

Time, Deconstruction, and the Challenge to Legal Positivism: The Call for Judicial Responsibility

Drucilla Cornell*

I. INTRODUCTION

The central purpose of this essay is to show why the deconstruction of the traditional conception of time, a conception which privileges the present, permits an effective challenge to Niklas Luhmann's systems theory. As we will see, this deconstruction of the privileging of the present helps give us a correct understanding of the relationship between law, justice, and the phenomenology of judging.

The traditional conception of time defines the past and the future as modifications or horizons of the "now." By time, I am not evoking chronology, but the privileging of the present as it is understood to be necessary to the establishment of a legal system. Without this present there would be no legal system that could be grasped as simply there for its participants, whether they be lawyers or judges. We find the deconstruction of the traditional conception of time worked through in Jacques Derrida's discussions of *différance*. I will specifically focus on how the diachronic view of time implicit in the explanations of *différance* undermines the very possibility of a positivist conception of law as Luhmann conceives of it.

Legal positivism, when left unchallenged, creates a system, a kingdom which reigns over possibility and excludes the dream of a truly different future. Deconstruction, however, exposes the presumption of a determinant certitude of a present "justice" as defined by any current legal system, including legal positivism. But in so doing, deconstruction is hardly the nihilistic language exercise claimed by many critics. In the movement through the aporias of justice, deconstruction protects the divide between law and justice. This exposure of the aporias of justice is in and of itself ethical. The aporias, or more precisely, justice conceived as aporia, is an uncrossable limit which continually returns us to an inherent and ulti-

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mately irresolvable paradox. Justice so conceived resists its own collapse into law.

As we will see, this ethical resistance to positivism is crucial for the development of an adequate conception of legal interpretation. First, it allows us to understand why legal interpretation always involves both "discovery" and "invention." Interpretation is not an activity separable from the other two. Indeed, deconstruction emphasizes precisely the necessity of "invention" in interpretation. But this process of invention and re-statement of legal norms also entails a judge's "responsibility toward memory." This responsibility is not to an accurate repetition through the recollection of legal norms, but to a refutation of the belief that what has been can *ever* be conflated with justice. Invention is inescapable if legal norms cannot be discovered purely through their mere recollection. We cannot escape appeals to redemptive perspectives projected into the future as the "truth" of the past in justifying legal norms. The judge is responsible for his or her projection of the legal truth or appeal to the normative rightness of the past.

I use the word "redemption" deliberately, even if it sounds foreign in the context of the secularized vocabulary of modern, liberal jurisprudence. I have chosen "redemption" because I wish to emphasize the inevitability of the projection of a "different" and "better" future, an inevitability which is essential to the justification of legal principles if such justifications are not to be reduced to a positivist appeal to convention. Moreover, it is a "projection," not simply a recovery of the past or the inevitable fulfillment of the *telos* of history. We can only maintain a critical resistance against the pull of the logic of recursivity through projections of the "future." It is the turn toward the future, once it is properly understood, that deconstruction demands of us.

Is this simply a restatement of the Kantian insistence that justice is an ideal of political-historical reason, and as such is irreducible to the actual conventions of any existing legal system? In Kant's later writings the idea of justice or the totality of reasonable beings functions as the "as if" which is an ethical condition for the future that we must postulate if we are to preserve practical judgment from being a mere appeal to convention. Deconstruction does not, as it is often interpreted, reject out of hand the Kantian project. But deconstruction refuses to reduce the aporias of justice to a horizon. To analyze why, we will have to discuss how an ethical horizon has traditionally been conceived. The question of whether one can or should project a horizon of justice is itself addressed through the recognition that there is a historical specificity of types of horizons associated with the project of a horizon as an ideal. Do we idealize a 'totality' of multiple language games, as in Jean-François Lyotard's paganism, or the totality of reasonable beings in Kant's own Kingdom of ends? Would we instead project an ideal speech situation as does Jürgen Habermas? The

questioning of the very concept of horizon as itself a reflection of historical specificity is just that—a questioning.

The Kantian ethical suspicion of consensus as a “reality” which dresses up convention as truth is undoubtedly evidenced in deconstruction. Like Kantianism, deconstruction rejects the identification of the ethical with reality. This affinity does not, of course, mean that deconstruction does not challenge the metaphysical premises that underlie the Kantian split between the phenomenal and the noumenal realms. Deconstruction undermines this rigid dichotomy as it does all others.

Deconstruction operates within the reality of the legal system by breaking it open and showing us that there can be no legal system that is just there. The Derridean deconstruction of the present also reminds us of the responsibility of judges, lawyers, and law professors for what the law “becomes.” Moreover, this responsibility is connected with the very idea of judgment. Judgment is only judgment, and not mere calculation or recollection, if it is “fresh.”¹ The judge is called upon to do just that, judge. As we will see, Derrida’s remarkable insight into the limits of memory is connected to his deconstruction of the traditional conception of the modalities of time in which the present is privileged. The unique Derridean contribution to legal interpretation is to show us why the act of memory in judging involves the seemingly contradictory notion that the judge, in his or her decision, remembers the future.

Deconstruction, in other words, helps us to correct recent misdescriptions of the process of legal interpretation which either appeal to the established conventions of the present or look back to the past. Even if that past is understood as a constructed “overlapping consensus,”² and not just the simple recollection of norms, the process of reconstruction through the overlapping consensus is still directed to the past. The deconstruction of the traditional conception of time also provides us with an account of critique that can successfully answer the argument of Stanley Fish, who asserts that critique, in any strong sense, is impossible. For Fish, we are inevitably caught in the logic of recursivity, which enforces the apparent adequation between the legal system and justice. It is this logic of recursivity that makes the following of the pregiven legal rules or norms, “Doing What Comes Naturally.”³ Judges and lawyers would, as a result, be caught in a mechanism of repetition from which they could not escape. Judgment, then, could not be separated from calculation. Memory would *just* be rote, a replication in consciousness of an objective reality. Decon-

1. See Derrida, *Force of Law: The “Mystical Foundation of Authority”* 29 (forthcoming in 11 *Cardozo L. Rev.*, Summer 1990). I am deliberately echoing Derrida’s reference to Stanley Fish’s expression “fresh judgment” in his article *Force*. S. Fish, *Doing What Comes Naturally* (1989).

2. See generally Rawls, *The Domain of the Political and Overlapping Consensus*, 64 *N.Y.U. L. Rev.* 233 (1989).

3. See generally S. Fish, *supra* note 1.

struction challenges the possibility that the lawyer or the judge can be identified with the mere instrument for replication of the system. The judge and the lawyer "act" when they remember precedent.

The newest brand of legal positivism is offered by Niklas Luhmann and goes by the name autopoiesis. But if the name is new, the ultimate project of legal positivism, which is to solve the problem of the *validity* of legal propositions through an appeal to the *mechanism* of validation internally generated by an existing legal system, remains the same. In order to achieve a satisfactory solution to the post-modern problem of *Grundlosigkeit*—the loss of grounding of legal rules in foundationalist principles—the positivist, in any of his guises, must postulate a self-maintaining, even if evolving, *cognitive system* in which there is what Luhmann calls normative closure. At the very heart of the conception of law as autopoiesis is this idea of the self-maintenance of a normatively, if not cognitively, closed system.⁴

This conception of self-maintenance, and its corresponding notion of recursivity, implies an understanding of time. In terms of its definition within the framework of law understood as an autopoietic system, recursivity means that the normativity of law can only be established by reference to the legal norms already in place as they are *authorized* and, *therefore, justified* by the system. The legal system, in other words, grounds the validity of its own propositions by turning back on itself. Without recursivity there would be no operative, normative closure and, therefore, no system present to itself that could be considered self-maintaining.

Luhmann explores the iterative use of temporal modalities (past presents, future presents, etc.) as they are relevant to his social theory and more specifically to his conception of law as autopoiesis. For Luhmann, following the tradition of Western metaphysics, any theory of modal forms must privilege the present. It is this privileging of the present that lies at the very heart of Luhmann's conception of social evolution as the only way to make sense of change in a legal system which nevertheless remains normatively closed. Validity is found only by circling within the system. Luhmann's well known anti-utopianism is inseparable from his view of time.

II. LAW AS NORMATIVE AUTOPOIESIS

But let me turn now to a brief discussion of what autopoiesis means within the context of Luhmann's systems theory of law. I will not attempt to discuss autopoiesis in all its subtlety but only as it incorporates a conception of time as it is relevant to the very possibility of the establishment

4. For a discussion of the conflict within autopoiesis between the autonomy of a normatively closed system and the dynamism of a cognitively open system, see Jacobson, *Autopoietic Law: The New Science of Niklas Luhmann*, 87 Mich. L. Rev. 1647 (1989).

of validity within law. The central thesis of autopoiesis as it has been succinctly summarized by Luhmann is that legal validity is always circular. Legal propositions or norms can only claim validity within a self-generating system of communication which both defines relations with the outside environment and provides itself with its own mechanism of justification. Autopoiesis postulates law as an autonomous system that achieves full normative closure through epistemological constructivism. To quote Luhmann:

Epistemological "constructivism" concludes from this that what the system, at the level of its operations, regards as reality is a construct of the system itself. Reality assumptions are structures of the system that uses them. This can be clarified once more using the concept of recursiveness. The system controls the environment, operationally inaccessible to it, by verifying the consistency of its own operations, using for this a binary scheme which can record agreement or non-agreement. Without this form of consistency control, no memory could arise, and without memory there can be no reality.⁵

Practically speaking, then, recursiveness allows for the consistency control that enables the system to function as a system. The system, legal or otherwise, is a system only to the degree that it is operationally closed. As Luhmann himself explains:

[S]tructures of the system can be built up only by operations of the system. This too must take place in such a way as to be compatible with the system's autopoiesis; in the case of social systems, for instance, with communication. There is accordingly no input and no output of structures or operations of the system, and at this level, there are no exchange relationships with the environment. All structures are operationally self-specified structures of the system, which orients its operations to these structures. In this respect, too, the system is a recursively closed system.⁶

For Luhmann, then, law is a specialized system of information processing. Law constructs legal reality through the very recursiveness of its system of communication. But even so, the legal system is not autonomous in the sense that it is completely disengaged from the rest of society, the economy, the political arena, etc. Indeed, Luhmann argues that it is the very nature of the legal system to engage with events that are fed to it by the outside environment. As a result, there is always a material continuum between the law and its environment. The legal system is only auto-

5. N. Luhmann, *Closure and Openness: On Reality in the World of Law in Autopoietic Law: A New Approach to Law and Society* 337 (G. Teubner ed. 1987).

6. *Id.*

mous in the sense that it is a self-reproducing mechanism for information processing.

The postulation of operational closure explains why systems theory is a form of epistemological constructivism in which reality comes to "be" only within the recursiveness of the system. But, of course, reality is only given in language. What words mean can only be deciphered from within the relevant system of communication, not through a more general system of definition. As Luhmann explains:

The law need not and cannot concern itself with whether particular words like "woman", "cylinder capacity", "inhabitant", "thallium" are used with sufficient consistency inside and outside the law. To that extent, it is supported by the network of social reproduction of communication by communication. Should questions such as whether women, etc., really exist arise, they can be turned aside or referred to philosophy.⁷

The reality of law, for Luhmann, is a normative reality. Or, to put this another way so as to explain the distinction he makes between normative closure and cognitive openness: normative closure is based in the definitional recursiveness of the law. Normative closure creates the seeming adequation of law and justice. This formulation of law as logically recursive can, of course, be understood as a reformulation of the positivist hypothesis. The *nomos* of the law can only be found in law's *thesis*. But there is an important difference in Luhmann's conception of autopoiesis that separates him from the traditional legal positivist. In Luhmann's systems theory, the *thesis* is not an outside foundation, but the postulation of law itself as its own origin. For Luhmann, the thesis of law cannot be the will of the legislator. Rather, the thesis is the already-in-place legal system, with its recursive system of normative self-reproducing definitions.

Law is a normatively closed system in the sense that the opposition between *nomos* and *thesis* is practically overcome in the functioning of the legal system. But at the same time, law is not a cognitively closed system. This distinction is connected to Luhmann's position that while the legal system's normative autopoiesis is self-referential, it is not self-transparent. Luhmann denies that any complex system can achieve perfect self-reflexivity. This is why Luhmann distinguishes his own systems theory from all forms of neo-Kantianism. The biological metaphor of autopoiesis is supposed to capture this distinction between self-thematization or self-referentiality, and self-transparency. A biological system can be self-referential without necessarily knowing itself to be such.⁸ Because law is not self-

7. *Id.* at 340.

8. As Luhmann himself explains:

First of all, with a comparable theoretical approach, it [the concept of autopoietic closure] replaces Kantian premises. This has chiefly affected epistemological questions. Autopoietic sys-

transparent and, therefore, not able to verify all of its operations, the legal system remains cognitively open. However, it is cognitively open only in a very special sense. For example, the legal system can take account of the notion that electricity can be stolen. But even as it *recognizes* this idea, it can do so only within the normative autopoiesis that recursively defines what it means for something to be stolen. Moreover, the normative definition of theft can only be what the legal system says it is. Recursivity also replaces the assumption of an *a priori* which could serve as an outside ground for justice by which to justify legal principles within a legal system. Without recursivity there would be no self-reproducing system that could come full circle to claim itself as its own origin.

III. THE ITERATIVE USE OF THE MODALITIES OF TIME WITHIN SYSTEMS THEORY

Luhmann's basic hypothesis is that time, as well as its conceptualization, is changed through the mechanisms of social evolution. Time, as Luhmann defines it, is "the social interpretation of reality with respect to the difference between past and future."⁹ Modern societies can be distinguished from traditional societies because of what he calls the temporalization of being. According to Luhmann, temporalization of being discredits any theory of natural forms, which would always turn us toward the past as the fundamental pivot of a society's time frame. Temporalization of being means that the past can no longer be grounded in an initial event or origin. This loss of origin shifts the very ground of time in modern societies and is reflected in the iterative use of temporal modalities within social theory. For Luhmann, the chief features of social evolution, at least in terms of how it has changed the concept of time, is to be found in what he calls the non-temporal extension of time.

Luhmann associates his conception of the non-temporal extension of time with his basic notion of a social system as a mechanism for processing information through communication with the "outside" environment:

This nontemporal extension of time by communication creates tem-

tems need not be transparent to themselves. They find nothing in themselves that could be regarded as an undeniable fact of consciousness and applied as an epistemological *a priori*. The assumption of an *a priori* is replaced by recursivity itself . . . It may be that continuing application of the operations available to the system to the results of precisely those operations produces stable states (which means states that repeat themselves in further operations, so-called "eigenstates"), or it may not, and depending on the type of operation, many, or few, or only one of these self-referentially stable states may exist. How far the system itself possesses reflexive capacity to observe its own states and finds its own "identity" in them is another question.

Id. at 336.

9. N. Luhmann, *The Differentiation of Society* 274 (1982) (emphasis omitted).

poral horizons for selective behavior—a past that can never be reproduced because it is too complex and a future that cannot begin.¹⁰

The nontemporal extension of time in turn implies time's reflexivity. As Luhmann rightfully explains, a theory of time that is distinguishable from chronology must make use of the iteration of temporal modalities. Even though Luhmann insists that the reflexivity of time in modern society turns around our orientation to the future, the future can only be understood from within the present. The future and, indeed, the past only "are" as horizons of the present. To quote Luhmann:

{T}he *relevance* of time (in fact, I would maintain, "relevance" as such) depends upon a capacity to interrelate the past and the future in a present. All temporal structures relate to some sort of present.¹¹

The present interrelates time and reality and represents a set of constraints on the temporal integration of the future and the past. Meaning can only arise if there is this shared "present." This set of constraints establishes the recursivity of the system. Social communication demands that there be a "present" that is "there" for the temporal actors. The non-extension of time—by which Luhmann indicates the evolution of society as the continued development of the present—implies the recursivity of the systems pattern, or what Luhmann calls self-thematization. This process of self-thematization is what makes a system self-constituting in and through the present. The actors in the system can interact only because there is a shared present.

The concept of the present contains rules for using the idea of simultaneity, which itself underlies the possibility of communication in social life.¹²

The system depends on temporal integration because without such integration it would not maintain its identity. The very distinction between the system and its environment means that there is an inevitable temporalization of the system. The system, in other words, is not there all at once in an eternal present. It is always coming to be. Recursivity is a mode of temporal integration of the past and the future as both these conceptual horizons have come to present themselves within the frame of modern society.

As has recently been made clear, underlying this schema is the idea that *the differentiation of system and environment produces tempo-*

10. *Id.* at 283.

11. *Id.* at 276 (emphasis in original) (endnote omitted).

12. *Id.* at 308.

reality because it excludes an immediate and point-for-point correlation between events in the system and events in its environment. Everything cannot happen at once. Preserving the system requires time.¹³

In modern society the present now contains possibilities and, in this sense, the present future has conditional possibilities. Luhmann distinguishes between societies and social systems on the basis of whether or not they are expanding or curtailing the possibilities of the present future. But even so, the non-extension of time means that the present remains the basis for the iteration of all temporal modalities even if the present view includes the future present and the present future.

According to Luhmann, once we see the future as the storehouse of possibilities of the present—both as the future present and the present future—we can no longer conceive of time as containing a turning point where it veers back to mythical past or where the order of the present is to be apocalyptically transformed as a truly different future. For Luhmann, there is no *telos* in history which leads us to the ideal through the progressive realization of the potential that inheres in the origin and which ultimately has the power to make itself real. Luhmann believes himself to be enriching the iterative use of temporal modalities so as to develop a unique, modern conception of time.

For modern society, it is especially important that we be able to distinguish between our future presents and our present future. We can even speak, if necessary, about the future of future presents, the future of past presents (*modo futuri exacti*), and so on. This iterative use of modal forms has always been a problem for the theory of modalities. For example: why not speak of the “future of futures” like the “heaven of heavens” (*coelum coeli*)? Only phenomenological analysis can justify the selection of meaningful combinations of modal forms. What it shows, in fact, is that all iteration of temporal forms must have its basis in a present.¹⁴

For Luhmann, rooting the iteration of all temporal modalities in the present has implications for the way we think about historical time and systems history.

Historical time is constituted as the continuity and irreversibility of this movement of past/present/future as a whole. This unity of historical time lies in the fact that the past and future horizons of each present intersect with other (past or future) presents and their temporal horizons. This guarantees each present a sufficient continuity

13. *Id.* at 292 (citations omitted).

14. *Id.* at 278 (citations and endnotes omitted).

with other presents—not only temporally, but materially and socially as well.¹⁵

It is because the future and past move around the present that Luhmann can speak of his theory of time as reflexive. The horizons of the past and the future are reflexively integrated and thematized into a system through the non-temporal extension of time. This integration must take place through the present precisely because the notion of a past origin, which would constitute the true meaning of the present, is undermined.

It must now be recognized that the future (and this means past futures as well as our present future) may be quite different from the past. Time can no longer be depicted as approaching a turning point where it veers back into the past or where the order of this world (or time itself) is apocalyptically transformed.¹⁶

Once we accept Luhmann's proposition that the future is reflexively integrated into the present, we can understand exactly what he means when he insists that the future cannot begin.¹⁷ For Luhmann the future is both the *present future*, as the conditional possibilities inherent in any complex modern social system, and the *future present*, expressed as the utopian projections of social critics. These projections of the utopian future, however, are only expressible as the negations of the present and, therefore, are contained in the very systems history they purport to reject. They serve as images to give body to the aspirations of the future present.

A future that cannot begin inheres in the reflexive view of time Luhmann associates with complex modern societies based on advanced technology. An open-ended future ironically involves the loss of the future as the promise of a truly "new beginning." The present of the systems theory is not a simple present, because it is relativized through the horizons of the past and the future, still constitutes reality. The future, in the sense of what would be truly different, an "apocalyptically" transformed world, cannot begin because the future "is" only as a horizon of the present.

This view of the time of social systems and of world history has specific implications for legal interpretation, the conception of justice, and the possibility of social criticism. For Luhmann, if there is no *telos* of history, the pull of the regulative ideal cannot be introduced into social theory or systems history. This is what Luhmann means when he says that history has been neutralized. History no longer has normative implications. As a result, there can be no use for utopian or redemptive visions within legal

15. *Id.* at 307 (citation omitted).

16. *Id.* at 272.

17. *See generally id.* at 271-88.

interpretation or within social theory generally. Luhmann uses legal positivism as one of the examples of what the neutralization of history entails.¹⁸ The past can no longer provide us with an origin that can serve as the basis for normative justification for the present or for the projection of a truly different future as the truth of the past. In Luhmann's conception of the legal system's autopoiesis, justice can only be what the legal system defines it to be. The idea of justice as a projected horizon is completely rejected. The horizon, of course—Habermas' ideal speech situation or Kant's Kingdom of ends, for example—is only an ethical horizon to the degree that the projected ideal is beyond the logic of recursivity. The "ought to be," in other words, cannot be captured by the present. Kantianism, in all its forms, maintains a transcendental divide between the is and the ought. But in Luhmann, any norm, legal or otherwise, only means something to the degree that such a norm expresses the present understanding. The legal system can develop, but only as the legal system. For Luhmann, the victory of legal positivism inheres in the very mode of the temporalization of modern society.

IV. THE DECONSTRUCTIVE CHALLENGE TO LUHMANN'S CONCEPTION OF TIME

Deconstruction challenges the idea that a theory of modal forms must have its basis in the present. As we will see, this challenge is crucial for the development of an anti-positivist conception of legal interpretation in which the divide between justice and law is always maintained.

But first I will turn to the deconstruction of the traditional conception of time which privileges the present. In order to do so, we must turn with Derrida around *différance*. Heidegger forcefully pointed to the privileging of the present in traditional conceptions of time in Western metaphysics. Derrida clearly recognizes the explosive power of Heidegger's attempt to follow through on the implications of *Dasein*'s¹⁹ finitude and its potential to undermine the traditional conception of time. But it is not this aspect of Heidegger's analysis that is crucial for the deconstruction of Luhmann's theory of temporal modalities.²⁰ Therefore, I will focus instead on the significance for legal theory of the Derridean *différance*. Because *différance*

18. See *id.* at 318.

19. The concept of *Dasein* is one which is familiar to those who engage with German philosophy and especially with Heidegger. Generally, it is "[t]his entity which each of us is himself and which includes inquiring as one of the possibilities of its Being." M. Heidegger, *Being and Time* 27 (J. Macquarrie & E. Robinson trans. 1962) (footnote omitted). More specifically:

in everyday usage it [*Dasein*] tends to be used more narrowly to stand for the kind of being that belongs to *persons*. Heidegger follows the everyday usage in this respect, but goes somewhat further in that he often uses it to stand for any *person* who has such Being, and who is thus an "entity" himself.

Id. at 27 n.1 (emphasis in original).

20. See generally *id.*

is not a traditional philosophical concept, it is difficult to define it directly. Indeed, Derrida himself circles around the play of *differance* as it operates within several different theoretical parameters.

Differance can be understood as the "truth" that being is only represented in time; therefore, there can be no all encompassing ontology which claims to tell us the truth of all that is. *Differance*, to use Derrida's word, *temporizes*. It breaks up the so-called claim to fullness of any given reality, social or otherwise, because reality only "presents" itself in intervals.

An interval must separate the present from what is not in order for the present to be itself, but this interval that constitutes it as present must, by the same token, divide the present in and of itself, thereby also dividing, along with the present, everything that is thought on the basis of the present, that is, in our metaphysical language, every being, and singularly substance or the subject.²¹

The intervals through which reality is "presented" also make possible the presentation of reality out of what would otherwise be sheer density, "or the night in which all cows are black." In order for reality to "present" itself, it must already be spaced, which implies temporization and time. "The present," in other words, is what is already past and, therefore, "presented." But this condition is only reachable as the "effects" of temporization; one of which is that time is itself a diachronic force. Time, understood in this way, cannot function as both an integration and a unit of the past and future through the present, as in Luhmann. Any reality is always already divided against itself. Thus, the disruption of temporizing turns us toward the past, even if only in a very specific sense, because this past can just as well be conceived as the trace of the future.

It is because of *differance* that the movement of signification is possible only if each so-called "present" element, each element appearing on the scene of presence, is related to something other than itself, thereby keeping within itself the mark of the past element, and already letting itself be vitiated by the mark of its relation to the future element, this trace being related no less to what is called the future than to what is called the past, and constituting what is called the present by means of this very relation to what it is not: what it absolutely is not, not even as past or a future as a modified present.²²

The statement that the trace is related "no less to what is called the future than to what is called the past" may seem strange indeed. Yet it is precisely this insistence on the constitutive power of the "not yet" of the never has been that separates the Derridean understanding of temporiza-

21. J. Derrida, *Differance*, in *Margins of Philosophy* 13 (A. Bass trans. 1982).

22. *Id.* at 13 (emphasis in original).

tion from Luhmann's conception of time and sets Derrida against Luhmann's assertion that the future cannot begin.

For Derrida, the future has already begun—although it is, of course, inappropriate to use the word beginning here since temporization belies an absolute beginning—as the trace of the unreachable origin. Derrida would agree with Luhmann, then, that there is no way back to the origin. As we approach the origin it recedes. For Derrida, the receding of the origin is inevitable because we have always already begun once there is a reality that has been presented. The origin only “is” as this recession of the never has been of an absolute beginning; this is why it can also be related to the future of the not yet. The past is not the past of chronology, which can be traced back through a linear succession of moments. Nor is it one of the horizons that extends back from the present, what Luhmann would call the present past. Rather, the past is the primordial constitution of temporality, which in turn is the condition of presentation. The present, as a result, itself becomes a sign, pointing beyond itself. Thus, it can no longer be the basis for meaning as Luhmann would have it.

Derrida would also agree with Luhmann that the recognition that we can never grasp the origin has implications for the way we think about the future. The central difference is that for Derrida it is the present that is postponed, because the present “moment” must refer to the trace of the not yet of the never has been that cannot be conceived as simply a modification of the now. In order to be what it is, the now or the present must refer back to an anterior/posterior that is the basis for presentation. As we have seen, this “movement” of temporalization is already “there” in presentation. As a result, the “present” is always belated. It cannot arrive except as a constitutive power of the not yet of the never has been, which can be evoked as either the “not yet” past or future. The future in this specific sense of the “not yet” cannot be reduced to the present future or future present. It remains the “not yet.” To use Luhmann's language, the future as the “not yet” cannot be lost. But as that power it has always already begun. This is why *differance* implies a diachronic view of time. Time disrupts the very pretense of full presence at the very moment that it makes presentation possible. Time, in this primordial sense, is the delimitation of the ontology of presence.

We can now put very simply what the diachronic view of time means for the critique of Luhmann's systems theory. Luhmann claims that his epistemological construct view is “past-ontology.” And, of course, it is in the sense that Luhmann gives to post-ontology. For Luhmann, ontology claims privileged access to an “external reality” outside of the autopoietic system. Since the very idea of recursiveness belies the possibility of directly reaching the outside of the system, if we accept autopoiesis, ontology is impossible. Sociology replaces philosophy. We no longer attempt to

know Being, only social systems. This displacement of philosophy is crucial to Luhmann's conception of "post-ontology."

But in another, more profound sense, the very idea of recursiveness implies exactly what Derrida means by the ontology of the full presence. Recursiveness implies a view of time that necessarily privileges the present. The whole point of Luhmann's theory of autopoiesis is to show us how a social system makes itself real through operative closure in the present. Through autopoietic closure, the system becomes the only reality. As such, it fills the universe; it becomes a kingdom which reigns over possibility and excludes the dream of a truly different future. Derrida challenges this idea that the system can reign in the beyond of the not yet through the demonstration of the significance of the play of *differance*.

It is the domination of beings that *differance* everywhere comes to solicit, in the sense that *sollicitare*, in old Latin, means to shake as a whole, to make tremble in entirety. Therefore, it is the determination of Being as presence or as beingness that is interrogated by the thought of *differance*. Such a question could not emerge and be understood unless the difference between Being and beings were somewhere to be broached. First consequence: *differance* is not. It is not a present being, however excellent, unique, principal or transcendent. It governs nothing, reigns over nothing and nowhere exercises any authority. It is not announced by any capital letter. Not only is there no kingdom of *differance*, but *differance* instigates the subversion of every kingdom. Which makes it obviously threatening and infallibly dreaded by everything within us that desires a kingdom, the past or future presence of a kingdom.²³

Recursiveness establishes the kingdom or the system as ontology, the "truly" real; *differance*, on the other hand, explodes from within its very claim to rule over the future by reducing the future to a horizon of the present. There is a sense, of course, in which Derrida would agree with Luhmann that the future cannot begin, because the very idea of the not yet is both anterior and *posterior* and, therefore, not merely "future" in the traditional meaning of the word. But, as we have seen, the very posterity of the future as the not yet of the never has been means that it has already begun as a constitutive force that disrupts the presence of the present. The future "is" as *redemption* from enclosure in the present.

Within a legal system, the future as the promise of justice "is" as the possible deconstruction of law or right. The destabilization of "the Kingdom" is also the destabilization of the functional or practical identity of *nomos* and *thesis* within a given legal system. As we have seen, in Luhmann, the logic of recursivity functions so as to postulate itself as its own origin, therefore urging *nomos* and *thesis* into accord. It is this end-

23. *Id.* at 21-22.

less process of turning in on itself that replaces the myth of origin. But it is precisely the legal system, turning in on itself, postulating itself as its origin, that deconstruction exposes as an impossibility. The legal machine is itself violence, as the erasure of the violent founding of the state. Think, for example, of the significance for legal interpretation of the replacement of the founding of the United States in revolution with the myth of the origin of the Constitution in the heads of the Founding Fathers. This replacement is what deconstruction shows to be the mythical foundation of authority.

Derrida agrees with Luhmann—and we will return to the significance of this agreement in his discussion of Rousseau—that there is no “real” normative origin from which all the values and norms of the legal system can be returned so they can be adequately assessed. But, unlike Luhmann, Derrida does argue that this origin cannot be displaced by the logic of recursivity:

Since the origin of authority, the foundation or ground, the position of the law can't by definition rest on anything but themselves, they are themselves a violence without ground. Which is not to say that they are themselves unjust, in the sense of “illegal.” They are neither legal nor illegal in their founding moment. They exceed the opposition between founded and unfounded, or between any foundationalism or anti-foundationalism. Even if the success of 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 said conditions, rules or conventions, and at the origin of their dominant interpretation.²⁴

Instead, the logic of recursivity is itself another myth that erases the founding violence from which the state and the legal system are constituted. Or, put somewhat differently, Luhmann's own insight can be deconstructed to show the fallacy of his own conclusions. As a result, the exposure of the violent act of constitution and the mystical foundations for authority is also the opening to the deconstruction of law and, correspondingly, to the law of recursivity which would identify law and justice through the replication of the legal machine.

Law, as a construct, is always deconstructible. The endless deconstruction of law destabilizes the machine and exposes the cracks in the system. As a result of this destabilization, the displacement of the origin can never be completed through the functioning of the legal system, or through the postulation of a Master Rule of Recognition which supposedly replaces

24. Derrida, *supra* note 1, at 17.

the founding moment of violence with a norm of foundation. This destabilization is itself done in the name of legal transformation and reform and, ultimately, in the name of Justice. To quote Derrida:

The structure I am describing here is a structure in which law (*droit*) is essentially deconstructible, whether because it is founded, constructed on interpretable or 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. But the paradox that I'd like to submit for discussion is the following: it is the deconstructible structure of law (*droit*), or if you prefer of justice as *droit*, that also insures the possibility of deconstruction. Justice in itself, if such a thing exists, outside or beyond law, is not deconstructible. No more than deconstruction itself, if such a thing exists. *Deconstruction is justice.*²⁵

Why is deconstruction justice? There are several levels on which this question must be answered. Deconstruction, as we have seen, undermines the legal machine that claims to find authority in its own functioning. The tyranny of the "real," and with it the appeal to a present "reality" as the basis of the law, denies possibilities of legal reform that have yet to be articulated. The attempt to positively establish the nature of justice is rejected as incomplete because descriptive justification, the appeal to what is, still stands in for prescriptive justice. If we say this is what justice is through descriptive justification, (no matter how sophisticated the argument, if a victim's claim can still not be adequately translated, her claim goes unnoticed) to identify any existent state of affairs as justice is to impose silence on the other who dares not speak in that system.

Luhmann's conception of a legal system's evolution, which allows for a limited role for reform, obviously reinstates notions of mimetic adequation to pre-given standards, standards which themselves inevitably reflect pre-existing inequalities. The recognition that justice, if it is defined immanently, reinstates a circular mode of justification that turns on what already is and, therefore, cannot be fully prescriptive but only descriptive, is one dimension of deconstruction's insistence on the maintenance of the divide between the is and the ought, law and justice. This resistance is in and of itself ethical.

But if justice is not immanent to any legal system, how can we conceive of justice as transcendent without simply reverting to Kantian metaphysics in which the is and the ought are clearly divided into realms? In other words, how can deconstruction destabilize the traditional dichotomy be-

25. *Id.* (italics in original, emphasis added).

tween nature and freedom, so crucial to Kantian ethics, while at the same time insisting on justice as transcendent to any set of immanent norms in any legal system? As we have seen, this destabilization can itself only be conceived within the deconstruction of the traditional modality of time. The legal system is never simply present to itself so as to self-generate purely immanent norms. This destabilization of the relation between the immanent and the transcendent is done in the name of justice, but it is not itself justice. Justice "is" the limit of the immanent of the present. But for Derrida, this limit is not projected as a transcendental ideal. Rather, it is an unsurpassable aporia. Justice, in other words, operates, but it operates as aporia.

Derrida gives us three examples of the operational force of justice as aporia.²⁶ The first aporia is between "épokhe and rule." If law is just calculation, then it would not be self-legitimizing, because the process of legitimation implies an appeal to a norm. The judge is called to judge, which means that she not only states what the law is, but she also confirms its value as what ought to be.

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, rejustifying it, at least reinvent it in the reaffirmation and the new and free confirmation of its principle. Each case is other, each decision is different and requires an absolutely unique interpretation, which no existing, coded rule can or ought to absolutely guarantee. At least, if the rule guarantees it in no uncertain terms, so that the judge is a calculating machine—which happens—we will not say that he is just, free and responsible. But we also won't say it if he doesn't refer to any law, to any rule or if, because he doesn't take any rule for granted beyond his own interpretation, he suspends his decision, stops short before the undecidable or if he improvises and leaves aside all rules, all principles.²⁷

But at the same time, the judge is called to judge according to law. That is part of the responsibility of a judge: he must judge what is right. This means he appeals to law, to rules and not only to his opinion. So the judge is caught in a paradox. He must appeal to law and yet judge it through confirmation or rejection. But this act of judgment, if it were simply a calculation of law, would not be a "true" judgment, nor a fresh one. As a result:

It follows from this paradox that there is never a moment that we

26. *See id.* at 28-37.

27. *Id.* at 29.

can say *in the present* that a decision *is* just (that is, free and responsible), or that someone *is* a just man—even less, “*I am just.*”²⁸

To be just is to be in the throes of this paradox.

The second aporia is the “undecidable,” an aporia which is close to the first, and to some degree reflects a transcendental deduction of the conditions of a decision.²⁹ A legal decision is an interpretation which “exists” in the first aporia. If a decision is merely calculation, it is not a decision.

There is apparently no moment in which a decision can be called presently and fully just: either it has not yet been made according to a rule, and nothing allows us to call it just, or it has already followed a rule—whether received, confirmed, conserved or reinvented—which in its turn is not absolutely guaranteed by anything; and, moreover, if it were guaranteed, the decision would be reduced to calculation and we wouldn’t call it just. That is why the ordeal of the undecidable that I just said must be gone through by any decision worthy of the name is never past or passed, it is not a surmounted or sublated (*aufgehoben*) moment in the decision.³⁰

The third aporia³¹ is, perhaps, most significant for the purposes of our discussion here, because it most clearly distinguishes the Kantian divide between the noumenal and the phenomenal from the Derridean conception of justice as the limit of the immanent as aporia. The third aporia is created by the very urgency of justice. As we have seen, every case calls for a decision and a “fresh” judgment. The judge is called to decide now. In Habermas or Lyotard, two modern interpreters of Kant, justice ultimately “is” only as the projection of the ideal. The content of the ideal differs in Habermas and Lyotard, but not the Kantian mode of argumentation. But we are not in Habermas’ ideal speech situation now, nor are we in Lyotard’s paganism. And yet, we must judge. As a result, Derrida states:

One of the reasons I’m keeping such a distance from all these horizons—from the Kantian regulative idea or from the messianic advent, for example, or at least from their conventional interpretation—is that they are, precisely, *horizons*. As its Greek name suggests, a horizon is both the opening and the limit that defines an infinite progress or a period of waiting.³²

Justice does not wait. We judge in our present. But the ideal cannot guide

28. *Id.* at 29-30.

29. *See generally id.* at 30-33.

30. *Id.* at 31.

31. *See generally id.* at 33-37.

32. *Id.* at 33.

us precisely because it is the ideal and thus not present. For Habermas, truth and rightness in the ideal speech situation demand the projection of a regulative ideal to guide us. As a regulative ideal, it is not realizable. Yet, we do not have the ideal speech situation and, indeed, as an ideal we cannot have it.

There is another concern. In spite of ourselves, the ideal will not be other to the real, therefore ideal; it will only be a rationalized projection of our current norms. Justice demands the recognition of the possible contamination of the ideal itself.

Paradoxically, it is because of this overflowing of the performative, because of this always excessive haste of interpretation getting ahead of itself, because of this structural urgency and precipitation of justice that the latter has no horizon of expectation (regulative or messianic). But for this very reason, it *may* have an *avenir*, a "to-come," which I rigorously distinguish from the future that can always reproduce the present. Justice remains, is yet, to come, *à venir*, it has an, it is *à-venir*, the very dimension of events irreducibly to come. It will always have it, this *à-venir*, and always has. Perhaps it is for this reason that justice, insofar as it is not only a juridical or political concept, opens up for *l'avenir* the transformation, the recasting or refounding of law and politics. "Perhaps," one must always say perhaps for justice.³³

Justice as the perhaps that must be said, also separates Derrida from Luhmann, for whom there is no perhaps, no possibility, only the evolution of an established system of communication in the present. The legal system as the present norm silences the perhaps. The machine may or may not operate. But, as a machine, in Derrida's sense, it demands only calculation of those who operate it. For Derrida, unlike Luhmann, and as we will see, for Fish, judgment begins where calculation ends. Ultimately, the deconstruction of the traditional modality of time, which privileges the present, and with it the destabilization of the traditional dichotomies, is connected to a reconceptualization which moves within Kantianism to find a beyond to its own metaphysical presuppositions.

Here we see the affinity of Derrida's conceptualization of the aporias of justice with Emmanuel Levinas' "Jewish humanism," in which justice provides the sanctity for the Other. Justice does not begin with the "I" that strives to establish *his* rights and protect *his* due share of the pie. The right of the Other is infinite, meaning that it can never be reduced to a proportional share of an already established system of ideality, legal or otherwise. Justice understood as distributive justice always implies an already-established system of ideality in which the distribution takes place.

33. *Id.* at 35 (emphasis added).

For Levinas, distributive justice is never a question of justice, but only of right. It is the Other as other to the present that echoes in the call to justice. The echo breaks up the "present," because the Other is there before the conception of a system of ideality and remains after.

For Derrida, the future is distinguished from the present that merely reproduces itself. Justice as a limit or as the call of the Other that cannot be silenced is the opening of the beyond that makes "true" transformation to the new possible. Without this appeal to the beyond, transformation would not be transformation, but only evolution, and in that sense, a continuation. The very concept of continuation as evolution of the system implies the privileging of the present.

V. THE IMPLICATIONS FOR LEGAL INTERPRETATION

The distinction between transformation and evolution is crucial in order to distinguish Derrida from a writer such as Stanley Fish, who is also identified as post-modern. I focus on Fish because he has developed his own conception of legal interpretation. In the view of deconstruction I have offered here, "post-modern philosophy" is certainly not just positivism in a new guise. Justice is radically separated from law. Yet, someone like Stanley Fish,³⁴ who has adopted many of what he sees as deconstructive insights, has argued that the identification of law with justice is inevitable.

For Fish, what deconstruction or post-modern philosophy more generally has shown us is that all reality, including the self, is socially constructed. This in turn means for Fish that "we" are what our reality makes us. We could not be otherwise. This position, of course, is almost identical to Luhmann's "epistemological constructivism." The result of this position as Fish sees it, is that social criticism and radical transformation is impossible. In order to have social criticism in legal interpretation, and a standpoint by which to know that real transformation had happened, we would have to appeal to a transcendental viewpoint. Since we have no transcendental or outside viewpoint, it follows that there can be no social criticism and no critical consciousness. Change can take place only as slow evolution, but not through transformation. The system "is" differently, but there is no true difference from the system. There is only evolution, not transformation. Here again, we see how close Fish is to Luhmann, because his argument implicitly relies on the logic of recursivity.

For Fish, in other words, law is always evolving, but at the same time, and in spite of his remarks to the contrary, law is not deconstructible. As Derrida reminds us, the deconstructibility of law is possible through the

34. See generally Fish, *Anti-Professionalism*, 7 *Cardozo L. Rev.* 679 (1986).

paradox that it is only the non-deconstructibility of justice that makes deconstruction possible.

1. The deconstructibility of law (*droit*) (for example) or of legitimacy makes deconstruction possible. 2. The undeconstructibility of justice also makes deconstruction possible, indeed is inseparable from it. 3. The result: deconstruction takes place in the interval that separates the undeconstructibility of justice from the deconstructibility of *droit* (authority, legitimacy, and so on).³⁵

Because for Fish there is no divide between justice and law, the deconstruction of law is not possible. In this sense, Fish is not a deconstructionist, but a positivist.

The significance of Fish's positivism for legal interpretation is as follows: We have seen in the discussion of the aporias of justice that judgment as judgment demands the suspension of rule following, otherwise, application of the law would not be judgment, but only calculation. Fish, unlike Derrida, does not indicate the aporias of justice. Instead he argues that what "is" is a system of rules from which no one can extract himself or herself. The suspension of rule following that Derrida rightfully argues is necessary for judgment is exactly what Fish insists cannot exist. As a result, "Doing What Comes Naturally," does not include judging. The problem, of course, is that a judge who does not judge cannot claim to do justice. And yet, the claim of legitimacy of law cannot be separated in its articulation from justice. This claim is part of running the very machine Fish calls law. Fish cannot avoid the confrontation with justice as easily as he thinks.

Fortunately, as we have seen, there is also an effective challenge to legal positivism through the deconstruction of the traditional conception of time, which helps us solve the dilemma inherent in Fish's own work. There is no system present to itself which can fill the universe, and ourselves as containers for that universe, and by so doing "foreclose" the future or reduce it to the continuation of the present.

This *same time* never is, will never have been and will never be *present*. . . . There is only the promise and memory, memory as promise, without any gathering possible in the form of the present. This disjunction is the law, the text of law and the law of the text.³⁶

Deconstruction calls us to that promise and leaves us with that hope. The utopianism, if it can be called that, is in the reminder "that what took

35. Derrida, *supra* note 1, at 18.

36. J. Derrida, *Acts*, in *Memories for Paul de Man* 145 (C. Lindsay, J. Culler & E. Cadava trans. 1986).

place humanly has never been able to remain closed up in its site.”³⁷ But as we have seen, this reminder, at least within the legal system, also opens up the space for, indeed, demands utopian imagination. As suggested in the last section, this reminder is crucial for distinguishing between evolution and transformation. The impossible, Justice, is what makes the possible possible.

Given this, we must now re-think the significance of Derrida’s deconstruction of Rousseau’s political theory and its implications for legal interpretation. Many claim Derrida’s deconstruction of Rousseau theoretically undermines the very possibility of political and ethical thought by showing that it must rely on an origin that does not exist. However, once we put Derrida’s deconstruction within the understanding of time and temporization I have presented here, we can see why this is not the case. For Derrida, the Rousseauian community postulates an originary instant of coming together without a trace of what has gone before. This originary instant is the festival based on an unmediated unity in the face to face relations of the participants. As Derrida points up, Rousseau’s vision privileges the living voice. Speech is the vehicle of co-equals who are literally present to one another as they co-determine their fate, as if they could start again from the absolute beginning, the origin.

There is also a more profound point which has been completely missed and one which shows the significance of temporization for legal interpretation. Derrida shows us how the inevitable failure to find the origin as the full presence that Rousseau so desperately seeks opens up the space for the conditional mood. Derrida wants us to see that what masks itself as simple discovery is in fact discovery through a projection of the ought to be. Rousseau argues from the logic of discovery, as if we could just discover the origin in which oppositions of nature and spirit, man and woman, etc. did not exist so as to rend the soul apart. Rousseau seeks reconciliation in the past as if it were “there.” But the power of his message actually lies in its eschatological anticipation, in Derrida’s sense of the “not yet.” If there is no simple origin that we can find our way back to in the future, then we cannot escape the conditional mood of political and ethical vision. We project forward the truth of the past of the never has been as the “ought to be.” As Derrida reminds us again and again, when we remember the past to find the ethical truth of the origin, we are, in truth, remembering the future. But we do so within the rhetoric of memory, because the future only is as the anterior/posterior.

Memory is the name of what is no longer only a mental “capacity” oriented toward one of the three modes of the present, the past present, which could be dissociated from the present present and the

37. E. Levinas, *Otherwise Than Being* 184 (A. Linges trans. 1981).

future present. Memory projects itself toward the future, and it constitutes the presence of the present. The "rhetoric of temporality" is the rhetoric of memory.³⁸

But this rhetoric is also a tension toward the future as the ought to be since memory can never exactly reconstitute what was.

The memory we are considering here is not essentially oriented toward the past, toward a past present deemed to have really and previously existed. Memory stays with traces, in order to "preserve" them, but traces of a past that has never been present, traces which themselves never occupy the form of presence and always remain, as it were, to come—come from the future, from the *to come*. Resurrection, which is always the formal element of "truth," a recurrent difference between a present and its presence, does not resuscitate a past which had been present; it engages the future.³⁹

In this sense, legal interpretation must be both discovery and *invention* because there can be no simple origin of legal meaning, whether we call it intent of the founders of the Constitution or some other name. We cannot escape the conditional mood of legal interpretation. In this sense, interpretation is always an act; moreover, an act from which we cannot escape responsibility.

VI. THE EXAMPLE OF *ROE V. WADE*⁴⁰ AND ITS PROGENY: THE ACT OF REMEMBRANCE OF JUDGING

We can now turn to how this understanding of memory as inevitably involved in the remembrance of the future should shift our conception of the judge's role in "perpetuating" precedent. Let us take as an example, the line of decisions following *Roe*. In these cases, the Supreme Court examined state and municipal laws restricting a woman's right to choose whether to terminate her pregnancy. In *Roe*, the Supreme Court was presented with whether or not the constitutional right to privacy recognized in previous decisions such as *Griswold v. Connecticut*⁴¹ should apply to abortion. *Roe*, as Catharine MacKinnon has *described* the decision, "guaranteed the right to choose abortion, subject to some countervailing considerations, by conceiving it as a private choice, included in the constitutional right to privacy."⁴² MacKinnon, among others has challenged the

38. J. Derrida, *The Art of Mémoires*, in *Memories for Paul de Man*, *supra* note 36, at 56-57 (emphasis in original).

39. *Id.* at 58 (emphasis in original).

40. 410 U.S. 113 (1973).

41. 381 U.S. 479 (1965).

42. C. MacKinnon, *Feminism Unmodified* 93 (1987). Two separate state interests have been identified. The first is preserving and protecting the health of the pregnant woman. The second is protecting the potentiality of human life. "Each grows in substantiality as the woman approaches

normative bases of grounding the decision in the right to privacy. My focus, however, is not on the normative basis for the decision, but on the mistaken “phenomenology” of judging that has now been used to justify the undermining of the principles on which *Roe* was based. The argument, supposedly legal, not moral, goes something like this: there is no origin in the Constitution itself for the right of privacy; let alone for the right of privacy to be “applied” to abortion.

We will now turn to how the judges, when they enunciated the decision in *Roe*, were unfaithful to their designated role as judges. The charge is that they did not simply re-collect precedent and then enunciate its reading as if this could be done without involving an *evaluation*. Instead, they made up the law to fit the “new” situation, the demand of women for reproductive rights.⁴³ It is not just that the judges had competing constitutional views which could be understood to “fit” the example of abortion and they chose the wrong one—although I think it is evident that they had such norms available for their imaginative “re-collection.”⁴⁴ There is no *firmly rooted* constitutional precedent for the judge to re-collect that could justify *Roe*. If the only correct act for the judge when enunciating a legal decision is the re-collection of past decisions that are understood to be based on the intent of the fathers, or on some other notion of the foundational origin of constitutional meaning, there can be *no* justification for *Roe* that is consistent with this view of judging.⁴⁵ I have argued, elsewhere⁴⁶ and in the course of this essay, that this understanding of the relationship of law and judging completely misunderstands the role of interpretation in legal decisions because such interpretations always involve the justification, not merely the perpetuation, of the norms “embodied” in past decisions. Even if judging was understood primarily to involve memory in the sense of re-collection of precedent, memory itself can never just capture the past. Derrida’s analysis of the limit to memory, as well as the responsibility to it, is thus crucially important to an adequate understanding of what judicial memory involves. This more adequate understanding of the phenomenology of memory in judging can be used in turn to cri-

term and, at a point during pregnancy, each becomes “compelling.” *Roe*, 410 U.S. at 162-63. The Court considered these interests sufficiently compelling to authorize the state to override a woman’s privacy interest.

43. For background on the history of, and demand for, reproductive freedom, see generally, L. Gordon, *Woman’s Body, Woman’s Right: A Social History of Birth Control in America* (1977); R. Peachesky, *Abortion and Woman’s Choice: The State, Sexuality, and Reproductive Freedom* (1985).

44. For a more completed discussion of the concept “collective imagination”, see Cornell, *Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation*, 136 U. Pa. L. Rev. 1135 (1988).

45. “The fundamental aspiration of judicial decision-making [is] . . . the application of neutral principles “sufficiently absolute to give them roots throughout the community and continuity over significant periods of time. . . .” *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 458 (O’Connor, J., dissenting) (quoting A. Cox, *The Role of the Supreme Court in American Government* 114 (1976)).

46. See generally Cornell, *supra* note 44.

tique any justification for the reversal of *Roe* as the correction of an irresponsible act of judging.

We can use the progeny of *Roe* to show that the deconstruction of the traditional conception of the modalities of time has implications for the way we think about the role of the judge. The judge can never be reduced to the instrument of the system who simply re-collects precedent. Her subjective role is not merely the passive one of re-collecting what is there in the origin. She also cannot just do what comes naturally, that is, follow the rules as if such a following were a form of automatic writing. She is responsible for her memory and the future which she promotes in the act of remembrance itself.

I am using responsibility in the sense that we are accountable for our own actions and our judgments. We are responsible precisely because we cannot be reduced to automatons who cannot choose to do other than what comes naturally. Responsibility has often been thought to turn on a positive account of a transcendental or autonomous subject. Only a subject that can rise above circumstances, so the argument goes, can be held accountable, because only an autonomous subject can achieve meaningful freedom to choose. If we cannot do otherwise, responsibility becomes a misnomer. But such a view, which completely identifies the subject with the "machine" or system, depends on the myth of the full presence and the privileging of the present which has been deconstructed. Similarly, the machine or system is not just a self-replicating presence. The machine is *only presented* through its enforcers. The very functioning of the machine demands its enforcers. It is our irreducibility and the irreducibility of the machine to a self-contained context, that makes our responsibility inescapable. This is not, admittedly, a *positive* account of the subject. But deconstruction reinforces an account of the irreducibility of the subject to a context which is necessary for the strong sense of responsibility that Derrida emphasizes.

We have to think again about the responsibility to memory that is demanded by deconstruction and the very deconstructibility of law.

The sense of a responsibility without limits, and so necessarily excessive, incalculable, before memory; and so the task of recalling the history, the origin and subsequent direction, thus the limits, of concepts of justice, the law and law [*droit*], of values, norms, prescriptions that have been imposed and sedimented there, from then on remaining more or less readable or presupposed. As to the legacy we have received under the name of justice, and in more than one language, the task of a historical and interpretive memory is at the heart of deconstruction, not only as philologico-etymological task or the historian's task but as responsibility in face of a heritage that is at

the same time the heritage of an imperative or of a sheaf of injunctions.⁴⁷

In this unique sense, genealogy becomes a part of judicial integrity itself.⁴⁸ The tradition is called to remember its own exclusions and prejudices. We are called upon to remember the history in which women did not have the right to an abortion. We have to remember what the general conditions of women were during those times in history in which abortion was disallowed. Genealogy is not invoked for the sake of de-bunking. Genealogy, in the sense that I use it, is crucial to the integrity to justice that demands that we also examine the existing limits of actualized concepts of justice, particularly as these exist in, and perpetuate, the patriarchal order of society. Integrity to justice, the attempt to be just with justice, demands no less than this responsibility, to expose the limits of what has been established as law, as well as in other circumstances, its confirmation or re-instatement.

This responsibility toward memory is a responsibility before the very concept of responsibility that regulates the justice and appropriateness (*justesse*) of our behavior, of our theoretical, practical, ethico-political decisions. This concept of responsibility is inseparable from a whole network of connected concepts (property, intentionality, will, conscience, consciousness, self-consciousness, subject, self, person, community, decision, and so forth) and any deconstruction of this network of concepts in their given or dominant state may seem like a move toward irresponsibility at the very moment that, on the contrary, deconstruction calls for an increase in responsibility.⁴⁹

In *Roe*, Justice Blackmun confessed that the question of when life begins was not one the Justices could answer.⁵⁰ Blackmun, however, was able to *decide* whether and when a fetus becomes a *legal* person. In a profound sense, Blackmun responsibly operated within the first aporia of justice. He imaginatively recollected a legal norm from within our heritage that would allow us to make crucial distinctions about the status of the fetus for the purposes of law. He had to make a fresh judgment in the new conditions created by women's demand for the right to abortion. In this sense, he applied the norm of privacy developed in *Griswold* to a new situation. This "application" clearly was also a judgment about what right women should have to privacy and why abortion was part of that

47. Derrida, *supra* note 1, at 24.

48. I am using "integrity" here in the sense given it by Ronald Dworkin in *Law's Empire* (1989).

49. Derrida, *supra* note 1, at 25.

50. As Blackmun himself explained: "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." *Roe*, 410 U.S. at 159.

right. In terms of the second aporia, he was called to make a decision in response to the woman's movement's call to justice, and he did. Once we read Blackmun's judgment within the aporias of justice, we can see his decision as the kind of activism that is *inevitable* in judgment and decision, but an activism exercised in accordance with responsibility and the call to justice. As we will see, Rehnquist is no less an activist, just less responsible, and deaf to the call of justice for women. Blackmun constructed the trimester framework⁵¹ based upon the State's shifting interests in the respective lives of the woman and fetus. In dissent, Justice Rehnquist found himself "in fundamental disagreement" with almost every segment of the *Roe* framework.⁵²

Sixteen years later, in *Webster v. Reproductive Health Services*,⁵³ Chief Justice Rehnquist failed to re-collect precedential history. First, he maintained that *stare decisis* is a constitutional principle applicable only where used to re-collect "good" law. Then, by identifying *Roe* as "unsound in principle and unworkable in practice,"⁵⁴ he substituted his own standards in lieu of those which already existed, while maintaining that differences in fact justified not revisiting *Roe*.⁵⁵ We can now see just how deconstruction, with its emphasis on responsibility to history, differs from the position that would argue that all judges do is make things up as they go along. Rehnquist was responsible for considering the history in which women were not allowed to have abortions and what that meant for the exercise of their bodily integrity. But, equally important, he was called by the demand of justice for women to consider the reasons for the compromise in *Roe*. The *Webster* decision certainly shows why the deconstructibility of law promotes anxiety. As women, our rights can always be undermined. But we cannot protect against the deconstructibility of law by denying its possibility. Our only protection is in the call to responsibility, which is precisely why the recognition that law is always deconstructible increases rather than decreases responsibility.

For Rehnquist, the fact that the *Roe* framework was difficult to apply

51. The trimester framework was set out as follows:

- (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgement of the pregnant woman's attending physician.
- (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate abortion procedure in ways that are reasonably related to maternal health.
- (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgement, for the preservation of the life or health of the mother.

Id. at 164-165.

52. *Id.* at 171 (Rehnquist, J., dissenting).

53. 109 S. Ct. 3040 (1989).

54. *Id.* at 3056 (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)).

55. *See id.* at 3057-58.

statutorily led him to question whether it had any constitutional basis. To quote Rehnquist:

In the first place, the rigid *Roe* framework is hardly consistent with the notion of a Constitution cast in general terms, as ours is, and usually speaking in general principles, as ours does. The key elements of the *Roe* framework—trimesters and viability—are not found in the text of the Constitution or in any place else one would expect to find a constitutional principle. Since the bounds of the inquiry are essentially indeterminate, the result has been a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine.⁵⁶

Therefore, although Rehnquist acknowledged that “[s]tare decisis is a cornerstone of our legal system,”⁵⁷ he nevertheless felt that the *indeterminacy* of the *Roe* framework was sufficient justification to ignore it as precedent.

Perhaps the most striking aspect of Rehnquist’s decision was its undermining of the principle which justified the erection, and I use that word deliberately, of the *Roe* framework.⁵⁸ This is most clearly shown in Rehnquist’s interpretation of the preamble of the contested law restricting abortion.⁵⁹ The preamble stated:

“findings” by the [Missouri] state legislature that “[t]he *life* of each human being *begins at conception*,” and that “unborn children have protectable interests in life, health, and wellbeing.” The Act further requires that all Missouri laws be interpreted to provide unborn children with the same rights enjoyed by *other persons*, subject to the Federal Constitution and [Supreme Court] precedents.⁶⁰

As Rehnquist explained, “[t]he preamble can be read simply to express . . . a value judgment favoring childbirth over abortion.”⁶¹ Of course, that value judgment, cast as a finding of fact, undermines the fundamental basis upon which the *Roe* Court limited the states’ interference with a woman’s right to choose whether to have an abortion. The preamble establishes that life begins at conception and that a “fetus is a “person”⁶² with “protectable interests in life, health, and wellbeing.”⁶³ Therefore, the case for a woman’s right choose whether to terminate her pregnancy “col-

56. *Id.* at 3056-57.

57. *Id.* at 3056.

58. See *supra* notes 50-52 and accompanying text.

59. Mo. Rev. Stat. §§ 1.205.1(1)-(2), 1.205.2 (1986).

60. *Webster*, 109 S. Ct. at 3049.

61. *Id.* at 5027. In his dissenting opinion, Justice Blackmun voiced an eloquent appeal for justice for women: “I fear for the future. I fear for the liberty and equality of the millions of women who have lived and come of age in the 16 years since *Roe* was decided. I fear for the integrity of, and public esteem for, this Court. I dissent.” *Id.* at 3067 (Blackmun, J., dissenting).

62. *Roe v. Wade*, 410 U.S. 113, 156 (1973).

63. Mo. Rev. Stat. § 1.205.1(1)-(2).

lapses, for the fetus's right to life would then be guaranteed specifically by the [Fourteenth] Amendment."⁶⁴ By allowing the Missouri statute to stand, the *Webster* plurality authorized the supersession of the woman's privacy right. Rehnquist interpreted the preamble of the statute in deliberate disregard of the genealogical considerations demanded by integrity. These considerations are demanded by the call of the Other for justice.

Likewise, in *Akron v. Akron Center for Reproductive Health*,⁶⁵ Justice O'Connor, in dissent (joined by Justices White and Rehnquist), characterized

[t]he *Roe* framework . . . [as] clearly on a collision course with itself. As the medical risks of various abortion procedures decrease, the point at which the State may regulate for reasons of maternal health is moved further forward to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception.⁶⁶

This, she felt, would render the principle of the trimester approach worthless. The compelling state interest at the point of viability in the potential life of the fetus would clash with the woman's right to decide whether to terminate the pregnancy. This looming confrontation would create in fact what Justice O'Connor already believed true. O'Connor appealed to what was already understood as the state's interest in protecting the fetus, to undermine the woman's call for justice.

The choice of viability as the point at which the state interest in potential life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward. Accordingly, I believe that the State's interest in protecting potential human life exists throughout the pregnancy.⁶⁷

O'Connor, then, engaged in an irresponsible act of judging not by imaginatively re-collecting her projection of the future, but by failing her responsibility to remember the actual conditions women would again face if the *Roe* framework was dismantled. Those conditions had been graphically described. They needed to be addressed. Instead, O'Connor appealed to the state's interest in the law, rather than to justice for women. Viability, as essential to the *Roe* framework, was clearly a compromise. As we have seen, in my interpretation, the compromise should be understood within Blackmun's attempt to operate within the aporias of justice. The call of women was for justice. What they got, indeed the only "thing" they

64. *Roe*, 410 U.S. at 156-57.

65. 462 U.S. 416 (1983).

66. *Id.* at 458.

67. *Id.* at 461.

could get from the legal system, was law. But the law, the new application of the norm of privacy, was an act of responsibility to memory in that it recognized the actual conditions in which women had been denied the right to abortion. Of course, the fetus can itself be recognized as Other, with infinite right. But whether or not this recognition is to be embodied in law must directly confront the woman as Other, who called for her right and for justice.

We can now return to why the deconstruction of the traditional conception of the modalities of time has implications for the way we think about the role of the judge. We have seen that when we remember the past we do so through the "ought to be" implicit in the not yet of the never has been. But we can also see the difference between this conception of the future of justice and the projection of a horizon. In the first place, it should be obvious that such horizons, as traditionally defined within our heritage, have projected rational persons as interchangeable, yet it is unclear whether an ideal premised on interchangeability can really help us justify abortion. Here we see a specific example in which the projected ideal, premised on interchangeability, itself may be contaminated by history, in this case patriarchal ignorance of the specificity of femininity. Secondly, as the slogan from the 1970s asserted, "women want abortion now." Thus we return to the third aporia of justice: Justice does not wait.

We do not remember through the logic of recursivity, although Justice O'Connor implicitly relied on such a logic when she appealed to an established state interest. If we undermine the "ought to be," we can only do so through a direct appeal to a counter normative justification, in this case an appeal that would discuss whose life counts more, woman or fetus. Changing technology, which is what O'Connor pointed to, is not the issue. An "is" cannot simply undermine an "ought." Interpretation is not the calculation that "fits" pieces into a puzzle. The question of fit can never be legitimately used to enunciate an articulated norm. If the norm is wrong, it must be condemned through evaluation. I have suggested that a part of this evaluation must be a recognition of the conditions of women and the conditions in which the right of abortion had been denied. Both aspects of this evaluative process are demanded by the exercise of responsibility to memory. The question is not whether *Roe* fits into our constitutional scheme, because every new decision raises the question of whether our constitutional system is just. Again, we are returned to the first aporia of justice. *Roe* was an attempt at fresh judgment based on this responsibility to memory. Privacy may not have been the "best norm." I would translate the call of justice into the right of bodily integrity. But the attempt was still made to heed the call to Justice. In the recent decisions, we find the failure to heed the call; it is hidden by the rhetoric of fit. And yet, even Rehnquist recognized that only good law is to be followed. Unless one can show that there is a past present or a present past that merely

evolves, the reliance on the logic of recursivity, including the rhetoric of fit, is an impossibility. It is precisely the contribution of deconstruction to show us that such a present past does not exist. By doing so it shows us why we cannot avoid appealing to the "ought to be" when we interpret precedent. Integrity demands that we face the call to Justice and the endless transformative demands on the legal system which justice demands of us. We are left with a simple command and an infinite responsibility. Be just with Justice.

