CRITICAL THEORIES, JUSTICE, AND THE RULE OF LAW

Adam J. MacLeod[*]

ABSTRACT

An increasing number of legal scholars and activists now identify law as an impediment to justice that must be deconstructed. The deconstructionists tear down the resources we need to sustain the rule of law. And as they deconstruct law, they also deconstruct justice itself. Against deconstructionism, the classical tradition of jurisprudence that gave us our fundamental law affirms that we can know justice and that we can achieve justice through the establishment of law.

That classical tradition made possible the conviction that law is not a mere product of power, as the deconstructionists assert. And that conviction made the rule of law possible. The critical essence of the rule of law is that at least some part of the law stands above everyone. In deconstructionist terms, law is not a "system" or "discursive regime" created by raw power. Some law is natural. This is why the rule of law requires equity. But equity is subsidiary to law. When exercising the power of equity, judges should discern the "true sense of the law," presuming that the legislatures who laid down the legal rule know the natural law and intended to achieve the reasonable, right, and just result in every case. Equity presupposes what the Christian philosopher Thomas Aquinas called the "rectitude of law [and] of legal justice."

The rule of law is not perfect. But it is the best way we have ever found to achieve justice. The duty to obey the law is a duty of justice.

TABLE OF CONTENTS

---

[*] Professor of Law, St. Mary's University; Research Fellow, Center for Religion, Culture and Democracy. This essay is adapted from a lecture delivered at the Acton Institute's annual conference, Acton University, on June 21, 2023.

1. INTRODUCTION: THE AIMLESS QUEST FOR JUSTICE

Justice is like nuclear fusion. Everyone wants it. But few people can say intelligibly what it is. And no one seems to know how to get it.

Young people march around demanding justice. Politicians promise to deliver it. Americans pledge allegiance to a flag that symbolizes a Republic which provides "liberty and justice to all." At times, it seems that we worship justice. The government of the United States has an entire Department of Justice. Its lawyers (and thousands of other lawyers) daily go to work in enormous buildings that look like temples, vast halls sparingly decorated with the iconography of legal justice: plaques inscribed with quotes about the rule of law, statues and portraits of judges and jurists, and Lady Justice, blindfolded, holding her scales.

We seem to desire justice. But we also seem to be confused about it. Some people think justice is a right to be left alone; others think that justice requires regulations and mandates to govern every aspect of our lives. Some

people think justice requires us to have more law; others think it requires less law.

Most significantly, an increasing number of legal scholars and activists now identify law as an impediment to justice that must be deconstructed.[1] The movement to deconstruct the law began as a trickle a half-century ago with the Critical Legal Studies movement.[2] Today, it is a raging torrent. It includes a variety of critical theories whose adherents hold sway on several American law faculties, publish large quantities of legal scholarship, file *amicus curiae* briefs in landmark cases, and influence American jurisprudence in other ways. The scholars and advocates who comprise this movement share a conviction that law is a discursive regime that is often or always opposed to justice.[3] In their view, law is shot through with systemic injustices.[4] Their calls for justice are coupled with efforts to deconstruct legal rights, duties, and institutions (to which they often refer collectively as a "system" or "legal system").[5]

The deconstructionists acquired their ideas and methods from French post-structuralists, adapting to law the techniques of literary and cultural deconstruction developed by thinkers such as Jacque Derrida and Michel Foucault.[6] Because they have come to dominate jurisprudential discourse about justice, any effort to understand the connection between justice and law must first examine those theories and asses their critique of law. This article explains the assumptions and methods of contemporary deconstructionists and demonstrates why they are incompatible not only with the rule of law but also with justice generally. The deconstructionists are correct that law is conventional, constructed by human beings, and that law can be used

---

1 *See, e.g.*, Alan Hunt, *The Theory of Critical Legal Studies*, 6 OXFORD J. LEGAL STUD. 1, 43 (1986) (U.K.).

2 *See* Harlon L. Dalton, *The Clouded Prism*, 22 HARV. C.R.-C.L. L. REV. 435, 437 (1987).

3 *See, e.g.*, Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461, 462–63 (1993).

4 *See, e.g.*, Douglas E. Litowitz, *Some Critical Thoughts on Critical Race Theory*, 72 NOTRE DAME L. REV. 503, 506 (1997).

5 *See, e.g.*, Betsy B. Baker, *Constructing Justice: Theories of the Subject in Law and Literature*, 75 MINN. L. REV. 581, 593 (1991); Angela Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 748–49 (1994).

6 *See* Pierre Schlag, *"Le Hors de Texte, C'est Moi": The Politics and the Domestication of Deconstruction*, 11 CARDOZO L. REV. 1631, 1635 (1990).

as a tool for unjust purposes. But their assumptions and methods lead them to believe that justice also is artificial, a fiction. That is false. And they fail to understand how law serves justice.

The article proceeds through six parts. After this introductory Part 1, Part 2 briefly discusses why all the deconstructionist theories of law and justice fail on their own terms. They render justice both impossible and incoherent. And they do so necessarily. Their deconstruction of justice is baked into the assumptions and methods that they employ to deconstruct law.

In contrast to the deconstructionists, this article also examines the classical view that law plays an indispensable role in achieving justice. Part 3 affirms that, contra the deconstructionists, justice is possible because there are truths about justice and we can know them. It briefly explains why injustices and other departures from the ideal of justice—the failures of justice that critical theorists examine in their scholarship—need not lead us to conclude that justice is impossible, as deconstructionism requires us to believe. Part 4 examines the meaning of justice handed down to us in the classical juristic tradition that runs from Roman jurisprudence through Christian jurists, such as Justinian and Aquinas, to the English and American common-law jurists who shaped the fundamental rights and institutions of American law.

That classical tradition addresses the injustices which concern the deconstructionists without deconstructing the laws that we need to achieve justice. In Part 5, a close examination of the features of justice reveals why we need the rule of law to attain justice. It also reveals why positive law is not alone sufficient to achieve justice. We also need equity to keep our human laws in line with natural law, which is an equally important requirement of justice and, therefore, a critical component of the rule of law. Equity is the answer to the critical theorists' observation that law can be used for unjust purposes. But equity perfects the law without deconstructing it. Part 6 briefly concludes.

2. CRITICAL THEORIES AND JUSTICE: IMPOSSIBILITY AND INCOHERENCE

2.1. The Foundations of Deconstruction

The theories that now dominate academic and jurisprudential reasoning about justice in the United States, and increasingly dominate education and civic discourse as a whole, grew up within law school faculties during the last five decades.[7] Critical legal studies, critical race theory, dominance feminism, and intersectionality theories differ in some respects, but they all share an aspiration to deconstruct some part or the whole of legal orders.[8] Their assumptions are the anti-essentialist assumptions of post-structuralist thought (among other modern ideologies).[9]

The debunking project that post-structuralists inaugurated in literature, sociology, and other fields came early into legal education through the works of Critical Legal Studies scholars, who used post-structuralist methods and assumptions to debunk legal adjudication and the law.[10] Those methods and assumptions now pervade discourse about law and justice, especially in critical scholarship and advocacy, which asserts that legal norms and institutions are products of "discursive" or "systemic" coercion, bias, prejudice, or discrimination and that injustice is therefore so inherent and pervasive

---

7 *See generally* GEORGE C. CHRISTIE, PATRICK H. MARTIN & ADAM J. MACLEOD, JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW 1067–186 (West Acad., 4th ed. 2020); BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 120–21, 235–56 (6th ed. 2012).

8 *See* CHRISTIE, MARTIN & MACLEOD, *supra* note 7, at 1067–186.

9 *Id.* at 1067–75, 1083–84, 1148–53; Derek P. Jinks, *Essays in Refusal: Pretheoretical Commitments in Postmodern Anthropology and Critical Race Theory*, 107 YALE L.J. 499, 501 (1997). Other influences include Critical Marxists and Frankfurt School theorists. CHRISTIE, MARTIN & MACLEOD, *supra* note 7, at 1080–85; BIX, *supra* note 7, at 277; Thomas C. Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127, 130–55, 163–71 (1984). Because this article focuses on the critical deconstruction of law, and because the tools that critical theorists employ to deconstruct law are post-structuralist in origin, the focus here is on the post-structuralist assumptions from which the critical deconstruction of law operates.

10 Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 210 (1979); DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE 4 (1997).

within the law that nothing short of the deconstruction of law can achieve justice.[11]

To someone who has not paid close attention to post-structuralist thought, the terms and claims of critical theorists can seem opaque or disorienting. But to understand the central teachings of deconstruction is to begin to see why our civic discourse around questions of justice is fractured and unproductive. Critical theorists insist on justice but they also insist that all norms and institutions of justice are socially constructed for motivations of power.[12] They demand what, on their own assumptions, does not exist. This contradiction makes all of the deconstructionist theories incoherent. It also explains why all of them require acts of injustice to remediate historical injustices; the best they can do is to exert power on behalf of some coalitions over other coalitions.[13]

The language of deconstruction is the first obstacle to understanding it. Post-structuralists felt free to invent their own terms and concepts because they believed that words do not refer to any objective referents but instead are entirely contingent upon subjective experience and power.[14] They insisted that there is no meaning apart from subjective, individual expression.[15] Language is a never-ending play of what post-structuralists call "signifiers," with each signifier signifying nothing outside the language but instead constantly shifting and sliding over other signifiers.[16] Being faithful adherents to their own ideologies, the post-structuralists rejected the lexicon and

---

11 *See, e.g.*, Baker, *supra* note 5, at 587–98; Richard K. Sherwin, *Law, Violence, and Illiberal Belief*, 78 GEO. L.J. 1785, 1791–92 (1990); Michel Rosenfeld, *Law as Discourse: Bridging the Gap Between Democracy and Rights*, 108 HARV. L. REV. 1163, 1172–76 (1995); Mitchel de S.-O.-l'E. Lasser, *"Lit. Theory" Put to the Test: A Comparative Literary Analysis of American Judicial Tests and French Judicial Discourse*, 111 HARV. L. REV. 689, 691–92 (1998); Doug Colbert & Colin Starger, *A Butterfly in COVID: Structural Racism and Baltimore's Pretrial Legal System*, 82 MD. L. REV. 1, 2 & n.1 (2022).

12 *See* CHRISTIE, MARTIN & MACLEOD, *supra* note 7, at 1148.

13 *See supra* notes 7–11 and accompanying text.

14 *See supra* notes 7–11 and accompanying text.

15 JACQUE DERRIDA, SPEECH AND PHENOMENA AND OTHER ESSAYS ON HUSSERL'S THEORY OF SIGNS 18 (David B. Allison, trans., 1973).

16 MADAN SARUP, AN INTRODUCTORY GUIDE TO POST-STRUCTURALISM AND POSTMODERNISM 3 (2d ed. 1993).

conceptual categories in which Western ideas, especially ideas about justice, are expressed.[17]

In the deconstructionist way of thinking, words and other expressions are not means to convey shared knowledge of truth.[18] They are instead products of what post-structuralists and their critical theoretical disciples call "discursive practices" or "discursive regimes."[19] In the most candid expressions of post-structuralist and critical thought, discursive practices and regimes are entirely conventional and arbitrary; they do not correspond to anything external to themselves.[20] The words and concepts that we use within our discursive communities refer to no realities—natural or conventional—outside of our discursive regimes.[21] They are pure social constructions.[22] Indeed, on this view, there *are no* realities outside of our discursive practices.[23] All "truth is beholden to the discursive regimes through which it is apprehended and validated."[24]

---

17 *Id.*

18 *Id.*

19 *See, e.g.*, 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 8 (Robert Hurley trans., Pantheon Books 1978) (1976); MICHEL FOUCAULT, *The Order of Discourse*, *in* UNTYING THE TEXT: A POST-STRUCTURALIST READER 48, 48, 52 (Robert Young ed., 1981); Allan C. Hutchinson, *From Cultural Construction to Historical Deconstruction*, 94 YALE L.J. 209, 229 (1984); JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX" 1 (1993); Rosenfeld, *supra* note 11, at 1169; Hugh Baxter, *Bringing Foucault Into Law and Law Into Foucault*, 48 STAN. L. REV. 449, 477–78 (1996); Nan D. Hunter, *Escaping the Expression-Equality Conundrum: Toward Anti-Orthodoxy and Inclusion*, 61 OHIO ST. L.J. 1671, 1720 (2000); Anthony V. Alfieri, *Ethics, Race, and Reform*, 54 STAN. L. REV. 1389, 1392 (2002); Pierre Legrand, *Paradoxically, Derrida: For a Comparative Legal Studies*, 27 CARDOZO L. REV. 631, 631 (2005); Laura Spitz, *The Evolving Architecture of North American Integration*, 80 U. COLO. L. REV. 735, 738 (2009); Gerald J. Postema, *Custom, Normative Practice, and the Law*, 62 DUKE L.J. 707, 729–31 (2012).

20 Hutchinson, *supra* note 19, at 229.

21 *Id.* at 230.

22 *Id.*

23 *Id.* at 231–32.

24 Allan C. Hutchinson, *Work-in-Progress, Gadamer, Tradition, and the Common Law*, 76 CHI.-KENT L. REV. 1015, 1033 (2000).

It is thus a "discursive regime" of relational power, not knowledge of reality, that generates a human being's identity.[25] Law is one such discursive regime, which constitutes (i.e. makes actual or real) discursive subjects (what more traditional jurists would call "natural persons" or "human beings") often at the expense of each subject's authentic, subjective self.[26] This means that the stakes are very high. Because all human identities are made real within socially constructed regimes, such as law, whoever gets to define the regimes' terms and concepts gets to define what is possible to express, and therefore what is real.[27] Terms and conceptual categories such as "male" and "female," for example, do not refer to anything enduring and real but instead are entirely contingent upon the arbitrary assumptions of the powerful people (usually men of European descent) who constructed the regimes.[28]

Nor do pure deconstructionists believe in the efficacy of reason to know what is true.[29] That we prefer reason to madness is a historically contingent fact about us. Reason triumphed over madness illicitly, by power and violence.[30] Science and reason are not means of knowing reality but are instead discursive regimes created by powerful humans to have political status at the expense of other human beings.[31] In fact, even the concept of a human being is a recent invention by powerful men.[32]

---

25 Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1, 16 (2000); J. Allen Douglas, *The "Most Valuable Sort of Property": Constructing White Identity in American Law, 1880–1940*, 40 SAN DIEGO L. REV. 881, 899–902, 899 n.50 (2003).

26 Baker, *supra* note 5, at 595–96.

27 JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 4–5 (1990); Heller, *supra* note 9, at 140–55.

28 Katherine M. Franke, *What's Wrong With Sexual Harassment?*, 49 STAN. L. REV. 691, 714–15 (1997).

29 Jack M. Balkin, *Deconstruction's Legal Career*, 27 CARDOZO L. REV. 719, 727 (2005).

30 *See generally* MICHEL FOUCAULT, MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON (1965).

31 MICHEL FOUCAULT, THE FOUCAULT READER 51 (Paul Rabinow ed., 1984). *See generally* MICHEL FOUCAULT, THE ARCHEOLOGY OF KNOWLEDGE AND THE DISCOURSE ON LANGUAGE (A.M. Sheridan Smith, trans., 1972).

32 MICHEL FOUCAULT, THE ORDER OF THINGS: AN ARCHEOLOGY OF THE HUMAN SCIENCES 387 (1970).

Furthermore, even if reason were competent to know—even if it were competent only to know the most essential truths about the world—there are no essential truths to be known of anything in the world.[33] Truth also is a product of power and of nothing else.[34] The only thing to be known is subjective experience, and no person's experience is inherently or necessarily essential to any other person's experience.[35] The idea of essence is just another oppressive discursive practice used to normalize some experiences and marginalize others.[36]

It follows from those post-structuralist assumptions that all of the terms and concepts that purport to refer to some reality outside of subjective personal experience are contingent upon the subversion of authentic personal identity and, therefore, tools of oppression.[37] For example, sex and gender are not real, except as they refer to individual experience, but are instead concepts that are socially constructed by the arbitrary selection of some conventional criteria to the exclusion of others.[38] The objective components of gender and other aspects of personal identity depend upon a performative activity that one person coerces out of another; they do not refer to anything essentially true about a person.[39] The reality of one person's subject can only be defined and manifested by another person's recognition and signification of the first person's subjective experience.[40] Therefore,

---

33 Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 586 (1990); Devon W. Carbado & Cheryl I. Harris, *Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality, and Dominance Theory*, 132 HARV. L. REV. 2193, 2194 (2019).

34 *See* Baxter, *supra* note 19, at 458–59.

35 *See, e.g.*, Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CALIF. L. REV. 3, 7 (1995); Rosalind Dixon, *Feminist Disagreement (Comparatively) Recast*, 31 HARV. J. L. & GENDER 277, 283–84 (2008).

36 Harris, *supra* note 33, at 588–90.

37 BUTLER, *supra* note 19, at 1–5.

38 Karl M. Bowman & Bernice Engle, *Sex Offenses: The Medical and Legal Implications of Sex Variations*, 25 L. & CONTEMP. PROBS. 292, 303 (1960); John P. Holloway, *Transsexuals–Their Legal Sex*, 40 U. COLO. L. REV. 282, 282 n.1 (1968); David William Meyers, *Problems of Sex Determination and Alteration*, 36 MEDICO-LEGAL J. 174, 176 (1968).

39 BUTLER, *supra* note 19, at 33.

40 JACQUES LACAN, THE FOUR FUNDAMENTAL CONCEPTS OF PSYCHO-ANALYSIS 205–06 (Alan Sheridan trans., W.W. Norton & Co. 1981) (1973).

subjective experiences such as race and gender are contingent upon other people's recognition and affirmation, and for one to refuse to affirm another's experienced identity is to cause the other harm.[41]

If the deconstructionists are correct then can law and justice mediate the demands of identity affirmation? In short, no. Truth claims about law and justice instead contribute to the problem. Indeed, deconstructionists treat law and legal justice as essential to unjust power relations (ironically, in light of their anti-essentialist dogmas).[42]

One of the founding fathers of post-structuralist and critical theories, Jacque Derrida, explained this in a talk delivered at Cardozo Law School in 1989 and later published in the Cardozo Law Review.[43] Consistent with his conviction that signifiers which propose propositions for acceptance as either true or false are inherently violent, Derrida refused to answer directly the overarching question of the conference whether deconstruction renders justice impossible (a question that he suspected "contains some instrument of torture—that is, a manner of interrogation that is not the most just").[44] But in his extended remarks, he made clear that the answer is *yes*, deconstruction renders justice impossible.[45]

Derrida started in on law. He explained that because reason and logic are incapable of yielding rational assent to legal propositions (or any propositions) as true apart from conventional idioms and sliding referents, law has no independent reason but only force.[46]

> Applicability, "enforceability," is not an exterior or secondary possibility that may or may not be added as a supplement to law. It is the force essentially[47] implied in the very concept of

---

41 Kathryn Abrams, *Performing Interdependence: Judith Butler and Sunaura Taylor in the Examined Life*, 21 COLUM. J. GENDER & L. 72, 77–78 (2012).

42 Jacques Derrida, *Force de loi: Le "Fondement mystique de l'autorité"* [*Force of Law: The "Mystical Foundation of Authority"*], 11 CARDOZO L. REV. 920, 927 (1990).

43 *Id.* at 920.

44 *Id.* at 923.

45 *Id.* at 923–31.

46 *Id.* at 923.

47 In that word is the irony, which Derrida himself would likely appreciate, embrace, and enjoy. Derrida, the chief anti-essentialist, here attributes an essence to law. Later in the essay, Derrida stated in a passing parenthetical that the "essence of law is not

> *justice as law* (*droit*), of justice as it becomes *droit*, of the law as "*droit*". . . . The word "enforceability" reminds us that there is no such thing as law (*droit*) that doesn't imply, *in itself, a priori, in the analytic structure of its concept*, the possibility of being "enforced," applied by force.[48]

Therefore, "there is no law without enforceability."[49] Nor is there any inherent difference between the force of law and the "violence that one always deems unjust"; no difference outside of the deconstructive "questioning" of the received opposition between positive law and natural law.[50] Logically entailed in this critique is the conclusion that law is nothing more than "a force that justifies itself."[51]

So much for law and legal justice. What of justice generally? Derrida was no more consoling on this question than on the possibility of legal justice. Early in the lecture, he expressed his desire to "reserve" the possibility of justice apart from law.[52] But to consider that possibility expressly is to "thematize or objectivize justice," an act that betrays deconstruction and, therefore, betrays justice.[53] It turns out that the concept of the just also entails enforcement—that the strongest be obeyed—because the "truth of justice" is itself a "fiction" that requires for its institution a "*coup de force*" that "in itself is neither just nor unjust."[54]

There would be a way out of this impasse if language were oriented toward truth, and justice were authorized by God or some other "mystical foundation of authority."[55] Then justice could be "universalizable."[56] Unsurprisingly, Derrida declined to take that way out which he associated with the

---

prohibitive but affirmative." *Id.* at 929. It is often difficult, to say the least, to discern the meaning of deconstructionists, in part, because the principle of non-contradiction is, in their ideology, itself a product of an illicit discursive regime, and they often refuse to abide by it.

48 *Id.* at 925.

49 *Id.*

50 *Id.* at 927, 929, 931.

51 *Id.* at 925.

52 *Id.*

53 *Id.* at 935.

54 *See id.* at 935–43.

55 *Id.* at 1021–23.

56 *Id.* at 1023.

"divine violence" of ancient mythologies.[57] In his closest approach to a proposition about justice that could be affirmed or denied, Derrida concluded that justice is the "experience that we are not able to experience… an experience of the impossible."[58]

2.2. The Impossibility of Justice After Deconstruction

In his Cardozo lecture, Derrida affirmed American "critical legal studies" as the "most fertile and the most necessary" inquiries about law, literature, and "politico-institutional problems."[59] And indeed, his American disciples have used deconstruction techniques effectively to deconstruct law and its foundations. As Derrida hoped and predicted, they have changed not only the legal profession but also "the polis and more generally the world."[60]

Not all proponents of Critical Legal Studies, critical race theory, dominance feminism, intersectionality, and the other critical deconstructions of law are willing to go all in with Derrida on denying the correspondence between signifiers and reality. Their writings are more ambiguous than Derrida's about the extent of their embrace of radical subjectivity. In particular, they make frequent references to principles of equality, fairness, autonomy, privacy, democracy, rights, tolerance, and justice.[61] This puts them in a bind. When they embrace the assumptions and methods of deconstruction, they have nothing to say in defense of justice. When they reject critical assumptions and methods in favor of justice, their critique of law collapses.

Precisely to the extent that they reject the post-structuralist methods and assumptions of Derrida, Michel Foucault, and other post-structuralists and accept certain principles as objectively true, American critical theorists risk guilt of special pleading. Derrida employed one consistent method and set of assumptions when critiquing others and when reflecting on his own

---

57 *See generally id.* at 1023–39 (describing and rejecting the idea of "divine violence").

58 *Id.* at 947.

59 *Id.* at 931.

60 *Id.* at 931–33.

61 *See, e.g.*, ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT: ANOTHER TIME, A GREATER TASK 153–62 (1983); Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 618–19, 634–35 (1990); Sherwin, *supra* note 11, at 1822–29; DEBORAH L. RHODE, JUSTICE AND GENDER 2 (1989); Rosenfeld, *supra* note 11, at 1164; Franke, *supra* note 28, at 698–714.

statements and ideas. His American disciples are not as consistent. They employ deconstructionist tools on selective targets. This makes critical theories unpersuasive to all but their most faithful adherents. It also opens each wave of critical theory to deconstruction by the next, more radical wave, which is purer and more thorough-going in its deconstructive methods and assumptions than the wave that preceded it.[62] Critical theories have short shelf lives.

On the other hand, to the extent that they accept and utilize post-structuralist methods and assumptions (and they do so to a large extent), critical theorists undermine the foundations of the rule of law and render justice both impossible and incoherent. While the critical theorists' deconstruction of natural reality is "radical," as Derrida put it[63]—literally, going all the way to the roots of concepts such as reason, human nature, and sex—the critical theorists' deconstruction of law and constitutionalism is both radical and totalizing. After all, law is artificial in the classical sense that it is an artifact made by human beings.[64] To some extent, all law is constructed by social consensus because, whether or not the positing of a law is a *sufficient* condition for its validity, laws must be recognized as posited[65] or, to use the older term, promulgated.[66] Laws and constitutions are therefore even more susceptible to critical deconstruction than are nature and reason.[67] Law is arguably the most paradigmatic instance of a socially constructed discursive regime.[68] Deconstructionist theories, such as those derived from post-structuralist ideologies, promise to help us see through the law and to perceive that all laws are merely disguised ideologies.[69]

---

62 *See generally* CHRISTIE, MARTIN & MACLEOD, *supra* note 7, at 1070–71, 1148–53.

63 Derrida, *supra* note 42, at 931.

64 *See* 4 JOHN FINNIS, *The Truth in Legal Positivism*, *in* PHILOSOPHY OF LAW: COLLECTED ESSAYS 174, 174–88 (2011); Eric R. Claeys, *Property, Concepts, and Functions*, 60 B.C. L. REV. 1, 5, 35–37 (2019).

65 *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS, 25–29, 266–70 (Paul Craig ed., 2d ed. 2011); 4 FINNIS, *supra* note 64, at 182–84; H.L.A. HART, THE CONCEPT OF LAW 100–23 (3d ed. 2012).

66 THOMAS AQUINAS, SUMMA THEOLOGICA pt. I-II, q. 90, art. 4 (Fathers of the Eng. Dom. Province trans., Benziger Bros. 1915) (1485).

67 Robert L. Tsai, *Democracy's Handmaid*, 86 B.U. L. REV. 1, 8–10 (2006).

68 CHRISTIE, MARTIN & MACLEOD, *supra* note 7, at 1067–186.

69 J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 743, 764 (1987).

Having liberated us from our false belief in legal ideals, critical theories liberate us from all law. To accept post-structuralist assumptions is to accept what is entailed in those assumptions, namely that "all law is based on violence" because it had to be instituted at some time, and the institution of law is an act not of reasoned consent but of coercion.[70] Critical deconstruction is inherently incompatible with belief in legal ideas and ideals.[71] It is therefore incompatible with the rule of law.

The liberation from law comes at an additional cost for deconstructionist theories. Having seen through the law as just another discursive regime that disguises unjustified power relations, a critical theorist has no non-arbitrary reason to stop seeing through the other aspects of justice and perceiving raw power on the other side. Not only law but also rights,[72] equal protection, and the other basic purposes of law must be deconstructed if critical theoretical assumptions are true because deconstruction logically entails the "radical subversion of knowledge."[73] All of those concepts, like all other truth claims, are contaminated by the violence inherent in their foundations, the force of oppositional (i.e. logical) thought, and the violence of language itself.[74] Candid deconstructionists acknowledge and embrace this implication.[75]

Once we accept critical theoretical assumptions, therefore, we are left with nothing to mediate our conflicts. In a consistent deconstructionist paradigm, justice is just one more discursive regime, and law is just one more social construct, built by the powerful to define away the identities of marginalized groups. There is no justice in a universal sense. There may be any

---

70 Petra Gehring, *Force and the "Mystical Foundation" of Law: How Jacque Derrida Addresses Legal Discourse*, 6 GERMAN L.J. 151, 155 (2005).

71 This is true not only of critical theories but also of all theories of deconstruction, including American Legal Realism. *See* A.W.B. Simpson, *Legal Iconoclasts and Legal Ideals*, 58 U. CIN. L. REV. 819, 835–36 (1990).

72 Like the classical jurists, Derrida identified the right with the law, and used the same term for both. Derrida's term for right and law, "droit," does the work in French that the Latin term "ius" performs in the Western jurisprudential canon which Derrida deconstructed. *Compare* Derrida, *supra* note 42, at 925, *with supra* Section 2.1.

73 Gehring, *supra* note 70, at 151.

74 *Id.* at 159; Derrida, *supra* note 42, at 997, 1019–21.

75 *See, e.g.*, Derrida, *supra* note 42, at 935–43; Dean Spade, *Laws as Tactics*, 21 COLUM. J. GENDER & L. 40, 40, 42, 68 (2012).

number of different justices within different discursive regimes belonging to different identity coalitions. But no concept of justice refers to any standard of justice that is external to and independent of any discursive regime. No identity coalition can appeal to a sense of justice that it shares with any other identity coalition. At best, each coalition can hope that its conception of justice overlaps with some others and must strive to have its discursive regime entrenched in place of any others that are inconsistent with its validation.

One result of all this deconstruction is an existential zero-sum warfare in legal and constitutional adjudication. Because the realization of each person's identity requires validation by others, each person's experience requires affirmation by every person in order to exist in reality. What stands in the way of validation is the dominant discursive regimes out of which laws and constitutions are constructed, e.g., the putatively neutral discursive practices of "equal protection," "due process of law," "presumption of innocence," and the other familiar liberal, legal constructs.[76] All of those liberal legal ideas were "forged and imposed at the behest of an allied set of political actors to advance their own visions, goals, and interests."[77] The rule of law is not the solution to injustice; it is its source. The problem is "the very striving of our politics to hold public policy hostage to a higher legal code of prefixed limits and demands, the one we call the Constitution."[78]

What is the alternative to law and constitutionalism? Contests of power between advocates for incompatible discursive regimes. To achieve the goal of legal validation, people form coalitions with similarly-identifying people to displace the dominant discursive regimes of the rule of law and replace them with discursive regimes that are more amenable to their own expressions of identity.[79] Every legal discourse becomes a constitutional challenge, and the objective of every constitutional challenge "is to construct an opposition that will displace the dominant discursive regime with their own as a means of institutionalizing or entrenching their coalition."[80]

---

76 CHRISTIE, MARTIN & MACLEOD, *supra* note 7, at 1075–107.

77 Ken I. Kersch, *The Talking Cure: How Constitutional Argument Drives Constitutional Development*, 94 B.U. L. REV. 1083, 1093 (2014).

78 Frank I. Michelman, *Why Not Just Say No? An Essay on the Obduracy of Constitution Fixation*, 94 B.U. L. REV. 1141, 1141 (2014).

79 *See* Kersch, *supra* note 77, at 1093.

80 *Id.*

This is why the word "justice" is now preceded by an adjective. We hear about "economic justice," "racial justice," and "environmental justice." But adding adjectives to justice doesn't seem to get us any closer to it. Indeed, it seems to make the problem worse. It pits justice against justice. If "environmental justice" requires the government to impose regulatory burdens on businesses in poor communities—to shut down coal mines and small manufacturing operations, for example—then it seems to conflict with "economic justice." If "racial justice" requires affirmative action policies that discriminate against certain racial minorities in favor of other racial minorities then justice eats its own tail.

It is difficult to avoid the inference that, after deconstruction, justice simply means "what I want." And increasingly, we don't want the same things. Indeed, we have mutually incompatible goals. Read a newspaper or turn on a news program and you will learn that:

- justice requires more freedom for abortionists; justice requires more legal protections for unborn human beings;[81]
- justice requires that criminal laws be enforced without regard to race;[82] justice demands that we enforce fewer of our criminal laws in the neighborhoods of racial minorities;[83]
- justice requires more economic freedom;[84] justice requires more government redistribution of wealth and resources.[85]

Justice means so many different and inconsistent things that it seems to mean nothing at all.

In practice, fill-in-the-blank justice turns out to be a way of asserting raw power, of picking winners and losers. My tribe wins; yours loses. *What*

---

81 Dorothy Roberts, *Reproductive Justice, Not Just Rights*, DISSENT (Fall 2015), https://perma.cc/E2ZM-6DUA; Ryan T. Anderson et al., *Protecting the Unborn: A Scholar's Statement of Pro-Life Principle and Political Prudence*, ETHICS & PUB. POL'Y CTR. (Sept. 22, 2022), https://perma.cc/2UQV-NVME.

82 U.S. DEP'T OF JUST., GUIDANCE FOR FEDERAL LAW ENFORCEMENT AGENCIES REGARDING THE USE OF RACE, ETHNICITY, GENDER, NATIONAL ORIGIN, RELIGION, SEXUAL ORIENTATION, OR GENDER IDENTITY 2 (2014), https://perma.cc/HU5W-U25K.

83 Paige Fernandez, *Defunding the Police Will Actually Make Us Safer*, ACLU (June 11, 2020), https://perma.cc/NB6U-9ZPM.

84 James A. Dorn, *The Scope of Government in a Free Society*, 32 CATO J. 629, 631 (2012).

85 *See generally* Joe. T. Feagin, *Social Justice and Sociology: Agendas for the Twenty-First Century*, 66 AM. SOCIO. REV. 1, 5 (2001) (giving an example of a theory requiring the redistribution of wealth).

do we want? Justice! When do we want it? Now! Who's in the way? Some other group for whom the particular justice we demand would be an injustice. So, fill-in-the-blank justice fails. It leaves us in a zero-sum contest for power and privilege. If deconstruction is our way, then Derrida was right. Justice is impossible.

2.3. The Incoherence of Justice After Deconstruction

If one accepts the principles of deconstruction, then justice is also incoherent. More precisely, justice becomes an infinite regress. Each assertion of justice that is used to critique a norm or institution of justice is itself open to critique as the product of a discursive practice that is incompatible with some person's lived experience. Justice turns out to be injustice all the way down.

Consider "social justice." Most versions of that idea today divide us into tribes and assign approval or blame not according to our choices and actions but instead according to our skin color, sex, religion, annual income, or geographic region. Depending on who is adjudicating the "social justice," some people turn out to be inherently unjust as a result of being born in the wrong skin, the wrong body, or the wrong family, and there is nothing they can do to be justified. If that's justice, then justice does not and cannot govern our choices and actions. If I am inherently unjust and there is nothing I can do to be just or act justly then my injustice is not a product of what I choose to do; it is simply what I am. But if there is nothing we can do about justice and injustice—if it's just baked into our bodies—then why demand that we act justly? That's incoherent. It's an example of what the philosopher John Finnis calls "operational self-refutation."[86] To demand justice from a person whom one asserts is inherently unjust by virtue of his immutable characteristics is like scolding a fence post for being a fence post while also demanding that it run the 100-meter dash.

---

[86] FINNIS, *supra* note 65, at 74–75; 1 JOHN FINNIS, *Self-Refutation Revisited*, *in* REASON IN ACTION: COLLECTED ESSAYS 81, 81–91 (2011).

Many forms of so-called "social justice" also demand central planning for some supposed collective good.[87] To save diversity and inclusion, all colleges and universities must teach the same things and must not teach other things. Everyone must read Ibram X. Kendi. Aristotle, Justinian, and Aquinas are right out. To save the world from overpopulation and to liberate young people from sexual mores, all employers must pay for their employees' contraceptives and abortifacient drugs. We could multiply examples here. The basic idea is that social justice requires us all to act the same way—to value the same goods and to pursue those goods by the same means.

That too is incoherent. Indeed, *all* forms of collectivism are incoherent. Collectivism presupposes that the goods and plans of human societies are all commensurable on a single scale. But there is no such scale on which human goods could coherently be compared or their quantities calculated.[88] The plurality of human goods means that a society cannot rationally operate on a single, unitary plan of action. Many different plans of action for the use of resources are equally reasonable. So a government cannot rationally justify a central plan for real, personal, or intellectual property.[89] The common good of the engineering university is not the same as the common good of the liberal arts college, which is not the common good of the musical theater or the symphony orchestra, which is not the common good of the family. Knowledge is not reducible to justice, which is not of the same kind of value as friendship, which is not commensurable to beauty or human life. Any central plan predicated on a putative collective assessment of the common good is inherently arbitrary because it requires everyone to pursue one good instead of other, equally important goods.

Collectivism is not only incoherent but also unjust. It is unjust to take away from people the liberty and power to decide what is to be done with their limited time and resources. A central plan deprives people of the opportunity to become self-governing people, more fully human.[90] People must

---

87 *See generally* Justus Uitermark & Walter Nicholls, *Planning for Social Justice: Strategies, Dilemmas, Tradeoffs*, 16 PLANNING THEORY 32 (2017) (giving an example of one such social justice theory requiring central planning).

88 FINNIS, *supra* note 65, at 92–95, 114–18; JOSEPH RAZ, THE MORALITY OF FREEDOM 321–67 (Adam Hodgkin ed., 1986).

89 ADAM J. MACLEOD, PROPERTY AND PRACTICAL REASON 230–33 (2015).

90 *See id.* at 1–4, 91–121.

have the right, as individuals and in groups and associations, to decide what is good and right to do with the resources under their dominion. To enforce one central plan for everyone is to fail to accord equal concern and respect to the individuals and groups whose goods and plans the central plan displaces.

3. JUSTICE

3.1. Justice is Possible

Critical theorists must choose between justice and deconstruction. They do well to embrace justice and reject deconstruction. To the extent that they resist the logical implications of their own deconstructionist assumptions and methods, critical theorists implicitly indicate that they actually do believe in justice and law. They should.

Justice does mean something. And, contra Derrida, justice is possible. Like gravity and nuclear physics, justice is not a matter of subjective preference. Like beauty, justice is difficult to define precisely but also universal and valuable in itself. Furthermore, we can achieve justice. We've done it before. We abolished slavery in Christendom (twice!—first in the ninth and tenth centuries and then again in the nineteenth).[91] We defeated totalitarian regimes in Europe (twice!—Nazis in the 1940s and Soviets in the 1980s).[92] Americans won civil rights for racial minorities (twice!—in the first civil rights movement of the 1860s and 1870s and then in the second movement of the 1950s and 1960s)[93] and South Africans abolished Apartheid a few decades later.[94]

---

91 *See* Frederik Pijper, *The Christian Church and Slavery in the Middle Ages*, 14 AM. HIST. REV. 675, 681 (1909); *see also* U.S. CONST. amend. XIII.

92 *See* IMMIGR. & NATURALIZATION SERV., U.S. DEP'T OF JUST., UNITED STATES HISTORY 1600–1987: LEVEL II, at 121 (1987); *see also* George C. Herring, *The Cold War as Context*, 4 FED. HIST. 101, 110 (2012).

93 Robert J. Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship, and Civil Rights after the Civil War*, 92 AM. HIST. REV. 45, 45 (1987); *see also* Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

94 *See* Margaret Roberts, *The Ending of Apartheid: Shifting Inequalities in South Africa*, 79 GEOGRAPHY 53, 56 (1994).

As these examples show, justice is not a steady end state. The history of justice is not one of inevitable progress toward a just utopia. Victories are temporary. And so are the losses. We can and must achieve justice again and again. But to achieve justice, we must first understand what it is and how to bring it about. We must deliberate about justice and choose to act justly. Justice is not a matter of being on the right side of capital-H History. Justice is something we must do. Fortunately, we have good examples to follow. We can follow those who abolished slavery in earlier generations, those who led the victorious movements for equal civil rights, and those who defeated first the Nazis and then the Soviet Union. We can follow them if we first go back to the original sources from which they drew intellectual resources and moral resolve.

3.2. There Are Truths to Know About Justice

Justice seems to mean different things to different people. So, we might conclude that justice is relative or subjective. Each person has his or her own truth about justice. But that is a dead end. If there are no objective standards of justice, independent of our personal preferences and desires, then we have no reason to demand justice from anyone. The most you can do is demand that they give you *your* justice. But if your justice conflicts with *their* justice, and they have an equal claim to demand *their* justice from *you*, then you are at an impasse. You're stuck.

Fortunately, no one really thinks that. Even the most radical, post-modern deconstructionist—even Derrida—speaks of the just and the unjust and acts as if there are truths about justice, even if the only truths about justice are the dogmas of deconstruction itself.[95] The demand, "*Give us justice!*," presupposes that there is something to give, something that exists independently of our preferences and opinions, something that we can all understand with our minds and act upon.

We do understand and act upon demands for justice. By our actions, our commitments, the institutions we build, the speeches we make, and the ways we order our communities, we demonstrate that we are pursuing an object that can be known and pursued and achieved. So, there must be a

---

[95] *See* Jacques Derrida, *The World of the Enlightenment to Come (Exception, Calculation, Sovereignty)*, 33 RSCH. PHENOMENOLOGY 9, 41 (2003).

truth about justice, a truth that does not depend upon our agreement or assent. We can know what justice is. We can reason together about it. We can, in many contexts, agree on what it requires of us.

To be sure, the idea of truth is itself contested these days. For present purposes, let us stipulate that truth is knowledge of what is real. Truth distinguishes belief from knowledge. I may believe that the sun rises in the west, or that the sun rotates around the earth, but I cannot know those propositions. They are not true. The earth is real, and the sun is real, and the relative movements of the earth and sun are real.

That's easy enough. We live in an empirical age. Even people who believe that men can be birthing people believe in science. Indeed, they sometimes capitalize the word "Science" to demonstrate their veneration, much like monotheist capitalize the name of God.[96] "Trust the Science!"[97] So, we all agree on at least one kind of truth. Science is real. Science is true.

Science isn't the only way to know truth. Other inquiries are also possible. Productive inquiry proceeds on the assumption, taught by Aristotle as an enduring truth, that a thing can be known by its essence (the very same way of knowing that deconstructionists allege is illicit and unjust).[98] For example, we can know certain things about dogs because there is an essential logic to dog-ness, a discernable set of characteristics that we can expect to find repeated in all of our encounters with animals that have the nature of a dog. Dogs are mammalian, meaning they are warm-blooded, have live births, and are covered with hair or fur. So, dogs are *not* reptiles or amphibians or birds. Dogs are domesticated. They are not foxes, wolves, or coyotes. Dogs are social pack animals. They are not cats.

---

96 *See generally* Peter Van Doren, *When and How We Should "Trust the Science,"* CATO INST. (Sep. 7, 2020), https://perma.cc/T7L6-Z9E2 ("Scientists wear lab coats instead of vestments, but like clerics, they have the authority that comes with access to knowledge unavailable to laypersons. Insisting that we yield to their judgment . . . .").

97 *See* Margaret Simons, *'Trust the Science' Is the Mantra of the Covid Crisis — but What About Human Fallibility?*, GUARDIAN (Jul. 23, 2021, 3:00 PM), https://perma.cc/YUJ6-LA7Z.

98 *See* Constantin Cezar Tita & Violeta Dana Tita, *The Essence, Content and Form of Law*, 6 J.L. & PUB. ADMIN. 154, 154 (2020).

We know the essence of a thing by studying its strongest, fullest, or most central instance.[99] Some animals are more like dogs than others. Foxes, wolves, and coyotes are similar to dogs in many ways, though they are not domesticated. They are more like dogs than they are like dragonflies. If we were to diagram dog-ness, we could draw concentric circles in the shape of a target. We would put chihuahuas and terriers in the center circle of the target, wolves and coyotes in an outer circle, and dragonflies outside the boundaries of the outer circle, out at the periphery, beyond the edges of the target.

So, the existence of differences, so enthusiastically exploited by deconstructionists, is no threat to our belief that there are truths about dogs. We can understand the nature of a fox by reference to the central case of a dog, or vice versa, and we can therefore understand two similar-but-distinct phenomena in the world with epistemic certitude.

Aristotle's method of inquiry enables us to identify what is most essential or centrally true about some type of human relationship or action. Aristotle illustrated this method in his famous discussion of friendship.[100] Not all human relationships are friendships in a strong or full sense, though many different human relationships exhibit some traits of a friendship. This need not lead us to conclude that friendship is a discursive regime concocted by extroverts to discriminate against introverts. No, we can understand friendship as a real, natural, and repeatable phenomenon by studying the essence of friendship. We look at the central case of a friendship. In that central case, each person in the friendship acts for the well-being of the other person. Each friend desires the other person's well-being for its own sake and not for purely selfish reasons, and each friend reciprocates the desire and action for the good of the other.

To be sure, we find in the world weaker examples of friendship, such as commercial transactions, where each person acts for the good of the other only instrumentally as a means to provide the service or item that the other wants for some personal, economic benefit. We also find defective friendships, where some person exploits another person and uses them *only* as an

---

99 This method is adopted from HART, *supra* note 65, at 81, 206–12, JOSEPH RAZ, PRACTICAL REASON AND NORMS 150 (1999), and especially FINNIS, *supra* note 65, at 9–18.

100 ARISTOTLE, NICOMACHEAN ETHICS bk. VIII, at 1156b33–1157b4 (Lesley Brown ed., David Ross trans., Oxford Univ. Press 2009) (c. 350 B.C.).

instrument for personal satisfaction. But as long as we keep in mind Aristotle's central case of friendship, the existence of commercial relationships and exploitation need not make us doubt the possibility of achieving real friendship. True friendship.

Just as there are true friends and false friends, there is true justice and false justice. And just as there are different degrees of friendship, there are different degrees of justice. We can distinguish between a friend and an enemy, or a friend and an acquaintance. Similarly, we can distinguish between justice and injustice, and between true justice and lesser instances of justice.

If we were to diagram this idea, we might draw a justice target consisting of concentric circles around a central core. Acts of true justice are in the center circle of the target. Think of a legislature conferring a medal on a war hero, someone honoring their contractual obligations, or a father teaching his children how to respect authority. Those are truly just acts.

Moving out from the center, we would encounter lesser forms of justice. Once someone has committed a wrong, such as trespass or defamation, that injustice cannot be undone. But we can provide a lesser form of justice by requiring the wrongdoer to pay damages to the person whom he wronged. In the case of public wrongs, such as murder and theft, we punish the wrongdoer. This is not perfect justice, but it is a measure of justice nonetheless.[101]

Out beyond the outer circle, we find acts of injustice. One person enslaves another person, says something untrue about her, or steals her possessions, and gets away with it. That's unjust! But how do we know it's unjust? We know injustice when we see it because we can compare it to the truly just acts in the center of the target. When injustice is neither remedied nor punished, we have missed the target altogether. But that doesn't mean that there is no target. It means we failed to hit it.

---

[101] FINNIS, *supra* note 65, at 263–64.

4. JUSTICE DEFINED

4.1. The Possibility of Justice and Law

So, we can understand justice. We can study those true cases of justice at the center of our justice target, and we can observe what they have in common. And if we do that, we might arrive at a classical definition of justice. This definition has been around for centuries. The authors of this definition were the jurists of the sixth-century Christian emperor Justinian.[102] The books they wrote, collectively known as the *Corpus Juris Civilis*,[103] became the definitive treatises on justice throughout Christendom. The world's first university, the University of Bologna, was founded for the express purpose of teaching and studying the *Corpus Juris Civilis*.[104] Law students in Europe read them for centuries, and law students in England and the United States studied jurists who framed their treatises in Justinian's categories, especially the distinctions amongst natural law, civil (in England and the United States, common) law, and the *ius gentium*.[105]

The texts of the *Corpus* framed the conceptual categories that eventually gave us the rule of law.[106] By describing law as something enduring, to some extent fixed, and independent of political power, the *Institutes* and *Digests* of Justinian made it possible to *think* about equal justice under the rule of law, and so made it possible to *achieve* equal justice under the rule of law. Because law can have meaning independent of power, it can stand above the powerful, even above the sovereign. And indeed, the jurists taught that at least some law is neither artificial nor even conventional; some law precedes all human conventions and discursive regimes. As the jurists declared, "[T]he laws of nature, which all nations observe alike, being established by a divine providence, remain ever fixed and immutable."[107]

---

102 *Id.* at 193 n.1.

103 Cary R. Alburn, *Corpus Juris Civilis: A Historical Romance*, 45 A.B.A. J. 562, 563 (1959).

104 *See* JAMES A. BRUNDAGE, THE MEDIEVAL ORIGINS OF THE LEGAL PROFESSION: CANONISTS, CIVILIANS, AND COURTS 75 (2008).

105 R.H. HELMHOLZ, NATURAL LAW IN COURT 14–21, 88–92, 131–40 (2015).

106 Alburn, *supra* note 103, at 562.

107 J. INST. 1.2.11 (J.B. Moyle trans., 1913).

Note the contrast between the divine providence of Justinian and the divine violence of Derrida. God acts in both accounts. But whereas God acts coercively and arbitrarily in Derrida,[108] Justinian's God acts with benevolence and authority in a manner intelligible to human reason.[109] The *Corpus* discusses several legal doctrines that are required not only by human-made law but also by "natural reason."[110] This directly contradicts a fundamental assumption of the deconstructionists. To communicate truth claims about nature and justice is not merely to engage in a play of signifiers. It is instead to employ words and concepts as tools to understand and communicate what justice requires of us as rational, acting agents.

Because law can stand above the sovereign, and because we can know it, the law is not merely the sovereign's commands and prohibitions. The most powerful men can be subject to the law. Because of Justinian's jurists, we can deny that might makes right. And we can explain in detail how justice makes right.

4.2. Justinian's Definition of Justice

The *Institutes* opens with a definition of justice. Here it is in the original Latin and in an English translation:

> Iustitia est constans et perpetua voluntas ius suum cuique tribuens.
>
> Justice is the set and constant purpose which gives to every man his due.[111]

A lot is packed into that sentence. It bears unpacking.

4.2.1. Justice is the Point of Law and Legal Education

First, the teaching of Justinian's jurists implicit in this sentence (and made explicit in the two paragraphs following it) is that *justice* is the point

---

108 *See* Derrida, *supra* note 42, at 1033–35.

109 *See* J. INST. 1.2.11 (J.B. Moyle trans., 1913).

110 J. INST. 1.10.pr., 2.1.12, 2.1.25, 2.1.35 (J.B. Moyle trans., 1913); DIG. 1.1.9 (Gaius, Institutes 1); *id.* 5.3.36 (Paul, Edict 20); *id.* 7.5.2 (Gaius, Provincial Edict 7); *id.* 9.2.4 (Gaius, Provincial Edict 7); *id.* 41.1.1 (Gaius, Common Matters or Golden Things 2); *id.* 50.17.85 (Paul, Questions 6).

111 J. INST. 1.1.1 (J.B. Moyle trans., 1913).

of law and legal education.[112] Today, many lawyers assume that the point of law is to achieve the best result for one's client and that law is basically procedure. Or perhaps the point of law is social engineering, and the highest and best study is legislation or economics or sociology. Or maybe the point of law is social justice or equality of outcome. In that case, we should dispense with the artificial distinctions of the law altogether and study systems of power and inequality instead, as the deconstructionists assert.

If, by contrast, law is the means by which we achieve the goal of justice, and if we bend law to other purposes, then we pervert the law. We destroy the only tool that we have to achieve justice in an imperfect world. We can't trust everyone to perform acts of perfect and true justice all the time. But we can use law to remedy, punish, and deter acts of injustice. We can use law to educate people, to help us understand what we owe each other. We don't need to depend on perfectly just judges to tell us what is just to do. So, to understand law, we need to study justice. And to achieve justice, we need to preserve the integrity of the law.

4.2.2. Justice is a Virtue

Second, observe that justice is a virtue. Justinian's jurists define justice as a disposition, a way of interacting with other human beings.[113] Justice is the *set and constant purpose to do* something. Justice is not merely a state of affairs out there in the world but is primarily a continual intention that is interior to an acting person. Justice must be *in me* and must drive and motivate my choosing, intending, and acting. I must allow the law to shape me to conform to what justice requires. We need the law to help us become just people. Very few people possess enough practical wisdom to know what is just to do in all cases. There is only one Moses. You don't find a Thomas Aquinas, Richard Hooker, or Thomas More standing on every street corner. So we look to the law.

The law is like a collection of practical wisdom collected over centuries. The common law contains just solutions to practical problems, many of which are more than 1000 years old. The civil law is even older. We don't learn and follow fundamental law just because it's old or because we think

---

112 *See id.*

113 *See id.*

English lawyers and Holy Roman jurists are smarter than the rest of us. We learn and obey the fundamental law because it contains just solutions to practical problems that human societies have always faced, and always will face. For example, we have settled property rights and duties because we need to allocate resources in just ways. The resources are different today than they were 1000 years ago. We argue over inventions and data privacy rather than land and animals. But we can learn how to be just in our use of intangible resources by studying property rights in land and other tangible things.

As judges adjudicate according to law, and as citizens and lawyers learn to follow the law, the law shapes us into lawful people. We internalize the lessons of the law and become more just. To be sure, to become fully just we must move beyond what the law requires and forbids. But the law gets us moving in the right direction. It moves us out of our selfish desires and appetites. It makes us focus on what we owe to others. It lifts our eyes beyond our own tribe or identity group. It forces us to confront the humanity in other persons, to treat each and every human being as a bearer of dignity, a person to whom we owe duties and who possesses rights.

4.2.3. Justice is the Right Action to Do

Third, justice does not depend upon outcomes or consequences. Nor does it depend on my particular circumstances. I can be just toward other people whether I am rich or poor, comfortable or uncomfortable, even when other people are unjust toward me. If someone defames me, for example, I can still speak truthfully and charitably about them, or at least say nothing in return.

Nor is justice about equality of result—what we today call social justice. The jurists tell us that the virtue of justice is a disposition to give to everyone what each is due or owed.[114] And we owe different people different things. What is due to a person differs according to who they are, what they do, and, sometimes, where they are from or where they are located. I owe more to my own children than to other children. I owe honor to a war veteran and dishonor to a con man. Therefore, to insist that everyone be treated the same is actually a kind of *injustice*. To achieve perfect equality of outcome

---

[114] *Id.*

requires us to do away with all distinctions and discriminations, which makes it impossible to reason practically about our differences.

Here again, the law provides what we need. Both the common law and the civil law begin with the distinction between private law and public law.[115] Our fundamental law is pluralistic. With respect to public rights and wrongs, public law places the same legal duties on everyone. We all have duties not to enslave, murder, and steal from every other person. But with respect to most legal questions, private law gives us the tools to arrange our legal relations in a variety of ways, according to the plural and various goods that our communities are trying to achieve: the commercial law for commercial relations, the laws of gifts and trusts for charitable and family relations, the law of property and intellectual property for impersonal relations, and so on. Law enables us to differentiate persons as bearers of *different* rights and to give to every person what he or she is due in the particular case.

4.2.4. Justice is Owed to Persons

If justice is not about outcomes, then what is its point? Justice exists for persons, especially natural persons—human beings.[116] The point, Justinian's jurists tell us, is to give or render or bestow to every person what he or she is due or owed. It is to give to everyone "ius suum cuique"—what we would today say is his or her property as a matter of right, or what is due to the person as a matter of law.

Notice that the term for justice and the term for right have the same root: "ius."[117] The right and the just are the same thing. Today, when people speak of rights, they tend to mean personal claims or entitlements. The first-person perspective of a right today is the point of view of the person who believes he is owed something. The perspective of the *Institutes* is the other way around.[118] The point of view of justice and rights is the perspective of the acting person, the person who owes something to others. Rights are

---

115 *Id.*

116 *See* 2 JOHN FINNIS, *The Priority of Persons*, *in* INTENTION & IDENTITY: COLLECTED ESSAYS 19 (2011).

117 *See* Enrico Olivetti, *iūs*, ONLINE LATIN DICTIONARY, https://perma.cc/7U7Q-BNCB.

118 *See* J. INST. 1.1.1 (J.B. Moyle trans., 1913).

about justice, which concerns what is right to do. And by derivation, injustice is what is wrong to do.

So, a right is a direction for right action. The purpose of a right is to impose on each of us a duty to act justly toward every person that we encounter. A right is not about what I am owed but rather what I owe others. It is understood by its correlative duty, which is a duty in either natural or legal justice. And a right is contrasted with a wrong, which is an act of injustice.

This was the perspective of the entire legal tradition throughout Europe, England, America, and the other former English colonies right up until the day before yesterday. So if you want to understand fundamental rights in our legal tradition, then you must stop thinking of rights as entitlements. Rights are directed at what we owe to others, not what others owe to us. Rights direct our *own* action and our *own* attitude.

How do we know what is right and just? How do we learn to render to people what we owe them? The jurists tell us that we look to jurisprudence.[119] "Jurisprudence," they explain, is the study of "iuris," the term that they use to refer to law.[120] To know the difference between right and wrong, just and unjust, the ius and the inius, we must acquire iurisprudentia, literally knowledge of law. We study the law and obey the law because the law tells us what we owe to other people. To be a good student of law is to become a just person. One becomes a just person by studying law—iuris—so that one can give to everyone what is right—ius. Without knowing the law, we cannot know how to act justly toward others.

5. Justice and the Rule of Law

5.1. The Two Parts of Justice

So we need law to achieve justice. Now things get a bit complicated. Justice is not merely a matter of legal rights or rules. And justice is more than the law. Justice precedes both law and rules. Indeed, law and rules are evaluated under standards of justice. Justice is not legalistic. But law is also necessary to achieve justice, however imperfectly, in a world where people

---

119 *Id.*

120 *Id.*; *see also* Olivetti, *supra* note 117 (noting that *iuris* is the genitive singular of *iūs*).

require particular direction to know how justice requires them to act toward others. So law is indispensable. But it is not the whole of justice.

Justice is not one thing but two things. The ancient Greek philosopher Aristotle identified the two parts of justice as natural justice and legal justice.[121] Aristotle observed that a virtue, such as justice, is not opposed to one vice.[122] It is instead a mean, an excellence, poised between two opposing vices, as he explained in Book II of the Ethics.[123] Courage is the mean between cowardice and recklessness. Generosity is the mean between profligacy and stinginess. Justice is the mean—the excellent virtue—between the vice of inequity and the vice of lawlessness. To be just we must hold law and equity—legal justice and natural justice—in tension with each other. A judgment can be unjust if it violates legal justice and it can be unjust if it violates natural justice. We can't do without natural law. And we can't do without human law. We need both.

Aristotle taught that natural justice is "that which everywhere has the same force and does not exist by people's thinking this or that."[124] Later thinkers called the universal principles of natural justice "natural law."[125] A lack of natural justice—rejection of the natural law—is the vice of inequity, also known as legalism. Many people today follow a particularly insidious form of legalism that identifies justice with the will of a superior or sovereign. Sometimes the sovereign is a human being; sometimes it is a caricatured divine being. This form of legalism is known as legal positivism.[126] It is a kind of voluntarism because it identifies right and wrong with the arbitrary will of some superior being or supreme power. According to this view, you should obey the sovereign's will *because* he is sovereign, regardless of whether the sovereign wills what is good or bad.[127] Rights and other reasons

---

121 ARISTOTLE, *supra* note 100, bk. V, at 1134b15–20.

122 *See id.* at 51, 103.

123 *Id.*

124 *Id.* at 105.

125 CICERO, THE LAWS (c. 49 B.C.), *reprinted in* THE REPUBLIC AND THE LAWS 95, 124 (Johnathan Powell & Niall Rudd eds., Niall Rudd trans., 1998); AQUINAS, *supra* note 66, pt. I-II, q. 91, art. 2; *id.* pt. I-II, q. 94.

126 JEREMY BENTHAM, OF LAWS IN GENERAL 18–20 (H.L.A. Hart ed., 1970); JOHN AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW 34, 36 (R. Campbell ed., 5th ed. 1885).

127 BENTHAM, *supra* note 126, at 16.

have no authority over the sovereign because the sovereign is under no law.[128]

But sovereignty and power are just and right only insofar as they are exercised for the good. The point of justice is to render to everyone what they are due as a matter of right, which is to say to do toward other people what right reason—natural law—directs us to do. What we owe others just is their rights, and the point of their rights is their flourishing, their well-being, and our common good as fellow human beings. Justice is what is good to do. The law cannot function as law if it directly contradicts the natural law. For example, we must remain committed to the natural law principles that life and knowledge are good, and that we must never be willing to murder or defame people. As Robert George has explained,

> Authoritative actors in a legal system may fail to secure or enforce a right that, morally speaking, ought to be secured and enforced; or they may posit and enforce a right that ought not to be posited and enforced. For example, the law might unjustly fail to give a certain class of human beings a legal right not to be enslaved or arbitrarily killed; that is, it might unjustly confer upon another class a legal right to enslave or kill them. The justice or injustice of such acts of positive law is measured by reference to standards of the higher law, i.e., the moral law, that are objective or true eternally and universally.[129]

This means that laws can be defective. The unjust order to enslave a class of persons or to kill innocent civilians may be recognizable as a law and yet may be inherently unjust. The classical understanding of justice thus enables us to perform the critique of law that critical theorists desire without deconstructing law. "If there are objective or true principles of justice (such as the principle of equality) that constitute a higher standard [than law itself]," George argues, "then legislative action may be rationally guided and criticized in the light of those principles; and legal rights, or the absence of certain legal rights, can be judged morally good or bad."[130]

---

128 *Id.*

129 Robert P. George, *Natural Law and Civil Rights: From Jefferson's "Letter to Henry Lee" to Martin Luther King's "Letter from Birmingham Jail,"* 43 CATH. UNIV. L. REV. 143, 145 (1993).

130 *Id.* at 144–45.

On the other hand, we can't act justly without law. This is because most questions of justice are not resolved entirely by the natural law. Aristotle explains that legal justice is "that which is originally indifferent, but when it has been laid down is not indifferent."[131] Aquinas later called these matters of determination, which are settled in part by principles of natural law and in larger part by the choice of whoever has authority to settle legal questions.[132] Natural law does not tell us whether we should drive on the left or right side of the road. On that question, natural law is indifferent. Nor does it tell us what should be the marginal income tax rate for a married couple filing jointly who earns $122,000 per year. To answer most questions of justice in our community, we need some just settlement, a conclusive rule or standard of decision. Law provides that.

Natural law jurists insist that, once law has settled a question of indifference, we all have a new obligation to obey the law's authoritative settlement (unless the settlement is directly contrary to a conclusive requirement of natural law).[133] If the law says that everyone must drive on the right side of the road then it is unjust to drive on the left side. To disobey the law is to place oneself above the law. It is to say to one's fellow citizens, *I think that I am entitled to more than the rest of you. I deserve to have all the benefits of living in a society governed by law, and I deserve to disobey the law when I disagree with it or when I find it inconvenient*. To flout the law in this way is a grievous act of injustice toward all the other members of one's political community. A lack of legal justice is the vice of lawlessness.

Because justice has two parts, we face a dilemma as we try to achieve justice. Justice seems to have a complicated relationship with law. Justice means obeying the law and enforcing it equally, with impartiality. Yet law is sometimes credibly accused of being unjust. We need law to achieve justice. Yet as we pursue justice, law sometimes gets in the way. Law speaks in general terms and does not always expressly direct the just result in particular cases, especially cases that the legislators did not anticipate.

This dilemma is not new. Aristotle discussed it more than two thousand years ago. Here is how he described it:

---

131 ARISTOTLE, *supra* note 100, bk. V, at 1134b20–22.

132 AQUINAS, *supra* note 66, pt. I-II, q. 95, art. 2.

133 *See* FINNIS, *supra* note 65, at 231–367.

> What creates the problem is that the equitable is just, but not the legally just but a correction of legal justice. The reason is that all law is universal but about some things it is not possible to make a universal statement which shall be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error. And it is none the less correct; for the error is in the law nor in the legislator but in the nature of the thing, since the matter of practical affairs is of this kind from the start.[134]

In short, we need law to tell us what is right and just to do. But the generality of law means that law cannot give us the perfectly just result in every case. Legal justice must be general and equally enforced, but laws cannot be made to anticipate every future case in which they might be applied. This is where equity comes in.[135] Equity answers the potential for law to be used as an instrument of injustice, which concerns deconstructionists.[136] But unlike deconstruction of the law, equity does not tear law down. Instead, equity completes the law, rendering it just in its particular applications. Equity is the charitable interpretation of law that enables law to remain consistent with the requirements of natural law.[137] Equity interprets the law to be consistent with the basic requirements of justice as defined by the fundamental doctrines of Roman, canon, civil, and common law, where such an interpretation is not foreclosed by the law's text.[138]

When judges apply the law to particular cases, justice requires that they apply the law equitably. As Aristotle expressed it:

> When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is

---

134 ARISTOTLE, *supra* note 100, bk. V, at 1137b10–20.

135 *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *431; 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA § 6, at 7 (Boston, Hilliard, Gray, & Co. 1836); Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050, 1068–69 (2021).

136 Balkin, *supra* note 29, at 730.

137 *See* Charles Grove Haines, *The Law of Nature in State and Federal Judicial Decisions*, 25 YALE L.J. 617, 621–23 (1916).

138 *See* STORY, *supra* note 135, at 18–19; Timothy S. Haskett, *The Medieval English Court of Chancery*, 14 L. & HIST. REV. 245, 256–68 (1996).

> right, where the legislator fails us and has erred by over simplicity, to correct the omission—to say what the legislator himself would have said had he been present, and would have put into his law if he had known.[139]

5.2. The Solution: The Rule of Law

Jurists worked out a solution to Aristotle's dilemma over the course of many centuries. The solution produced the rule of law, which marries law and equity and is therefore attentive to both legal justice and natural justice. The rule of law accepts the authority of law to govern human action in the community and directs equity to follow the law as it interprets and applies the law.

The rule of law is complicated. And conceptions of the rule of law are contested. Some conceptions of the rule of law focus on law's formal requirements, such that public laws must be promulgated, must be stable and administered consistently, and must not be ambiguous or impossible to obey.[140] Any official act that purports to be a law but does not satisfy those formal requirements does not deserve to be accepted as a law. Other, thicker conceptions of the rule of law assert inherent limitations on law that are substantive and not merely formal. For example, many American jurists have taught that not only retroactive but also retrospective laws are inherently unjust, and therefore, no law may deprive any person of a vested private right after it has vested.[141]

---

139 ARISTOTLE, *supra* note 100, bk. V, at 1137b20–24.

140 LON L. FULLER, THE MORALITY OF LAW 39 (1964); ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW 121 (1999).

141 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 319 (New York, O. Halsted 1826); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1398–99, at 272–274 (Melville M. Bigelow ed., Boston, Little, Brown, & Co., 5th ed. 1891) (1833); THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 357–413 (Boston, Little, Brown, & Co. 1868); Gordon S. Wood, *The Origins of Vested Rights in the Early Republic*, 85 VA. L. REV. 1421, 1442 (1999); Adam J. MacLeod, *Of Brutal Murder and Transcendental Sovereignty: The Meaning of Vested Private Rights*, 41 HARV. J.L. & PUB. POL'Y 253, 254 (2018); Adam J. MacLeod, *Vested Patents and Equal Justice*, 72 CATH. U. L. REV. 359, 396 (2023).

Despite their differences, the various conceptions of the rule of law share the conviction that law is not a mere product of power, as the deconstructionists assert. Whether one adheres to a thin or thick conception of the rule of law, the critical essence of the rule of law is that law is not merely what the most powerful people say it is. Some aspects of law are not contingent upon the words we use and the coercion we exercise against each other. On this view, at least some part of the law stands above everyone. In deconstructionist terms, law is not a "system" or "discursive regime" created by raw power. The fundamental doctrine of American law is that law is, at least in part, a pre-conventional reality.[142] Thus, John Adams, author of the most influential definition of the rule of law as something other than the rule of men, could intelligibly remark, "I study law as I do divinity and physic; and all of them as I do husbandry and mechanic arts, or the motions and revolutions of the heavenly bodies."[143]

Equity is an important part of the rule of law. It keeps law from perpetrating natural injustices. But equity is subsidiary to law. When exercising the power of equity, judges should discern the "true sense of the law," presuming that the legislatures who laid down the legal rule know the natural law and intended to achieve the reasonable, right, and just result in every case.[144] Equity presupposes what the Christian philosopher Thomas Aquinas called the "rectitude of law [and] of legal justice."[145] The law should never be interpreted to require an intrinsic wrong nor to forbid an act of justice unless the legislature expressly said that's what it intended.

---

142 James M. Ogden, *Lincoln's Early Impressions of the Law in Indiana*, 7 NOTRE DAME L. REV. 325, 328 (1932); ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW 249–54 (1966); Morris L. Cohen, *Thomas Jefferson Recommends a Course of Law Study*, 119 U. PA. L. REV. 823, 824 (1971); ROBERT A. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE 11–33 (1984); Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 2 (1996); HELMHOLZ, *supra* note 105, at 127–41; JAMES R. STONER JR., COMMON-LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM 22–23 (2003).

143 JOHN ADAMS, *On Private Revenge*, *in* THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 12, 14 (C. Bradley Thompson ed., 2000).

144 3 BLACKSTONE, *supra* note 135, at *431; 1 THOMAS AQUINAS, COMMENTARY ON THE NICOMACHEAN ETHICS 342–46 (C.I. Litzinger, trans., 1964); Roger Shiner, *Aristotle's Theory of Equity*, 12 LOY. L.A. L. REV. 1245, 1254–60 (1994).

145 AQUINAS, *supra* note 144, at 344.

So we have equity to correct the law in particular cases. But the power to render equity threatens to undo the law. This is a constant threat. Therefore, jurists have long insisted that equity must follow the law and must not be used to undermine legal rights and duties. Where the text of the law speaks clearly, judges and other officers of equity must follow the law in their decrees no less rigorously than courts of law do.[146] Equity always seeks to interpret and apply the law charitably. But equity does not defy the law.

The rule of law is not perfect. But it is the best way we have ever found to achieve justice. The law provides particular answers to our practical questions of justice. It directs our deliberations and actions as we attempt to render to every person what he or she is due as a matter of right. It tells us what is the marginal tax rate for a married couple filing jointly who earns $122,000 per year. It tells us when a property owner may exclude other people and when she must allow other people to access her land or her invention. These particular answers enable us to know what we owe to each other.

Once the law has answered our practical questions, we all have a duty to honor, respect, and obey those settled answers. And that duty to obey the law is a duty in justice. No one must be above the law. And no one must be placed below the law. Justice requires that we all act lawfully, that we all avoid the vice of lawlessness, and that we all act justly toward our fellow citizens by obeying the same laws that they obey.

6. Conclusion: The Rule of Law Completes Justice

The legal institutions that critical theorists today are busy deconstructing contain the very resources we need to achieve justice. When you take the elements of our legal institutions all together, you have human law giving specific content to natural law, and equity completing human law in its particular applications—legal justice and natural justice working together.[147] We can be lawful people *and* we can be just people. Indeed, we can be just people only by being lawful. This is how we render to each and every human being what he or she is due as a matter of right. That is what justice requires.

---

146 3 Blackstone *supra* note 135, at *430.

147 Aquinas, *supra* note 144, at 344–45; Haskett, *supra* note 138, at 267; Haines, *supra* note 137, at 621–23.