ARTICLES : SPECIAL ISSUE
A DEDICATION TO JACQUES DERRIDA - JUSTICE

The Thinker of the Future – Introduction to *The Violence of the Masquerade: Law Dressed Up as Justice*[*]

By Drucilla Cornell[**]

There has perhaps been no greater thinker of the future than Jacques Derrida. Throughout his entire body of work Derrida constantly returns to the thinking of the "perhaps," of the *arrizant*. This thinking of the "perhaps" takes shape as what is "new" and other to our world, something that is therefore unknowable even as a horizon of ideality that both arises out of and points to what ought to be in any given world. I renamed deconstruction the philosophy of the limit so as to emphasize Derrida as the protector of what is still yet to come. My argument was fundamentally that Derrida radicalized the notion of the Kantian meaning of "laying the ground" as the boundaries for the constitution of a sphere of valid knowledge, or determinant judgment. In Kant, to criticize aims to delimit what is decisive to the proper essence of a sphere of knowledge, say for example science. The "laying of limits" is not primarily a demarcation against a sphere of knowledge, but a delimiting in the sense of an exhibition of the inner construction of pure reason. The lifting out of the elements of reason involves a critique in the sense that it both sketches out the faculty of pure reason and surveys the project as the whole of its larger architectonic or systematic structure.

But critique, in Kant, is a setting of boundaries in the sense that human reason is seen as a finite creature. The finitude of reason, in a sense, defines unalterable

[*] Apart from the introduction "Thinker of the Furture," the text is a reprint from Chapter 6 of Drucilla Cornell's book, PHILOSOPHY OF THE LIMIT. The Editors would like to thank the publishers for their generous reprint permission. "The Violence of the Masquerade: Law Dressed Up as Justice," Copyright © 1992 from *Philosophy of the Limit* by Drucilla Cornell. Reproduced by permission of Routledge/Taylor & Francis Books, Inc.

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limits for Kant. The price we pay for a verifiable island of truth is that reason, understood as finite reason, can never reach beyond the limits of the human mind—a knowing subject who intuits the world through a transcendental imagination in which all objects come to this subject bounded already by space and time. Martin Heidegger famously wrote that Kant takes us to the limit of the very notion of critique and ultimately raises, but does not fully address, the question of "who" is this finite being that must think through the transcendental imagination. "Who," in Heidegger's words, is "man," and so this "who" is *da sein*. That Heidegger himself so carefully addressed Kant and the way in which Kant pushes us to answer the question of "who is man" is an important part of philosophical history that has often been lost. As Derrida has himself noted, in France those neo-Kantians who focused almost exclusively on the architecture of the system and the existential phenomenologists that take up the question "who is man" were both divided from one another and, indeed, hostile to one another. And yet as I suggested Heidegger's own thinking can only be grasped if it is understood as a deep and profound response to Kant; and, if you will the question, the critique in Kant's sense demands that we ask. One aspect of the renaming of the *Philosophy of the Limit* was to return Kant to his rightful place in what has now become called continental philosophy. We can not rightly understand the significance of Kantian critique if we do not struggle with those aspects of Kant that are most troublesome, at least to certain schools of neo Kantianism—the transcendental imagination and synthetic a priori judgment. I wanted, in this way, to bring a Kantian specter that I believe haunts Derrida's work into the vision of deconstruction that had dominated the academy in the United States, at least at the time when I wrote *Philosophy of the Limit*.

We know several interpretations of deconstruction: as a method of reading, as a demonstration of the infinite regress in language that undermines the foundations of determinant judgment, as serious play that opens up new possibilities of interpretation in the conventions of meaning. I was not so much arguing against the validity of these interpretations of deconstruction as much as I thought it was necessary to open up the ethical as the heart of the matter of deconstruction. In the *Philosophy of the Limit* I sought to show that Derrida radicalizes the notion of the "laying of the ground" in Kant's critique by showing us that the a priori of the "laying of the ground" of reason can never be overcome. Nor can the question of "who is man" be answered definitively as another ground for pure reason. Derrida set deconstruction to work against all attempts to ontologize the meaning of "man," whether optimistic or pessimistic. Therefore, the "deontological" moment in Derrida was always done to show us that it was impossible to know definitively what is possible or what is impossible. Most notably, Derrida set deconstruction to work in *Specters of Marx* against the ontologization of a triumphant liberalism that in many different declarations suggests "man" is definitively the liberal citizen of

modern western democracies, and that the rest of humanity was fated to catch-up with this negatively idealized "man." In this sense, deconstruction shows us that the limits of the knowable exist in the name of a future that might yet always arrive. The chapter published here was originally called, "From the Lighthouse: The Promise of Redemption and the Possibility of Legal Interpretation." In the *Politics of Friendship* Derrida returns to my metaphor of lighthouse and writes as follows:

> Yes, like searchlights without a coast, they sweep across the dark sky, shut down or disappear at regular intervals and harbour the invisible in their very light. We no longer even know against what dangers or abysses we are forewarned. We avoid one, only to be thrown into one of the others. We no longer even know whether these watchmen are guiding us towards another destination, nor even if a destination remains promised or determined.
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> We wish only to think that we are on the track of an impossible axiomatic which remain to be thought. Now, if this axiomatic withdraws, from instant to instant, from one ray of the searchlight to another, from one lighthouse to the next (for there are numerous *lighthouses*, and where there is no longer any home these are no longer homes, and this is what is taking place: there are no longer any homes here), this is because darkness is falling on the value of value, and hence on the very desire for an *axiomatic*, a consistent, granted or presupposed system of values.[1]

Here, in this quotation, Derrida is true to his constant reminder that what remains "other," only appearing briefly as a glimmer, might come in the form of a warning for what is new; the truly different might not arrive for us as the good or the just, but indeed might be its exact opposite.

We can not know the future precisely; if something is the future, the other, then it is not in our system of calculable knowledge. Thus, the lighthouse, or lighthouses, can be read as giving us warnings. But of course it can also be read as giving us hope of redemption held out—to use Derrida's famous phrase—in the messianism without messiah. My interpretation, if you will, is more optimistic in that I read my

[1] JACQUES DERRIDA, THE POLITICS OF FRIENDSHIP 81 (George Collins trans., 1997).

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own metaphor as giving us the glimmer of a good that is always beyond our immediate horizon of knowledge. The lighthouse, of course, could be read either way. Derrida is right that there is always a risk and a promise of redemption and the relentless protection of the "yet to come" as what might be different, as what might be other, and, yes, what might be a redeemed world. There is no promise of redemption without this risk. And yet, as Derrida himself always wrote, his own deconstruction was always in the spirit of Marxism in that he sought to delimit the realm of the possible in the name of the what might yet still be possible—the dream of a redeemed humanity that is inseparable from ideal of communism.

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The Violence of the Masquerade: Law Dressed Up as Justice

From our childhood, most of us are familiar with the fairy tale "The Emperor's New Clothes." Throughout this book I have challenged a reading of "deconstruction" that has been proposed by its friends and its foes in legal circles. My decision to re-name deconstruction the philosophy of the limit has to do with the attempt to make the ethical message of deconstruction "appear." The more accepted readings understand deconstruction to expose the nakedness of power struggles and, indeed, of violence masquerading as the rule of law. With this exposure, the intervention of deconstruction supposedly comes to an end.[2] The enemies of "deconstruction" challenge this exposure as itself an act of violence which leaves in its stead only the "right" of force and, as a result, levels the moral differences between legal systems and blurs the all-too-real distinctions between different kinds of violent acts. We have seen this critique specifically evidenced in the response to Derrida's writing on Rousseau. I have countered this interpretation as a fundamental misreading, especially insofar as it misunderstands the Derridean double gesture.

At first glance, however, the title of Jacques Derrida's essay, "Force of Law: The 'Mystical Foundations of Authority,'"[3] seems to confirm this interpretation. It also, in turn, informs Dominick LaCapra' s subtle and thoughtful commentary,[4] which evidences his concern that Derrida's essay may – in our obviously violent world – succumb to the allure of violence, rather than help us to demystify its seductive power. I refer to LaCapra's text because it so succinctly summarizes the political

[2] Seyla Benhabib, *Deconstruction, Justice and the Ethical Relationship*, 13 CARDOZO LAW REVIEW 1219 (1991).

[3] Jacques Derrida, *Force of Law: The "Mystical Foundations of Authority"*, 11 CARDOZO LAW REVIEW 920 (1990).

[4] Dominick LaCapra, *Violence, Justice, and the Force of Law*, 11 CARDOZO LAW REVIEW 1065 (1990).

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 that troubles LaCapra. Undoubtedly, Derrida's engagement with Walter Benjamin's text, "The Critique of Violence,"[5] has been interpreted as further evidence of the inherent danger in upholding the position that law is always deconstructible. It is this position that makes possible the "on strike" posture toward any legal system.[6] But it is a strike that supposedly never ends. Worse yet, it is a strike that supposedly cannot give us principles to legitimately curtail violence. This worry is a specific form of the criticism addressed in chapter 2 that deconstruction, or the philosophy of the limit as I have renamed deconstruction, can only give us the politics of suspicion. I, on the other hand, have argued throughout that deconstruction, understood as the philosophy of the limit, gives us the politics of utopian possibility. As we saw in the last chapter, 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 re-examine the stance on violence which inheres in Derrida's exposure of the mystical foundations of authority if we are to satisfactorily answer his critics. To do so we will once again return to the ethical, political, and juridical significance of his critique of positivism. The case we will examine in this chapter 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 to erase human responsibility for violence, because the distinction between mythic violence – that is, the violence that founds or constitutes law (right) – and divine violence, which is the "antithesis" of mythical violence because it destroys rather than founds, expiates rather than upho1ds, 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

[5] Walter Benjamin, *The Critique of Violence*, *in* REFLECTIONS: ESSAYS, APHORISMS, AUTOBIOGRAPHICAL WRITINGS 277 (Peter Dementz ed., Edmund Jephcott trans., 1978).

[6] *Id.* at 281-83.

[7] Bowers v. Hardwick, 478 U.S. 186 (1986).

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will return to why this is the case later in this essay. Law-making 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 – erases 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 a 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 rightfully 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 "judgement, evaluation,

[8] Benjamin, *supra* note 5 at 277-79; Derrida, *supra* note 3 at 983-85, 989.

[9] Benjamin, *supra* note 277.

[10] Benhabib, *supra* note 2. Seyla Benhabib misunderstands Benjamin here.

[11] LaCapra, *supra* note 4 at 1077.

[12] Derrida, *supra* note 3 at 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.

examination that provides itself with the means to judge violence,"[13] must take place.

As we have seen, 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."[14] 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"[15] 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.
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> Only the yet-to-come (avenir) will produce intelligibility or interpretability of this law.[16]

[13] Derrida, *supra* note 3 at 983.

[14] *Id*. at 945.

[15] *Id*. at 991.

[16] *Id*. at 993.

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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."[17] As we saw in the last chapter, this insistence that there can be no metalanguage in which to establish the "external" norms by which to legitimate the legal system separates Derrida from Habermas. The question then becomes, what does it mean practically for the field of law that we cannot have such insurance, other than that it separates Derrida from Habermas' neo-Kantianism? For LaCapra this lack means that we cannot in any way whatsoever justify legal principles of insurance. If we cannot justify legal principles, 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.[18]

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 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 developed 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.[19] Fish understands that as a philosophical matter

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[17] *Id.* at 943.

[18] LaCapra, *supra* note 4 at 1067.

[19] See STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF

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law can never catch up with its justifications, but that as a practical reality its functional machinery renders its philosophical inadequacy before its own claims irrelevant. Indeed, the system sets the limit of relevance. The 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 he celebrates as a marvel, I abhor as a monster. Once again, as in the last chapter, we are returned to the divergent viewpoints of different observers.

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 foundation 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.[20] 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-legitimating 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.[21]

THEORY IN LITERARY AND LEGAL STUDIES (1989).

[20] *Id.* at 328-31

[21] 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.

Id. at 94 (footnote omitted; emphasis in original).

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*.[22] 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, as 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, its constructibility, and therefore its potential deconstructibility, has no "consequences."[23]

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[22] Bowers v. Hardwick, 478 U.S. 186 (1986).

[23] 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 you feet, it cannot tell you which one it is or how to identify it. It is not disquieting because in the absence of 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, *supra* note 19 at 395 (footnote omitted).

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.[24] 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 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 and they 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 regress 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's[25] 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.[26] The Eleventh Circuit relied on

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[24] Bowers v. Hardwick, 478 U.S. 186, 192-94 (1986).

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

[26] Bowers v. Hardwick, 478 U.S. 186, 189 (1986). 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 line of precedent from *Griswold*[27] through *Roe*[28] and *Carey*[29] 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.[30]

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 cases should be narrowly decided. If one accepts that this principle was operative in the cases associated with the establishment of the "right of privacy"[31] then the reason none of these cases "spoke" to homosexuality was that

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The Due Process Clause of the Fourteenth Amendment provides that:

> 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.

[27] Griswold v. Connecticut, 381 U.S. 479 (1965).

[28] Roe v. Wade, 410 U.S. 113 (1973).

[29] Carey v. Population Services International, 431 U.S. 678 (1977).

[30] Bowers v. Hardwick, 478 U.S. 186, 190-91 (1986).

[31] The cases in this line include Skinner v. Oklahoma, 316 U.S. 535 (1942), which struck down a law requiring sterilization of those thrice convicted of certain felonies involving "moral turpitude," on

the question of homosexuality wasn't before them. Judges under this principle, or in Luhmann's terms, under this system, are to decide cases, not advance norms or speculate about all possible extensions 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, like the commentators already mentioned_ is interpreting from a silence, and a silence that inheres in the principle that constitutional cases in particular should be construed narrowly. Need I add here that if one is a homosexual, the right to engage in homosexual activity might have everything to do with "family, marriage, or procreation,"[32] even though Justice White argues the contrary position? As a result, his very interpretation of the "privacy" cases – as being about "family, mamage, 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 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 the case 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

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grounds which 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 non-prescription contraceptives by any but pharmacists or distribution to minors under the age of 16.

[32] Bowers v. Hardwick, 478 U.S. 186, 191 (1986).

> 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.[33]

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, "[t]he 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."[34]

I have critiqued the charge of judicial activism elsewhere as a fundamental misunderstanding of the inevitable role of normative construction in legal interpretation[35] once we understand that interpretation is also evaluation.[36] 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 the 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 importantly, 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

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[33] Bowers v. Hardwick, 478 U.S. 186, 192-94 (1986) (footnotes and citation omitted).

[34] Bowers v. Hardwick, 478 U.S. 186 194 (1986).

[35] *See* Drucilla Cornell, *Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation*, 136 U. PA. L. REV. 1135 (1988); DRUCILLA CORNELL., THE PHILOSOPHY OF THE LIMIT Ch. 5 (1992) (Chapter five is entitled: *The Relevance of Time to the Relationship between the Philosophy of the Limit and Systems Theory: The Call to Judicial Responsibility*).

[36] *See* FISH, *Working on the Chain Gain*, *in* DOING WHAT COMES NATURALLY, *supra* note 19 at 93-95.

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 differantielle contamination between the two, with all the paradoxes that this may lead to.[37]

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 Justices' own choice of values on the States and the Federal Government, the Court has sought to identify

[37] Derrida, *supra* note 3 at 997.

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> the nature of the rights qualifying for heightened judicial protection.[38]

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."[39] 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 most 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."[40]

Quoting Justice Holmes, Blackmun reminds us that:

> 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.[41]

Derrida gives us insight into how the traditional positivist conception of law, in spite of Justice Holmes' 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 it 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.

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[38] Bowers v. Hardwick, 478 U.S. 186, 191 (1986).

[39] Bowers v. Hardwick, 478 U.S.186 (making reference to Justice Goldberg's concurrence in Griswold v. Connecticut).

[40] Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (Blackmun, *J.* dissenting; quoting *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) (Brandeis, *J.*, dissenting)).

[41] Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (quoting Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 469 (1897)).

It is, however, precisely the status as 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."[42] 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."[43]

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* insure the role of a metalanguage in relation to its dominant interpretation, means that the conserving promise of law can be never be fully actualized in a hermeneutical 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 juris pathetic 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 are again returned 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 jurispathic or law-conserving violence of the decision. The exposure of the mystical foundation of authority, which is another way of writing that the performativity of institutive language cannot be fully incorporated by the system once it is established, and thus, 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, then, of questioning the origin of authority is precisely

[42] Derrida, *supra* note 3 at 943.

[43] LaCapra, *supra* note 4 at 1069.

to undermine the conflation of justification with an appeal to the origin, a conflation made possible because of the erasure of the mystical foundation 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 us to the conclusion that LaCapra fears it might? That conclusion being that all legal systems, because they are based on a mystical foundation of authority, have "something rotten"[44] at the core and are therefore "equal."[45] 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, as we have seen throughout this book, 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"[46] than those ideals. As we have seen in Bowers, achieving them remains an aspiration, but an aspiration that is not just impotent idealism against the ever functioning, nondeconstructible machine.

As we have seen, Derrida is in disagreement with Fish about 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, the myth of full presence. In Fish, it is practically insignificant that law is a social construct, because, social construct or not, we can not deconstruct the machine. Derridean deconstruction reaches the opposite conclusion. As Derrida explains, returning us to the excess of the performative language that *establishes* a legal system:

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[44] Benjamin, *supra* note 5 , 286.

[45] *See* LaCapra, *supra* note 4 at 1071, 1077-78.

[46] Derrida, *supra* note 3 at 971.

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> 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 transfonnable textual strata, (and that is the history of law (droit), its possible and necessary transfonnation, 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.[47]

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 challengers 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 attempt fidelity to the deconstructibility of even the "best" constitution, so as 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 norms 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

[47] *Id.* at 943-45.

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.[48]

Silence, in other words, is to be constructed as the "not yet thought," not 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, rather than a projected ideal.[49] To try exactly to define 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.[50] But, of course, a legal system if it is to be just must also promise universality, the fair application of the rules. As a result, as we saw in the last chapter, we have what for Derrida is the first aporia of Justice, *epokhe*, and rule. 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.[51]

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[48] *See* Hardwick v. Bowers, 760 F.2d 1202, 1211-13 (1985).

[49] *See* Derrida, *supra* note 3 at 961-63.

[50] Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 469 (1897).

[51] Derrida, *supra* note 3 at 961.

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.[52]

But if Justice *is* (note the constative language) only as aporia, if no descriptive set 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? And 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 culture? As I have argued throughout this book, Derrida explicitly disagrees with that conclusion: "That justice exceeds law and calculation, that the unpresentable 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."[53]

But let me state this positioning *vis-à-vis* the deconstructibility of law even more strongly. The deconstructibility of law is, as I have argued for the last two chapters, exactly what allows for the possibility of transformation, not just the evolution of the legal system. This very openness to transformation, which, in my interpretation of the Ninth Amendment, should be understood as institutional humility before the call to 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.[54] 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 can not be determined once and for all as a set of established norms.

The idea of right and the concrete, practical importance of rights, it must be noted, however, is 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.

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[52] 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 (Judith Butler and Joan Scott eds., 1991).

[53] Derrida, *supra* note 3 at 971.

[54] Bowers v. Hardwick, 478 U.S. at 186, 187, 199 (1986).

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 persecuted, 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 the 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 rightly 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.[55]

It is this "rottenness" in our own legal system as it is evidenced in Justice White's opinion that causes me to refer to the legal system, as Fish describes it, as a monster. The difference in Luhmann's terms turns on what is observed and why.

But for LaCapra, there is also another issue, separate if connected to the potential equalization of legal systems due to their inherent "rottenness." That danger is a danger of an irresponsible turn to violence, because there can be no projected standards by which to judge in advance the acceptability of violent acts. For LaCapra, this danger inheres in the complete disassociation of cognition and action that he reads as inherent in Benjamin's text, and perhaps in Derrida's engagement with Benjamin. As LaCapra reminds us in a potential disagreement with Derrida's formulation of this disassociation:

[55] Derrida, *supra* note 3 at 955.

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> As Derrida himself elsewhere emphasizes, the performative is never pure or autonomous; it always comes to some degree bound up with other functions of language. And justificatory discourse-however uncertain of its grounds and deprived of the superordinate and masterful status of metalanguage-is never entirely absent from a revolutionary situation or a *coup de force*.[56]

But Derrida certainly is not arguing that justificatory language has nothing to do with revolutionary situations. His argument is instead that the justificatory language of revolutionary violence depends on what has yet to be established, and of course, as a result, might yet come into being. If it did not depend on what was yet to come, it would not be revolutionary violence. To quote Derrida:

> A "successful" revolution, the "successful foundation of a State" (in somewhat the same sense that one speaks of a "felicitous" performative speech act) will produce apres coup what it was destined in advance to produce, namely, proper interpretative models to read in return, to give sense, necessity and above all legitimacy to the violence that has produced, among others, the interpretative model in question, that is, the discourse of self-legitimation … There are cases in which it is not known for generations if the performative of the violent founding of the state is "felicitous" or not.[57]

That separation of cognition and action by *time* means that no acts of violence can truly be justified at the time they take place, if by truly justified one means cognitive assurance of the rightness of action. I believe that this interpretation of , Derrida's engagement with Benjamin is the reading that does full justice to the seriousness with which both authors take the command "thou shalt not kill."[58]

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[56] LaCapra, *supra* note 4 at 1068.

[57] Derrida, *supra* note 3 at 993.

[58] Benjamin, supra note 5 at 297-98; Derrida, *supra* note 3 at 1029-31.

Thus, we can only be just to Benjamin's text and to Derrida's reading if we understand the responsibility imposed upon us by Benjamin's infamous statement about divine violence. "For it is never reason that decides on the justification of means and the justness of ends, but fate-imposed violence on the former and God on the latter."[59] Since there can be no cognitive assurance in advance of action we are left with our responsibility for what we do. We cannot escape responsibility by appealing to established conventions. Revolutionary violence cannot be rationalized by an appeal to what "is," for what "is" is exactly what is to be overturned. In this sense, each one of us is put on the line in a revolutionary situation. Of course, the inability to know whether or not the situation actually demands violence also means there can be no justification for not acting. This kind of undecidability is truly frightening. But it may not be more frightening than the justifications for violence-whether they be justifications for the death penalty or the war machine-put forward by the state. LaCapra worries precisely about the day-to-dayness of extreme violence in the modern/postmodern state.[60] But so does Benjamin in his discussion of the police.[61] The need to have some standards to curtail violence, particularly this kind of highly rationalized violence, should not be confused with a justification for revolutionary violence. The problem is not that there are not reasons given for violence. It is not even that these reasons should better be understood as rationalizations. It is rather that revolutionary violence cannot be rationalized, because all forms of rationalization would necessarily take the form of an appeal to what has already been established. Of course, revolutionary movements project ideals from within their present discourse. But if they are *revolutionary* movements they also reject the limits of that discourse.

Can they do so? Have they done so? Judgment awaits these movements in the future. Perhaps we can better understand Benjamin's refusal of human rationalizations for violence by appealing to Monique Wittig's myth, Les Guerilleres.[62] In Les Guerilleres, we are truly confronted with a revolutionary situation, the overthrow of patriarchy with its corresponding enforcement of heterosexuality. In the myth, the Amazons take up arms. Is this mythic violence governed by fate? Is the goal the establishment of a new state? Would this new state not be the reversal of patriarchy and therefore its reinstatement? Or does this "war" signify divine violence-the violence that truly expiates. The text presents those questions as myth, but also as possibility "presented" in literary form.

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[59] Benjamin, *supra* note 5 at 294.

[60] *See* LaCapra, *supra* note 4 at 1069-70.

[61] *See* Benjamin, *supra* note 5 at 286-87.

[62] MONIQUE WITTIG, LES GUERILLERES (David Le Vay trans., 1975).

How could the women in the myth know in advance, particularly if one shares the feminist premise that all culture has been shaped by the inequality of the gender divide as defined by patriarchy? If one projects an ideal even supposed by feminine norms, are these norms not contaminated by the patriarchical order with which the women are at "war"? Rather than a decision about the resolution of this dilemma, Wittig's myth symbolizes the process of questioning that must inform a revolutionary situation, which calls into question all the traditional justifications for what is. I am relying on this myth, which challenges one of the deepest cultural structures, because I believe it allows us to experience the impossibility of deciding in advance whether the symbolized war against patriarchy can be determined in advance, either as mythic or divine, or as justified or unjustified.

Yet, I agree with LaCapra that we need "limited forms of control".[63] But these limited forms of control are just that, limited forms. Should we ever risk the challenge to these limited forms? Would LaCapra say never? If so, my response to him can only be "Never say never." And why? Because it would not be just to do so.

Derrida's text leaves us with the infinite responsibility undecidability imposes on us. Undecidability in no way alleviates responsibility. The opposite is the case. We cannot be excused from our own role in history because we could not know so as to be reassured that we were "right" in advance.

[63] LaCapra, *supra* note 4 at 1070.