be conserved, conservable, promised to heritage and tradition, to be shared. A foundation is a promise. Every position (*Setzung*) permits and promises (*permet et pro-met*), it positions *en mettant et en promettant*. And even if a promise is not kept in fact, iterability inscribes the promise as the guard in the most irruptive instant of foundation. Thus it inscribes the possibility of repetition at the heart of the originary. . . . Position is already iterability, a call for self-conserving repetition. Conservation in its turn refounds, so that it can conserve what it claims to found. Thus there can be no rigorous opposition between positioning and conservation, only what I will call (and Benjamin does not

name it) a *différentielle* contamination between the two, with all the paradoxes that this may lead to.³⁸

The call for self-conserving repetition is the basis for Justice White's opinion and, more specifically, for his rejection of "reading into" the Constitution, *in spite of an interpretation of precedent*, a fundamental liberty to engage in "homosexual sodomy." As White further explains:

Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justice's own choice of values on the States and the Federal Government, the court has sought to identify the nature of the rights qualifying for heightened judicial protection.³⁹

To summarize again, the result for White is that "fundamental liberties" should be limited to those that are "deeply rooted in the Nation's history and tradition."⁴⁰ For Justice White, as we have also seen, the evidence that the right to engage "in homosexual sodomy" is not a fundamental liberty is the "fact" that at the time the Fourteenth Amendment was passed, all but five of the thirty-seven states in the Union had criminal sodomy laws, and that many states continue to have such laws. In his dissent, Blackmun vehemently rejects the appeal to the fact of the existence of antisodomy criminal statutes as a basis for the continuing prohibition of the denial of a right, characterized by Blackmun not as the right to engage in homosexual sodomy but as "the right to be let alone."⁴¹

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.⁴²

Derrida gives us insight into how the traditional positivist conception of law, in spite of Justice Holmes's remark and Justice Blackmun's concern, consists precisely in this self-conserving repetition. For Fish, as we have seen, it is the practical power of the legal system to preserve itself through the conflation of repetition with justification that makes a legal system. Of course, Fish recognizes that repetition as iterability

also allows for evolution. But evolution is the only possibility when *justification* is identified as the functioning of the system itself. Law, for Fish—in spite of his remarks to the contrary—is not deconstructible and, therefore, is also not radically transformable. As a system it becomes its own “positive” social reality in which the status of its own myths cannot be challenged.

It is, however, precisely the status as the myth of its originary foundation and the “plain meaning of the words”—or in more technical language, the readability of the text—that Derrida challenges in the name of justice. We are now returned to LaCapra’s concern about the potentially dangerous equalizing force in Derrida’s own argument. LaCapra reinterprets what he reads as one of Derrida’s riskier statements. Let me first quote Derrida’s statement: “Since the origin of authority, the foundation or ground, the position of law can’t by definition rest on anything but themselves, they are themselves a violence without ground.”⁴³ LaCapra reformulates Derrida’s statement in the hope of making it less subject to abuse. To quote LaCapra: “Since the origin of authority, the foundation or ground, the position of the law can’t by definition rest on anything but themselves, the question of their ultimate foundation or ground is literally pointless.”⁴⁴

My disagreement with LaCapra’s restatement is as follows: it is not that the question of the ultimate ground or foundation of law is pointless for Derrida; instead, it is the question of the ultimate ground, or correctly stated, lack of such, that *must* be asked, if we are to heed the call of justice. That no justificatory discourse *can* or *should* ensure the role of a metalanguage in relation to its dominant interpretation *means* that the conserving promise of law can never be fully actualized in a hermeneutic circle that successfully turns back in on itself and therefore grounds itself.

Of course, there are, at least at first glance, two kinds of violence at issue here: the violence of the foundation or the establishment of a legal system and then the law-conserving or jurispathectic violence of an actual legal system. But Derrida demonstrates in his engagement with Benjamin’s text just how these two kinds of violence are contaminated. To concretize the significance of this contamination, we again return to *Bowers*. The erasure of the status of the intent of the founding fathers and the plain meaning of the words as legal myths is the basis for the *justification* of the jurispathectic or law-conserving violence of the decision. The exposure of the mystical foundations of authority, which is

another way of writing that the performativity of institutive language cannot be fully corporated by the system once it is established and thus cannot become fully self-justifying, does show that the establishment of law is violence in the sense of an *imposition* without a *present* justification. But this exposure should not be understood as succumbing to the lure of violence. Instead, the tautology upon which Justice White's opinion rests—that the law is, and therefore it is justified to be, because it is—is exposed as tautology rather than justification. The point in questioning the origin of authority is precisely to undermine the conflation of justification with an appeal to the origin, a conflation made possible because of the erasure of the mystical foundations of authority. LaCapra's reformulation may be "riskier" than Derrida's own, because it can potentially turn us away from the operational force of the legal myths that seemingly create a self-justifying system. The result, as we have seen, is the violence of Justice White's opinion in which description is identified as prescription, criminal persecution of homosexuals defended as the necessity of the rule of law.

But does the deconstructionist intervention lead to the conclusion that LaCapra fears it might: that all legal systems, because they are based on a mystical foundation of authority, have "something rotten"⁴⁵ at the core and are therefore "equal"?⁴⁶ In one sense, LaCapra is right to worry about the equalizing force of Derrida's essay. The equality between legal systems is indeed that all such systems are deconstructible. But it is precisely this equality that allows for legal transformation, including legal transformation in the name of the traditional emancipatory ideals. Derrida reminds us that there is "nothing . . . less outdated"⁴⁷ than those ideals. As I have shown elsewhere, in *Bowers* achieving them remains an aspiration, but an aspiration that is not just impotent idealism against the ever-functioning, non-deconstructible machine.

Derrida is in disagreement with Fish about the deconstructibility of law. For Fish, since law, or any other social context, defines the parameters of discourse, the transformative challenges to the system are rendered impotent because they can only challenge the *system* from within the constraints that will effectively undermine the challenge. There is no other "place" for them to be but within the system that denies them validity or redefines them so as to manage the full range of the complaint. But for Derrida "there is" no system that can catch up with itself and therefore establish itself as the only reality. To think that

any social system, legal or otherwise, can "fill" social reality is just another myth, a myth of full presence. In Fish, it is practically insignificant that law is a social construct, because, social construct or not, we cannot *deconstruct* the machine. Derridean deconstruction reaches the opposite conclusion. As Derrida explains, turning to the excess of the performative language that *establishes* a legal system:

Even if the success of the performatives that found law or right (for example, and this is more than an example, of a state as guarantor of a right) presupposes earlier conditions and conventions (for example in the national or international arena), the same "mystical" limit will reappear at the supposed origin of their dominant interpretation.

The structure I am describing here is a structure in which law (*droit*) is essentially deconstructible, whether because it is founded, constructed on interpretable and transformable textual strata, (and that is the history of law (*droit*), its possible and necessary transformation, sometimes its amelioration), or because its ultimate foundation is by definition unfounded. The fact that law is deconstructible is not bad news. We may even see in this a stroke of luck for politics, for all historical progress.⁴⁸

But the deconstructibility of law, then, as Derrida understands it, is a theoretical conception that *does* have practical consequences; the practical consequences are precisely that law cannot *inevitably* shut out its challenges and prevent transformation, at least not on the basis that the law itself demands that it do so. It should not come as a surprise, then, that the Eleventh Circuit, the court that held that the Georgia statute violated the respondent's fundamental rights, rested on the Ninth Amendment as well as on the Fourteenth Amendment of the Constitution. The Ninth Amendment can and, to my mind, *should* be interpreted to allow for historical change in the name of justice. The Ninth Amendment can also be understood from within the problematic of what *constitutes* the intent of "the founding fathers." The intent of the Constitution can only be *to be just*, if it is to meet its aspiration to democratic justification. This intent need not appeal to "external" legal norms but to "internal" legal ideals embodied in the interpretation of the Bill of Rights itself. The Bill of Rights clearly attempts to spell out the conditions of *justice* as they were understood at the time of the passage of the

Constitution. But the Ninth Amendment also recognizes the limit of any *description* of the conditions of justice, including those embodied in the Bill of Rights. An obvious example is the call of homosexuals for justice, for their "fundamental liberty." The Ninth Amendment should be, and indeed was, used by the Eleventh Circuit to guard against the tautology upon which Justice White's opinion rests.⁴⁹ Silence, in other words, is to be constructed as the "not yet thought," rather than the "self-evident that need not be spoken."

But does this interpretation of the Ninth Amendment mean that there is no legitimacy to the conservation of law? Can a legal system completely escape the promise of conservation that inheres in its myth of origin? Certainly Derrida does not think so. Indeed, for Derrida, a legal system could not aspire to justice if it did not make this promise of conservation of principle and the rule of law. But it would also not aspire to justice unless it understood this promise as a promise to justice. Again we are returned to the recognition, at least in my interpretation of the Ninth Amendment, of this paradox.

It is precisely this paradox, which, for Derrida, is inescapable, that makes justice an aporia.⁵⁰ To try to describe exactly what justice *is* would once again collapse prescription into description, and fail to heed the humility before justice inherent in my interpretation of the Ninth Amendment. Such an attempt shuts off the call of justice, rather than heeding it, and leads to the travesty of justice so eloquently described by Justice Holmes.⁵¹ But, of course, a legal system, if it is *to be just*, must also promise universality, the fair application of the rules, and so on. This aporia stems from the responsibility of the judge not only to state the law, but to *judge* it.

In short, for a decision to be just and responsible, it must, in its proper moment if there is one, be both regulated and without regulation: it must conserve the law and also destroy it or suspend it enough to have to reinvent it in each case, rejustify it, at least reinvent it in the reaffirmation and the new and free confirmation of its principle.⁵²

Justice White failed to meet his responsibility precisely because he replaced description with judgment, and indeed, a description of state laws a hundred years past, and in very different social and political circumstances.⁵³

But if no philosophical description of current conditions for justice can be identified *as* Justice, does that mean that all legal systems are equal in their embodiment of the emancipatory ideals? Is that what the "equality" that all legal systems are deconstructible boils down to? Worse yet, if that is the conclusion, does that not mean that we have an excuse to skirt our responsibility as political and ethical participants in our legal future? As I have argued elsewhere, Derrida explicitly disagrees with that conclusion: "That justice exceeds law and calculation, that the unrepresentable exceeds the determinable cannot and should not serve as an alibi for staying out of juridico-political battles, within an institution or a state or between one institution or state or others."⁵⁴

But let me state this positioning vis-à-vis the deconstructibility of law even more strongly. The deconstructibility of law is exactly what allows for the possibility of transformation, not just the evolution of the legal system. This very openness to transformation, which, in the interpretation of the Ninth Amendment, should be understood as institutional humility before the call of justice, as the "beyond" to any system, can itself be *translated* as a standard by which to judge "competing" legal systems. It can also be *translated* into a standard by which we can judge the justices themselves as to how they have exercised their responsibility. Compare, for example, Justice White's majority opinion with Justice Blackmun's dissent.⁵⁵ Thus, we can respond to LaCapra's concern that all legal systems not be conceived as equally "rotten." All judges are not equal in the exercise of their responsibility to justice, even if justice cannot be determined once and for all as a set of established norms.

It must be stated, however, that the idea of right and the concrete, practical importance of rights and legal ideals are not denied. Instead, the basis of rights is reinterpreted so as to be consistent with the ethical insistence on the divide between law and justice. This ethical insistence protects the possibility of radical transformation within an existing legal system, including the new definition of right. But the refusal of the idea that only current concepts of right can be identified with justice is precisely what leads to the practical value of rights. Emmanuel Levinas once indicated that we need rights because we cannot have Justice. Rights, in other words, protect us against the hubris that any current conception of justice or right is the last word.

Unfortunately, in another sense of the word, Justice White is "right" about our legal tradition. Homosexuals have been systematically per-

secuted, legally and otherwise, in the United States. Interestingly enough, the reading of deconstruction I have offered allows us to defend rights as an expression of the suspicion of the consolidation of the boundaries, legal and otherwise, of community. These boundaries foreclose the possibility of transformation, including the transformation of our current conceptions of “normal” sexuality, as these norms have been reflected in law and used as the basis for the denial of rights to homosexuals. What is “rotten” in a legal system is precisely the erasure of its own mystical foundation of authority so that the system can dress itself up as justice. Thus, Derrida can rightfully argue that deconstruction

hyperbolically raises the stakes of exacting justice; it is sensitivity to a sort of essential disproportion that must inscribe excess and inadequation in itself and that strives to denounce not only theoretical limits but also concrete injustices, with the most palpable effects, in the good conscience that dogmatically stops before any inherited determination of justice.⁵⁶

It is this “rotteness” in our own legal system as evidenced in Justice White’s opinion that causes me to refer to the legal system, as Fish describes it, as a monster.

What is the “madness of law” that I have been asked to write about? The madness of law is law’s disappearance of the violence of its conserving power through an appeal to the reality that it has shaped. Again, think of Justice White’s opinion and the tautology on which it is based. Gay men have no rights, because they have no rights. What is erased in Justice White’s opinion is that gay men continue to have no rights, because Justice White has judged that they should have no rights. *Should* is the crucial word here.

Derrida puts deconstruction to work to relentlessly expose the *should* behind any appeal to a legal reality that is just there. Once the *should* is exposed, the responsibility of the judge is also inevitable in legal judgment. The madness inherent in the masquerade that dresses up law as a positive reality that can be known but not judged is relentlessly exposed to be just that: madness. Thinking like a lawyer unfortunately is all too often the training in this madness, and the cynical realism that underlines it—*cynical* because it denies the responsibility that inheres in lawyers and judges perpetuating what concept of right is acceptable

or unacceptable in the legal system. The idea of being locked in to a legal system is that this defines what is relevant to itself, and that a lawyer or judge has nothing to do about it.

What is relevant to a legal system, however, is itself a matter of legal definition, particularly when it comes to competing conceptions of right and other legal ideals. Think for example, of Justice Blackmun's most daring opinion, *Roe v. Wade*. He was "out there" in that decision, and he dared to be "out there" because he clearly believed that justice gave him no other choice but to grant women the right to abortion. As I argued earlier, rights are established legal ideals and can actually be defended as one weapon we can legally deploy against legal positivism. It was Ronald Dworkin who forcefully defended rights as this kind of legal weapon in his book *Taking Rights Seriously*.⁵⁷ Certainly it is correct that Derrida's work undoes the legitimacy of certain kinds of philosophical claims for principles of justice and other ideals often referred to in law, such as freedom and equality. We certainly have to ask ourselves the question, Can we defend ideals after deconstruction? In all of my recent work, I have argued that we can defend ideals as long as we understand ideals such as equality, freedom, and most recently, the dignity of the person—and yes, justice itself as an aesthetic idea. An aesthetic idea is a configuration of an idea of reason that cannot be directly presented or cognitively accessed, but that can be signaled in its significance in symbols. What is left after deconstruction is the defense of legal ideals as aesthetic ideas. This is where I perhaps part ways with Derrida, because *to date*, Derrida has not explicitly addressed whether or not he would agree that after deconstruction it is still possible to defend ideals as aesthetic ideas. But I would argue that such a defense is consistent with deconstruction and, indeed, with Nietzsche-inspired genealogies.

The reason that I believe that we still have this possibility has to do with what can now constitute a justification for a legal ideal. Justification would have to appeal explicitly to ethical and aesthetic standards. These standards would be ethical in the sense that any particular configuration of an ideal—for example, an ideal that seeks to figure sexual freedom for a Western legal system, such as I hope to do with the imaginary domain⁵⁸—can only defend itself through a call to judge the ideal as it is figured against other figurations of that same ideal. This kind of circularity is not scary; nor does it mean that all configurations of the legal ideal of sexual freedom, for example, are equal. It just means that

their defense can only be within the parameters of an ethical debate about whether or not a particular configuration is a more adequate representation of what the ideal seeks to protect. There is no outside point to which we can turn, including in a proceduralist conception of justice, that can give us one determinate set of principles that absolutely define ideals such as justice. John Rawls in *A Theory of Justice*⁵⁹ is often read as seeking to defend a proceduralist conception of justice that could directly generate principles of justice; put yourself behind the veil of ignorance and *voilà*, the two principles of justice, the principle of liberty and the difference principle, along with their order of priority are recovered as *the* principles that are rationally acceptable as justice.

But I have argued that this is only one way of reading Rawls. The “veil of ignorance” is a metaphor, and more precisely what I have called an aesthetic idea. In *Political Liberalism*,⁶⁰ Rawls himself clearly understands the “veil of ignorance” as a representational device. A representational device cannot be conflated with a fully rational theory of rules of presentation for legal ideals. In Rawls’s case, at least in certain of his own interpretations of his own work, the “veil of ignorance” attempts to represent what cannot be represented, the suprasensible world of the noumenal. Under such an interpretation there is always a gap between what is represented and the suprasensible. Thus for me it is no coincidence that, in *Political Liberalism*, Rawls argues that we should seek tolerance at the level of philosophy itself.

This tolerance is obviously crucial in a world such as ours, in which Western philosophy has only too often been deployed to defend its own superior position over other general and competing comprehensive worldviews. If ideals are to be defended as aesthetic ideas then one configuration of them could never be the last word.

NOTES

1. Seyla Benhabib, “Deconstruction, Justice and the Ethical Relationship,” *Cardozo Law Review* 13 (1991).

2. Jacques Derrida, “Force of Law: The ‘Mystical Foundations of Authority,’” *Cardozo Law Review* 11, nos. 5–6 (1990).

3. Dominick LaCapra, “Violence, Justice, and the Force of Law,” *Cardozo Law Review* 11, nos. 5–6 (1990).

4. Walter Benjamin, “The Critique of Violence,” in *Reflections: Essays, Aphorisms, Autobiographical Writings*, ed. Peter Dementz, trans. Edmund Jephcott (New York: Harcourt Brace Jovanovich, 1978), 277.

5. Benjamin, "The Critique of Violence," 281–83.
6. See Drucilla Cornell, *The Philosophy of the Limit* (New York and London: Routledge, 1992).
7. *Bowers v. Hardwick*, 478 U.S. 186 (1986).
8. Benjamin, "The Critique of Violence," 277–79; Derrida, "Force of Law," 983–85, 989.
9. Benjamin, "The Critique of Violence," 277.
10. Benhabib, "Deconstruction, Justice and the Ethical Relationship." Seyla Benhabib misunderstands Benjamin here.
11. LaCapra, "Violence, Justice, and the Force of Law," 1077.
12. Derrida, "Force of Law," 919. I want to note here that this is also a reference to the title of the conference, "Deconstruction and the Possibility of Justice," held at the Benjamin N. Cardozo School of Law in October 1989. "Force of Law" was the basis of Jacques Derrida's keynote address at the conference.
13. Derrida, "Force of Law," 983.
14. See generally Drucilla Cornell, *The Philosophy of the Limit*.
15. Derrida, "Force of Law," 945.
16. Derrida, "Force of Law," 991.
17. Derrida, "Force of Law," 993.
18. Derrida, "Force of Law," 943.
19. LaCapra, "Violence, Justice, and the Force of Law," 1067.
20. Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham: Duke University Press, 1989).
21. Fish, *Doing What Comes Naturally*, 328–31.
22. In his essay "Working on the Chain Gang," Fish notes:

Paradoxically, one can be faithful to legal history only by revising it, by redescribing it in such a way as to accommodate and render manageable the issues raised by the present. This is a function of the law's conservatism, which will not allow a case to remain unrelated to the past, and so assures that the past, in the form of the history of decisions, will be continually rewritten. In fact, it is the *duty* of a judge to rewrite it (which is to say no more than that it is the duty of a judge to decide), and therefore there can be no simply "found" history in relation to which some other history could be said to be "invented."

Fish, *Doing What Comes Naturally*, 395 (footnote omitted).

23. *Bowers v. Hardwick*, 478 U.S. 186 (1986).
24. In "Dennis Martinez and the Uses of Theory," Fish responds to Mark Kelman, quoting:

"It is illuminating and disquieting to see that we are nonrationally constructing the legal world over and over again. . . ." In fact, it is neither. It is not illuminating because it does not throw any light on any act of construction that is currently in force, for although your theory will tell you that

there is always one (or more) under your feet, it cannot tell you which one it is or how to identify it. It is not disquieting because in the absence to any alternative to interpretive construction, the fact that we are always doing it is neither here nor there. It just tells us that our determinations of right and wrong will always occur within a set of assumptions that could not be subject to our scrutiny; but since everyone else is in the same boat, the point is without consequence and leaves us exactly where we always were, committed to whatever facts and certainties our interpretive constructions make available.

Fish, *Doing What Comes Naturally*, 395 (footnote omitted).

25. *Bowers v. Hardwick*, 478 U.S. 186 (1986) at 192–94.

26. *Hardwick v. Bowers*, 760 F.2d 1202 (1985), *rev'd* 478 U.S. 186 (1986).

27. *Bowers v. Hardwick*, 478 U.S. 186 (1986) at 189. The Ninth Amendment reads:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people. (U.S. Const. amend. IX)

The Due Process Clause of the Fourteenth Amendment provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. (U.S. Const. amend. XIV, cl. 1)

28. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

29. *Roe v. Wade*, 410 U.S. 113 (1973).

30. *Carey v. Population Services International*, 431 U.S. 678 (1977).

31. *Bowers v. Hardwick*, 478 U.S. 186 (1986) at 190–91.

32. The cases in this line include *Skinner v. Oklahoma*, 16 U.S. 535 (1942), which struck down a law requiring sterilization of those thrice convicted of certain felonies involving “moral turpitude,” on grounds that included that the punishment interfered with the individuals’ rights in procreation; *Loving v. Virginia*, 388 U.S. 1 (1967), in which the Supreme Court overturned a miscegenation law, in part because it interfered with the right to marry; *Griswold v. Connecticut*, which affirmed the rights of married persons to receive information on the use of contraceptives as part of their rights to conduct their family life free from state interference; *Eisenstadt v. Baird*, 405 U.S. 438 (1972), which addressed the right of a person, regardless of marital status, to make decisions as to her own procreative choices; *Roe v. Wade*, providing for the right of a woman to have an abortion; and *Carey v. Population Services International*, 431 U.S. 678 (1977), in which the Court disallowed a law prohibiting distribution of nonprescription contraceptives by any pharmacists or distribution to minors under the age of sixteen.

33. *Bowers v. Hardwick*, 478 U.S. 186 (1986) at 191.

34. *Bowers v. Hardwick*, 478 U.S. 186 (1986) at 192–94 (footnotes and citation omitted).
35. *Bowers v. Hardwick*, 478 U.S. 186 (1986) at 194.
36. See Drucilla Cornell, "Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation," *University of Pennsylvania Law Review* 136, no. 4 (1988); and chapter 5, "The Relevance of Time to the Relationship between the Philosophy of the Limit and Systems Theory: The Call to Judicial Responsibility," in *The Philosophy of the Limit* (New York and London: Routledge, 1992).
37. See Fish, "Working on the Chain Gang," in *Doing What Comes Naturally*, 93–95.
38. Derrida, "Force of Law," 997.
39. *Bowers v. Hardwick*, 478 U.S. 186 (1986) at 191.
40. *Bowers v. Hardwick*, 478 U.S. (making reference to Justice Goldberg's concurrence in *Griswold v. Connecticut*, 381 U.S.).
41. *Bowers v. Hardwick*, 478 U.S. 186 (1986) at 199 (Blackmun, J. dissenting); quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting).
42. Blackmun is quoting Oliver Wendell Holmes, "Path of the Law," *Harvard Law Review* 10, no. 8 (1897): 469.
43. Derrida, "Force of Law," 943.
44. LaCapra, "Violence, Justice, and the Force of Law," 1069.
45. Benjamin, "The Critique of Violence," 286.
46. See LaCapra, "Violence, Justice, and the Force of Law," 1071, 1077–78.
47. Derrida, "Force of Law," 971.
48. Derrida, "Force of Law," 943–45.
49. See *Hardwick and Bowers*, 760 F.2d 1202 (1985) at 1211–13.
50. See Derrida, "Force of Law," 961–63.
51. Oliver W. Holmes, "The Path of the Law," *Harvard Law Review* 10, no. 8 (1897).
52. Derrida, "Force of Law," 961.
53. For a more thorough exploration of the appeal to natural and unnatural conceptions of sexuality, see Drucilla Cornell, "Gender, Sex and Equivalent Rights," in *Feminists Theorize the Political*, ed. Judith Butler and Joan Scott (New York: Routledge, Chapman, and Hall, 1991).
54. Derrida, "Force of Law," 971.
55. *Bowers v. Hardwick*, 478 U.S. at 186, 187, 199 (1986).
56. Derrida, "Force of Law," 971.
57. Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977).
58. Drucilla Cornell, *The Imaginary Domain: Abortion, Pornography and Sexual Harassment* (New York: Routledge, 1995), and *At the Heart of Freedom* (Princeton: Princeton University Press, 1988).
59. John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1999).
60. John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993).