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DERRIDA, LAW, VIOLENCE AND THE PARADOX OF JUSTICE

*Michel Rosenfeld**

My contribution to this roundtable is meant to be in the form of a comment on—or more precisely of a small supplement to—Jacques Derrida's extraordinarily rich and insightful text entitled *Force of Law: The "Mystical Foundation of Authority"*¹ from the standpoint of a common-law jurist. Derrida's text touches upon a vast number of essential issues in jurisprudence, but I wish to focus on one issue in particular: the relation between law, violence, and the paradox posed by the concurrent requirement that justice be both universal and singular.

Derrida succinctly captures the paradox of justice when he writes:

To address oneself to the other in the language of the other is, it seems, the condition of all possible justice, but apparently, in all rigor, it is not only impossible . . . but even excluded by justice as law (*droit*), inasmuch as justice as right seems to imply an element of universality, the appeal to a third party who suspends the unilaterality or singularity of the idioms.²

In other words, Derrida stresses that there is an unsurmountable gap between justice as law, which must remain forever universal, and justice as giving to each what is his or her due, which necessarily involves an element of irreducible singularity. Derrida's dichotomy between justice as law and justice as each person's due is reminiscent, moreover, of Aristotle's distinction between justice as equality and justice as equity.³ However, whereas for Aristotle justice as equity is meant to supplement justice as equality, for Derrida justice as each person's due is not only impossible but it also completely frustrates the achievement of justice as law. In the Aristotelian universe, justice as equality is the rule and justice as equity is introduced to deal with the exception. For Derrida, in contrast, every case appears to be an exception, or more accurately—in view of the respective demands of equality and of the irreducible singularity of the other—every case should (but is inevitably bound to fail to) satisfy both the rule and the

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¹ 11 CARDOZO L. REV. 919 (1990).

² *Id.* at 949.

³ See ARISTOTLE, NICOMACHEAN ETHICS, bk. V (D. Ross trans. 1980).

exception.⁴

The disjunction between justice as equality and justice as equity is linked—in the Derridian vision—to a series of insurmountable oppositions that include: the clash between self and other, the singular and the universal, the concrete and the abstract, and the rule and its exceptions. Moreover, it is because it is caught between these insurmountable oppositions that justice cannot avoid producing violence. Thus, for example, when the self presses its claims in the name of justice it is bound to do violence to the other. But, by the same token, when the self restrains the pursuit of its own claims to do justice to the other, it does violence to itself.

It would be not only dangerous but also plainly erroneous to infer that it necessarily follows from Derrida's belief in the impossibility of achieving justice and in the inevitability of the link between violence and the pursuit of justice that the quest for justice is meaningless or that all plausible dispositions of the conflicting claims of self and other are likely to be morally equivalent. Indeed, at least in my reading of Derrida, the quest for justice is a permanent ethical imperative. Moreover, the particular form which that ethical imperative takes for any given individual actor depends on the actual social and historical circumstances surrounding that actor. Thus, although justice is ultimately beyond reach, the call to justice imposes real constraints that circumscribe the legitimate choices open to morally responsible actors.

Looking at the matter from the standpoint of an American jurist, it is striking how close Derrida's conception of the relationship between law and justice comes to that which emerges from the common-law system of adjudication. Under the common law, legal rules are fashioned through the application of precedents. Confronted with the clashing arguments of opposing litigants, the common-law judge seeks a just resolution of the case at hand by reaching a verdict that is consistent with relevant past judicial decisions. The rule of law to be applied to a pending case must be inferred from existing judicial precedents. That rule, however, can never be completely elaborated as its full and final determination must await the completion of all relevant future adjudications. Accordingly, whereas every adjudication sharply circumscribes the legitimate avenues towards justice, so

⁴ Strictly speaking, the exception is defined in terms of the rule from which it deviates, and is thus in some sense subordinate to the latter. In the context of a Derridian vision, however, the subordination of the exception to the rule would unduly privilege the latter over the former. Accordingly, I use "rule" here primarily to denote the universal side of justice and exception to refer to its singular pole.

long as any future adjudication remains possible the achievement of justice is necessarily postponed.

To illustrate how the common law makes justice both necessary to pursue and impossible to achieve let us consider the following rather banal example.⁵ Suppose *A*'s cat has entered on *B*'s land and wrecked the latter's flowers. *B* then sues his neighbor *A* and seeks compensation for the wrecked flowers. To adjudicate this controversy, the judge must look to precedents. Let us assume, moreover, that the judge finds a single precedent, namely a case where a cow's owner was held liable for the damages caused when his cow entered upon his neighbor's land. In these circumstances, the judge's decision in the case between *A* and *B* depends on her assessment of whether the situation involving the cat is sufficiently analogous to that concerning the cow. Because of the extremely schematic nature of the example under consideration, we lack the means to make any principled decision as to whether the situations involving respectively the cow and the cat ought to be considered essentially alike or fundamentally different. Suppose, however, that the judge can justify the conclusion that the two situations are alike in all relevant respects and that *B* is therefore entitled to compensation from *A*. By linking the precedent involving the cow with that regarding the cat one can begin to infer a general legal rule, but without the benefit of further cases it is impossible to specify *which* rule. One possible rule would be that justice requires that an owner of domestic animals be liable for the mischief which they cause; another, that an owner of any animal, whether domestic or not, be so liable. Furthermore, a future case may well decide between these two rules, but would leave open, for example, the question of whether an owner's children should be considered akin to that owner's domestic animals from the standpoint of the legal responsibility under consideration. In short, the force of precedents delimits paths towards justice but the dependence of legal rules on future cases forces a perpetual postponement of justice—that is, of justice understood as necessarily encompassing both the singularity of each individual case and the universality of every fully elaborated legal rule.

It is not necessary to remain within the confines of the common law to appreciate that justice is inevitably caught between the universal and the singular, the abstract and the concrete. Indeed, one cannot dispense genuine justice to a concrete other without first fulfilling

⁵ This example is based on the one provided in Rosenfeld, *Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism*, 11 CARDOZO L. REV. 1211, 1231 n.48 (1990).

the demands of abstract equality. Paradoxically, it is the need for justice to fully account for the singularity of the concrete other which makes recourse to abstract equality imperative. Moreover, this nexus between abstract equality and concrete singularity is underscored by the very structure of the search for justice in its two principal forms: corrective or compensatory justice and distributive justice.

Compensatory justice seeks to wipe out the suffering of a concrete other by exacting compensation from the wrongdoer who has caused the suffering. Compensatory justice aims at placing the victim of wrongdoing in the position he or she would have been but for the wrong sought to be compensated. This position is projected as the singular historical position of a concrete person but is, in fact, a counterfactual construct mediated by some criterion of abstract equality. Not all sufferings or harms experienced by a concrete other are subject to compensation, but only those that are recognized as wrongs. And to be able to draw any cogent line between wrongs and noncompensable harms, one must have recourse to some notion of abstract equality.⁶

Distributive justice, which requires that the benefits and burdens of social cooperation be allocated according to a plausible criterion of proportional equality, is obviously dependent on the implementation of some conception of abstract equality. For example, distributive justice may require that allocation be made to each according to his or her merit or according to his or her needs. Furthermore, notwithstanding its focus on abstract equality, distributive justice cannot be satisfied without taking full account of the singularity of each concrete person who belongs to the class of those entitled to claim distributive rights. Thus, if the operative criterion were to each according to his or her needs, distributive justice could not be fully realized before every need of every person were properly taken into account in its ultimately irreducible singularity.

Viewed phenomenologically, justice—whether compensatory or distributive—requires the passage from concrete singularity to abstract equality and then back to the singularity of the concrete other. At first, it is precisely by emphasizing the differences that mark the distinction between self and other, that the self can cast the other as

⁶ For example, depending on whether one adopts formal equality or equality of welfare as the operative criterion of abstract equality, one is likely to reach different conclusions concerning whether a person's action which causes another person significant economic harm amounts to a compensable wrong. Thus, a proponent of formal equality rights would not consider the harms due to the vicissitudes of economic competition to be compensable wrongs. A proponent of equality of welfare, on the other hand, may well maintain that at least some of these harms should be treated as compensable wrongs.

an inferior and treat him or her as an unequal.⁷ To overcome the injustices flowing from the use of difference to foster inequality, it is in turn necessary to promote mutual recognition as equals, but that requires looking beyond concrete differences and relating to one another as abstract egos that are essentially equal in dignity.⁸ From the standpoint of abstract equality, equality tends to be correlated to identity. Accordingly, persons can avoid being treated as inferiors, but only by conforming to the identity projected by the dominant other.⁹ In order to overcome the limitations of abstract equality, it is necessary to return to the singularity of each concrete person without regressing to the position from which the concrete other tends to be perceived exclusively in terms of differences. In other words, the achievement of justice ultimately depends on (the impossible to complete) synthesis between the essential identity in dignity sustained by abstract equality and the full diversity generated by the irreducible singularity radiated by each concrete person.

Treating the other as inferior obviously entails violence. Moreover, while perhaps less obvious, the pursuit of abstract equality and the drive to vindicate the singularity of each concrete person also necessarily involve violence. Indeed, abstract equality looms as the product of the counterviolence that unhinges interpersonal relationships predicated on inequality and of the violence that suppresses the differences prone to hinder mutual recognition as subjects possessing equal dignity. Furthermore, the drive to vindicate the singularity of each concrete person without reverting to relationships of inequality is also dependent on violence, although the violence in question is primarily turned inward to curb the self's tendency to treat the other as an inferior or to identify him or her as a mere abstract equal.

Justice is inevitably tied to violence, but that does not constitute a justification to abandon its pursuit. Indeed, not all violence is alike, as the violence involved in reducing another to a subservient position clearly seems more objectionable than the (counter) violence required to establish abstract equality or the self-directed violence associated with promoting the singularity of the concrete other. Accordingly,

⁷ For example, by emphasizing differences in skin color, the racist can cast members of other races as inferiors and thus purport to justify denying them equal rights.

⁸ Cf. G. HEGEL, *PHENOMENOLOGY OF SPIRIT* ¶¶ 178-96 (A. Miller trans. 1977) (Hegel's dialectic of master and slave).

⁹ Thus, for instance, women may achieve equality at the workplace by behaving "like men," that is by repressing their femininity and by concealing their needs as women. For a more extended discussion of the tendency to correlate difference to inferiority and equality to identity, see M. ROSENFELD, *AFFIRMATIVE ACTION AND JUSTICE: A PHILOSOPHICAL AND CONSTITUTIONAL INQUIRY* 222-24 (1991).

the nexus between justice and violence should not be a cause for despair, but rather a cause for sobering reflection. Similarly, the impossibility of achieving justice and the inability of law to fully account for the universal and the singular should not be a cause for paralysis. On the contrary, the inevitability of violence and the impossibility of justice should be construed as a call to measured but continuous action through law in efforts to reduce inequities and to promote equality without sacrificing singularity. In the last analysis, that the task of seeking justice can never be completed and that violence cannot be eradicated from the path to law and justice should be viewed as important truths that no ethical jurist can afford to ignore.