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 (he 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.¹ 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.

¹ Copyright©2004 From The Philosophy of the Limit by Drucilla Cornell. Reproduced by permission of Routledge/Taylor & Francis Books, Inc.
At first glance, however, the title of Jacques Derrida's essay, "Force of Law: The 'Mystical Foundations of Authority'," seems to confirm this interpretation. It also, in turn, informs Dominick LaCapra's subtle and thoughtful commentary, 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 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," 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. 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.* 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 - the violence that founds or constitutes law (right) - and the divine violence that is its "antithesis" because 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 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 - does erase the very basis on which the critique of violence proceeds. 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.

Critique, in this sense, is hardly the simple glorification of violence per se, since Benjamin carefully distinguishes between different kinds of violence. 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. 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.” His text proceeds precisely through the configuration of the concepts of justice and law in which the critique of violence, understood as “judgement, evaluation, examination that provides itself with the means to judge violence,” 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.” 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” 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, finds 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 this law.15

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.”16 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.\textsuperscript{77}

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.\textsuperscript{18} 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 its own claims irrelevant. Indeed, the
real world, the functional machine is already present. To put it in plain language, the machine is already a part of the system that sets the limit of relevance. The machine, in other words, functions to erase the mythic 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 mythic 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. 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,” just 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.
To “see” the violence inherent in being _before the law_ in the many senses of that phrase which Derrida plays on in his text, Jet us imagine the scene in Georgia that sets the stage for _Bowers v. Hardwick_. 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 gle 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 Jaw 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 mandate, its constructability, and therefore its potential deconstructibility, has no “consequences.”

жива поистоветувањето на правдата со законот и овековечувањето на „постоечкиот“ правен систем.**

За да се „види“ насилството којшто е својствено за ситуацијата кога сме _перед законом_, во многути значења на овој израз со кој Дериди се служи во неговиот текст, ајде да ја замислиме сликата во Полсија која ја подигнува стената за случайот _Бауерс против Хардвик_. Двајца мажи спокойно водат љубов без воопшто да знаят дека се _перед законот_ и дека накос- ро ќе бидат прогласени за виновни поради содомија која се смета за криминален престап. Радоста на Фиш се содржо во тоа да ја покаже немоката - збор кој намерно го користам - на философското противставување или на политичката критика кон законскиот систем. Законот постојано доаѓа. Сетете се на страшната приказна од дететвото „Крвави Коски“ ( _Bloody Bones_ ) за подобро да си ја претставите стената. Законот е на првото чекор. Философот очајно пробува да го сочува законот повикувајки се на „надворешни“ норми на правда, но залудно. Законот е на второто чекор. Сега феминистичката критичарка се обидува да ја раскропи законската машина која работи против неа. Повторно законот едноставно ја брише критиката за неговата маскираност, во овој случај хетеросексуалната пристрасност, како нешто безначајно. Законот определува што е значајно. Законот е на третото чекор. Им се приближува на неговите жртви. Фиш ќе се восхитува токму на оваа _сила на законот_ , таканеречената _боеност_ , постојано да доаѓа и покрај неговите критичари и неговата философска шупливост, шупливост која не е само сознавена туку и постојано сополувана од самото Фиш. Го навијат ли еднаш, законот ништо не го спира, а она што го навива се неговите функции како што се разработени во митовите на законската култура. Така, иако законот може да биде човечка
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. 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 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." The Eleventh Circuit relied on the line of precedent from Griswold through Roe and Carey 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:
Прифаћи ги одлуките од овие случаи и гореспоменатиот опис на истите, сметаме дека е очигледно дека ниту едно од правата нагласени во тие случаи нема никаква сличност со баранот уставно право хомосексуалци да се впуштаат во чин на содомија, што се тврди во овој случај. Никаква врска помеѓу семејството, бракот, и создавањето потомство од една страна, и хомосексуалната активност од другата, не беше докажана, ниту од Апелационниот Суд ниту од обвинетот.39

Не мора да развиваме некаква софистицирана философска критика за да укажеме на грешката во „буквалниот“ толкување на овие случаи од страна на судијата Вајт. Можеме едноставно да се потпреме на еден од најстарите и најдокажани „принципи“ на уставно толкување, а тоа е принципот дека случаите треба ограничиено да се решаваат. Ако човек прифати дека овој принцип се употребувал во случаите поврзани со утврдувањето на „правото на приватност“,39 тоа колку се причината што ниту еден од овие случаи не изрази „прозборил“ на хомосексуалноста е во тоа што прашањето за хомосексуалноста не било пред нив. Судиите под овој принцип, или како што вели Луман (Luhmann), под овој систем, треба да решаваат случаи, а не да изложуваат норми или да спекулираат за сите можни проширувања на некое право. Кога и како правото ќе се проширува зависи од конкретните факти на секој случај. И покрај она што вели дека го прави, судијата Вајт, како што коментаторите веќе споминаа, толкува од молк, и тоа молк кој се содржи во принципот дека особено уставните случаи треба ограничено да се толкуваат. Потребно ли е овде да додадам дека ако некој е хомосексуал, правото да се впушта во хомосексуална активност може да има секаква врска со „семејство, брак или создавање потомство“,38 иако судијата Вајт го тврди спротивното?

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.39

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,"39 then the reason none of these cases "spoke" to homosexuality was that 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,"31 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
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 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.\textsuperscript{32}

For White, not only is the danger of activism always to be guarded against, but it must be specifically for-saken 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."\textsuperscript{33}

I have critiqued the charge of judicial activism elsewhere as a fundamental misunderstanding of the inevitable role of normative construction in legal interpretation\textsuperscript{34} once we understand that interpretation is also evaluation. "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 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 (Rechtsverhaltende 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 différents contamination between the two, with all the paradoxes that this may lead to.36
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 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.”38 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.”39

Quoting Justice Holmes, Blackmun reminds us that:
Revolting means having 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.\textsuperscript{10}

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.

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 be definition rest on anything but themselves, they are themselves a violence without ground.”

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 be definition rest on anything but themselves, the question of their ultimate foundation or ground is literally pointless.”

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 jurispathetic 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 fa-
"...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 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 reformation 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" at the core and are therefore "equal."44 In one
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” 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, non-deconstructible 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:
Even if the success of the performatives that found law or right (for example, and this is more than an example, of a stale 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.40

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 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. 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
pravda dokolku pod vakvoto vetevanje ne podrazbirava vetevanje dado na Pravdata. Povtorno sme vratiti na sochleduvanneto na ovoj paradoks, barem sporred moeto tolkuvanje na Eдинаесетното Амандман.

Tokmu ovoj paradoks, koj sporred Derrida e neizbezhen, e ona koeto ja pravi Pravdata aporiija, namesto liquitjan ideal. Obidot precizno da se odredi što e Pravda povtorno bi go turral proplisot vo opis i ne bi obrnal vam стране на понизностa pred Pravdata koja e svojstvena za moeto tolkuvanje na Dеветното Амандман. Eden takov obid go zamolkuva povikoto na Pravdata namesto da go posluca, i vodi kon travaestja na pravdata kako toto tolku umeshno opisha sudijata Xolme. No, za eden zakonski sistem da bide pravichen, toj mora isto taka da veti univerzalnost, pravnichna primena na pravilata. Kakto rezultat na toa, i kakto što vidovme vo poslednoto pavgavje, go imame ona što za Derrida e prvata aporija na Pravdata, epokhe, i pravilo. Ova eporka doaba od odgovornost na sudijata ne samo da go kaze zakonot tuk i da go prosusu.

Nakuso, za edna odluka da bide pravichna i odgovornaja, ako ima takva, taa morga da bide i regulirana i bez regulativen zakon: taa morga da go odhuku zakonot i isto taka da go ponistiva ili dovolno da go otprisuku za da to moze povtorno da go otkrija vo sekoi nov slucaj, povtorno da go opravduva, ili barem povtorno da go otkrije vo reafirmacijata i novata i slobojda potirka na nezavjat principe.

Sudijata Bajt ne uspea da ja ispolni negovata dolzhnost tokmu zatoa što toj go zameni oписot so prosujuvanje, i toa opis na zakonite na sojuznite drzavi star stotina godini, i vo mnogu razlicni oshtevernini i politichki okolnosti. 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.

return 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. 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. 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.
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 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 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.”

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. “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
начин, може да одговориме на загриженост на Лакапра сите правни системи да не бидат замислени како подеднакво „чили“. Сите судии не се истин во спроведувањето на нивната одговорност кон Правдата, дури и ако правдата не може да се одреди еднаш и засекогаш како збир на утврдени норми.

Сепак, мора да се забележи дека не се оспорува идејата за правото и конкретната, практична важност на правата. Наместо тоа, основата на правата одново се толкува за да биде во согласност со етичкото инсистиране врз поделеноста помеѓу правото и правдата.

Ваквото етичко инсистиране ја штити можности од радикална трансформација во рамките на некои постојанци правен систем вклучувајќи ја и новата дефиниција на право (right). Но, отклањањето на идејата дека само тековните сфакања за правичност може да се изведнат со правда е токму она кои води кон практичната вредност на правата. Емануел Левинас (Emmanuel Levinas) во еден случај забележал дека ни требаат права за тоа што не може да имаме Правда. Правата, со други зборови, не штитат од суштинските сфакања за правда или за право (right) е последниот збор.

За жал, во една друга смисла на зборот, судијата Вайт е „во право“ кога станува збор за нашата правна традиција. Хомосексуалците во САД систематски се гонети, како законски така и на други начини. Интересно е што читањето на деконструкцијата што го понудив ни овозможува да ги браним правата како израз на сомеситет од зацртнување на законските и другите граници на заедницата. Овие граници ја затвораат можноста за трансформација, вклучувајќи ја и трансформацијата на нашите важечки сфакања 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.

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
for the denial of rights to homosexuals. What is “rotten” in a legal system is precisely the erosion 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. 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:
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.55

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 après 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 its self-legitimization. . . . 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. 56
Dorottya Cornell: The Violence of the Masquerade: Law Dressed Up as Justice

вистински да се опправдава во моментот кога тие се случуваат, доколку под вистинско опправдување се мисли на споназнало уверување за праведноста на постапката. Верувам дека ова толкување на занимавањето на Дерид со текстот на Бенјамин е читање кое целосно ја почитува сериозноста со која обата автори ја земаат заповеда „не убија“. Така, можеме да бидеме праведни кон текстот на Бенјамин и кон читањот на Дерид само ако ја разбереме одговорноста на која ни ја наметнува фамозната изјава на Бенјамин за божественото насилиство. „Зашто разумот никогаш не е тој кој решава за опправданоста на средствата и правичноста на делите, ами судбински наметнато насилиство решава за првото, а Господ за второто.“ Видејќи не може да има когнитивна сигурност пред некоја постапка, препуштени сме на нашата одговорност за она што го правиме. Не можеме да побегнеме од одговорноста повикувайки се на установени конвенции. Револуционерно насилиство не може да се рационализира повикувайки се на она што е, зашто она што е тоа што треба да се прераски. Во таа смисла, секој од нас е соочен со една револуционерна ситуација. Се разбира, неможноста да се знае дали ситуацијата е впуштен налага насилиство, исто така значи дека не може да има опправдување за недејствување. Ваквата неодлучувост е навистина застрашувачка. Но, може и да не е застрашувачка од опправдувањата за насилиство потикнати од државата, без разлика дали тие се опправдуваа за смртната казна или за воената машина. Лакапра е загрижен токму за таа секојдневност на екстремното насилиство во модерната/постмодерната држава. Заѓигиен е и Бенјамин во неговата расправа за полицијата. Потребата од некакви стандарди за отпирчување на насилиството, посебно на овој вид високо рационализирано насилиство, не треба да се меша со опправдувањето за 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.” 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.” 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. But so does Benjamin in his discussion of the police. 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
revolucionero nasiestvo. Problemot ne e vo тоа
ko toa deka vakiite prinicii treba podobro da se
ofxat kako racionalizacija. Posisko, problemot e
ko problemot novo nasiestvo ne moze da se
racionabiliiza bidejki sile formi na raciona-
liizacija neizaberno ke go poprimat oblikont na
povikuvanje kon nekto toto e veke ustanoveno.
Se razbira, revolucionerne dvijenja zaprputva-
ideali od ramkite na nivnite postoecki diskurs.
No, ako toto se revolucionerni dvijenja toto isto
taka gi ofklaad granichite na toj diskurs. Mogat
li da go pravat toa? Go napravile li toa dosegla?
Ocen-
kata za toa gi ochekuva ovme dvijenja vo idinkata.
Mogebi ke mogemo podobro da go sfratime Benjam-
inovo ofklaan na chovske impriavdvanja na nasi-
stvoto ako se povikame na mitot na Monik Wittig
(Monique Wittig), Les Guerilleres.66 Vo Les Guerilleres
vistinski sme srocheni so edna revolucionerna
situationa, ofklaane na patrijarhato so negovoto
sojstveno nalozuvane na heteroseksualnosta. Vo
mitot, Amazonkitite se krevat na oruzje. Dali ova
mitsko nasiestvo e vodeno od sudbinata? Dali cela
e vospastavuvane na nova drzhava? Nema li ova
balka da bide sprativnoto na patrijarhato, i na
eto naemin i negovoto vozbnowuane? I dali ova
vojna oznauva boshestveno nasiestvo, nasiestvo
koe vistinski iskoopuv. Tekstot gi prestavuva tne
preshuva kako mit, no isto toa i kako vozmoznost
prestavena vo knizhena forma.

Kako moze jenite vo mitot onapred da znaiat,
posebno ako nekoj ja spodeluva feministiche
promiska deka celata kultura e oblikuvana od ned-
iznvesta na rodovata podelba kako toto definirana
od patrijarhato? Ako nekoj zacta ideal koj duji se
prepostavuya spored feminismcite normi, ne se
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.66 In Les Guerilleres, we
are truly confronted with a revolutionary situation, the
overthrow of patriarchy with its corresponding enforce-
ment 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.
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.” 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.
Belgsk:  


5. Ibid., 281-83.


11. Derrida, "Force of Law," 919. Овде би сакал да напомним дека ова исто така упатува и на насловот на конференцијата, "Deconstruction and the Possibility Notes:


5. Ibid., 281-83.


11. 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
of Justice", отржана на Benjamin N. Cardozo School of Law во октомври 1989 година. „Силата на законот“ (Force of Law) беше основата на главното обрачување на Жак Деррида на конференцијата.

13. Ibid., 945.
15. Ibid., 993.
16. Ibid., 943.
20. Во неговото есеј "Working on the Chain Gang" Фиш вели:
Парадоксално, на првата историја може да се биде верен само преку нејзино ревидирање, преку нејзино повторно опишување на таков начин што ќе ги прилагоди и ќе ги скроти проблемите покренати од сегашноста. Оваа функција на конзервativното на законот, која нема да дозволи некој случај да остане неповрзан со минатото, и на тој начин осигурува дека минатото постојано ќе се припишува и препишувач во форма на историјата на одлуки. Всушност, должност на судијата е одново да го напишат (што значи само од тоа дека должностникот на судијата е да решет), па според тоа не може да има само некаква привнапредна" историја во 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. Ibid., 945.
15. Ibid., 993.
16. Ibid., 943.
20. 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 conservativism, 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."
однос на која некоја друга историја би могла да се нареће „изнислена”.

Fish, Doing What Comes Naturally, 94 (footnote omitted; emphasis in original).


22. Во “Dennis Martinez and the Uses of Theory,” Фиш му одговара на Марк Келман (Mark Kelman), цитирам:

Просветлувањето и вознемирнувањето е да видиме дека неразумно го конструираме правниот свет безброй пати по ред...

Всушност, не е ни тоа ни тоа. Не е просветлувањето биле и не филма никаква светлина врз којо било чин на конструирање кој во моментов е правоспољен, зашто нако твојата теорија ќе ти каже дека секогаш има само еден (или повеќе) под твоите нозе, не може да ти каже кој е тоа или како да го препознаеш. Не е вознемирнувањето биле во отсуство на каква било алтернатива за толкувања конструирана, тоа што не постојано го правиме не е ниту овде ниту таму. Само ни кажува дека нашите определби за тоа што е добро а што лошо секогаш ќе се јаснуваат во склоп на еден збир препоставки кои не можат да подлежат на разгледување од наша страна; но биле и не сме во ист кош, како што прашањето е без последици и нè остива токму таму каде што оне секогаш сме биле обезбедени кои какви биле факти и извесности кои нашите толкувања конструирана ни ги овозможуваат.

Fish, Doing What Comes Naturally, 395 (фуснотата е омислена).


Fish, Doing What Comes Naturally, 94 (footnote omitted; emphasis in original).


22. 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 feel, 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 are certainties our interpretative constructions make available.

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


The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage by the people.

*U.S. Const*, amend. IX.

The Due Process Clause of [he 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


30. 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 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
Connecticut), which he preserved the right to bear children without regard to marital status, to make decisions as to her own reproductive 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.


42. LaCapra, “Violence, Justice, and the Force of Law,” 1069.


46. Ibid., 943-45.


51. 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).

52. Derrida, "Force of Law," 971.


