

“Transcendence and Finitude in Drucilla Cornell’s *Philosophy of the Limit*”

Roger Berkowitz

Bard College

berkowitz@bard.edu

**Forthcoming in “Memory, Imagination, Feminism. On Drucilla Cornell.”
(SUNY, 2006).

At the end of my first year of graduate school, I was bored. Faced with the reduction of thinking to politics on the one hand and the perversion of thinking into an indulgent pastime on the other, I was experiencing firsthand the anti-intellectualism that now pervades our elite colleges and universities. And yet, from out of the swamp that is the American academy, two discoveries gave me hope. One was the encounter with the thought of Martin Heidegger through my mentor in Berkeley, Philippe Nonet. The other was the work of Drucilla Cornell.

I had never heard of Cornell when I was assigned *The Philosophy of the Limit* in a seminar in the Berkeley Rhetoric department in 1992. What struck me in that book—struck me so hard that I sought out the author and, with her blessing, took a leave of absence from graduate school to journey back across the country to study with her for six months—what struck me was its *force of thinking*.

Philosophy and thinking matter for Cornell in the deepest sense of the word: philosophy itself “*does* have practical consequences; the practical consequences are precisely that law cannot *inevitably* shut out its challengers and prevent transformation, at least not on the basis that the law itself demands that it do so.” ((*Philosophy of the Limit*, [PL]165)) Unlike those who enlist philosophy in political causes, Cornell’s politics demands that she engage in the activity of

philosophy itself. By continually and rigorously pointing to the impossibility of a closed and actualized knowledge of the good, philosophy makes room for utopian dreams and justice. The force of philosophy is to open a space for living justly.

Her devotion to the forceful importance of the *idea* of justice has led Cornell to be called a dreamer, a utopian, and an idealist. She is unapologetically all three. But what is often forgotten is that Cornell's utopia is founded upon a relentless probing of her fundamental question: the possible unity of freedom and law—a unity that itself has its ground in the activity of thinking.

This paper situates Cornell's work within a specific tradition of thinking the belonging together of law and freedom. From Kant to Heidegger, the possibility of freedom amidst legal obligation is one of the central questions of political and ethical philosophy. Following both Kant and Heidegger, Cornell thinks freedom as the free embrace of obligation. At the same time, Cornell insists that contemporary thinkers take seriously the radical meaninglessness—the absence of both freedom and obligation—that threatens the modern condition. Suspicious of both Kant's turn to a universal law of reason and Heidegger's free embrace of man's finite legal inheritance, Cornell accepts the increasingly widespread view that all meaning and all law are without ground. What is needed, Cornell argues, is a freely accepted embrace of law within and amidst the recognition of radical nihilism. Her insistence that finite beings can and must live in the paradoxical state of commitment to law in the face of the fact of law's meaninglessness is the ethical center of her work.¹

Cornell's philosophical inquiries gather their force from her conviction that the force of thinking can and does change the world. The force of thinking, in other words, is an active force that furthers justice. However, to say that the philosophy of the limit is the active force of justice is to locate Cornell's thinking on the plane of ontology. This is to use a language that Cornell frequently does not. Yet, if the philosophy of the limit *is* justice, and if justice is that part of law that must be vigilantly protected in its distinction from law, then the philosophy of the limit is a characterization of the essential way in which the law *is*. Understood as the philosophy of the limit, law *is* the thinking of the absolute (the metaphysical dream of universal justice) from the position of human finitude (the limit). As one crossroads where the absolute and the finite meet in human experience, law is a space of paradox—a space of the necessary encounter of the impossible dream of justice.

Before law and freedom can happen in the space opened by the paradox of justice, justice itself must be freed from its particular manifestations. Cornell will never tire of showing us that no theory of justice can ever actualize justice in the world. Man's finitude, his radical inability to know the absolute and bring it to life, ensures that the communal project of transcendence must always remain an aspiration and thus without end. Law, like thinking, can never come to an end. It is for this reason that Cornell's thinking about law takes as its point of departure—and must do so—her critique of legal positivism in all of its motley modern manifestations.

Positivism

The philosophy of the limit, at once the title of Cornell's first book and her name for ethical philosophy, has many resonances. Overtly, it is the name that she gives to the aspect of deconstruction that carries forward the Kantian critical project. In this respect, the philosophy of the limit is thought from out of the fact of human finitude. More specifically, as a way of thinking about law for a finite being such as man, the philosophy of the limit gives voice to the demand that justice not be reduced to law.

[T]he philosophy of the limit protects the divide between law and justice, and protects justice from being encompassed by whatever convention described as the good of the community. (PL, 118)

If the philosophy of the limit means anything, it means the care for the difference between positive law and law as the manifestation of justice.

By simultaneously protecting justice against the encroachment of law while insisting that law recall its connection to justice, the philosophy of the limit offers one of the legal academy's most inspired critiques of positivism. What the dry word positivism names is the loss of the beyond. Positivism is the doctrine that asserts that truth and justice are, in the highest instance, determined by reasons; as rational, law is grounded upon either natural or social facts. This means that the

common claim that positive law emerges out of the drive for legal certainty is of only secondary importance. The desire for and belief in legal certainty is an outgrowth of a prior positivist understanding of the world—one that locates the source of law in scientifically knowable rational principles.

Positive laws, of course, are nothing new; the distinction between a natural ratio scripta and willful positive law is ancient. And yet, there are two ways in which the relation between rationalism and positivism can be conceived. First, positive law can be understood as the posited expression of a transcendent and esoteric justice. Second, positive law can be understood as the source of justice. The doctrine of legality, for example, asserts that justice is nothing other than the conformity with law (*Gesetzmäßigkeit*). If written law was traditionally understood as simply a positive expression of a true, just, and yet ineffable idea of the good, the distinctive characteristic of modern positive law is the absolute denial of the knowability and thus the power of the good. In its contemporary form, positive law is a way of knowing law that imagines justice to inhere in the posited law itself. As a social fact, justice is knowable, calculable, and useful. This is what is meant by the victory of positive law.²

Cornell's opposition to positivism may seem unremarkable given the fact that positivism has a largely pejorative connotation in American legal theory.³ It is important to see, however, that nearly all of the legal theorists who understand themselves to be anti-positivist critics of positivism are unwitting positivists. Stanley Fish, Jürgen Habermas, and Ronald Dworkin are Cornell's favored targets. What unites all of these critics of positivism as positivists is their

inability and unwillingness to hold open the possibility that justice has ethical force beyond its social and normative instantiation in laws, conventions, and norms.

Ronald Dworkin is perhaps the most surprising name on Cornell's list of positivist legal thinkers. Dworkin has made his reputation as a normative critic of H.L.A. Hart's legal positivism. Normative jurisprudence, however, has a double sense. While normative connotes moral or ethical principles, its root sense is normal. As a normalization, norms are regulative in the way that habits and usages form themselves, over time, into rules of normal conduct. For a normative thinker such as Dworkin, law has its source not in reason and not in the good, but in social norms.

Dworkin's normative theory fully accepts the basic positivist orientation that equates law and justice. Law, he argues, flows "from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the *community's legal practice*."⁴ Hercules, Dworkin's mythical judge, must judge according to a knowable principle of justice that is itself founded upon a norm of community behavior. Justice, in other words, is identified with existing social and legal norms. Insofar as Dworkin conflates justice with the best interpretation of community practices, he blurs the distinction between law and justice.

Similarly, Habermas blurs the distinction between the facticity of legal decisions and the validity of legal norms. Since legitimacy cannot be grounded in metaphysical or religious bonds, Habermas seeks legitimacy in the factual

decisions of procedural democracy. As Niklas Luhman has seen, Habermas seems to collapse the distinction between legality and legitimacy in favor of legality so that justice is identified with legitimacy guaranteed by existing legal norms.⁵ Similarly, Cornell sees the essence of Habermas's positivism in his belief that "majority rule is analogized to the search for truth by the community, grounded only in rational will-formation...."⁶ By denying any ideal of justice beyond the activity of legalist discourse, Habermas cannot but subordinate law to the social fact of legitimacy.

What unites Habermas and Dworkin as unwittingly positivist critics of positivism is their inability and unwillingness to hold open the possibility that justice has ethical force beyond its ultimately social and normative instantiation in laws, discourse, and norms. Since both Dworkin and Habermas root law in positive social practices, judges and legal actors are required to don rose-colored glasses to guide their legal interpretations.⁷ But the question remains: if the principles that guide interpretation are themselves grounded in communal practices and, in the end, a "pre-interpretive consensus,"⁸ how are Dworkin's Hercules and Habermas's ideal speech situation to escape the tyranny of actually existing social norms? In the end, Dworkin and Habermas both violate Cornell's first principle: to preserve the difference between existing positive laws and the ideal of justice. For Dworkin and Habermas, law and justice are the same.

The dominance of legal positivism ranges far beyond normative legal theorists like Dworkin and Habermas and includes as well practitioners of feminist and critical legal studies. Stanley Fish, for example, is named as the representative of

the “most recent and sophisticated brand of legal positivism...” (PL 158) As does much of contemporary jurisprudence, Fish begins with the claim of indeterminacy. Since there is no transcendental good that can constrain legal interpretation, judges are thrown back on their own best efforts to determine the good. And since these judges are socially constructed players within the system of legal rules and principles, there is no exit from the sociologically closed system of law. All legal decisions are just that, decisions, from which Fish concludes that justice, like the text of literature, has no meaningful existence. “For Fish,” Cornell writes, “the identification of law with justice is inevitable.” (PL 144)

Fish and other “indeterminist” legal theorists are so captivated by their joy in pointing out the indeterminacy of rules that they don’t bother to ask: why has the long-acknowledged fact of legal indeterminacy suddenly come to be seen as so important? This question is especially pertinent because for thousands of years of legal thinking, the indeterminacy of rules was not considered incompatible with just legal practice. From Plato’s Statesman to the twelve tables in Rome to the natural law of Kings, law has resisted the equally ancient desire that it be set into ordered and knowable rules. Rather than indeterminacy itself, the new claim of modern critical legal scholars is simply that the unavoidable openness of law is a sin.⁹

Cornell sees through the false radicalism of the indeterminacy thesis. As a result, she can reject the spurious conclusion that the indeterminacy of rules requires the absence of justice. (PL 101) Instead of pointing to the evacuation of justice from an indeterminate law, Cornell argues that the indeterminacy of rules

makes manifest that law cannot be reduced to positive law. Since “[I]nterpretation always takes us beyond the mere appeal to the status quo,” law “cannot be reduced to a self-generated and self-validating set of cognitive norms.” (PL 102) Fish does see law as just such a self-validating mechanism, a “machine” that “functions to erase the mystical foundations of its own authority.” (PL 158) Contra Fish, Cornell argues that the uncontroversial fact of indeterminacy means that justice can never be reduced to a mechanism of validation.

The mistake Fish makes—and here he is hardly distinguishable from Dworkin and Habermas—is to forget that the interpretation of law always demands an appeal to justice and the good beyond the law. Interpretative judgments, therefore, demand an attention to the distinction between law and justice. A positivist approach to law, in other words, is as impossible as it is dangerous.

The Absolute and the Community of Justice

Against positivism, Cornell insists upon the “aspiration to the ideal of community.” (PL, 40) While it might seem surprising to find Cornell idealizing community, her italicized emphasis on “*aspiration*” and the focus on the “*ideal*” of community radically separates her from advocates of communitarianism. The dream of community is—as an aspiration and an ideal—essentially different from community itself.

In her chapter “The ‘Postmodern’ Challenge to the Ideal of Community,” Cornell rehearses the abiding danger of community. As the source and ground of the norms underlying normative visions of positive law, claims of community

insist upon unity. Catholics, Jews, and Muslims are unified by necessary moral and theological commitments just as Americans, Israelis, and Saudis are unified by necessary legal and moral obligations. By privileging unity, communities set the whole above the individual and “can do violence to difference and particularity.” (PL 39)

Even Hegel, who seeks a “true unity” in which the community and each person accord each other reciprocal recognition, eventually sacrifices individual particularity and difference to the overwhelming identity of thinking. The ultimate priority of logic in Hegel’s system is itself grounded in Hegel’s commitment to the rationality of the world and its necessary ground in logic as the kind of thinking that offers grounds.¹⁰ Thus Hegel ultimately sacrifices particularity to the universality of reason and logic in a way that enables the political subordination of the individual to the community.¹¹

In spite of her deep suspicion of claims to community and unity, Cornell explicitly rejects calls to abandon the dream of community. On the contrary, the possibility of law and justice demands the universality of community. She writes: “law is embedded in ontology, in a shared social reality.” (PL 107) The law, in other words, requires a universal conception of the good that is only possible within a shared communal space. All law and all legal interpretation requires a “projection of a horizon of the good within the nomos of any given legal system....” (PL 93) The good, by which is meant justice as that which is not captured in positive law, is the claim of universal justice that, as universal, cannot exist apart from an idealized and communal unity of persons.

It is helpful to compare Cornell's cautious embrace of communalism with Aristotle's own cautious embrace of Plato's communism in the *Politics*. Against the Socratic proposal for the community of women and children in the *Republic*, Aristotle offers a qualified critique of his teacher. While granting that it is best for a community to be as unified as possible,¹² he writes:

if the process of unification advances beyond a certain point, the polis will not be a polis at all; for a polis essentially consists of a multitude of persons, and if its unification is carried beyond a certain point, the polis will be reduced to family and family to individual.... So that even if any lawgiver were able to unify the state, he must not do so, for he will destroy it in the process.¹³

Confronted with Plato's claim that the best polis is the most unified polis, Aristotle sees that the political unity of a community must allow for difference: "And not only does a city consist of a multitude of men, it consists of men differing in kind."¹⁴ The political community, in other words, must be unified in a way that allows for difference.¹⁵

What Aristotle makes manifest is that politics demands not simply a *unification* of a multitude, but the unification of *multitude*. As Cornell writes, borrowing from Martin Heidegger's discussion of the belonging together of man and being: to belong together as a plurality requires that we envision a new way of "belonging together," one that understands *belonging* together differently from

“belonging *together*.”¹⁶ (PL 45) Cornell’s gloss on Heidegger’s emphasis makes clear that what she seeks is a communal unity that does not simply accommodate difference, but welcomes and treasures what makes each person unique amidst their sameness.

Cornell’s effort to think *belonging* together differently is an attempt to “approach “diversity in unity.”” (PL 37) As she writes:

The power of communalism as a dream lies in the chance of uncovering or having revealed to us a different way of belonging together, which does not revert to classic individualism and which is also not just the identification of the individual with the community in mass society. (PL 60)

Communalism is thus Cornell’s ideal of the shared *belonging-togetherness* of a multitude that privileges belonging over togetherness. Such a belonging, however, cannot happen without a sense of the universal and the absolute as the aspirational ideal of communal life. Communalism, therefore, necessarily retains a non-positivist moment of idealism.

The ideal of communalism, “as an *ideal*, expresses the recognition of the sameness and difference that marks each one of us as an individual and thus as both different and the same.” (PL 60) Only if we are struck by the truth of our sameness as well as our difference is it possible that we can belong together in a

way that strives for the actualization of a communal nomos while also respecting the meaningful differences that separate us.

Whether such a belonging together is *really* possible is, of course, not centrally important for Cornell. As Cornell writes in *At the Heart of Freedom*, “A good definition of *utopian* is that what is possible cannot be known in advance of social transformation.”¹⁷ The utopian moment that pervades all of Cornell’s writing is neither a policy prescription nor a pie-in-the-sky fantasy. Instead, it is an argument for the centrality of imagination to human thinking.

The Transcendental Imagination and the Humility of Justice

Beyond the posited world of social fact, the aspirational nature of communal justice means that justice—at least when viewed from one side—*exists* as an imagined ideal. The ontological claim that justice is an imagined ideal cannot be minimized. Justice, as a call to the beyond of the real, is precisely that imagined ideal that is the condition of the possibility of communal being together. Togetherness, in other words, requires the transcendental imagination of the ideal of justice that unites a multitude into a people.

The specific path that the imaginary ideal takes toward transcendence shifts throughout Cornell’s work. In *Philosophy of the Limit*, the ideal is figured alternatively as “the Other” that marks the ethical relation (PL 99) and the “Good” as the “Law of the Law”, that is the responsibility to the other that calls us to justice. (PL 100) Later, in both *The Imaginary Domain* and *At the Heart of Freedom*, the form of the imaginary ideal is identified as the person.

The person, from the Latin *per-sonare* (literally, in English, to sound through), “is that which shines through. For a person to be able to shine through, she must first be able to imagine herself as whole even if she knows that she can never truly succeed in becoming whole....”¹⁸ The person, “as aspiration,... is a chance or opportunity.”¹⁹ The person is a “project that demands space for the renewal of the imagination and the concomitant re-imagining of who one is and who one seeks to become.”²⁰ Only by transcending oneself and going over to one’s imagined and ideal persona is the freedom to be oneself possible.

The freedom of finite persons depends upon persons becoming who they are. There is no freedom without the struggle for the ideal *persona*. To be whole requires that the finite person heed the call of the universal law—that which sounds through themselves—and move beyond themselves to their imagined true and universal self. The freedom of personhood, in other words, requires transcendence, a moving beyond oneself to an imagined ideal of oneself.

In founding her theory of the subject on the divided self of the transcendental person, Cornell makes clear her debt to Kant. Within Kant’s critical philosophy, the fact of human finitude raises the problem: If law is an absolute obligation and yet man is finite, how can man stand under the obligation of law without sacrificing his freedom? Kant’s answer, and Cornell’s as well, is to insist that legal obligation and subjective freedom are the same, united in the split nature of the person.

For Kant, the proof of the identity of freedom and obligation in the person is most economically accomplished in part two of the *Grundlegung zur Metaphysik*

der Sitten. The “ground” of the “highest practical principle,” Kant writes, is: “*die vernünftige Natur existiert als Zweck an sich selbst* (rational being exists as an end in itself).”²¹ This oft misunderstood statement depends upon the doubled understanding of a person as both a *rational* being and a rational being: the person is at once rational (thinking) and sensible (nature). As a rational being, every person is a split subject, both a natural *being* and a *rational* being. Since the purpose and end of a rational being is to be rational, and since it has its reason in itself as one part of itself, every rational being is an end—i.e. rational existence—in itself.

Insofar as man is an end for himself—in other words, man has an obligation to be whom he is—he is also a law for himself. Human autonomy means that “the will is not only set under laws, but is so set under, that it also must be seen as giving-itself-the-law and only thus is it subsumed under the laws (which it can consider itself to be the author of).”²² The Kantian idea of autonomy as self-lawgiving (*auto-nomos*) means that finite man must freely give himself the universal law as an absolute obligation.

Importantly, autonomous self-legislation is, for Kant, not the source of law; rather, autonomy is a necessary *effect* of man’s imagination of his rationality in the transcendental apperception.²³ Only in the imaginary moment of the transcendental apperception does mankind find himself to be rational—a finding of his imaginary self that he then sets as a law for himself. From out of the transcendental apperception of my rationality—the fact that “man actually finds in himself a power” of reason that “distinguishes him from all other

things”²⁴—Kantian man stands in awe of the beauty and power of his potential to be rational and of the possibility of a rational world. This awe (*Achtung*) for the universal law at once is the effect of a “finding” of the universal law and “necessitates” that I, at every moment, set myself under the law and “act out of awe for the law.”²⁵ The non-sensible feeling of awe, in other words, is the moral feeling itself that first makes it possible for man to be open to the law.²⁶ Only someone in awe of the beauty and rationality of universal law can give himself the moral law as an absolute obligation to obey the law, and—what is the same—to be himself.

Just as Kant embraces the transcendental imagination of an awe-inspiring rational law as the original bridge between our positivist-sensible and our imagined-rational selves, so too does Cornell see the imagination as the bridge between individualism and communalism. The imagination is the faculty through which individuals come to experience themselves as those beings who are, in their nature, transcending—as beings who are at once different from others and simultaneously united in their faculty of transcendence. In the face of human finitude, the transcendental imagination makes possible the “recognition of the connection between sameness and difference that allows us to understand belonging together without some overriding spirit in and through which we are connected.” (PL 60) It is through the power of imagination that finite beings can be turned towards the possibility of encountering and knowing others as both the same and as different.

Humility Before Awe: Cornell's Rational Critique of Reason

In spite of her deep and avowed Kantianism,²⁷ Cornell departs from Kant in her understanding of the transcendental imagination. Whereas Kant's rational subject stands in awe of the felt-but-unknown reality of the universal law, Cornell's rational subject bows humbly before the impossibility of knowing an other. In place of Kantian awe before the majesty of law, Cornell offers humility before the other. In the face of ineradicable difference, the ethical subject reacts with "humility" and "humor."²⁸ (PL 114-15) While she never makes the change from awe to humility explicit, Cornell's ambivalence towards Kant is inseparable from her ambivalence to the Kantian insistence on awe before the law as the essential transcendental feeling.

In substituting humility for awe, Cornell is clearly influenced by the work of Emmanuel Levinas. She quotes Levinas's characterization of reason itself as the name for the humble relationship of the *belonging* together of the subject with the other: "Reason consists in ensuring the coexistence of these terms [rb: the one and the other], the coherence of the one and the other despite their difference, in the unity of a theme; it ensures the agreement of the different terms without breaking up the present in which the theme is held."²⁹ (PL 107) Reason, Cornell argues, must acknowledge its humble incapacity to unify the subject or the community.

While Kant's awe and Cornell's humility share a basic grounding in finitude, Cornell suggests that her emphasis on humility avoids the lingering heteronomy of Kant's "morality of duty." (PL 99) Kant, she argues, seeks a pure ethic of duty

that rises above contamination by what is other. His insistence on the universality of law threatens to overcome the necessary humility in the face of the fact of the other that Cornell argues is essential to the ideal of ethical belonging together.

Against her suspicion of Kant's lingering universalism, Cornell writes:

The philosophy of the limit clearly guards the trace of otherness that resists assimilation and reduction to the selfsame.... To respect the Other as other and, therefore, as phenomenologically symmetrical to me is to respect the being of the Other. Even a "transcendental" ethics presupposes respect for the phenomena of the "being" of the Other. (PL 84-85)

The radical "phenomenological symmetry" of Cornell's ethics refuses Kantian universalism, even in the form of autonomy. Even as Kant's free subject gives himself to the law, he constitutes himself as subject: "The attempt to postulate such an independent, autonomous subject," Cornell writes, is, itself, "unethical." (PL 99)

The premise for Cornell's suspicion of Kantian reason is that reason, for Cornell, is inevitably limiting and oppressive. And yet, Kant's thinking of the transcendental imagination suggests that transcendental reason is, most originally, a spontaneous power of reason that cannot be conceptualized or argued over.

Kant announces: "Now man finds in himself a power through which he distinguishes himself from all other things—and even from himself insofar as he is affected by objects, and that is *reason*."³⁰ As a power that man "*finds*" in

himself, reason is neither an empirical intuition nor a rule of the understanding. Instead, as a “pure self-activity” (*reine Selbsttätigkeit*), reason stands above both sensibility and understanding.³¹ Against both conceptual understanding and empirical sensibility, reason

shows a spontaneity so pure that it goes far beyond anything sensibility can offer: it manifests its highest function in distinguishing the sensible and intelligible worlds from one another and so in marking out limits for understanding itself.³²

As an uncharacterized “third,” (“*dieses Dritte*,” and not a third term as Paton misleadingly renders it),³³ reason is the unknown and unknowable transcendental-imaginary ground of sensibility, understanding, and of all knowledge in general.³⁴ Nowhere in his critical work does Kant endeavor to name the content of the universal law of reason. On the contrary, reason, like freedom, “is a mere idea” that “can never admit of full comprehension.”³⁵ For Kant, reason is a pure spontaneous non-sensible feeling of the transcendental imagination, which, by awakening awe, gives rise to the moral law of obligation that is rendered in the categorical imperative.

Against Kant’s grounding of freedom on reason, however, Cornell insists upon separating freedom from reason precisely because the awesome power of reason threatens to overwhelm freedom. “Human freedom,” she writes, “is not to be found in the human capacity to act according to the dictates of reason....” (PL

28) While Kant finds our call to reason to be the ultimate freedom—either to act rationally or not—Cornell argues that even the call to reason as law is anathema to the freedom of the ethical subject. The very effect of reason, its awesome causality that commands the person to set himself under the law, “corrupts freedom into obedience.” (PL 31) In her re-thinking of freedom, Cornell insists upon the pursuit of community not-grounded in reason.

In place of reason that risks imposing a law of command, Cornell seeks to build her free community on sympathetic grounds. Cornell argues that “[h]uman freedom... is not to be found in the human capacity to act according to the dictates of reason.” (PL 28) Instead, human freedom comes to work most essentially in relation to a suffering other. As she intones (quoting Adorno): “the need to let suffering speak is the condition of all truth.”³⁶ Only by giving voice to the suffering and the corollary demand to give ear to what suffering says can we prepare ourselves for truth. Truth and justice reimagined are made possible only in the hearing of suffering.

The dream to let suffering speak in the name of truth cannot be separated from Cornell’s opposition to positivism. Since “the very materiality of human existence demands a socially realized freedom in which want, in its extreme form, has been eliminated,” the “idea of freedom is entwined with the experience of unfreedom.” (PL 32, 33) Suffering disrupts all systemic claims of truth and identity and ensures the “disjuncture between reality and utopia.” (PL 16) Suffering, therefore, manifests the illusory nature of the dreams of both truth and justice.

Even as suffering works to demystify ideals, it also serves as the foundation for new ideals and new truths. To give voice to suffering does not mean that we forsake the futile struggle to be at home in the world. (PL 16) Instead, the disruption of the suffering other can “illuminate our state of homelessness [so] that we can begin to glimpse through the cracks and the crevices what it would be to be at home in the world.” (PL 16) Suffering is the gateway to the idealized community of belonging together.

The vigor with which Cornell seeks to protect not only the suffering other but also the persona of the subject from any and all conceptualization raises questions, however, about her desire to rethink the “status of reconstruction.” Every attempt to exercise reason in the name of justice risks doing injustice through an unethical constitution of the subject. As she writes, quoting Ingeborg Bachmann, in the last line of *The Philosophy of the Limit*: “That’s why [justice] is simultaneously both oppressive and near, but in the nearness, we call it injustice.”³⁷ (PL 183) The paradox of justice is that it must be unceasingly pursued and even so steadfastly avoided.

The Paradox of Justice

In spite of her suspicion of reason, Cornell does not fully reject reason and the conceptual understanding of truth. Instead of the irrationalism favored by many critical theorists, Cornell stakes a claim to reason, albeit reason understood as “a practical faith.” (PL 107) To set reason alongside its usual antagonist, faith, may seem to invite contradiction; in Cornell’s writing, however, the faith of

reason names the infinite and impossible responsibility to see in the other someone with whom I belong together amidst our differences. To live in the paradox of finitude and community, the philosophy of the limit

demands that we think about the status of reconstruction differently. More specifically, it demands that we think through the realization that justice can never be reduced to the conventions of what “is.” This effort is philosophical precisely insofar as it refuses to replace philosophy with sociology. (PL 181)

What philosophy—as opposed to positivist sociology—requires is the suspicion of all normative claims of social justice and, more importantly, an ever-vigilant readiness to live “in the throes of this paradox.” (PL 134) To “be just with justice” means to resist the urge to know and master justice, and to hear the call of justice as “a simple command and an infinite responsibility.” (PL 154)

The embrace of the paradox of transcendence and finitude is what Cornell names justice. Justice requires the acceptance of the irresolvable conflict: “To be just, is to be in the throes of a paradox.” (PL 134) Instead of seeking to overcome the paradox of finitude and the aspiration for community, Cornell counsels that justice requires that we resist the urge to “deparadoxicalization.” (PL 118) The dream of community compels the creation “of unified meaning through the establishment of generalizable or universalizable standards.” (PL 104) And the law of finitude ensures that, because “the Good can never be simply identified

with a state of affairs, ... we need not fear its oppressive power to obliterate difference.” (PL 104-05) Absent a universalizable and knowable concept of the good, we are left, in the end, with a paradoxical and limited injunction to act with regard to practical reason.

The strength of Cornell’s thinking is found here in willingness to live within the paradox of justice. Instead of seeking to resolve the paradox, Cornell has sought to articulate the legal and institutional means that would allow us to endure the tragic inevitability of injustice in the pursuit of justice. First and foremost, living amidst the foreclosed demand for justice requires that each person be free for and capable of practical reason as an aspiration. For Cornell, in other words, the success of the deconstructive and epistemological critique of justice leads to a constructive reimagination of the very nature of justice itself.

Finitude, Transcendence, and Freedom: Cornell and Heidegger

The insistence on the paradoxical essence of justice emerges from Cornell’s fundamental effort to think the belonging together of finite human freedom with transcendent law. Following Kant—especially the Kant of the first edition of the *Critique of Pure Reason*—Cornell argues that rational ideals have their source in the imagination. It is these imaginary ideals that she suggests offer a possibility of judgment that both free and lawful. The imaginary nature of ideals combined with the acceptance of the paradoxical nature of just yet unjust ideals are, together, thought to ensure that freedom can coexist with lawfulness.

What needs to be questioned, however, in Cornell's turn to imaginary ideals, is her continued faith in the conceptualization of ideas at all, whether rational, empirical, or imaginary. In spite of her insight into the impossibility of objectively true judgments, Cornell continues to speak of ideals of justice. Whether she writes of the ideal of preserving feminine sexual difference or the respecting of human dignity, Cornell insists on the need to name ideals of justice. Communalism, Cornell writes, is an "ideal." Similarly, the persona is an aspiration. In this way, truth, for Cornell as Derrida and all those who offer epistemologically-based critiques of the western canon, is still thematized as something correct, something that can be known, or, even if it can't be known by finite intellects, is knowable. Truth, in other words, continues to be understood as question of the validity of a proposition—albeit a validity of an ideal that is ultimately foreclosed.

In holding on to the ideal of objectively true judgments in the face of their impossibility, Cornell shuns the Heideggerian move to put the conceptual understanding of truth itself into question. Whereas Heidegger comes to see truth as the happening of the historical (*geschichtlich*) inheritance of a people that is revealed in the striving between concealment and unconcealment that happens in, for example, the work of art, the experience of the thinking, or the founding deed of a polity, Cornell will insist that truths exist. Even as the philosophy of the limit teaches that truths can't be finally known, it commits one to the search for truths that are politically and ethically imagined as future aspirations. Against Heidegger, Cornell insists that we not abandon the political and metaphysical

struggle to define truth. It is here, in Cornell's confrontation with Heidegger, that her work becomes at once most questionable and most worthy of questioning.

It is worth returning to the Heideggerian account of "*belonging together*" that Cornell cites from Heidegger's essay "Identity and Difference." Instead of thinking "belonging *together* in the customary way," in which the "meaning of belong is determined by the word together, that is, by its unity," Heidegger suggests that "belonging together can also be thought of as *belonging together*."³⁸ The shift in emphasis reflects the need to free belonging from the unity of a system. Instead, "the "together" is now determined by the belonging." (PL 29)

Insofar as Cornell brings Heidegger's meditation on "belonging together" to the question of "diversity in unity", she transposes Heidegger's thought into a realm foreign to it. For Heidegger is not speaking about the relation between an "I" and an ethical ideal of a 'we.'³⁹ There is no thought in Heidegger of how best to constitute a polity or an ideal community. Man, he writes, is never a subject that aims for some object or end.⁴⁰ Instead, Heidegger is referring to the relation between man (*Dasein*) and being (*das Sein*) in which man holds himself in the open of being as the being who is called upon by being to do so. Such a belonging together is not to be known as an ideal, Heidegger writes, but must be experienced as one's own: the event or happening of ownness (*das Ereignis*), of the belonging together of man and being as historically given (*geschichtlich*), is, he writes, the "experience of thinking."⁴¹

That Heidegger speaks of the experience of thinking and not the community of justice is not accidental. Above all, he strives to avoid all thinking

of “belonging together” that is governed by political, rational, or technical ends. As will Cornell, Heidegger insists that any attempt to lend normative weight to a theory or understanding of justice violates human finitude and risks foreclosing other possibilities of truth and justice. Attention to human finitude demands that we be aware that every attempt to institute justice carries with it the possibility and even the need for injustice.⁴²

In *Being and Time*, finitude is part of the ontological heritage of man as a being who is in time.⁴³ The finitude of man is not a result of his mortality, but is a result of his essential relatedness to beings and to being itself. As Dasein (“being there”), man must step out beyond himself into the world. Dasein, therefore, is man as the finite being who can and must transcend his finitude in its holding itself open to beings and being.⁴⁴ And as a being that steps over into the world, *Dasein’s* transcendence is his freedom: as Hans Ruin has written, “The stepping over –*Überstieg*—toward the world is freedom itself.”⁴⁵ Insofar as *Dasein* transcends his finitude and opens himself to the world, he holds himself there and frees himself for his fate.

By the mid to late 1930s, Heidegger distances himself from his earlier connection of finitude with transcendence and freedom. In his early understanding of Dasein as the being who transcends and opens the possibility for freedom, Heidegger—at least to some degree—remained trapped in the very subjectivist worldview he was struggling against. Freedom, as Heidegger understands its persistence in the idealist tradition from Kant through Schelling, is the demand that a willing subject grounds its relation to the absolute. Such a

grounding is infused with the idea of the activity of a willing subject. Thus, to make freedom a doing of man is to say that man is the ground and the cause of being as well as of beings; in other words, man, as the site of freedom, remains the ground and maker of all things.

Heidegger's early emphasis on transcendence and freedom are, insofar as they imagine freedom to be a property of man, infused by the technical thinking that he identifies as the gravest of dangers. The essence of technique is that all beings are summoned forth (*herausfördert*) for some end and according to some principle. Insofar as things come to be for some end, things lose their natural and customary existence. And insofar as man is a being, man too is summoned forth in such a way that he loses any connection to his original or natural way of being. While we may try to think of the dignity of man, doing so is always today a choice in reaction against the prevalent understanding of all persons as human resources. Indeed, the first glimpse that we today have of the belonging together of man and being is in the experience of the reciprocal summoning forth of beings that is the gift of being that Heidegger sees as the essence of the modern technical world.⁴⁶

It is possible that the reciprocal summoning forth of man and being will address us in such a way as to return us to a more original way of the being together of man and being. Such a leap out of the perils of calculating thought, however, is ever less likely so long as man strives to moderate and control the technical powers that he wields. "As long as the sensibility of the atomic age, earnestly and responsibly, only drives towards the peaceful use of nuclear energy

and will only be content with that goal, then thinking goes only half way.

Through this half-ness is the technical world only secured and furthered in its metaphysical predominance.”⁴⁷ What Heidegger insists upon is that the escape from the technical world is not up to us. Our efforts to bridle our technical use of technology will not, in the end, save us from the sway of technique. We must accept that our thinking and our doing happens in a tradition that is given to us.

Freedom, Heidegger insists, is not man’s act of grounding himself or giving himself to an ideal and universal law. Instead, freedom is a way of being in which man endures his relation to being as that which is given to him as his fate.⁴⁸

Freedom is “*Unbegreiflich*,” which means both that it is not graspable by man and that it exceeds all effort at conceptualization.⁴⁹ As that which belongs not to man but to being, freedom is the “knowing standing-in” (*Innestehen*) in which man stands in the open as “an historical being” (*ein Geschichtlicher*), one who is “to meet his fate, to endure it and take it into himself and for himself.”⁵⁰ Against the idealist tradition in which freedom, as the will of a subject, is the site of man’s capacity to control and legislate his destiny, Heidegger reconceives freedom as the enduring of fate that frees us to think the future in a way free from all willing and planning.⁵¹

Precisely here, where Heidegger gestures towards the abandonment of all political struggle and the preparation of oneself for the experience of thinking, Cornell rebels. Against Heidegger, Cornell resists the move to thinking as a flight from will. Whereas Heidegger argues that we must bind ourselves to “existing bonds,”⁵² Cornell dreams of a better future. If Heidegger locates the possibility of

a new founding in the thoughtful confrontation with the essence of technique, Cornell insists that we not foreclose the possibility of improving or bettering our world. Whereas Heidegger speaks of a leap into a new beginning, Cornell struggles to reimagine what we have. In the face of Heidegger's effort to historicize the destiny of modern man, Cornell fights to save the man of reason and technical calculation, even if, as shown above, she recoils from reason's violence and seeks to re-imagine reason along the lines of a practical faith. While Heidegger offers the possibility of letting-be of rational metaphysics in the turn towards the work of art, Cornell calls for a confrontation with and a rethinking of reason that heeds the call of the suffering other.

Cornell's response to Heidegger's challenge—for asking is the fitness of thinking—is to insist that we do not have the luxury of asking and waiting. Against Heidegger's valorization of questioning and thinking, Cornell offers the active practice of loving: "If thinking demands we live in anxiety, love demands we accept the relation to tragedy."⁵³ Faced with the tragedy of suffering and injustice, man must act and struggle and fight to actualize justice. There is, for Cornell, an ethical imperative to act in the name of justice, even in the face of the possibility that all action risks reinstating an ideal of justice that threatens itself to justify injustice.

Here is where Cornell makes the choice that first drew me to her work. Her courage as a thinker is manifest in her willingness to fight for the good as possible and necessary in spite of its necessary impossibility. She embraces a paradoxical possibility, since even the impossibility of the good must itself be a limited

concept and not absolute. From her opposition to the war in Iraq and the bombing in Afghanistan, to her engagement with legal questions from abortion to sexual harassment, and her committed feminism, Cornell demands that philosophy enable rather than disable political engagement. In doing so, Cornell consciously runs the risk that speaking and advocating for ideals of justice will both have unexpected and undesirable consequences and, more importantly, contribute to the very forgetfulness of our finitude that the philosophy of the limit strives to recall.

Without mitigating these risks, Cornell acts through her thinking, spurred by her conviction that not acting in the face of injustice is inexcusable. The harder she holds fast to man's finite incapacity to speak or know of absolute truth, the more stubbornly she insists that justice demands the speaking of truth in the face of its impossibility. There is no jumping over the shadow of human finitude, and yet, the dignity and power of Cornell's thinking is that she knows this and nevertheless refuses to shirk from the jump.⁵⁴ Just as Kant, "despite everything, holds fast" to the idea that true knowledge "is grounded in principles" that can't be known,⁵⁵ so too does Cornell insist that justice demands a reconstruction of ideals that, in the end, cannot be defended.

The good must be spoken; that is Cornell's challenge in the face of her truth that the good can never be known.

¹ Correspondence with Davide Panagia and Fredrik Westerlund, two readers of earlier drafts of this paper, both contributed to my own formulation of Cornell's central problematic in this paragraph.

² I offer a genealogy of the victory of positive law and show how positive law is a corollary of the rise of legal science in my book The Gift of Science: Leibniz and the Foundation of Modern Law (Cambridge, MA: Harvard University Press, 2005).

³ Anthony Sebok, Legal Positivism in American Jurisprudence (New York: Cambridge University Press, 1998), 2. See also, Frederick Schauer Positivism as Pariah, in The Autonomy of Law: Essays in Legal Positivism, ed. by Robert George, 1996.

⁴ Ronald Dworkin, Law's Empire (Cambridge, MA: Harvard University Press, 1986), 225. (emphasis added).

⁵ Jürgen Habermas, Between Facts and Norms, trans. William Rehg (Cambridge, Massachusetts: The MIT Press, 1998). See also, Niklas Luhmann, "Quod Omnes Tangit," in Habermas on Law and Democracy, ed. and Andrew Arato Michel Rosenfeld, (Berkeley: University of California Press, 1998).

⁶ "Response to Thomas McCarthy: The Political Alliance Between Ethical Feminism and Rawls's Kantian Constructivism," in Constellations, v. 2 (1995) p. 204.

⁷ See generally, Dworkin, Law's Empire, 225.

⁸ Id., at pg. 65 ff. See Drucilla Cornell, "Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation," University of Pennsylvania Law Review 136 (1988): 1170.

⁹ For an excellent account of the impossible efforts to order law throughout history, see Rainer Maria Kiesow, Das Alphabet des Rechts (Frankfurt am Main: Fischer Taschenbuch Verlag, 2004).

¹⁰ Martin Heidegger, "Die onto-Theo-Logische Verfassung Der Metaphysik," in Identity and Difference, ed. Joan Stanbaugh, (Chicago: University of Chicago Press, 1969), 126.

¹¹ See, e.g., the excellent discussion of Hegel's approach to Jewish emancipation in, Patchen Markell, Bound by Recognition (Princeton: Princeton University Press, 2003), chp. 5.

¹² Aristotle, Politics, ed. G.P. Goold, trans. H. Rackham, vol. Aristotle: XXI (Cambridge: Harvard University Press, 1998), 1261b16-18.

¹³ Ibid., 1261a17-24.

¹⁴ Ibid., 1261a24.

¹⁵ On this point, see the excellent discussion in, Jill Frank, A Democracy of Distinction (Chicago: University of Chicago Press, 2004), 143 ff.

¹⁶ See Martin Heidegger, "Der Satz Der Identität," in Identity and Difference, ed. Joan Stanbaugh, (Chicago: University of Chicago Press, 1969), 92. (emphasis in both Heidegger and Cornell). Heidegger's thinking of the essence of belonging in Er-eignis brings him, of course, to a much different place than Cornell's use of his distinction. In an important way, however, Heidegger's idea of Ereignis as the

event of the open where being shows itself to man is the necessary condition for the kind of free belonging together that Cornell transposes to the legal and political realms. See *infra*, at n. xx.

¹⁷ Drucilla Cornell, At the Heart of Freedom (Princeton: 1998), 185.

¹⁸ Drucilla Cornell, Imaginary Domain (Routledge, 1995), 4-5.

¹⁹ *Ibid.*, 5.

²⁰ *Ibid.*

²¹ Immanuel Kant, Grundlegung Zur Metaphysik Der Sitten, ed., Karl Vorländer, (Hamburg: Felix Meiner, 1965), 429.

²² *Ibid.*, 431.

²³ *Ibid.*

²⁴ *Ibid.*, 452.

²⁵ *Ibid.*, 400.

²⁶ Martin Heidegger, Kant Und Das Problem Der Metaphysik (Frankfurt am Main: Vittorio Klostermann, 1975), 151.

²⁷ Drucilla Cornell, "Response to Thomas Mccarthy: The Political Alliance between Ethical Feminism and Rawls's Kantian Constructivism," Constellations 2, no. 2 (1995).

²⁸ Interestingly, Cornell largely ignores her reference to humor in The Philosophy of the Limit and in her later work.

²⁹ Citing Emmanuel Levinas, Otherwise than Being or Beyond Essence, trans. Alphonso Lingis (1991), pg. 165.

³⁰ Kant, Grundlegung Zur Metaphysik Der Sitten, 452.

³¹ Ibid.

³² Ibid.

³³ Ibid., 447.

³⁴ See Heidegger, Kant Und Das Problem Der Metaphysik, §31.

³⁵ Kant, Grundlegung Zur Metaphysik Der Sitten, 459.

³⁶ Cornell sets Adorno's line—"The need to let suffering speak is the condition of all truth,"—as the epigraph to her first chapter.

³⁷ Citing Ingeborg Bachmann's novel, Malina.

³⁸ Heidegger, "Der Satz Der Identität," 92.

³⁹ See also, Martin Heidegger, Über Den Humanismus (Frankfurt am Main: Vittorio Klostermann, 1949), 35-36.

⁴⁰ Ibid.

⁴¹ "Die Einfahrt in den Bereich dieser Übereignung stimmt und be-stimmt erst die Erfahrung des Denkens." Heidegger, "Der Satz Der Identität," 97.

⁴² Markell, Bound by Recognition, 4-5.

⁴³ Martin Heidegger, Sein Und Zeit (Tübingen: max Niemeyer Verlag GmbH & Co. KG, 1993), 329-30.

⁴⁴ In his 1929 essay, Vom Wesen des Grundes, Heidegger even suggests that the first part of Being and Time is "nothing but a project of the concrete-uncovering of transcendence." Martin Heidegger, "Vom Wesen Des Grundes," in Wegmarken, (Frankfurt am Main: Vittorio Klostermann, 1967), 162n.59.

⁴⁵ Hans Ruin, "The Destiny of Freedom-in Heidegger" (2004), 6-7. (Paper presented at the Collegium Phaenomenologicum in Citta di Castello, 2004. Paper on file with author). See Heidegger, "Vom Wesen Des Grundes," 163 ff.

⁴⁶ Heidegger, "Der Satz Der Identität," 103.

⁴⁷ Ibid., 105.

⁴⁸ Ruin, "The Destiny of Freedom-in Heidegger", 17. (Paper presented at the Collegium Phaenomenologicum in Citta di Castello, 2004. Paper on file with author)

⁴⁹ Martin Heidegger, Schellings Abhandlung Über Das Wesen Der Menschlichen Freiheit (Tübingen: Max Niemeyer Verlag, 1995), 195-96.

⁵⁰ Ibid., 196.

⁵¹ Heidegger, "Der Satz Der Identität," 106.

⁵² Heidegger, Über Den Humanismus, 38.

⁵³ Drucilla Cornell, Transformations: Recollective Imagination and Sexual Difference (Routledge, 1993), 56.

⁵⁴ See Martin Heidegger, Die Frage Nach Dem Ding, 3rd, durchgesehene Auflage ed. (Tübingen: Max Niemeyer Verlag, 1987), 118.

⁵⁵ Ibid., 132.