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REDEFINING VIOLENCE: SOME THOUGHTS ABOUT JUSTICE, POWER, PEACE, RESPECT, AND THE FABRIC OF OUR SOCIAL EXPERIENCE

SHARON S. HARZENSKI*

Reasoning which proceeds without regard for the dignity of all people is corrupted in its inception.¹ Pure good cannot come of it

* Professor of Law, Beasley School of Law, Temple University. BS, Kean College, 1965. JD, Temple University School of Law, 1974; LLM, Yale University, 1975. To write I am obliged to dedicate. To dedicate I am obliged to acknowledge. To acknowledge requires more than what is usual. The brief poem which follows is, as are other attempts at poetic expression in this document, my own creation. This footnote, this poem, speaks of my gratitude for those, from Tibet, who have come here as teachers.

Books broken open

Welcome is spoken

Word seeds come to flower

The new home has a door and is entered.

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1. See W. MICHAEL REISMAN & AARON M. SCHREIBER, JURISPRUDENCE, UNDERSTANDING AND SHAPING THE LAW 113 (1987) (quoting Thoreau who said "action from the principal, the perception and performance of a right, changes things and relations . . . it divides the individual, separating the diabolical from the divine."); see also *id.* at 119 (quoting Dr. Martin Luther King, Jr., who said that "any law that uplifts human personality is just. Any law that degrades human personality is unjust."); *id.* at 84 (quoting Socrates who said that

for I am and always have been one of those natures who must be guided by reason, whatever reason may be which upon reflection appears to be to be the best; and now that this chance has befallen me, I cannot repudiate my own words: the principles which I have hitherto honored and reversed I still honor, and unless we can at once find other and better principles, I am certain to agree with you.);

Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy*, 52 YALE L.J. 203, 214 (1943) (noting that "in a democratic society a policy maker must determine which adjustments of human relationships are in fact compatible with the realization of democratic ideals."); Harold D. Lasswell & Myres S. McDougal, *Criteria for a Theory About Law*, 44 S. CAL. L. REV. 362, 374-94 (1971) [hereinafter Lasswell & McDougal, *Theory About Law*] (stating that human dignity is a guiding principle); GREGORY BATESON, STEPS TO AN ECOLOGY OF MIND 159-65 (1972) (arguing that treating people as tools and things leads to destructive habits of thought). Bateson suggests directional, not goal oriented, operations are respectful of the moral authority of the human spirit. See *id.*

306 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 9:2]

because it is inappropriately oriented or grounded.²

What is not pure is tainted. What is tainted carries seeds of injury. Injury is harm. Harm is pain. Pain disrupts peace, violates good order. Pain calls attention to itself, demanding relief, release.³ It announces a need for remediation.

When an injury is severe enough, when the harm is great enough, pain does not seep from wounds. It screams. A serious enough injury can command an entire organism. It can become the voice, the brain, the very heart of awareness.⁴

Through the infliction of injury, pain invades consciousness.⁵ Whether I am injured by a deadly weapon, brought to extreme pain by feet and fists, whether the pain comes first from the rape which invades my body, and only later from the rape that invades my integrity, or first from the fear of exposure to violence, and only later from brutal physical trauma, whether the pain comes from verbal abuse or mental torment, whether it flows from intentional cruelty, careless degradation or ignorant disregard for the another's integrity, pain when it comes strips me of peace.⁶

Simple discomfort stimulates corrective strategies. Severe discomfort evokes more dramatic machinations. Discomfort, which rises to pain, produces stronger responses. Pain demands.

When pain demands attention and is denied, at least sometimes when that happens, all hell breaks loose.⁷ When all hell breaks loose

2. See BATESON, *supra* note 1, at 469-75 (reporting that the Treaty of Versailles was an instigation to World War II).

3. See THE FREUD READER 595 (Peter Gay ed., 1989) [hereinafter FREUD READER] (identifying that "unpleasure corresponds to an increase in the quantity of excitation and pleasure to a diminution.") (emphasis omitted); see also *id.* (suggesting that "the mental apparatus endeavours [sic] to keep the quantity of excitation present in it as low as possible."); *id.* (commenting that because pleasure corresponds to decreased mental excitations and unpleasure corresponds to increasing mental excitations, the release of excitation the release of unpleasure, is the release of tension); *id.* at 602 (referring to the release, at least after buildup, as "discharge"); *id.* at 606-07 (noting that Freud describes a "protective shield" preventing consciousness of each and every episode of excitational buildup and discharge).

4. See FREUD READER, *supra* note 3, at 607 (characterizing the breakthrough of excitation as an "invasion"); see also *id.* at 608 (describing how the flood of cathectic has a series of effects such as paralyzing processes, impoverishing, slowing down or halting other systems, and when severe enough it can give rise to a "very violent phenomena of discharge").

5. See *id.* (describing the effects of physical pain).

6. See SIGMUND FREUD, NEW INTRODUCTORY LECTURES ON PSYCHO-ANALYSIS 93-94 (1965) [hereinafter FREUD, PSYCHO-ANALYSIS] (commenting that the same build up, break through and cathetic flooding experience associated with an invasion of extreme excitation described for pain similarly describes anxiety reactions).

7. I suppose the break out of neurotic symptoms is not necessarily demonstrative of the truth of the statement that "all hell breaks loose." However, I believe it is demonstrative of the claim that these processes run their course and that the courses run by these processes are known to us, and recognized by us, as potentially debilitating if not downright horrific. See FREUD READER, *supra* note 3, at 88 (explaining that the nervous system is the inheritor of the

no one would question the presence of violence.⁸

What I bring to this discussion are some pieces of a puzzle. I have been working on the puzzle for a long time. I do not think you need to know the origins and I do not think you need to know much more about the puzzle to appreciate the pieces I have selected to share with you. Most of the pieces included here come from a book, still in draft form, on power and justice. What we thought, when we thought of the benefits of offering these pieces in the context of Redefining Violence, is that exploring impressionistically some aspects of the relationship between power and justice might bring into focus aspects, attributes, elements, and considerations of violence that might otherwise remain obscure.

Anyone hoping to elicit clarity from muddledness is ambitious.⁹ Ambition connotes power.¹⁰ Power is spiked with violence.¹¹

You are lawyers. Among my peers I am duty bound to “prove” the truth of statements. We might as well start here with this cautionary word. I am willing, and I hope, able to reveal my reasoning on or about a topic. I did not write the material you are about to read imagining or wishing to prove anything to anyone. If you maintain an “on guard” position, anticipating or hoping for proofs, which will require contention or acquiescence, you will be disappointed. What I am inviting you to do is to join with me as we think about power, justice and the pernicious influence of violence.

The material is divided into six sections. Each section is introduced by a series of short statements. The material within each section is subdivided into segments that vary in length from one

general irritability of all protoplasm, and that the the nervous system functions to discharge); *id.* at 96 (indicating that hysteria can be linked to the same discharge process).

8. See NARRATIVE, VIOLENCE, AND THE LAW, THE ESSAYS OF ROBERT COVER 205 (Martha Minow et al. eds., 1992) [hereinafter COVER] (stating that “prolonged pain does not simply resist language but actively destroys it, bringing about . . . a state anterior to language, to the sounds and cries a human being makes before language is learned.”) (quoting ELAINE SCARRY, *THE BODY IN PAIN* 4 (1985)).

9. See BATESON, *supra* note 1, at 3-8 (finding that muddledness is something that cannot easily be put into order).

10. See RALPH GUN HOY SIU, *THE CRAFT OF POWER* 35 (1979) (observing that “anyone with a . . . drive to accomplish anything wants to and does exercise power of one kind or another.”).

11. See NICCOLO MACHIAVELLI, *THE PRINCE* 7-8 (David Wootton ed., 1995) (noting that the prince has no trouble equating power, force and violence). “A prince . . . must make himself the chief protector of smaller neighboring powers . . . endeavor to weaken the most powerful, and take care [against] stranger[s] equally powerful with himself.” *Id.* See also *id.* at 63 (stating that “[a] prince . . . who is not master of the art of war . . . cannot be respected”); COVER, *supra* note 8, at 143 (positing that “a judicial interpretation is authoritative in the sense that it legitimates the use of force.”). The author points out that “judges are people of violence,” *id.* at 155, and argues that “the violence which judges deploy as instruments of a modern nation-state necessarily engages anyone who interprets the law in a course of conduct that entails either the perpetration or suffering of this violence.” *Id.* at 203.

308 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 9:2

paragraph to several pages. These segments have been lifted, and subjected to substantial editing, from the book on power and justice which is the source for this work.¹² Sections I, IV, and V are taken from the chapters in the book concerning power. Sections II and III are taken from the justice-focused material. Section VI mixes both power and justice sources.

I

Power is spiked with violence.
It goes to your head.

About inebriates, Buddha warned,
they lessened the capacity for self-recollection, for moral,
ethical, principled, behavior.

What is at stake here is your integrity and the integrity of
everyone you come in contact with.
Assuming you care at all, that is no small thing.¹³

a

What is the difference between power and an adrenaline rush? If you do not know you are in for some difficult times.

The confusion seems to be prevalent. People easily mistake the high of victory, the kick of getting over on others, the sweet feeling of one upmanship with a meaningful exercise of power.¹⁴ Of course, winning can be thrilling. The sources or causes of confusion can be hard to pin down. Getting a judge or jury to accept your version of a case is an undeniable exercise of power. Successfully carrying out a stunning play on the basketball court is an exercise of power. It is the kick some people get from these exercises that is neither power nor necessarily indicative of power. The kick, the rush, may make a

12. The book from which these essays have been lifted is a work-in-progress on file at the Temple Law School Library (unpublished manuscript on file with Temple University Law School Library).

13. I wrote these introductory poetic sections when I collected and reorganized the excised sections from the book. The book has its own poetical introductory sections. The introductory poetics for this Article were originally written between February and March of 1999. I rewrite them about as frequently as I edit the work. The current edition dates from February 2000.

14. See SIU, *supra* note 10, at 57 ("[M]ost persons of power eventually overreach themselves. They are flushed with gigantic egos and extraordinary self-confidence. This is only a short step to the magical transformation of what they are into what they are reaching for.").

person feel powerful. Feeling powerful is not the equivalent of exercising power. That is all there is to it.

When the two are confused, when an individual feels powerful, relies on this feeling as evidence of power, uses this feeling as positive feedback about himself as a powerful person, he is deluded.¹⁵

In my experience people suffering from this delusion are unable to appreciate their actual condition.¹⁶ They expect to be powerful. They expect to be treated as powerful. They are frequently frustrated. They treat non-compliant others as the cause of their frustration. They get angry with those who don't bow to their wishes. It's an awful condition. It's very common.

What is the difference between power and an adrenaline rush? Even when you do know you can be in for some difficult times.

One source of these difficulties has already been alluded to. A second calls for attention. The fact that you know the difference between the exercise of power and the excitement of victory won't protect you from those who do not. In fact, knowing the difference might make you impervious to the influence of their exuberance. Your ability to discern might make you less susceptible to their influence than someone who confuses the aura of success with skillful practice.¹⁷ In effect, since you are able to resist, you become identified as an independent source of frustration. You will be attacked for non-compliance.¹⁸

15. See *id.* (demonstrating how delusion about oneself occurs).

16. See *id.* at 76 (recounting a story where a corporate executive's desire for revenge had been so intense that when he was struck down as director of the company, the violent swings from "triumph to despair" and the ultimate humiliation he suffered may have contributed to his death).

17. I assume that everyone has had an 'emperor's new clothes' experience. I am referring to one of those times when the much-applauded idol of one or another cultural set appears to you as the mediocre pretender she 'really' is. The raved about history teacher is a pedantic fool. The acclaimed writer has nothing to say. The up-and-coming associate is unable to handle a reasonable client inquiry. The newest car, computer, movie-of-note is a bust as far as you can tell. For instance, I recall, when attending a well-known law school, being enrolled in a class taught by someone who had a sterling reputation as a leading scholar in his field. Class after class would go by with nothing but ordinariness. Once, asking a question by which I hoped to throw all this vacuity into sharp relief, I was thrown a comment suggesting that my previous training incapacitated me for this more sophisticated level of analysis. Admitting now to the possibility of personal arrogance and, on that basis, error, I offer the episode as a candid example of what can happen when the aura of success does not stun perception.

18. I once worked with a powerful organized crime figure. He was, at the time I came to know him, serving a twenty-year sentence in a federal prison. For a variety of reasons he was not doing time on another charge. Not least among those reasons was the fact that he had been acquitted. He was convinced the acquittal was the result of his *pro se* management of this other trial. And, because he was convinced that he played a central role in gaining this acquittal for himself, he had come to consider himself a bit of a legal pundit. Now what he wanted was to get the court to grant him a new trial for the charges that had landed him in prison. I was researching habeas law for him. I was putting in long hours, working hard to present him with

Certainly if you do not know that the world is populated by people who confuse the two, you might find it hard to understand why so many inept individuals expect to be treated with respect. On the other hand, if you know that power is not the equivalent of an adrenaline rush you might also know that power is not the equivalent of position or status.

The association between status and power is at least as clear as the association between victory and power, maybe clearer. When I was a young student I was often told that we obeyed the principal or the president or the police officer because he was the principal, president, or police officer. This is the kind of training that links power and position. This is hierarchical mythology at work. You tell an individual early and often that status operates in this way. You indoctrinate the person into a normative scheme of enforced positional respect. Societies with inherited royalty and nobility must find ways of producing widespread acceptance of unreasonable disparities.¹⁹ While the process of indoctrination is rarely called brainwashing, I do not comprehend a difference between my early childhood lessons and the process of indoctrination called brainwashing.²⁰

the best information available. The information did not favor his release. His response was nasty. Because I didn't tell him what he wanted to hear, he berated the legal system, my judgment, my intelligence, and my willingness to serve his best interests.

19. See REISMAN & SCHREIBER, *supra* note 1, at 25 (quoting Plato's REPUBLIC that "our rulers will find a considerable dose of falsehood and deceit necessary for the good of their subjects."). According to Reisman and Schreiber, the maintenance of a belief system, essential as it is to the established order, is a dynamic process with a coercive element. *Id.* at 27. Reisman also concludes that so important is the unifying mythology of a system that these beliefs are transmitted, through acculturation processes, to the core organization of the individual personality, so that, what threatens to disestablish the myth, threatens anomic and personal disintegration as well. *Id.* at 28; see also MICHEL FOUCAULT, POWER/KNOWLEDGE, SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977 222-23 (1977) [hereinafter FOUCAULT, POWER/KNOWLEDGE] (discussing the means of establishing an hereditary hierarchical belief scheme within the context of racism); GEORGE H. SABINE, A HISTORY OF POLITICAL THEORY 210-13 (3d ed. 1961) (commenting on the development of hereditary hierarchy in Medieval Kingship). The author also discusses the Thomistic hierarchy, the material on post-feudalistic developments leading to the development of absolute monarchies, and the material on the divine right of kings. *Id.* at 248-50, 331-35, 391-95.

20. See REISMAN & SCHREIBER, *supra* note 1, at 23 (stating that "[m]embership in the group involves . . . acculturation, a profound shaping of the personality, in processes that impart [a] preferred picture and make it part of the identity and cognitive structure of the individual. That picture includes the official code of the group and much of its distinctive ritual."). The authors elaborate on the indoctrination concept by noting that:

The apparatus for imposing 'evils' or deprivations for deviations from orthodox belief may not be obvious. For example, the potential characterization of eccentricity may . . . deter the more timid . . . from verbalizing their perceptions More serious violators may be . . . declared insane. Such characterizations neutralize the deviants and at the same time reinforce the accepted version of reality for the rest of the group.

Id. at 27. For Reisman and Schreiber, "[b]elief in the myth system is a critical part of group organization, the basis for mobilizing . . . collective activities. Because it has been transmitted,

Like the individuals who were unable to distinguish feelings of victory from power accomplishments, people who inherit or inhabit positions associated with control often expect control to flow from them personally. They confuse the exercise of positional power with the exercise of personal power.

I have often heard this said as criticism of judges. I think many teachers suffer from some form of this delusion.²¹ Doctors, lawyers, high level executives, military officers must all be prone to this confusion. I know of at least one family where aging parents insist their position as parents entitles them to exercise ultimate authority in the lives of adult children. Does all this sound familiar to you?

Individuals who confuse their positional or status-based authority with personal authority are bound to the same frustration as those who confuse feeling powerful with being powerful. And, people who are not confused about these issues, those who know the judge is just another ordinary citizen when her office doesn't enthrone her, are liable to elicit the pent-up fury of this frustration.

Is that enough information to alert you to what is not simple about some simple forms of confusion concerning who is or who is not powerful? Further distortions lie beyond these simple forms. For now it is enough to notice that the expectation of power when frustrated often finds expression in anger and violence. While the examples above generally involved low level violence, the fact is, frustration is tension. Tension is painful. Pain seeks release. People who get resistance when they expect, and feel correct in expecting, no resistance, may act out angrily toward those who disappoint their expectations.

through acculturation, to the core organization of the individual personality, a waning belief in it, without a replacement, may lead to anomie and personal disintegration." *Id.* at 28.

21. I recall a difficult episode from fairly early in my law teaching career involving my father. I was teaching Contracts. We were discussing a contract that held personal interest for him. He desired a particular outcome. I resisted, assured of the technical correctness of my interpretation. He said, she said, he said, she said with increasing tension. Eventually we reached a state of hostility that made substantive discussion impossible. We broke off communication. I retreated into myself, a not infrequent response to confrontations with my father. I no longer recall what he did. The anecdote fits here in this way: I was a law professor who expected her authority, her knowledge of the law, to be respected. He was my father who expected his parental authority to be respected. I was busy acting out my status as law professor while talking to my father. He was busy acting out his status as father while speaking to a legal authority. Each of us was busy acting out behind our status masks. At the time we could not conduct ourselves through that dynamic with these status roles disabled. Now, over twenty years later, we could do better.

b

A friend of mine has a sixteen-year old son.²² After a troubled early adolescence the son settled into a hard working active life. He had a full time summer job. He stayed up late working on his computer. He had a dirt bike that he continually rebuilt and raced. My friend believed her son was not getting enough sleep or nourishment. Overall, though, until recently, she was delighted with his development.

The story begins as dinner is put out for the family. My friend calls her son in from the backyard where he is working on his bike. "Oh, do I have to come in now?" he whines. "I'm in the middle of something. I'm not hungry. I'll eat later," he adds.

"No!" my friend, his mother, retorts. "You must come and eat dinner now. Now is when the family is having dinner. Now is when you are having dinner."

"I don't want dinner now," he bellows, stomping into the kitchen, revealing in every heavy footfall the annoyance of interrupted concentration. "I'll eat when I want." This evokes his mother's comment, "You can't set meal times to suit yourself. Either sit down to eat with the family or go to your room."

The son does neither. He storms out. Or, more accurately, he moves in the direction of storming out of the house. Mom jumps up also, rushing after him. She grabs his T-shirt, spins him around.

"You can't ignore me like that," she screams in his face. "I am your mother."

"F—you," he spits back, tearing himself away, to succeed in escaping the house onto the front lawn.

"Don't you ever speak to me like that," Mom shouts running after him.

22. I did not make these stories up out of whole cloth. But, had I, what meaningful difference would that make? Under no circumstances will I provide enough information to allow anyone to identify the people I write about. Their privacy, so shockingly invaded by my use of them as subjects, entitles them to as much confidentiality as possible under the circumstances. Nevertheless, I appreciate that people who read the sections describing the lives of my family and friends might want to know more. So, for me, the question is, what more could I tell you? What are you entitled to know beyond my assertion, my personal assurance, that these are not fictional creations? I know there is an entire literature devoted, or semi-devoted, to the issue of facticity in these matters. Patricia Williams was once the subject, if not the author, of some of this literature. Jacques Derrida, also, addresses the question. Surely, though, entertaining that tangent would simply distract us from the already dizzying complexity of ideas presented. The facts underlying this section occurred over four years ago. They were reported to me over a time which stretched to several months.

"I'll speak to you the way you deserve, you B——" he turns on her with hatred burning his leering mouth.

The mother realized something had gone terribly, terribly wrong here. She and her son are in the middle of their lawn, cursing each other out in a trap of fury neither seems able to stop. She knows in this moment that she should not have followed him out of the house. She knows she should have given him a chance to cool down before she disciplined him, before she attempted to discipline him, for his refusal to abide by the rules of the house. She knows, but she cannot stop herself. She feels absolutely justified, indeed, she feels obliged by parental responsibility to continue down the path of confrontation.

Have you been there as a child? As a parent? Or as a witness? If you've been there you know, the situation can deteriorate. It can. It did.

Out on the lawn the son continues to call his Mother names. She continues to demand corrective action. She slaps him. He pushes her. He calls her more names, worse names. She grabs hold of his neck and repeatedly hits him.

When words aren't enough, we may escalate to action. Unable to express intensity in language, we move to physical injury.

I am going to tell you something else about my friend. I am going to tell you that two years ago, after a lifetime of on again-off again brutality, her father beat her mother to death.²³

So there on their front lawn, my friend is hitting her son. Her son is hitting back. Fortunately, at sixteen, he is still unable to bring himself to use too much force against his Mother. She is hitting and hitting until he breaks free and runs to his room where he locks the door behind him.

Remember when my friend knew earlier in the confrontation that she was going down the wrong road. She knew but kept going out of . . . out of whatever it is that drives us to misconduct in the face of conscience. Of course, she is sorry. Of course, she cried. But, along with her sorrow she continues to harbor a desire, almost a need, for

23. My friend's father was an alcoholic. He reached a stage, early in my friend's life, which combined alcohol and physical brutality. When he drank, he was violent. When he was violent, he beat his wife. This is not an uncommon pattern. Many people have experienced it. After many years of broken promises, separations, reconciliations, the couple, my friend's parents, reached stability. Her father ceased drinking, her mother felt safe. Years of sobriety assured the family of a fundamental change in reality. Then, to everyone's dismay, my friend's father, who was suffering from some age-associated deterioration, ceased taking needed medication, got drunk and beat his wife, an event which caused her death. Needless to say, the batterer was mortified, mortified to the point of suicide. He was institutionalized, released to jail, and eventually committed as mentally ill.

314 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 9:2]

her son to apologize first.

Do you remember “You started it!” from your childhood? I do. I think, in a small part, my friend is caught up there.

My friend’s troubles, though, are complicated and disturbing. Conflict evokes stress that is released as violence. My friend was raised to it, trained in it, indoctrinated you might say, brainwashed, modeled, taught. It isn’t idiosyncratic. My friend is one of many. For people like this, from the acknowledgment that conflict is an ordinary fact of life it pretty much follows that violence, intense violence, is an ordinary fact of life.²⁴ Violence is attached to conflict as the coping mechanism of choice for the stresses of our social condition.²⁵ Violence relieves the stresses of inevitable conflict.

It’s frightening, frightening but true. There must be a better way. Whatever that better way consists of, power that masks violence in smooth language or polished institutions is not the whole answer. Masked violence is violence plus deception. That is not to say that there aren’t ways of ameliorating violence, watering it down, diluting its concentration.²⁶ The language and institutions in such a system could not claim purity. Violent flavors, violent elements, would be present threatening to corrupt the trend toward reliance on more developed coping skills. But, the difficulty of eliminating violence does not necessarily implicate us in deception if we are aware of the additive condition. As we make a transition from one mode to another we could gradually phase out violence reliance, phase in alternatives.²⁷

24. See FREUD READER, *supra* note 3, at 749. Freud stated:

men are not gentle creatures who want to be loved . . . [but] creatures among whose instinctual endowments is to be reckoned a powerful share of aggressiveness that waits for some provocation or puts itself at the service of some other purpose, whose goal might also have been reached by milder measures.

Id. Freud further believed that “[i]t is . . . not easy for men to give up the satisfaction of this inclination to aggression. They do not feel comfortable without it.” *Id.* at 751.

25. See *id.* at 88 (opining that “discharge represents the primary function of the nervous system.”).

26. See DRUCILLA CORNELL, THE IMAGINARY DOMAIN, ABORTION, PORNOGRAPHY AND SEXUAL HARASSMENT 155, 157 (1995) [hereinafter CORNELL, IMAGINARY DOMAIN] (noting that Angela Carter and Catherine MacKinnon view pornography as a form of anti-woman violence); see also COVER, *supra* note 8, at 255, 261 (comprehending the tragic necessity of law’s violence as justified by the law’s disciplined reliance on collective decision rules). “[I]nside the law, and against the possibilities of undisciplined force and aggression, legal interpretation and the law’s social organization are looked to as the domain to achieve . . . ‘the domestication of violence.’” *Id.* at 264.

27. See COVER, *supra* note 8, at 236-38 (recognizing that violence fuels legal decisions, yielding recognition of shared responsibility for that violence). The process of aggregating voices and the creation of a continuum of degrees of commonality do not fully answer the problem. *Id.*

Those of us who know alternatives need to share with those of us who do not know them how to confront, how to enter and participate in conflict, without constant resort and reliance on settlement by violence.

If you think it is possible, get started.²⁸

C

The emphasis in our legal system on process values²⁹ rather than outcomes,³⁰ when it is not a deceit, is a step in the right direction. When winning takes a back seat to conduct there is some hope that conflicts can be resolved without a minimum of violence.

There are people working on the subject, people studying the quantum of violence that taints, infects, irreparably corrupts or

28. See BATESON, *supra* note 1, at 287-306 (offering three models of learning as a means of developing mental facilities capable of handling knowledge, operating with understanding, and resolving profoundly disturbing contraries in a modern world); see also FREUD, *PSYCHO-ANALYSIS*, *supra* note 6, at 147-48 (expressing hopefulness in the potential of psycho-analysis to assist children to make thorough and lasting adjustments in their lives); BERTRAND RUSSELL, *UNPOPULAR ESSAYS* 106 (1950) (suggesting that “[u]ntil you have admitted your own fears to yourself, and have guarded yourself . . . against their myth-making power, you cannot hope to think truly Fear is the main source of superstition, and one of the main sources of cruelty. To conquer fear is the beginning of wisdom.”). Russell suggests “sheer courage” as the preferred technique. *Id.* See also HANNAH ARENDT, *BETWEEN PAST AND FUTURE* 14-15 (1968) [hereinafter ARENDT, *PAST*] (believing that a deep and searching investigation into the origins of traditional concepts is a means of distilling their original and hope-giving spirit).

29. See JOHN HART ELY, *DEMOCRACY AND DISTRUST, A THEORY OF JUDICIAL REVIEW* 87-88 (1980) (noting that it is not so much who ends up with what that is of constitutional importance, rather what matters more is how the process operated to reach distributional results); see also Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 2 (1959) (stating a neutral principle alternative to Ely’s representational reinforcement model). ROBERT H. BORK, *THE TEMPTING OF AMERICA, THE POLITICAL SEDUCTION OF THE LAW* 264-65 (1990).

Legal reasoning, which is rooted in a concern for legitimate process rather than preferred results, is an instrument designed to restrict judges to their proper role in a constitutional democracy. That style of analysis marks off the line between judicial and legislative power, which is to say that it preserves the constitutional separation of powers, which is to say that it preserves both democratic freedom and individual freedom. Yet legal reasoning must begin with a body of rules or principles or major premises that are independent of the judge’s preferences.

Id. Bork continued his analysis by stating that “[it is] impossible under any philosophy of judging other than the view that the original understanding of the Constitution is the exclusive source for those exterior principles.” *Id.*

30. See BATESON, *supra* note 1, at 156 n.4 (quoting Margaret Mead that

by working toward defined *ends* we commit ourselves to the manipulation of persons, and therefore to the negation of democracy. Only by working in terms of values which are limited to defining *direction* is it possible for us to use scientific methods in the control of the process without the negation of the moral autonomy of the human spirit.)

(emphasis in original).

316 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 9:2]

disturbs a developing situation.³¹ As far as I know we simply do not know how much violence and hostility can be introduced into a child's life without twisting that child toward the conflict-stress-relief formula of brutality.

We know even less about the effects of societal abuse. In the daily lives of ordinary people, how much undue intensity, restraint or constraint, coercion, duress, compulsion or force is tolerated before the distorted pattern is internalized and replicated, like a virus, spreading itself through individuals across the population?³²

These are questions people who work with power must ask. Our work is in the raw material of destruction.³³ There is no point in

31. D. GROSSMAN, ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY 44 (Little Brown, 1995) (citing R.L. Swank & W.E. Marhcand, *Combat Neuroses: Development of Combat Exhaustion*, in ARCHIVES OF NEUROLOGY AND PSYCHIATRY 55, 236-47 (1899)). See also HANNAH ARENDT, ON REVOLUTION 13 (1963) [hereinafter ARENDT, REVOLUTION] (noting that revolution has often served to justify war and its violence on the grounds of an original evil inherent in human affairs and manifest in the criminal beginning of human history). Anecdotally, I recall with respect a class I took with Harold Lasswell at Temple University in the fall of 1973. At that time he was working out of the John Jay School of Criminal Justice studying the South Bronx. Periodically during the course of our semester, Professor Lasswell would provide us with brief updates on the progress of this investigation. The information he provided us was never hopeful. According to his study, the South Bronx was being systematically raped (my word not Lasswell's) by and through the spread of a criminal drug culture. The energy, wealth and integrity of this community were deteriorating. Professor Lasswell was convinced that the process of depletion had already progressed beyond ordinary means of redemption. I wish I could, but I cannot, recall with detail the specifics of Professor Lasswell's observations. I know he studied the normal established institutions, schools, police, churches, jobs; he also studied corner stores, small businesses, family structures, clubs, traffic patterns. Unfortunately, because of the flawed memory I cannot reconstruct the useful information concerning how it was that Professor Lasswell combined information bits into his hypothesis about conditions in the South Bronx. I do know that I was alerted by Professor Lasswell in this 1973 class to the devastating effects drugs were having on what he told us had once been a struggling but not unsuccessful community. The plague drugs have become for many in the present was forecasted by Harold Lasswell's report. So, for myself, I know that this work of prediction is, given the talent and willingness, doable.

32. See BATESON, *supra* note 1, at 492 (explaining that "[t]here is an ecology of bad ideas, just as there is an ecology of weeds, and it is characteristic of the system that basic error propagates itself. It branches out like a rooted parasite through the tissues of life."). Bateson further notes that "there is no area in which false premises regarding the nature of self and its relation to others can be so surely productive of destruction and ugliness as this area of ideas about control." *Id.* at 267.

Under the influence of great fear, almost everybody becomes superstitious.

Collective fear stimulates herd instinct, and tends to produce ferocity towards those who are not regarded as members of the herd Fear generates impulses of cruelty Neither a man nor a crowd nor a nation can be trusted to act humanely or to think sanely under the influence of a great fear.

Id. See also RUSSELL, *supra* note 28, at 108-09.

33. See ARENDT, PAST, *supra* note 28, at 86-87 (explaining that in an age guided by Heisenbergian realization, "everything is possible not only in the realm of ideas but in the field of reality itself."); see also *id.* (noting that totalitarian systems unite hypothesis with "consistently guided action[s]" which are then observable as objectively true); *id.* at 141 (finding that living in a political realm without the restraint of authority or an awareness of a source of leaves humans without the protections of traditional, self-evident standards of conduct to help resolve

pretending that our work is solely creative or that its creative capacities obviously outweigh destructive tendencies. Contradictory evidence surrounds us. We are obliged to investigate.

Meanwhile, the duty to investigate does nothing to change the primal drift. Since we are going to rely on technologies of power to accomplish our personal, professional or communal objectives, since we are not going to shy away from any and all conflict, we need to consider ameliorating possibilities. In addition to the emphasis on conduct, we need to identify and practice antidotal skills.

What are some of these alternatives? Starting with our initiating paradigm, coping with the stresses of conflict without resorting to violence as a release mechanism, we can identify several alternatives:

(1) "Love your enemy" comes to mind along with "equanimity."³⁴ Both focus on softening the affects of enmity. Empathy is a technique. When empathy, or a heartfelt attachment to the well-being of your opponent dominates your attitude, it is hard to turn to hostility as a means of resolving disagreements. People have told me that love eliminates antagonism.³⁵ In love is there generally less conflict? In love is the stress of conflict weakened? Is the inclination to relieve oneself through brutality lessened? Perhaps all three occur. Genuine love, friendship, and empathy can shift attention away from

the inevitable problems of living together).

They say that power corrupts; but this, I suspect, is nonsense. What is true is that the *idea of power* corrupts. Power corrupts most rapidly those who believe in it, and it is they who will want it most But the *myth* of power . . . is very powerful . . . most people believe in it [I]f everybody believes in it, [it] becomes . . . self validating. But it is still epistemological lunacy and leads inevitably to various sorts of disaster.

BATESON, *supra* note 1, at 486-87 (emphasis in original); *see also id.* at 445-46 (explaining as "the power ratio between purposive technology and environment" change, man, as the "changer of his environment," has become "fully able to wreck" the environment and himself); *id.* at 434 (noting further that "conscious purpose is now empowered to upset the balances of the body, of society, and of the body around us. A pathology - a loss of balance - is threatened.").

34. *Luke 6: 27-31* (New Oxford):

But I say to you Love your enemies, do good to those who hate you, bless those who curse you, pray for those who abuse you. To him who strikes you on the cheek, offer the other also; and, from him who takes away your coat do not withhold even your shirt. Give to everyone who begs from you; and of him who takes away your goods do not ask them again. And as you wish that men would do to you, do so to them.

35. *See* EMMANUEL LEVINAS, *BASIC PHILOSOPHICAL WRITINGS* 165-66 (Indiana Univ. Press 1996) [hereinafter LEVINAS, *PHILOSOPHICAL WRITINGS*].

Ask . . . if peace, instead of being the result of an absorption or disappearance of alterity, would not on the contrary be the *fraternal* mode of proximity to the other, which would not simply be the failure to coincide with the other but would signify precisely the *surplus* of sociality over every solitude - the *surplus* of sociality and of love. Hence, peace as love.

Id. (emphasis in original).

primitive modes of stress or conflict management.

(2) Another alternative to violence is offered by the practice of calmness.³⁶ A person able to manage stress, especially the stress of conflict, without accumulating disturbing levels of built-up emotional pressure, has less need to relieve him/herself by blowing off the steam associated with temper and explosive violence.³⁷ Many individuals learn to meditate or undertake similar disciplines for this purpose.

(3) One of the teachers who instructed me emphasized the utility of awareness as a third alternative to violence. For him, awareness of the overall futility of animosity, the general unsuitability of hostility, and the high cost to one's self of antagonistic attitudes and behaviors will, over time, generate a desire to develop the ways of generosity and kindness.³⁸

(4) A highly developed, well-integrated map of the totality of circumstances might help keep things in a workable perspective. I have always thought that if saner minds contemplated the goals and the human cost of World War I, an awful and seemingly endless war could have been avoided. Similarly, I remember reminding myself as my first marriage dissolved that the comparatively small amount of money involved in our property disputes would not justify arguments upsetting to our college-age son.

(5) Conflict avoidance can be accomplished by setting up clear demarcations and procedures beforehand.³⁹ Many people know how to set boundaries. People know how to walk away from trouble.

The idea here is not to disable anyone as a powerful professional. The idea is to add to the library of strategic options and technologies

36. MASTER SANTIDEVA, *A GUIDE TO THE BODHISATTVA WAY OF LIFE* 47 (1997). "Untamed, mad elephants do not inflict as much harm in this world as does the unleashed elephant of the mind . . ." *Id.* at 61. "The mind does not find peace, nor does it enjoy pleasure and joy, nor does it find sleep or fortitude when the thorn of hatred dwells in the heart." *Id.* at 89. "[O]ne should stabilize the mind in meditative concentration, since a person whose mind is distracted lives between the fangs of mental affliction [Q]uiescence eradicates mental afflictions Quiescence is due to detachment toward the world and due to joy." *Id.*

37. See FREUD READER, *supra* note 3, at 88 (stating that "discharge represents the primary function of the nervous system."); see also *id.* (explaining Freud's work as authority for the observation that discharges of energy were often violent); BATESON, *supra* note 1, at 68-72 (explaining that schismogenesis or progressive differentiation is a process characterized by escalating patterns of differentiation which, if not restrained or restricted, can lead to a systemic breakdown. When the term is applied to human relations, the escalation can lead to extreme rivalry and hostility prior to breakdown).

38. See SANTIDEVA, *supra* note 36, at 89 (reminding that lack of awareness allows the unleashed elephant mind to romp freely).

39. RICHARD WILHELM, *THE I CHING (BOOK OF CHANGES)* 29 (Cary Baynes trans., Princeton Univ. Press 2d ed. 1967) (1950) ("If rights and duties are exactly defined . . . the cause of conflict is removed in advance.").

2001]

REDEFINING VIOLENCE

319

of power, comfortably available to those who shun force and violence.

II

The idea of whipping people into a just condition lies.
 “The wrath of God” “Hell fire and damnation”
 herald horror along with the Prince of Peace.

The loud, brutal nature of
 injustice more familiar,
 more common,
 then justice’s whispered voice
 whose delicate quality
 needs peace to survive.⁴⁰

a

Have you seen the bumper sticker “No Jesus, No Peace/Know Jesus, Know Peace?” I think of that bumper sticker as a way of communicating. I think of it as a quippy, clever way of communicating. It is connected, albeit through some extreme stretching, with the difficulties of talking to someone about what they can or cannot, should or should not, do to get peace in their lives. If these people are like my friend in the earlier story and cannot follow the given instructions, perhaps because they have too little peace in their lives to use that peace as a meditative starting point for attaining more, what are our options?

Think about it. What can you do? You cannot yell at people as a way of directing them toward peace.⁴¹ You cannot set them up in highly structured environments pervaded with peacefulness as a

40. Sharon S. Harzenski, unnamed work (Feb. 2000) (manuscript on file with author).

41. See BATESON, *supra* note 1, at 208 (explaining a breakdown in understanding that occurs in double bind situations). Double bind situations are described as: (1) involving intense, vitally important relationships, in which the capacity to respond appropriately is desired such that discriminating accurately about the nature of the message arises as a priority; (2) concerning the communication of two orders of messages wherein one order denies the other, for instance, one message asserts the importance of peace while the other message assaults the nervous system as a means of facilitation; 3) denying the recipient an opportunity to comment on the disparity, thereby denying the recipient an opportunity to determine an appropriate response. *Id.* Regarding the last situation, if the recipient was told by a screaming individual accompanied by angry facial expressions and threatening body language to control his hostile reactions to events by responding in a peaceful manner, he can hardly know whether he is being directed to respond to the lesson about peace or the lesson about aggression. A cowed “Yes, Ma’am” is about all one can do, which is not about peace as much as it is about appeasement.

320 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 9:2]

means of introducing peace into their lives. You cannot lock them up. You cannot provide them with a foolproof, available to anyone, set of instructions for producing peace.⁴²

So, really, what can you do? You can lead by example. You can show peacefulness in the way you treat them, in the way you treat others and in the way you live your life. You can point them in the direction of what you identify as the source, fountain or foundation of your peace. Like the bumper sticker, you can share your truth.⁴³

b

When people live reasonably, inflaming their passions demeans them. Emotional impulsiveness is not maturity. If you foment emotionality among immature people you may not actually demean them. Neither do you educate, elevate, or inform them. Instead you act as an opportunist by taking advantage of the weaknesses in your audience.⁴⁴

You may think or wish to think that justice was the issue. You may believe that passionate commitment and the expression of that passion justifies emotional instigation. But the manipulation of passion is degrading work. Justice has nothing to do with conduct that debases the relevant actors.⁴⁵

42. See MICHAEL POLANYI, *THE LOGIC OF LIBERTY, REFLECTIONS AND REJOINDERS* 184 (1980) (discussing the theme that polycentric tasks are best managed, and in fact are both 'ideally' and practically manageable, only within a system of mutual adjustments); see also *id.* (noting that because of this belief, Polanyi speaks critically throughout this volume of and about attempts to manage complex human endeavors through state or religious means); RUSSELL, *supra* note 28, at 123 ("[I]t is important . . . to realize the limitations of what can be done by organization. Every system should allow for loopholes and exceptions, for if it does not it will in the end crush all that is best.").

43. See POLANYI, *supra* note 42, at 6 (speaking about the love of knowledge, the spirit of pure scholarship and the communal experience of independent effort within a community of shared values). Polanyi continues in this vein by stating that "the world needs science today above all as an example of the good life. Spread over the planet scientists form . . . the body of a great and good society." *Id.*; see also ARENDT, *PAST*, *supra* note 28, at 14 (promising to share "how to think" examples because "thought . . . arises out of incidents of living experience and must remain bound to them as . . . guideposts."); RUSSELL, *supra* note 28, at 118 (speaking about a teacher who conveys what is in his heart to his students).

44. See RUSSELL, *supra* note 28, at 121 (warning that for democracy to survive, "a teacher should endeavor to produce in his pupils . . . the kind of tolerance that springs from an endeavor to understand those . . . different from ourselves."). This is a necessary educational undertaking because

It is perhaps a natural human impulse to view with horror and disgust all manners and customs different from those to which we are used. Ants and savages put strangers to death. And those who have never traveled physically or mentally find it difficult to tolerate . . . queer ways and outlandish beliefs . . .

Id.

45. See *id.* (warning against instilling collective hysteria, which is "the most mad and cruel

Efforts to educate, train and discipline individuals so that the maturation of reason takes place cannot depend upon degrading techniques.⁴⁶ People who are disciplined through degradation are, of course, degraded.⁴⁷ What this means is that if you take advantage of authority to enforce your will at the expense of respecting another's dignity, you introduce vice into the equation.⁴⁸ You are choosing to act in derogation of the standards to which a respectful person in your position would adhere. You are corrupting rather than constructing.

You may have been taught and may wish to believe that harsh methods are required to bring about the establishment of disciplined conduct.⁴⁹ But, the use of undue harshness weakens, rather than

of all human emotions"); *see also id.* at 119 (propagandizing rather than educating students "[d]estroys in them all generous vigor, replacing it by envy, destructiveness, and cruelty There is no need for men to be cruel; on the contrary Cruelty results from thwarting in early years, above all from thwarting what is good.").

46. *See* ARENDT, PAST, *supra* note 28, at 181 (explaining that "emancipated from the authority of adults the child has not been freed but been subjected to a much more terrifying and truly tyrannical authority, the tyranny of the majority."); *see also id.* at 183 (noting "the very thing that should prepare the child for the world of adults, the gradually acquired habit of work and not-playing, is done away with . . ."). *See generally id.* at 173-96 (regarding "The Crisis in Education"); RUSSELL, *supra* note 28, at 112-23 (relating to a discussion of "The Functions of a Teacher"); FREUD, PSYCHO-ANALYSIS, *supra* note 6, at 181-87 (discussing elicitation of hysteria in a fourteen-year-old girl as the result of sexual relations with an older man).

47. *See* WILHELM, *supra* note 39, at 22 (discussing the effects of degradation on the human spirit).

Law is the beginning of education. Youth in its inexperience is inclined at first to take everything carelessly and playfully. It must be shown the seriousness of life He who plays with life never amounts to anything. However, discipline should not degenerate into drill. Continuous drill has a humiliating effect and cripples man's powers.

Id. at 22; *see also id.* at 23 (noting further that "often the teacher, when confronted with such entangled folly [speaking of the folly of clinging to unrealistic fantasies] has no other course but to leave the fool to himself . . . not sparing him the humiliation that results. This is frequently the only means of rescue."); *id.* at 234 ("If one is too severe in setting up restrictions, people will not endure them. The more consistent such severity, the worse it is, for in the long run a reaction is unavoidable.").

48. *See* BATESON, *supra* note 1, at 163-64 (discussing the tragic process which occurs when anyone decides that the "end justifies the means").

[T]hat the 'end justifies the means' in their efforts to achieve either a Christian or a blueprinted heaven-on-earth . . . they ignore the fact that in social manipulation, the tools are not hammers and screwdrivers [I]n social manipulation our tools are people, and people learn, and they acquire habits which are more subtle and pervasive than the tricks which the blueprinter [Bateson's term for the person attempting to get students to generate specific behaviors toward the end; i.e. goal, of creating some specific social reality] teaches them [B]ecause the children are people they will do more than learn this simple trick [referring to a 'report on your parents' directive] they will build this experience into their whole philosophy of life [The parent spying directive] will color . . . [the children's] attitudes toward authority.

Id. at 163-64.

49. *But see* RUSSELL, *supra* note 28, at 148 (emphasizing "how much brutality has been justified by the rhyme 'A dog, a wife, and a walnut tree, The more you beat them the better they

strengthens, an individual's ability to acquire self-control.⁵⁰

Justice cannot be developed under conditions that weaken participants. To cultivate justice, self-development and respect are the keys to success.⁵¹

C

Responsible adults remain alert to injustice within their families and communities.⁵² Responsible adults want to know what is going wrong so that they can work with others to make the necessary corrections.⁵³ Injustice can corrupt quickly. People who love justice are ill at ease in situations heavily laden with injustice. Injustice twists people out of equality and mutuality into positions of defensiveness, competition, judgment and hostility.

We are not at peace when injustice tarnishes our interactions with others. Laws that establish and maintain unjust systems are violent expressions of oppressive power.

be . . . ' The reformative effect of punishment is a belief that dies hard, chiefly I think, because it is so satisfying to our sadistic impulse.").

50. YAMAMOTO TSUNETOMO, HAGAKURE 39-40 (William Scott Wilson trans., 1979).

There is a way of bringing up the child. From . . . infancy one should encourage bravery and avoid trivially frightening or teasing the child. If a person is affected by cowardice as a child, it remains a lifetime scar. It is a mistake for parents to thoughtlessly make their children dread lightening, or have them not go into dark places, or tell them frightening things in order to stop them from crying Furthermore, a child will become timid if he is scolded severely.

Id.

51. See CORNELL, IMAGINARY DOMAIN, *supra* note 26, at 5 (stating that "the freedom to struggle to become a person is a chance . . . which depends on a . . . set of conditions that I refer to as minimum conditions for individuation [E]ach one . . . must have the chance to take on this struggle in his or her own unique way.").

52. See EMMANUEL LEVINAS, TOTALITY AND INFINITY 245 (Duquesne Univ. Press 1969) [hereinafter LEVINAS, TOTALITY AND INFINITY] (stating that "[b]ehind the straight line of the law of the land of goodness extends infinite and unexplored, necessitating all the resources of a single presence. I am therefore necessary for justice, as responsible beyond every limit fixed by an objective law."); see also *id.* at 247 (noting further that "[g]oodness consists in taking up a position in being such that the Other counts more than myself."); LEVINAS, PHILOSOPHICAL WRITINGS, *supra* note 36, at 143 (explaining "the proximity of a neighbor is my responsibility for him Responsibility does not come from fraternity, but fraternity denotes responsibility . . . antecedent to my freedom."); ARENDT, PAST, *supra* note 28, at 189 (expressing the opinion that people must take responsibility for the world).

Anyone who refuses to assume joint responsibility for the world should not have children and must not be allowed to take part in educating them The teacher's qualification consists in knowing the world and being able to instruct others about it, but his authority rests on his assumption of responsibility for that world.

Id. at 189.

53. See LEVINAS, PHILOSOPHICAL WRITINGS, *supra* note 35, at 143 ("The proximity of a neighbor is my responsibility for him Responsibility does not come from fraternity, but fraternity denotes responsibility . . . antecedent to my freedom.").

The practice of justice must involve the practice of peace.

d

I saw a movie several years ago; *Qui Ju* was its name.⁵⁴ The movie takes place in modern era, circa 1980s, in rural mainland China. In the movie, the young, sympathetic protagonist seeks to redress an injury the chief of her agricultural community did to her husband. The chief had struck her husband and had disrupted the good order of her household, and her sense of a well-ordered world. She is disturbed because she wants peace, real peace. She wants to experience peace when she is moved to recall the events that now upset her. She wants the settlement of the dispute in deed and in thought. She wants the resolution of tension, the dissolution of antagonistic attitudes, an admission of error, and a reconstruction of social conditions.

In the Chinese system, as depicted in the film, each party is directed to engage in self-criticism in order to bring about the peace which is justice. As the story presents the situation, justice refers to a state of “everything in its place,” or as a friend of mine says, to equilibrium. And this state of affairs, this balance, appropriateness, cannot be achieved simply by authoritative statement or fiat. Winning in a court of law is unlikely to achieve the desired goal.⁵⁵ An arrest is not going to achieve the desired goal.⁵⁶ Neither a fine nor

54. See generally THE STORY OF QUI JU (Sony Picture Classics 1993).

55. See KATHARINE T. BARTLETT & ANGELA P. HARRIS, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 690 (2d ed. 1998).

[I]t is unlikely that courts will make a defining move that captures the myriad historical, social, ethnic, religious, economic, familial, and maturational aspects of the desires and behaviors that properly fall under the umbrella of ‘sexuality.’ Nuance here is crucial, yet almost impossible to achieve. The available legal compartments are simply too crude Legal categories . . . tend to repress or problematize nuances.

Id. (quoting Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45, 47, 54-56, 92, 95-96 (1996)).

[L]egal interpretative acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence.

COVER, *supra* note 8, at 203; see also *id.* at 221 (“On one level judges may appear to be, and may in fact be, offering their understanding of the normative world to their intended audience. But on another level they are engaging a violent mechanism through which a substantial part of their audience loses its capacity to think and act autonomously.”).

56. See THE STORY OF QUI JU, *supra* note 54 (featuring an awful and disturbing arrest that results from the protagonist’s efforts). As the story plays out, she moves through higher levels of state apparatus seeking an authority to rebuke the chief of her village. During her ceaseless

324 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 9:2]

imprisonment will achieve the objective.⁵⁷ The state of mind or quality that is experienced as justice arises in participants when disequilibrium is settled within them and between them.

Justice, understood from this perspective, is a quality, perhaps even a delicate quality, belonging to both a personal and a social condition.

e

"You have to stand for something or you'll fall for anything."⁵⁸ My Mother, who was the source of many homilies in my life, taught me to call statements like that "homilies." This subsection is about how each of us does need to stand for something in the way suggested by the homily or risk becoming foils for those who dissemble, feint, weave, spin and manage discussions about justice toward considerations consistent with their private interests.

The Bible story about Solomon as the judge, two mothers and one baby teaches this lesson by carefully considering private interests.⁵⁹ The fact is, I prefer to orient the material by focusing on Solomon

pursuit of justice he, on his own, saves her life and the life of her child. Qui Ju, profoundly grateful for his assistance, witnesses the fruit of her pursuit of justice as the man who saved her family from tragedy is arrested for his insult to her husband. *Id.*

57. Interview by Sharon S. Harzenski, with anonymous (Mar. 15, 2000). Domestic violence stories often reflect this difficulty. Just this week, I was privy to the following: a woman was living with a man in a carefully structured relationship following an outburst in which he held her in a stranglehold while threatening to kill her. Of course, he soon thereafter apologized. She was determined to remain in the relationship as long as violence was off limits. As often happens, her partner could not restrain himself. After a month or so of relative calm, he began a series of emotional explosions until, again, he held her down and threatened her life. This time she left their shared living space as soon as she could and reported his conduct to the police, who came and arrested him. As the story was reported to me, and as the woman seemed to understand the situation, the charges filed against the man carry lengthy prison sentence possibilities because he is a hunter and has hunting weapons, specifically guns, in the house. The possible prison sentence was far in excess of anything the woman could accept as appropriate. She desired to have him removed from the environment, restrained from reentry, and warned through arrest about the seriousness of his conduct as well as his need for professional treatment. A few nights in jail, a few weeks in jail; these were what the woman thought appropriate. The fact that this man might spend more than a year in jail astounded and upset her. Instead of the peace of mind she sought, she is now tormented by the legal consequences of her actions. As for me, I hope she is able to confront and recognize the mutuality of this construction.

58. See WILHELM, *supra* note 39, at 238 ("[When] the source of a man's strength lies not in himself but in his relation to other people . . . no matter how close to them he may be, if his center of gravity depends upon them, he is inevitably tossed to and fro [between joy and sorrow.]"); see also MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 111 (Signet, 1964) ("The old order ends, no matter what Bastilles remain, when the enslaved, within themselves, bury the psychology of servitude."); cf. at 128 ("Is not freedom the negation of servitude? Does not one have to end totally for the other to begin?").

59. 1 Kings 3:16-28 (Oxford).

rather than on the Federalist founding fathers⁶⁰ and their discussions about republican civic virtues.⁶¹ It is not that I do not value the political wisdom of developing civic virtue. Instead, I prefer the Solomon example because I feel it in my heart, or in my gut. I better understand its representational value. I am drawn into the basic human needs and desires of the competing mothers more thoroughly than I am drawn into the humanity of successful politicians in the post Revolutionary War period of United States history.

From the Solomon story, I learn that private interests deny us heartfelt identification.⁶² As I understand it, the mother who awakens

60. See generally GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 190-270 (1992) (presenting, in a historical and political context, the debate between the Federalists and the Anti-Federalists on what was and was not desirable and/or feasible with regard to the calculation, weighing and discounting of private interests among public-oriented citizens).

61. See *id.* at 195 (beginning the discourse on virtue by alluding to the enlightenment age's man made criteria of gentility). The criteria includes:

[P]oliteness, grace, taste, learning and character It implied being reasonable, tolerant, honest, virtuous and candid It signified being cosmopolitan, standing on elevated ground in order to have a large view of human affairs, and being free of the prejudices, parochialism . . . [what] we sum up today in the idea of a liberal arts education.

Id.; see also *id.* (explaining the revolutionaries were creating a new kind of aristocracy "based on principles that could be learned and were superior to those of birth and family."); *id.* at 197 (explaining that the leaders of the Revolution were unusually "self conscious about the moral and social values necessary for public leadership."); *id.* at 219 (explaining that "man . . . is formed for social life."); But see *id.* at 229-30 (noting that we should not confuse idealistic ideation with accomplishment. The fact is that "the American people seemed incapable of the degree of virtue needed for republicanism."); *id.* at 231 (explaining that "[w]ell before 1810 many of the founding fathers and others, including most of the older leaders of the Federalist party, were wringing their hands over what the Revolution had created."); *id.* at 239-41 (noting further that equalitarian pressures pushed the faith in Lockean sensationalism to its breaking point); *id.* at 246-67 (explaining that a full-scale ideological defense of self-interest was alarming to 'the gentry' who had interests, private interests, of their own); *id.* at 253 (noting, however, that whatever the tensions, "most of the revolutionary leaders . . . continued to hold onto the possibility of virtuous politics . . . [believing a few political leaders] had sufficient virtue to become disinterested umpires and promote an exclusively public sphere of . . . government").

62. 1 Kings 3:16-28 (Oxford).

Then two [women] came to the king and stood before him. The one women said . . . "[T]his woman and I dwell in the same house; and I gave birth to a child while she was in the house. Then . . . this woman also gave birth And this woman's son died in the night, because she lay on it. And she . . . took my son from beside me, while your maidservant slept, and laid it at her bosom, and laid her dead son in my bosom [W]hen I looked at it closely in the morning, behold, it was not the child that I had borne." But the other woman said, "No, the living child is mine, and the dead child is yours". . . . Then the king said, "The one says, 'This is my son that is alive, and your son is dead'; and the other says, 'No; but your son is dead, and my son is the living one'. . . . Bring me a sword Divide the living child in two, and give half to the one, and half to the other." Then the woman whose son was alive said to the king, because her heart yearned for her son, "Oh, my lord, give her the living child, and by no means slay it." But the other said, "It shall be neither mine nor yours; divide it." Then the king answered and said "Give the living child to the first woman, and by no means slay it; she is its mother". . . . And all Israel heard of the judgment . . . and they

326 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 9:2]

to find her baby dead is alone in her suffering. She is alienated, isolated, in her pain, and by her pain. She cannot imagine, or trust in, the capacity for comfort except for the comfort she anticipates by stealing from another what she has lost. She is willing to stop her suffering by inflicting it on another. She becomes so consumed by her own pain, she loses sight of the fact that this pain must be born by someone. In the end, having chosen the other mother as a substitute sufferer, the mother of the dead child becomes willing to sacrifice life itself (the surviving child) in an attempt to share the pain. Subtracting Solomon's wisdom and the nature of maternal love, I understand the story to be about the alienation of selfishness.

That the alienation of selfishness is not a ground upon which justice rests or can be safely built is a theme woven through republican theories of civic virtue.⁶³ However, the republicans did not provide me with a clear enough picture of the human suffering which feeds the absence of virtue, or, if you will, the vice of self-interest. Able to identify with the sad, sickened mother in the Solomon story, I know in my heart the failing of her heart.

Justice requires a strong heart. Likewise, I know in my heart the

stood in awe of the king, because they perceived that the wisdom of God was in him, to render justice.

Id.

63. See WOOD, *supra* note 60, at 174-75 (explaining historical notions regarding American ideology).

Americans steeped in the radical whig and republican ideology... regarded... monarchical techniques of personal influence and patronage as "corruption," as attempts by great men and their power-hungry minions to promote their private interests at the expense of the public good and to destroy... [the colonists'] popular liberty.

Id.; see also *id.* at 190 (relying on quotes from Samuel Stanhope Smith in reporting what the revolutionaries believed).

[T]he revolutionaries believed... that new habitual principles, "the constant authoritative guardians of virtue," could be created and nurtured by republican laws, and that these principles, together with the power of the mind, could give man's "ideas and motives a new direction." By the repeated exertion of reason, by "recalling the lost images of virtue: contemplating them, and using them as motives of actions, till they overcame those of vice again and again... it seemed possible for man to... form a society of 'habitual virtue.'"

Id.; see also *id.* at 197 (living as a gentleman in this social environment meant avoiding the appearance of meanness and dedication of oneself to the public good); *id.* at 207-08 (explaining that Washington had an excellent reputation in keeping motives like personal interest, consanguinity, friendship or hatred from interfering with his public judgments). In the winter of 1784-85, the Virginia Assembly, in recognition of his service, presented Washington with valuable shares in canal companies. *Id.* He believed in these ventures, had worked hard to foster their development and needed the money. *Id.* Nevertheless, rather than accept the shares, Washington sought the counsel of respected peers. *Id.* Jefferson recommended declining the offer as the best means to enhance Washington's reputation for disinterestedness. *Id.* Instead of taking the shares for his personal benefit, Washington gave them to the college that eventually became Washington and Lee. *Id.*

heartfelt willingness of the actual mother to undergo extreme pain to save her baby's life. Any emotional pain is endurable when compared to the emotional pain of standing speechless while allowing your child to be sacrificed unnecessarily.⁶⁴ I know that. However awful a fact it might be, it is a simple fact to me.

At this point in the story, the "You have to stand for something. . ." homily ties in. The actual mother in the story knew what she was about. She knew who she was and what she stood for in the context of the baby trial.⁶⁵ She was, first and foremost, the baby's mother. She knew what she stood for, she knew what her principles were and what her priorities were.⁶⁶ She was the child's mother. For me, that is where the heart of the matter lies in this story.

Of course, the mourning mother thought she knew what she was about. She thought she was "standing for" something. She wanted to provide herself with a substitute for her dead baby. But, her situation is more confusing, more complex, than that. She wants a substitute, but finding a substitute is not really what she is about. If she were entirely focused on replacing her deceased child with a living child to mother, she might have been able to think up a better plan than stealing the child of her house mate.⁶⁷ And, had she been dedicated to finding a substitute for her dead child, she would not have agreed to the slaughter of her selected replacement.⁶⁸ So, while it looks like this suffering mother is about finding a substitute, the situation is more complicated. Similarly, it might appear as if she is willing to stand on her principle or claim of motherhood, but here again, the situation is not that simple. She is unable to stand up as the child's mother because she is unwilling to sacrifice her needs for the needs of the child. The heart of her matter lies in her self-centered retreat from the pain of her loss. The substitute child is a means of escaping her own suffering. That is the baby's meaning to her. That is what she is "standing up" for.

Please do not understand this as some sexist theory about motherhood. I would expect my son's father to spare the life of our child because, like me, I would expect him to prefer any emotional suffering to the pain of watching his son's life end to prove a point of

64. 1 *Kings* 3:16-28 (Oxford).

65. *Id.* ("Then the woman whose son was alive said to the king, because her heart yearned for her son, 'Oh, my lord, give her the living child, and by no means slay it.'").

66. *Id.*

67. *Id.* ("And this woman's son died in the night, because she lay on it. And she . . . took my son from beside me, while your handmaiden slept, and laid it at her bosom, and laid her dead son in my bosom.").

68. *Id.* ("But the other said, 'It shall be neither mine nor yours; divide it.'").

328 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 9:2]

law. Instead of sexist propositions, why not think of political applications?

Think in terms of applying the principles of this story to the practice of justice. For instance, I taught myself to identify with Solomon in order to ponder what it was he knew about the human condition that enabled him to judge so accurately what each of the women was likely to do.⁶⁹ As a result of all that wondering, I moved on to wondering about the women. As a result of maturing events in my own life, I was able to reach into my own heart as I tried to understand the hearts of the two mothers. Finally, as a result of these combined efforts I was able to conclude that decisions without heartfelt grounding would inevitably fail to satisfy the heartfelt need we have for justice.

Justice goes to the heart of the matter because justice lies in the deep core of our hearts.⁷⁰

69. *Id.* ("And all Israel heard of the judgment . . . and they stood in awe of the king, because they perceived that the wisdom of God was in him, to render justice."). Solomon is speaking to God:

[T]hy servant is in the midst of thy people Give thy servant . . . an understanding mind to govern thy people, that I may discern between good and evil; for who is able to govern this great people? It pleased the Lord that Solomon had asked this. And God said to him, 'Because you have not asked for yourself long life or riches . . . but have asked . . . to discern what is right Behold, I give you a wise and discerning mind.

1 Kings 3:8-12.

70. See BATESON, *supra* note 1, at 134 (discussing "*le coeur a ses raisons que la raison ne connaît point*," which means that "the heart has its reasons which the reason does not at all perceive"). At a facial level, the quote calls for an acknowledgment that ordinary consciousness is an insufficient guide if profound understanding is sought. See *id.* at 134-44 (articulating Bateson's theory of understanding in which consciousness represents only the 'visible' arcs of circles or cycles of mental processes. Full or complete arcs, the whole of the mental process, including those processes Freud referred to as "primary," (i.e. including relational material, metaphoric material, etc.) are necessarily incorporated in fulfilling or sound intelligence functions.). See WILHELM, *supra* note 39, at 186.

[T]he well is the symbol of that social structure which, evolved by mankind in meeting its most primitive needs, is independent of all political forms [T]here are two prerequisites for a satisfactory political or social organization of mankind. We must go down to the very foundation of life. For any superficial ordering of life that leaves its deepest needs unsatisfied is as ineffectual as if no attempt at order has ever been made. Carelessness – by which the jug is broken – is also disastrous.

Id.; see also LEVINAS, PHILOSOPHICAL WRITINGS, *supra* note 35, at 3.

Henceforth the comprehension of being does not presuppose a merely theoretical attitude but the whole of human comportment. The whole human being is ontology. Scientific work, the affective life, the satisfaction of needs and labor, social life and death – all these moments spell out the comprehension of being, or truth It is not because of the human being that there is truth. It is because being in general is inseparable from its openness, because there is truth, or, if one likes, because being is intelligible, that there is humanity.

Id.; see also *id.* at 5 ("We exist as a circuit of understanding with reality. Understanding is the very event that existence articulates. All incomprehension is only a deficient mode of

III

The knowledge of injustice bothers people.
Feeling at ease with heaven and hellish myths,
they turn aside, pretending.

What cost justice when
expectations and disadvantages clash?

Is peace at any price an answer?

Not trusting the judgment of those with power,
what violence
when taking justice into your own hands?⁷¹

a

When I began law school, I thought of justice as the correct regulation of the socio-political world. I studied theories of justice in an attempt to discover which orderings of human societies were right and which were wrong. I saw practicing justice as moving society toward right forms and away from erroneous forms.

I thought a person would have to have a lot of power to make any meaningful progress at all toward these objectives.

Not all that much has changed. I realize now, however, that justice rarely, if ever, lies in constructing the correct rules for others to follow.⁷² There may occasionally be sages who are capable of this level of insight and influence.⁷³ For most of us, though, propagating

comprehension.”). “[K]nowledge of the other requires, outside of all curiosity, also sympathy and love . . . because in our relation with the other, he does not affect us in terms of a concept. He is being and counts as such.” *Id.* at 6. “The essence of discourse is prayer.” *Id.* at 7. “[I]t is as a neighbor that a human being is accessible” *Id.* at 8. “The human only lends itself to a relation that is not a power.” *Id.* at 10.

71. Sharon S. Harzenski, unpublished poem (Feb. 2000) (on file with author).

72. See BATESON, *supra* note 1, at 3 (alluding to the futility and the silliness of making laws as if people were predictable).

73. See *id.* at 146 (“[M]ere purposive rationality unaided by . . . art, religion, dream, and the like, is necessarily pathogenic and destructive [L]ife depends upon interlocking circuits of contingency”); see also POLANYI, *supra* note 42, at 28 (“[T]he freedom of science cannot be defended . . . on the basis of a positivist conception of science, which involves a positivist programme for the ordering of society. The . . . fulfillment of such a programme is the destruction of . . . free society and the establishment of totalitarianism.”). Polanyi also believed that the exercise of human will is “fully determined . . . by the responsibility inherent in action; hence any attempt to direct these actions from outside must inevitably distort or

a set of right rules for society will never be within our practice. We will practice justice on a more limited scale. This is a good thing.

For some of us it is helpful to look to others, to the shared wisdom of sages, to provide a solid foundation for our practice. Those of us who find our wisdom in the Bible,⁷⁴ the Koran,⁷⁵ Lao Tsu,⁷⁶ Confucius,⁷⁷ Thomas Aquinas,⁷⁸ Buddha,⁷⁹ Aristotle⁸⁰ and Mother

destroy their proper meaning." *Id.* at 58; *see also* RUSSELL, *supra* note 28, at 162 ("Most of the greatest evils that man has inflicted upon man has come through people feeling quite certain about something which, in fact, was false. To know the truth is more difficult than most men suppose, and to act with ruthless determination in the belief that truth is the [one's] monopoly . . . is to invite disaster.").

74. Oxford Bible, at xvi (stating in the preface that

[t]he Bible is more than a historical document to be preserved. And it is more than a classic of English literature to be cherished and admired. It is a record of God's dealing with men, of God's revelation of Himself and His will The Bible carries its full message, not to those who regard it simply as a heritage of the past or praise its literary style, but to those who read it that they may discern and understand God's Word to men);

see also 2 THE COMPLETE EDITION OF THE OXFORD ENGLISH DICTIONARY 168 (2d ed. 1989) (defining the Bible as "[t]he scriptures [sacred writings] of the Old and New Testaments").

75. 8 THE COMPLETE EDITION OF THE OXFORD ENGLISH DICTIONARY 531 (2d ed. 1989) (defining the Koran (from the Arabic word meaning recitation) as "[t]he sacred book of the [Muslims], consisting of revelations orally delivered at intervals by Muhammad, and collected in writing after his death").

76. LAO TZU, *TAO TE CHING* 1 (1972) (enunciating the principles of this mystical religion which acted as a counterpoint for the official Confucianism of the Chinese state).

77. *See* WILHELM, *supra* note 39, at 165 (describing the teachings of Confucius). Confucius was a Chinese sage or philosopher. His influence, and the influence of his followers, pervaded Chinese culture for at least a thousand years. Confucius, like Lao Tzu, is believed to be the source of much wisdom incorporated into the *I Ching*. As an example of Confucius' wisdom, Wilhelm includes the following quote from Confucius:

The superior man sets his person at rest before he moves; he composes his mind before he speaks; he makes his relations firm before he asks for something. But if a man is brusque in his movements, others will not cooperate. If he is agitated in his words, they will awaken no echo in others. If he asks for something without first having established relations, it will not be given to him. If no one is with him, those who would harm him draw nearer.

Id. at 165.

78. *See* SABINE, *supra* note 19, at 248 (noting that Thomas Aquinas was a thirteenth century Dominican monk, who, along with his teacher-mentor Albert the Great, transformed the ideas of Aristotle into a "permanent system of Christianized philosophy."). In this system of philosophy, "God and nature are large enough and opulent enough to afford a niche for all the endless diversity that makes up finite existence." *Id.* at 248. This mantra emphasizes the aspects of harmony and the fact that all human knowledge is of a single piece. *Id.* Sabine also recounts how it is especially important in this system to view the universe as forming "a hierarchy reaching from God at its summit down to the lowest being" so that social and political arrangements, the like the arrangements of nature, have design and purpose within an encompassing whole in which the lower serves the higher while the higher guides and directs the lower. *Id.* at 248-49.

79. *See* 2 THE COMPLETE EDITION OF THE OXFORD ENGLISH DICTIONARY 618 (2d ed. 1989) (noting that Buddha is "the title given by the adherents of one of the great Asiatic religions, thence called Buddhism, to the founder of their faith, Sakyamuni Guatama, or Siddhartha, who flourished in Northern India in the Fifth century."); *see also* NANCY WISON ROSS, *THREE WAYS OF ASIAN WISDOM* 89-94 (Clarion Book, Simon & Schuster 1966) (defining the term Buddha to

Teresa⁸¹ have much to be grateful for because these sources yield directions we can follow. Many are not so fortunate. We suffer from mixed messages when our sources supply mixed advice. The solid foundations we need come to us in fractured and paradoxical forms that we attempt to piece together in sensible ways.⁸² Even those of us with single sources of authority or multiple, but consistent, authorities may be misled if these authorities are qualitatively inadequate. Doctrinal loyalties to inadequate practices ask us to construct our practice of justice around counterproductive propositions. The source of these loyalties may be as appealing as charismatic political personalities, as evocative as popular ideologies, religious doctrines or philosophical paradigms, or as hard to deny as family obligations. However, when pursuing justice, it is not the

mean "Enlightened or Awakened Being," which should not be confused with the eighteenth century philosophical movement in Europe). The Enlightenment of eastern experience refers to the attainment of a consciousness higher and truer than provided by or through limited personal ego, *id.* at 89 & 94, and the attainment of Enlightenment presupposes a freedom from earthly or worldly ties describable as supreme detachment. *Id.* at 90. The author also describes an eightfold path which was Buddha's formula "for deliverance from the . . . crippling invalidism that comes with having a 'body-identified mind.'" *Id.* at 91-92. Ross sums up the eight requirements as follows:

First, you must see clearly what is wrong. (II) Next decide to be cured. (III) You must act and (IV) speak so as to aim at being cured. (V) Your livelihood must not conflict with your therapy. (VI) That therapy must go forward at the 'staying speed,' the critical velocity that can be sustained. (VII) You must think about it incessantly, and (VIII) learn how to contemplate *with the deep mind*.

Id. at 91-92.

80. See SABINE, *supra* note 19, at 88 (noting that Aristotle (384-322 B.C.) is understood to be "the greatest of Plato's students [to have] joined the Academy"). Aristotle was known for his empirical investigations into, and general conclusion about, the structure and functioning of states based upon observations and history. *Id.* at 119. Aristotle taught that what is complete and perfected arises out of, or develops from, what is primitive and simple. *Id.* Seeds, he believed, contained their own nature that is displayed as germination proceeds toward plait and eventual flowering. *Id.* Similarly, communities reveal their nature as they grow. *Id.* at 120. Once beyond subsistence, man's social proclivities move him out of the simplicity of family into the formation of more sophisticated organizations (can be thought of as "states") where the development of higher capacities and rational powers are fostered. *Id.* at 120-22.

81. See MOTHER TERESA, A SIMPLE PATH xvii (1995) (describing Mother Teresa as "a living saint," an "exponent of world peace," and "often appears on lists of the world's ten most admired women," although she has never claimed to have accomplished anything extraordinary).

82. See SABINE, *supra* note 19, at 253 (describing how Thomas Aquinas was able to build a singular system by integrating Aristotle's emphasis on reason with the importance the Church placed on faith). There are those who are unable to accept Aquinas' concept of Christian society, built on both faith and reason, as eternal, constructed secular state ideologies. *Id.* at 256. Aquinas' model de-emphasized the nature of empire while facilitating the introduction of the Church's claim to supernatural origins and theocratic authority. *Id.* at 261. Others, however, were less persuaded. *Id.* Even today, it appears difficult, if not impossible, to combine the dual institutions of faith and reason with grace or ease. *Id.* at 261-62. But see WILHELM, *supra* note 39, at xxvi (remarking that Lao Tzu and Confucius emerge in a shared culture inspired, in part, by a common source); LAO TZU, *supra* 77, at cover page (claiming that Confucianism concerns itself with "day-to-day rules of conduct" while "Taoism is concerned with a more spiritual level of being").

332 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 9:2

appeal of the source, but the efficacy of the practice, that ensures wholesomeness.

The dysfunctional results of misplaced loyalties are seen by some as pathological.⁸³ Others see the process in terms of inevitable enculturation.⁸⁴ Still others, the non-apologists, believe in teaching these loyalties as part of their cultural heritage.

Some people see society's contradiction in the administration of justice as social pathology.⁸⁵ Others see it as the inevitable results of enculturation.⁸⁶ Still, others believe in teaching these loyalties as part of their cultural heritage.⁸⁷ What remains unsettled is how we might, appropriately, respectfully and wholesomely, characterize our inheritance of dysfunction to avoid unduly replicating injustice.

Politicians may be honorable individuals in pursuit of creating a more just society.⁸⁸ However, I understand politicians as the

83. See WILHELM, *supra* note 39, at 30.

84. *Id.*

85. See BATESON, *supra* note 1, at 162 ("[T]he conflict is now a life-or-death struggle Are we to reserve the techniques and the right to manipulate people as the privilege of a few planning, goal-oriented, and power hungry individuals . . . ?"). "Conscious purpose is now empowered to upset the balances of the body, of society, and of the biological world around us. A pathology – a loss of balance – is threatened." *Id.* at 434.

86. See ARENDT, PAST, *supra* note 28, at 192 ("[C]onservatism, in the sense of conservation, is . . . the essence of . . . education activity . . ."). Arendt notes that "the function of school is to teach children what the world is like and not to instruct them in the art of living. Since the world is old, always older than they themselves, learning inevitably turns toward the past" *Id.* at 195. The author goes on to state that the aim is not "to introduce the young person to the world as a whole, but rather to a particular, limited segment of it." *Id.* at 196.

87. See *id.* at 193 (suggesting that education, at least primary education, rightfully, not only inevitably, involves indoctrination into cultural heritage); see also TSUNETOMO, *supra* note 50, at 166 (discussing the proper ancient Japanese manner for raising children).

In bringing up a boy, one should . . . encourage . . . valor [T]he child should liken his parents to the master, and learn everyday politeness and etiquette, the serving of other people, the ways of speech, forbearance . . . the correct way of walking down the street. The elders were taught in the same fashion As for the girl, it is most important to teach her chastity. She should not be in the company of a man at a distance of less than six feet, nor should she meet them eye to eye Neither should she go sight-seeing or take trips to temples. A woman who has been brought up strictly and has endured suffering at her home will suffer no ennui after she is married.

See *id.* at 166.

88. See ARENDT, PAST *supra* note 28, at 263 (presenting a deeply appealing image of political life, and "the joy and gratification that arise out of being in company with our peers, out of acting together and appearing in public, out of inserting ourselves into the world by word and deed, thus acquiring and sustaining our personal identity and beginning something entirely new."); see also SABINE, *supra* note 19, at 106 (describing Aristotle's view of political life that "the complete art of a statesman must take governments as they are and do the best it can with the means it has."). "The statesman of Aristotle's art is . . . seated in the midst of affairs. He cannot model them to his will . . . but there is . . . the intelligent use of available means to bring affairs to a worthy and desirable end." *Id.* at 116. "[T]he state gives the opportunity for higher development of . . . rational powers These represent the perfection of human development and . . . are attainable only in civil society." *Id.* at 199; see also WOOD, *supra* note 60, at 254 (describing the views reflected in and by the founding fathers who stated that "[t]he

individuals most likely to suggest honoring unjust propositions as a necessary element in the practice of justice.⁸⁹ With the exception of rare sages, people who exercise power by directing, cajoling or compelling others to practice in accordance with the principles they label as just or justice, are power players not justice practitioners. Power players are politicians.

As it turns out, most of what I was taught in school about justice was taught by people under the influence of other misinformed people. My teachers were often politicians or the “victims” of politicians.⁹⁰ The books I learned from taught good conduct as a duty. I was politically indoctrinated, but was I educated enough to find my own way to justice?

I would like to tell what I call the Patrick Henry story.⁹¹ Do you recall “Give me Liberty or give me Death”?⁹² I certainly do. I was stimulated by the courage of Patrick Henry’s convictions. I learned to identify with him as an example of how a responsible citizen conducts herself. She has principles. She stands up for those

new federal Constitution was designed to ensure that government leadership would be entrusted . . . to . . . ‘men who,’ in Madison’s words, ‘possess most wisdom to discern and most virtue to pursue the common good of society.’”).

89. See ARENDT, PAST, *supra* 28, at 257 (speaking about the leaders of the Russian Revolution and the use of propaganda during the era of the Soviet Union as an example of how politicians are likely to promote injustice in the name of justice). Arendt states that

Their trouble is that they must consistently change the falsehoods they offer as a substitute for the real story And though this continuing instability gives no indication of what the truth might be, it is itself an indication, and powerful one, of the lying character of all public utterances [T]he surest long-term result of brainwashing is a peculiar cynicism – an absolute refusal to believe in the truth of anything In other words, the result of a consistent . . . substitution of lies for factual truth is not that the lies will now be accepted as truth . . . but that the sense by which we take our bearings in the real world . . . is being destroyed.

Id.; cf. W. MICHAEL REISMAN, FOLDED LIES, BRIBERY CRUSADES, AND REFORMS 15-36 (1979) [hereinafter REISMAN, FOLDED LIES].

Elites are operators and are certainly acquainted with the discrepancies from the myth system; more important, they are aware of the utility (to themselves and, perhaps in rationalized form, to ‘the system’) of the particular practices of the operational code. When popular disquiet grows, they will respond in ways that reinforce belief in the myth system Some responses are uncomfortably obvious. For example, after a . . . revelation of campaign fund abuses, Congress heroically cleaned house . . . by shortening the statute of limitations on the offenses involved from five to three years.

Id. at 29.

90. See RUSSELL, *supra* note 28, at 113 (discussing the modern status of education in that “[t]he teacher has thus become . . . a civil servant obligated to carry out the behests of men . . . whose only attitude toward education is that of the propagandist.”).

91. See ROBERT DOUTHAT MEADE, PATRICK HENRY: PATRIOT IN THE MAKING vii-x (1957) (describing Patrick Henry as a true patriot and American hero based on his actions and accomplishments before, during, and after the American Revolution).

92. See generally A. CRAIG BAIRD, AMERICAN PUBLIC ADDRESSES: 1740-1952, 30-32 (1956) (quoting a Patrick Henry speech).

334 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 9:2]

principles. She is willing to face the consequences of her values when confronted with nasty, repressive, overbearing and power hungry autocrats. I tried to prepare myself.

What I hadn't figured on is that the very people who were exposing me to Patrick Henry as a hero where simultaneously exposing me to a double bind that would keep me imprisoned for many years. Even as I learned to see myself as a modern day version of revolutionary forefathers, I was under pressure to comport myself in accordance with restrictive regulations. "Liberty or Death" was taught to me in a context where I was obliged to wait single file in cafeteria lines, sit quietly at my desk, keep my books covered with the requisite plain brown paper and stand up, sit down, talk, or remain silent as commanded.

Of course, I was a school child, and children need structure, limits and discipline. But what, really, was I getting? Were all these school rules essential to my well-being? Weren't many of them designed and implemented by people who thought their system of control and order was the right one for everyone? Was I being educated by people who respected my dignity? No. You know and I know that these people may have been doing the best they could do, but they also had been victimized, the way I was being victimized and the way Patrick Henry was victimized.⁹³ We have all suffered to one degree or another from the imposition of order that was good for some, but bad for many.⁹⁴ The question is: what can be done to resolve this discrepancy?

There appears to be no answer to this dilemma. I do not have an answer. Or, my answer is humility.⁹⁵ That is, I have no single,

93. See RUSSELL, *supra* note 28, at 113-14 (warning against the dangers of dogmatic creeds); see also *id.* at 162 ("Belief in a divine mission is one of the many forms of certainty that have afflicted the human race."); *id.* at 123 ("Every system should allow loopholes and exceptions, for if it does not it will in the end crush all that is best in man.").

94. See CATHARINE A. MACKINNON, ONLY WORDS 21 (1993) (arguing that the current doctrinal paradigm governing the analysis of free speech is good for many, but bad for women, especially bad for women who oppose pornography). But see ROBERT BLY, IRON JOHN: A BOOK ABOUT MEN 1-4 (1990) (explaining how today's technological society may provide opportunities for women to participate, but it is depriving men of connectedness to the wild aspects of masculinity).

95. See POLANYI, *supra* note 42, at 199 (theorizing possible explanations for the status of man's current system of rules).

How should we consciously determine a future which is, by its very nature, beyond our comprehension? Such a presumption reveals only the narrowness of an outlook uninformed by humility. The super-planner who – like Engels . . . – announces that men 'with full consciousness will fashion their own history . . . reveals the megalomania of a mind When such men are eventually granted power to control . . . their fellow men, they reduce them to mere fodder for their unbridled enterprises.

dominating, structured response that will enable us to go forward into a utopian order good for everyone. Instead, I have a warning. If the guidance of our history books can be trusted, almost all humans are born, mature and die without experiencing much freedom from the oppressive fictions of their culture. When we practice justice, that is something that needs to be remembered.

b

A misconception that troubles me is the nonsense many of us were taught about the nature of justice. I was taught to think of injustice in the same way. Ordinary people living ordinary lives could have ideas about justice and injustice. These ordinary people could express their opinions and could, if qualified (and, if allowed), vote. These ordinary people could participate at some level of the law, in law enforcement and in the justice system itself. But, serious questions were left to those in positions of authority and control. The way I was taught to understand the world was that ordinary people, like my family and myself, were not supposed to spend too much of our time concerned with serious social questions. There were better educated, better positioned people who did that.

Since, according to the way I was taught, justice and injustice were out of the hands of the ordinary folk, the world we were taught about disempowered us while empowering the people already in control. Justice and injustice were something we could think about, but not something we were ordinarily invited to take responsibility for. They were not something we were ordinarily entitled to experience. Someone else was empowered to make these decisions and distinctions.

It is shocking when laid out like this. Nevertheless, that version is pretty close to the way I experienced the lessons I was taught about the distribution of influence and authority in the United States when I was in grade school. Only later in life did I take it upon myself to challenge the orthodoxy that I was taught. Only as an adult did I become convinced that justice was an essential experience for all people and that injustice was an experience we all shared.⁹⁶

Id. See also LEVINAS, PHILOSOPHICAL WRITINGS, *supra* note 35, at 72 (“[T]o the voice that calls from the Burning Bush, Moses answers, ‘Here I am,’ but does not dare to lift up his eyes. The glorious theophany which makes so much humility possible will be missed because of the humility which lowers the eyes. Later, on the rock of Horeb, the prophet ventures to know, but glory is refused to the boldness that seeks it.”); see also *id.* at 56 (“[a]nd is not the will thus at bottom humility rather than will to power?”).

96. See J. Hillis Miller, *Laying Down the Law in Literature: The Example of Kleist*, in

C

I was taught in law school to rely on abstract constructions to establish the perspectives and relationships that contained or contextualized our professional service. Get the ideas right, I understood my teachers as saying, and effective behavior will follow. At the root of this concept is the supposition that a commitment to honorable abstract concepts will result in honest and commensurate actions.⁹⁷ Relying on ideas (ideals) to direct and validate our actions,

DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 305-29 (Drucilla Cornell et al. eds., 1992) (observing that the idea of the administration of justice and injustice in society is well described by the story titled "Michael Kohlhaas"). In the story, the protagonist is an upright, respectable horse dealer who is detained for want of (apparently a spurious want of) a pass on his way through a particular Junker's territory. *Id.* at 310-11. Leaving as surety two horses and groom, he is allowed to continue on his journey with the remaining animals. *Id.* at 311. Returning several weeks later with proof that the demand for a pass was itself not legitimate – the first injustice – Kohlhaas finds his groom beaten and destitute and his fine horses thin, dull and overworked – the second injustice. *Id.* He demands as recompense the rehabilitation of his groom and his horses. *Id.* He is denied what he seeks. *Id.* at 312. Instead he is told to take up the horses, whatever their condition and depart – the third injustice. *Id.* at 311-12. Coming to his aid by pressing his suit, his wife is mortally wounded – the fourth injustice. *Id.* at 312. Claiming himself free to stand outside the law which has so casually refused to correct the growing litany of injustice, Kohlhaas issues a decree of independence following which he and his followers attack and burn the castlehold, thereafter, taking to the forest as outlaws – taking justice into his own hands? *Id.* His first acts of injustice? Eventually, under a grant of amnesty, the Elector of Saxony, an overlord, punishes the Junker and returns the fattened horses along with other recompense to Kohlhaas – the redeeming justice? *Id.* However, the overlord's overlord, the Emperor of the Holy Roman Empire, who considers himself unfettered by the amnesty, orders Kohlhaas's execution for "breach of the peace" – the ultimate justice or injustice. *Id.* at 312-13; *see also* FOUCAULT, POWER/KNOWLEDGE, *supra* note 19, at 8-9 ("In the case of popular justice you . . . have the masses and their enemies . . . [T]he masses, when they perceive somebody to be an enemy . . . do not rely on an abstract universal idea of justice, they rely only on their own experience, that of the injuries they have suffered, that of the way in which they have been wronged, in which they have been oppressed."); LESLIE BENDER & DAAN BRAVEMAN, POWER, PRIVILEGE AND LAW – A CIVIL RIGHTS READER 66-67 (1995) [hereinafter POWER, PRIVILEGE AND LAW] ("Oppression . . . is part of the basic fabric of a society, not a function of a few people's choice or policies. You won't eliminate this structural oppression by getting rid of the rules or making some new laws, because oppressions are systematically reproduced in major economic, political, and cultural institutions."). "The conscious actions of many individuals daily contribute to maintaining and reproducing oppression, but those people are usually simply doing their jobs or living their lives, not understanding themselves as the agents of oppression." *Id.* at 68; *see also* LEVINAS, TOTALITY AND INFINITY, *supra* note 52, at 72 (noting that "[t]ruth is . . . bound up with the social relation, which is justice"). Levinas appears to be stating that "God is accessible in justice . . . [and] the dimension of the divine open forth from the human face." *Id.* at 78. In addition, "metaphysics is enacted where social relation is enacted – in our relations with men. There can be no 'knowledge' of God separated from the relationship with me." *Id.*

97. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 115 (1994).

Observing . . . similarities – this pattern in a series of instances of experience – we abstract out of them common elements and develop a symbol to stand for the pattern of instances Characterizing signs of this kind, or *abstractions*, . . . stand[s] not for

we establish a hierarchy where words speak louder than actions and where the best ideas are valued more than good conduct. The situation is troublesome.

Theories of justice often propose ideas that seem impossible to practice.⁹⁸ Our justice ideas or ideals are presented as abstract goals or principles. I was taught that aspiring to these ideals or values was important. However, I was also taught that a certain greatness was required to identify and understand these ideals and that an even finer greatness was required to abide by them.

Because of the way this scheme of ideas and values operated, I was taught that acknowledging these ideals was imperative while acting in accordance with these principles could not be expected from mere humans. Therefore, as long as I could recite the principles and project the patterns of behavior implied by them, I was learning what was necessary for me to learn.

When the primary value of an abstraction is to be admirable, the utility of having well-thought out ideas about justice and law is

any particular instances of experience but for an idea Abstractions . . . are . . . the essential instruments by which the law performs its directive function of providing, authoritatively and in advance, what is to be done The process by which general or characterizing signs, or abstractions, are employed to arrive at the conclusion that this particular instance of experience is an example of a previously formulated general idea . . . is of the essence of the operation of law. What happens, when the operation runs smoothly, is that the user recalls the various characteristics which in combination form the pattern represented by the abstraction. He then examines the particular instance and observes that it exhibits the same characteristics. When the matching of the abstracted characteristics and the concrete ones is perfect, he moves surely to his conclusion.

Id.

98. See *id.* at 116-17 (acknowledging that the process they described does not always work smoothly). The “disorderly conduct of words” coupled with the incomplete and deviating patters of human conduct, make out abstractions “inexact.” *Id.* at 116. We depend, in fact, on shared (they call it “general”) understanding and judgment – a judgment that is likely to require “conscious ratiocination,” which is conscious thought along a “chain of reasoning.” *Id.* When we begin the process of characterizing qualities or tendencies of human experience, “we come to depend on ‘higher levels of abstraction’ . . . not involving in any way the perception of tangible objects.” *Id.* at 116-17. It is at this point of the process that “accurate communication requires that the speaker and the listener not only share the same understanding of the components of the abstraction – say, ‘justice’ – but that they be able to follow parallel lines of thought in applying it in the particular instance in question.” *Id.* at 117. As if the difficulty of achieving shared understanding, shared lines of reasoning and shared judgment regarding the “justice” might call for in a particular case were not daunting enough, Hart & Sacks identify additional requirements for sound legal reasoning. *Id.* at 117. In their paradigm, legal decision-making is about “controlling . . . the future.” *Id.* at 117. Accordingly, the statement of abstractions articulated in justification or explanation of a particular choice must indicate general direction while leaving just the right room for future aligned reasoning and judgment. *Id.* “[T]he direction-giver has to strike a happy medium between definiteness and indefiniteness. His task is to control the future as far as he wisely can. He must be indeterminate only when an attempt at too tight a control is unwise.” *Id.* at 117. See also CORNELL, IMAGINARY DOMAIN, *supra* note 26, at 16 (asserting the proposition that “[j]ustice is not something to be achieved, it is something to be struggled for.”).

338 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 9:2]

converted into dysfunction. The process of good conduct flowing from well-constructed ideals is inverted. When people are directed away from practicing actions consistent with accepted principles and toward the ability to imagine elegant social constructions as a “fantasy only” endeavor, a perversion is takes place.⁹⁹

Only if we do what we say we believe in, and when abstractions become principles for conduct rather than something we think about, can we move toward creating justice.

d

Lawyers function in highly regimented ways. There are forms and ceremonies, proper ways and required protocol that pretty much dictate the work of lawyers in courtrooms, government agencies, governing bodies.¹⁰⁰ These formalizations are not all about

99. See HART & SACKS, *supra* note 97, at lxii.

The rationalist tradition is deep and strong in Anglo-American law . . . By ‘rationalist’ we mean an insistence that legal commands be supported by reasons, that reasons be subject to evaluation by universal criteria, and that the reasons justifying different legal commands not be inconsistent with one another. The common law formalism of Langdell was rationalist.

Id. See also *id.* at lxiii (quoting Judge Benjamin Cardozo’s organic theory of rationalism as enunciated in his work, *THE NATURE OF THE JUDICIAL PROCESS* (1921)). “The judge . . . is to draw his inspiration from consecrated principles.” *Id.* “[These] principles emerge from the process of testing, retesting, and reformulation inherent in common law.” *Id.* “Law . . . is dynamic and not static. It is . . . activity with purpose.” *Id.* at n.141 (quoting Hart, *Note on Some Essentials of a Working Theory of Law*, Hart papers, Box 17, Folder 1). Law “is the channeling of community activity . . .” *Id.* at xciii. However, the resolving reliance on the design and implementation of processes of decision-making, i.e., procedure, quash vitalism for the sake of stability. The emphasis shifts from the initiating concern for dynamic to the modulating need for well-constructed, well thought out procedural methodologies. Ideation, this time ideation about procedural elegance, emerges as the important activity. “An unsound procedure invites ill-formed and unwise [decisions].” *Id.* at xciv. Judge Cardozo continues on to explain that “[p]rocess not only defines the roles and duties . . . but provides mechanisms for controlling discretion and for self-correction . . . [T]his process is critical to law’s stability and legitimacy.” *Id.* at xcv; see also THURMAN ARNOLD, *THE SYMBOLS OF GOVERNMENT* 31-36, 44-45 (1935), *reprinted in* REISMAN & SCHREIBER, *supra* note 1, at 448 (finding that the law “is a way of writing about human institutions in terms of ideals, rather than observable facts”).

100. See ARNOLD, *supra* note 99, at 448-49.

Law is primarily a great reservoir of emotionally important social symbols . . . [I]t is the greatest instrument of social stability The abstract ideal which is not tied up with a definite institution or memorialized by particular ceremonies, becomes relegated to the limbo of metaphysics and has little social consequences. The institutions which throw about the law the atmosphere of reality and concreteness so necessary for its acceptance are the court and the law school. The one produces the ceremonial ritualistic trial; the other produces a theoretical literature which defends the ideal from attack by absorbing and weaving into its mystical pattern all the ideas of all the critics.

Id. See also FOUCAULT, *POWER/KNOWLEDGE*, *supra* note 19, at 8 (expressing his judgment).

[L]ook . . . closely at . . . the spatial arrangement of the court, the arrangement of the people who are part of or before the court. The very least that can be said is that this

efficiencies or ordered regularity or theories of evidence, or justice. Some of these rituals are maintained to evoke respect or awe. Those British judges who wear black robes or red robes and white wigs come to mind, so, also, does the *Oyez Oyez* entrance that announces the “all rise” greeting in Pennsylvania courts.

I hear some voices quibbling back with “What’s wrong with a little tradition?” or “What’s wrong with a little respect?” The point I want to make is that there is nothing wrong with honoring tradition in the right time and place. There is nothing wrong with asking people to show regard for the authority of a sincere, hardworking judge, either. What is wrong is asking people to respect judging when judges cannot follow either law or justice.¹⁰¹ When we ask people to respect these individuals we are really asking people to respect the power, that is, the might of the “Form” of the state. When acting as a practitioner of justice you want to be careful about asking people to honor the power of reigning governors. Justice may not demand the disestablishment of all officials, it does demand the actualization rather than ritualization of respect. The fact that most of us were educated to produce ritualizations when respect is called for should suggest the depth of our struggle as we attempt to practice justice.

implies an ideology A table, and behind this table, which distances them from the two litigants, the ‘third party’, that is, the judges. Their position indicates . . . that they are neutral . . . that their decision is not already arrived at . . . that it will be made after an aural investigation . . . on the basis of a certain conception of truth and . . . ideas concerning what is just and unjust . . . that they have the authority to enforce their decision. This is ultimately the meaning of this simple arrangement.

Id. See also *id.* at 27 (suggesting that “[t]he court is the bureaucracy of the law. If you bureaucratise popular justice then you give it the form of a court.”); COVER, *supra* note 8, at 221-22 (speaking about the courtroom as “a setting of domination.”).

101. See ARENDT, PAST, *supra* note 28, at 257 (observing that the use of propaganda in the Soviet Union led to a peculiar type of cynicism, where the categories of “truth”: and “lies” no longer held any meaning); see also ROBERT PRESTHUS, THE ORGANIZATIONAL SOCIETY 27-55 (1962), quoted in REISMAN & SCHREIBER, *supra* note 1, at 364 (“Hierarchy . . . is the result of the separation of personal, charismatic authority from official authority. . . . The deference accorded organizational leaders is highly charged with charismatic implications. Such deference validates the individual’s need to impute superiority to those above him.”); *id.* at 362 (alleging that such a system anesthetizes “the sense of personal and systemic responsibility of individuals.”); Robert W. Gordon, *New Developments in Legal Theory*, in POLITICS OF LAW: A PROGRESSIVE CRITIQUE 281 (D. Kairys ed., 1982), reprinted in REISMAN & SCHREIBER, *supra* note 1, at 466 (speaking about hegemony which moves both the dominant and the dominated classes to believe that the existing order represents pretty much the best anyone can do). “[T]hese clusters of belief . . . convince people that all the many hierarchical relations in which they live and work are natural and necessary.” *Id.* at 466. Respecting the source of power only because it is the source of power, may be a practical requirement of living with others in the world. *Id.* This does not eliminate or circumscribe the risks of its misuse. *Id.* at 467.

e

I live in a house that is built on sand. Each year the building sinks or shifts as the foundation settles into the slowly moving sand. This is old-fashioned construction. No one would build a house this way today. No one would be allowed to. The point here is not whether my house fails to meet modern construction standards, the point is that I am constantly confronting choices. I can tear down my house and construct another sounder building. I can keep repairing the accretionary damage like cracked walls, tilting floors, sagging windows. I can let it deteriorate. It is my house. The issue comes down to my finances—what I can afford to do. What it makes sense for me to do. My house poses no danger to others. The cost of reconstruction, repair or neglect falls on me. In that sense, it's all the same thing.

The cost of tolerating unsoundness in a society, however, falls on all members of that society. With society, the costs of reconstruction, the costs of constant repairing, and the costs of living with deteriorating conditions may not be the same, but each is higher than citizens generally care to acknowledge. Usually what happens is that the cost of tolerating uncorrected conditions, remember we are speaking about injustice, is denied recognition or laid at the feet of those who suffer the condition.

At the time of the French Revolution, the crowds of poor protesting citizens were considered “the problem” by powerful aristocrats.¹⁰² In our society the unsupervised, “acting out” of latch-key children and the violence of the children of addicts is often identified as a problem of youth offenders.¹⁰³ Uncooperative wives

102. See FOUCAULT, POWER/KNOWLEDGE, *supra* note 19, at 15 (noting that the penal system operates as an anti-seditious system).

[T]his penal system was aimed . . . against the most mobile, the most excitable, the ‘violent’ elements among the common people: those who were most prepared to turn to direct, armed action, including farmers who were forced by debts to leave their land, peasants on the run from tax authorities, workers banished for theft, vagabonds or beggars . . . those who live by plundering the fields, those who . . . attacked the tax authorities and . . . agents of the State, and finally those who . . . carried weapons It was these ‘dangerous’ people who had to be isolated (in prison, in the Hôpital Général, in the galleys, in the colonies) so that they could not act as a spearhead for popular resistance. This fear was great in the eighteenth century.

Id.

103. See, e.g., Elizabeth Venant, “I Dream They are Going to Kill Me” Kidnappings. *Drugs. Violence. Death. In L.A. Neighborhoods Dominated by Gangs, The Invisible Victims are Children*, L.A. TIMES, Mar. 25, 1990, at E1 (reporting that latch-key children in inner-city Los Angeles are at particular risk of falling prey to drug and gang related violence).

2001]

REDEFINING VIOLENCE

341

are blamed for the brutality of their battering husbands.¹⁰⁴ Women in the workplace are blamed for an increase in sexual harassment.¹⁰⁵

As long as we displace or deny the costs of injustice, justice will look too costly. When justice is the only item with a price tag, injustice may look like a free lunch. It never was like that. It is not like that now. It will never be like that. Until you know the cost of maintaining injustice, you cannot judge the comparative cost of justice.

If you are old enough, you may be able to pass the problems on to the next generation. They can cope with the sagging beach house. If you are younger than that, the house will eventually collapse. You could be in it.

IV

Knowledge is Power is Knowledge is Power.

Forever looped,

forever woven,

a tapestry, once created,

never undone.

Caught like a fly in a spider web trap,

never unhung.

Meaning from context, context from culture,

culture from grammar, law, structure and form.

Form creates substance, substance generates form.

104. See Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2118 (1996) (noting that the "Anglo-American common law originally provided that a husband, as master of his household, could subject his wife to corporal punishment or 'chastisement' so long as he did not inflict permanent injury."); see also *People v. Berry*, 556 P.2d 777, 782 (Cal. 1976) (reversing a murder conviction when the now deceased wife's admissions of infidelity, her taunts, teasing and infuriating conduct were understood to support a finding that the defendant killed in wild desperation induced by this provocation); Victoria Nourse, *Passion's Progress: Modern Law Reform and The Provocation Defense*, 106 YALE L.J. 1331, 1343 (1997) (discussing 'separation assault' by reference to studies showing that forty-five to fifty-six percent of males committing intimate homicides are occasioned by a female's attempt to leave or leaving the relationship).

105. See L. Camille Hébert, *The Economic Implications of Sexual Harassment for Women*, 3 KAN. J.L. & PUB. POL'Y 41, 47-50 (1994), reprinted in BARTLETT & HARRIS, *supra* note 55, at 498 (finding that "[s]exual harassment in the workplace may even be motivated by the frustration some men feel over the loss of economic power in the workplace Some men feel threatened, both socially and economically, by the advancement of women; some of these men react to these women with hostility."). Bartlett & Harris go on to suggest that some men are acting out unconscious efforts to maintain male dominance by responding, with hostility and aggression against women in workplace situations, to preserve and protect male power, status and security. *Id.* at 508.

342 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 9:2

Enter a space defined action-by-action.
Is outside the lines
really "gone wrong"?

Rituals provide meaning, become meaningless.
"The groundlessness of our believing", the mutuality of
meaninglessness,
this hell we escape
only by sharing.¹⁰⁶

a

Foucault teaches that power is related to knowledge by way of mutual derivation and support.¹⁰⁷ Power can come from knowledge, can arise out of knowledge. Knowledge can generate a nodule, a clustering of ideas, concepts, ideations, which moves, influences, directs and so gives rise to power. On the other hand, established power controls information, directs institutions, channels resources, shapes knowledge.¹⁰⁸ Along the same lines, morality enforced by law is an instrument and expression of power. Law, separated, isolated, alienated from morality by power loses authority.¹⁰⁹ The idea of

106. Sharon S. Harzenski, unpublished poem (revised Mar. 2000) (on file with author).

107. See FOUCAULT, POWER/KNOWLEDGE, *supra* note 19, at 51-52. Foucault states:

exercise of power itself creates and causes to emerge new objects of knowledge and accumulates new bodies of information. One can understand nothing about economic science if one does not know how power and economic power are exercised in everyday life. The exercise of power perpetually creates knowledge and, conversely, knowledge constantly induces effects of power.)

[P]ower is strong . . . because . . . it produces effects at the level of desire—and also at the level of knowledge. Far from preventing knowledge, power produces it It was on the basis of power over the body that physiological, organic knowledge of it became possible.

Id. at 59.

Once knowledge can be analysed in terms of region, domain, implantation, displacement, transposition, one is able to capture the process by which knowledge functions as a form of power and disseminates the effects of power. There is an administration of knowledge, a politics of knowledge, relations of power which pass via knowledge and which, if one tries to transcribe them, lead one to consider forms of domination designated by such notions as field, region and territory.

Id. at 69. "Truth is a thing of this world: it is produced only by virtue of multiple forms of constraint. And it induces regular effects of power. Each society has its régime of truth, its 'general politics' of truth" *Id.* at 131.

108. See *id.* at 131-32 (arguing that truth "is produced and transmitted under the control, dominant if not exclusive, of a few great political and economic apparatuses (universities, army, writing, media) . . . it is the issue of a whole political debate and social confrontation . . .").

109. See REISMAN & SCHREIBER, *supra* note 1, at 26 (quoting REISMAN, FOLDED LIES, *supra* note 89) (arguing that "[a]ll foci of loyalty have, by definition, . . . a normative code."). "Legality" may be taken to refer to conclusions drawn by members of the community as to the

justice without power is abstract, unrealizable, still born. Power without justice threatens to erupt into oppression and violence.¹¹⁰

b

Ceremony is a prescribed series of acts, a pattern of formalized behavior.¹¹¹ It is akin to ritual, to etiquette, to politeness. It is also related to the performance of religious rites.¹¹² It carries a flavor of

propriety of practices determined by some method of logical derivation from the myth system." *Id.* at 27; see also HART & SACKS, *supra* note 97, at cxii (presenting a supporting message from a partially inverted view). Hart brought copies of *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964) (announcing the Supreme Court's reliance on the Civil Rights Act to halt prosecutions of desegregation sit-ins) to his Federal Courts class. The class was prepared from past experience for a serious and scathing analytical dissection of the case. Instead, Hart paused, reflected, remained silent for 'thirty breathless seconds,' looked up at the class and announced: "Sometimes, sometimes, you just have to do the right thing." *Id.*; see also REISMAN & SCHREIBER, *supra* note 1, at 118-19 ("[O]ne has not only a legal but moral responsibility to disobey unjust laws An unjust law is a code that is out of harmony with the moral law.") (quoting Dr. Martin Luther King, Jr.); SIU, *supra* note 10, at 64-65 (standing for the proposition that "[n]o power of major proportions can effectively be exercised over a prolonged period of time without an array of myths to sustain it . . . [therefore it] directly provide[s] [a] moral justification for the extension of . . . power.").

110. See Jacques Derrida, *Force of Law: "The Mystical Foundation of Authority,"* in DECONSTRUCTION AND JUSTICE, *supra* note 96, at 10-11 (quoting, in both the French and English versions, Pascal's belief regarding justice).

La justice sans la force est impuissante, la force sans la justice est tyrannique. La justice sans force est contredite, parce qu'il y a toujours des méchants; la force sans la justice est accusée. Il faut donc mettre ensemble la justice et la force; et pour cela faire que ce qui est juste soit fort, ou que ce qui est fort soit juste.

Id. The passage as translated is reproduced as follows:

Justice without force is impotent, force without justice is tyrannical. Justice without force is contradictory, as there are always the wicked; force without justice is accused of wrong. And so it is necessary to put justice and force together; and for this, to make sure that what is just be strong, or what is strong be just.

Id.

111. Ceremony is defined as

an outward rite or observance . . . the performance of some solemn act[s] according to proscribed form, [can be used] disparagingly [to refer] to rites or observances regarded merely . . . as empty form; 2. A formal act or observance . . . established by custom in social intercourse, a usage of courtesy; 3. Formal observances . . . in reference to matters of religion or state.

2 THE COMPLETE EDITION OF THE OXFORD ENGLISH DICTIONARY 1048 (2d ed. 1989); see also SIU, *supra* note 10, at 143 (contending that "[w]hat is meant by ceremony in the context of power . . . is . . . strategy reinforcing There has never been a person of great power who failed to recognize the indissoluble relationship between ceremonial reinforcement and social control.").

112. See JOHN BOYER NOSS, MAN'S RELIGIONS 15 (1963) ("[P]raise, thanksgiving, and the desire for communion with divine beings provide much of the content of religious ritual . . ."). Noss reports in the context of describing primitive religions:

[A]nthropologists claim that in most religious situations anxiety exists First, there is a primary anxiety arising from crises or strains in the life of the individual or the community . . . this calls forth rituals whose purpose is to provide reassurance . . . a secondary anxiety [arises] lest the rituals have not been . . . properly performed

344 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 9:2

sanctification or worship. Even watered down, reverence is often an associated emotion.

I am not at all certain I know how ceremonies operate to create awe or other proper emotional reactions. I am certain that ceremonies work at least some of the time for some of the people just as I am certain that ceremonies do not work all of the time for all of the people.¹¹³ Ceremonies are a useful place to take account of personal experience. One too many family weddings, too many funerals or the last straw obligatory professional gathering, its hard to

giv[ing] rise to further rituals of purification and expiation. The rituals . . . not only comfort and reassure but also bind

Id.; see also FREUD READER, *supra* note 3, at 712-13 (offering his own interpretation of religious rituals).

We know that a human child cannot successfully complete its development to the civilized stage without passing through a phase of neurosis This is because so many instinctual demands which will later be unserviceable cannot be suppressed by the rational operation of the child's intellect but have to be tamed by acts of repression, behind which, as a rule, lies the motive of anxiety In just the same way, one might assume, humanity as a whole, in its development through the ages, fell into states analogous to neuroses, and for the same reasons—namely because in the times of its ignorance and intellectual weaknesses the instinctual renunciations indispensable for man's communal existence had only been achieved by it by means of purely affective forces. The precipitates of these processes resembling repression which took place in prehistoric times still remain attached to civilization for long periods. Religion would thus be the universal obsessional neurosis of humanity

Id.

113. See SIU, *supra* note 10, at 153 (relating the following story on the war in Vietnam):

When the American president wanted to escalate the war in Vietnam during the early 1960s, he got the United States Senate to pass the 1964 Gulf of Tonkin Resolution. The overwhelming passage with only two dissenting votes out of a hundred provided the legal justification. By the time the Senate woke up to what it had done and repealed the resolution in 1969, the President had already committed half a million troops in a full-scale war. The succeeding President then claimed that *his* authority for continuation of the war does not rest on *that* piece of paper but on *others*. He would not object at all to see it repealed. In the meantime, it had served the intended purpose of legitimacy well.

Id. (emphasis in original); see also *id.* at 147 (recounting the story of a Chicago alderman in 1970).

He would often visit his favorite pawnshop, pay cash for a hundred-dollar watch, and immediately pawn it for thirty dollars. He would then redeem it within a short time. After this cycle happened several times, the pawnbroker became curious and asked the alderman as to the purpose of the routine. The latter explained that his political friends were continually pressuring him for contributions. So he simply tells them that he doesn't have any money and whips out the pawn ticket to prove the point.

Id. But see FREUD READER, *supra* note 3, at 689-90 (offering a different perspective on civilization).

[E]very civilization rests on a compulsion to work and a renunciation of instinct and therefore inevitably provokes opposition from those affected by these demands [T]hese privations [coercion and the renunciation of instinct] . . . form the kernel of hostility to civilization. The instinctual wishes that suffer under them are born afresh with every child

Id.

say, generally, exactly what occasion initiates a cynical chain-reaction. For each person a time comes when the proscribed rituals lose their magic and, stripped of their ability to inspire, become empty forms filled with cynical fakery.

"The Emperor's New Clothes"¹¹⁴ is too kind an epitaph for the experience of degraded ceremonial conduct. It compromises us deeply. We are demeaned, humiliated. The very acts designed to generate respect twist into conduct of form-only respectfulness.¹¹⁵ Fakery, trickery, fraudulent behavior is learned as an aspect of our ceremonial training. Once this point is reached anger and resentment are sewn into the fabric of our ceremonial experiences.¹¹⁶ Almost no one escapes without debasement.

The why of this rejection syndrome seems obvious. A set of behaviors, a pattern of conduct, established to assist in the direction or expression of shared emotion cannot work equally well for all people at all times. We are malleable, but not that malleable. We are herd animals, but not solely herd animals. We are social creatures, but not entirely social creatures. We are cooperative, but not wholly cooperative.¹¹⁷ We are neither the free-standing, atomistic individualists of some philosophies¹¹⁸ nor the passive bovine mass of

114. See HANS CHRISTIAN ANDERSEN, ANDERSEN'S FAIRY TALES 263-68 (1945).

115. See FREUD READER, *supra* note 3, at 691 (stating that "it is understandable that the suppressed people should develop an intense hostility towards a culture In such conditions an internalization of the cultural prohibitions among the suppressed people is not to be expected.").

116. See *id.* at 691 ("[A] civilization which leaves so large a number of its participants unsatisfied and drives them into revolt neither has nor deserves the prospect of lasting existence."). The relevancy of the Freud cites depends on the willingness of the reader to permit the analogy between ceremonialization and civilization. *Id.*

117. See SABINE, *supra* note 19, at 524 (stating that communities rely on cooperation). "The main result of Hobbes's analysis . . . had been to show that a community as such is a pure fiction, that it has no existence except in the cooperation of its members . . ." *Id.*

118. See *id.* at 432-33 (concluding his discussion of seventeenth century political ideation).

The individual human being, with his interests, his enterprise, his desire for happiness and advancement, above all his reason . . . appeared to be the foundation on which a stable society must be built Under other circumstances man as a member of an organized community might have figured as the axiom, as in general it did for Plato and Aristotle, and man as an individual as the derivative.

Id. Drawing on the philosophy of Immanuel Kant, Sabine argues that "[s]ociety is made for man, not man for society; it is humanity . . . that must always be treated as an end and not as a means. The individual is both logically and ethically prior." *Id.* at 526. Sabine, citing John Locke's philosophical works, states that "[b]oth government and society exist to preserve the individual's rights." *Id.* at 525. This ideation, according to Sabine, led to systematic individualism according to which "[t]he value of any social group consists in the happiness or self-satisfaction which it produces for its members . . ." *Id.* at 580. Turning to Bentham and his view that any corporate body, any state, community, society, is inevitably fictitious, Sabine reports that "[t]he utility of the greatest happiness principle, therefore, consists in the fact that it is the great solvent of fictions . . ." *Id.* at 679. Referring to the Nineteenth century in a chapter entitled "The Idealist Revision of Liberalism," Sabine offers this description:

counterbalancing alternative ideologies.¹¹⁹

Our willingness to cooperate “up to a point” requires respectful

This ideal requires that the members of a society meet as moral equals, that they treat each other with respect, that all are free to think and act for themselves For this reason coercion ought to be reduced to a minimum, and this is no truer of coercion exerted by the state than of any other form of coercion which has the effect of making persons less than free moral agents.

Id. at 731. Offering his own conclusion, Sabine reminds us that “[th]e picture of a liberal political community as a mass of unattached individuals . . . was never approximately a fact, but only a figment of a few philosophers . . .” *Id.* at 751.

119. See SABINE, *supra* note 19, at 751-52 (dismissing the idea that people would be free if they had no organization or that human communities take a form simple enough to allow a single, all encompassing organization, to serve all unification, cooperation functions). “Certainly no modern society can ever approximate such a condition,” he says, “and both fascism and . . . socialism demonstrate that experiments in this direction were both fictions and disasters.” *Id.* at 752. Criticizing Lenin’s philosophy, Sabine argues that:

[I]n effect Lenin said that the working-class people are not naturally much inclined to revolution, have learned little from their experience with capitalist industry, and in general have very little capacity for thinking about their place in society or ways to improve it. All this was contrary the Marxian belief that it is precisely experience with industry that creates a proletariat and makes it inherently revolutionary Lenin’s thought had a definitely anti-democratic undertone as if he did not really trust the proletariat For Lenin’s proletariat clearly needed to be managed and maneuvered by leaders . . . who know what the proletariat ought to want

Id. at 814-15. According to Sabine, Lenin believed that “a leader has nothing to learn about ends from the people he leads. He has a great deal to learn about how to urge them along as fast and as far as possible, and without the undo use of force, which works best when used moderately.” *Id.* at 817. Moderating or vacillating views have long been a part of our tradition. *Id.* at 525.

Both the government and society exist to preserve the individual’s rights, and the indefeasibility of such rights is a limitation on the authority of both. In one part of Locke’s theory, therefore, this individual and his rights figure as ultimate principles; in another society itself plays this part. There is nothing which adequately explains how both can be absolute.

Id. at 625-36. Paraphrasing Jaques Rousseau, Sabine states that “the natural egoist is a fiction . . . some kind of community is inevitable [A] unique fact about a community . . . [is] that it has a collective good which is not the same thing as the private interests of its members.” *Id.* at 588. Hegel is noted as having moved these ideas into a post-French Revolutionary formulation, according to which:

Neither society nor the state can be said to depend merely on individual consent; they are too deeply ingrained in the whole structure of needs and satisfactions that make up personal self realization. The highest of all human needs is the need for participation, to be an organ of causes and purposes larger than private wants and satisfactions. The fundamental error or revolutionary philosophy . . . was its abstract individualism.

Id. at 651; see also HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 465-66 (1973) [hereinafter ARENDT, TOTALITARIANISM] (arguing that total terror is a strategy attributable to totalitarian states and that it “substitutes for the boundaries and channels of communication between individual[s]. . . a band of iron which holds them so tightly together that it is as though their plurality had disappeared into one Man of gigantic dimensions.”); FOUCAULT, POWER/KNOWLEDGE, *supra* note 19, at 98 (offering an alternative view that

[t]he individual . . . is not the *vis-à-vis* of power; it is, I believe, one of its prime effects. The individual is an effect of power, and at the same time, or precisely to the extent to which it is that effect, it is the element of its articulation. The individual which power has constituted is at the same time its vehicle.).

regard. Ceremonial mandates rarely recognize the limitations of willing participation. More is demanded than can be produced.¹²⁰ The rewards for producing extraordinary cooperation are rarely sufficient to justify the expenditure of discipline. Hence, we are “forced” into producing a form of the requisite behavior. That is, we may go along with the ceremonial conduct but we go along with it without heartfelt commitment. To some degree or another coercion fuels our sense of obligation or duty.

Having been moved by compulsion to act in accordance with another’s demands we do not produce the desired emotional response. In actual fact an undesired emotional response is produced instead. Where reverence is wanted, the unwilling participant produces resentment.¹²¹ Where family unity is wanted, the compelled participant produces withdrawal and contempt.¹²² Where community spirit is wanted, the bullied participant experiences distancing, alienation.¹²³ In this way ceremonies designed to generate one set of responses degenerate into activities that produce a different and undesired, unwanted, set of responses.

Just about every kid reports this experience to just about every parent and teacher. Just about every parent and teacher misinstructs the concerned young person. As a result, misinstructed, misguided, we turn away or run away from events designed to bring us closer together.

120. See POPE JOHN PAUL II, *CROSSING THE THRESHOLD OF HOPE* 222 (1995).

[C]ontemporary man finds it hard to return to faith because he is afraid of the moral demands that faith makes upon him. And this, to a certain degree, is the truth. *The Gospel is certainly demanding* Christ never permitted His disciples and those who listened to Him to entertain any illusions about this.

Id. (emphasis in original). The Pope goes on to say that God’s demands never exceed the believer’s abilities. *Id.* at 222. If one accepts these demands with an attitude of faith, God will give you the strength to meet them. *Id.* at 222. “*To accept the Gospel’s demands means to affirm all our humanity, to see in it the beauty desired by God*, while at the same time recognizing, in light of the power of God Himself, our weaknesses: ‘What is impossible for men is possible for God.’” *Id.* at 223 (emphasis in original).

121. FREUD READER, *supra* note 3, at 690 (“[A] majority of people obey the cultural prohibitions on these points only under pressure of external coercion—that is only where that coercion can make itself effective and so long as it is to be feared.”). Speaking of ancestors who, like us, may have questioned the facticity or accuracy of the important traditional beliefs and rituals which make a religious practice, Freud says “[m]any of them probably nourished the same doubts as ours, but the pressure imposed on them was too strong for them to have dared uttered them.” *Id.* at 702.

122. See *id.* at 702 (arguing that with respect to religious beliefs and practices that “countless people have been tormented by similar doubts, and have striven to suppress them, because they thought it was their duty to believe.”).

123. See *id.* (claiming that “many brilliant intellects have broken down over this conflict [about religious beliefs and practices], and many characters have been impaired by the compromises with which they have tried to find a way out of it.”).

348 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 9:2]

What guidance was given? Do you recall? Was it phrased in mandatory terms for you? Terms of obligation are commonly employed. The why of this is easy enough to comprehend. I use the Church (The Catholic Church) as a prime example. Raised as I was right at the breaking point of its authority, I recall the Church described to me as a unitary organism established and maintained to serve the souls, the eternal well being, of all humans.¹²⁴ The ceremonies of this Church, called sacraments, were one method of service. These sacraments were sacred rites.¹²⁵ Abiding by the ritualistic performance of these rites positioned one safely as regards eternal life.¹²⁶ Deviation was soul threatening which, in effect, implied the possibility of eternal damnation. As far as I can

124. See NOSS, *supra* note 112, at 631 (arguing that the "word 'catholic' . . . became, in fact, part of the name of the single organized institution that expressed the Christian religion after the middle of the Second century.") (emphasis in original); see also POPE JOHN PAUL II, *supra* note 120, at 11 (emphasizing the universality of the church). "In the Church—built on the rock that is Christ—Peter, the apostles, and their successors are witnesses of God crucified and risen in Christ. They are witnesses of the life that is stronger than death. They are witnesses of God who gives life because He is Love." *Id.* The Pope further professes his belief that

[w]e can affirm that . . . the position . . . is inspired by a truly *universal concern*. The Church is guided by the faith that *God the Creator wants to save all humankind in Jesus Christ*, the only mediator between God and man, inasmuch as He is the Redeemer of all humankind. The Paschal Mystery is equally available to all, and, through it, the way to eternal salvation is also open to all.

Id. at 81 (emphasis in original). "Against the spirit of the world, the Church takes anew each day a struggle that is none other *than the struggle for the world's soul*." *Id.* at 112 (emphasis in original). "It is . . . a revealed truth *that there is salvation only and exclusively in Christ*. The Church, inasmuch as it is the Body of Christ, is simply an instrument of this salvation." *Id.* at 136 (emphasis in original).

125. See POPE JOHN PAUL II, *supra* note 120, at 182 (discussing religious sacraments). "Already, on earth the Church is adorned with true, even if imperfect, holiness . . . [T]he pilgrim Church, with its sacraments and institutions . . . carries the mark of this fleeting world, and lives among its creation, . . . yearning for the appearance of the children of God." *Id.* at 182.

What else are these sacraments (all of them!), if not the action of Christ in the Holy Spirit? When the Church baptizes, it is Christ who baptizes; when the Church absolves, it is Christ who absolves; when the Church celebrates the Eucharist, it is Christ who celebrates it: "This is my body" All the sacraments are an action of Christ, the action of God in Christ.

Id. at 130.

126. See *id.* at 74-75 (emphasizing that observance of the sacraments ensures one an eternal life).

[T]hat Christianity is a religion of salvation is expressed in the *sacramental life of the Church*. Christ, who came "so that they might have life and have it more abundantly" . . . discloses for us the source of this life. He does so in a particular way though the Paschal Mystery of His Death and Resurrection. Linked to this Mystery are Baptism and the Eucharist, sacraments which create in man the seed of eternal life. In the Paschal Mystery, Christ established the regenerative power of the Sacrament of Reconciliation. After the Resurrection He said to the apostles: "Receive the Holy Spirit. Whose sins you forgive are forgiven them."

Id. (emphasis in original).

determine, belief or faith was as obligatory as ceremonial compliance.¹²⁷ Where actual faith cannot be pretended, ceremonial compliance can be faked. “Fake it till you make it” might not have been what was said to my childhood Catholic friends, but they were without any doubt directed to go along with the rituals despite their doubts about their efficacy or the efficacy of the underlying beliefs. The price for exercising freedom of choice was understood in “forever” terms.¹²⁸ Few if any children in my circle were allowed to make this choice for themselves. The choice was made for them by their parents who supervised, to the best of their ability, the adequacy of my friends’ compliance.

What did we learn from this? We learned that deviation from ceremonial performance was forbidden. This wasn’t a suggestion, a guideline, an issue of cooperation or politeness. It wasn’t even an issue of tradition, custom, or culture. It was a bigger than life issue of obedience to a higher authority. The trouble with this lesson was that it left us without a structure for evaluation or judgment. You know as well as I what happened. What happened was already described in the earlier parts of this section. You can only witness so many sacramental marriages followed by broken vowed relationships before you, an intelligent child, begin to question the commitment that adults, your leaders, have toward the obligatory ceremonies. One cannot promise a God of true faith on Sunday morning only to find oneself compromised by Monday evening. The result was that the children lost faith in the rituals. Rituals, ceremonies, performed without belief are empty forms, meaningless procedures undertaken for show, theater. The requirement of participation does not engender faith, it engenders a lesson of obligatory submission to meaningless authority. It engenders a pattern of subjugation to human institutions and demands, which is coupled with resentment

127. See POPE JOHN PAUL II, *supra* note 120, at 192 (“*The essential usefulness of faith consists in the fact that, through faith, man achieves the good of his rational nature [H]e achieves it by giving his response to God, as is his duty—a duty not only to God, but to himself.*”) (emphasis in original).

128. See *id.* at 185-86 (speaking of eternal punishment and damnation for those choosing not to believe).

[C]an man be damned, can he be rejected by God? The problem of hell has always disturbed great thinkers in the Church And yet, the words of Christ are unequivocal. In Matthew’s Gospel He speaks clearly of those who will go to eternal punishment Who will these be? The Church has never made any pronouncement in this regard. This is a mystery, truly inscrutable, which embraces the holiness of God and the conscience of man.”

Id. “Eternal life can be given to man only by God; it can be only His gift.” *Id.* at 57 (emphasis in original).

350 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 9:2

and cynical behind-the-scenes rebelliousness.¹²⁹

These are not attitudes designed to produce mature, responsible adult citizens. As I said, we were misguided. This improper guidance infected our attitudes toward power. The institutions which held our parents captive and to which our parents sacrificed our sanity were understood by them, and hence at least initially by us, to be organizations of powerful people. When the institutions were churches or religious organizations the power of the people was often understood derivatively as the power of a higher authority. When the institutions were political, the power of individuals was understood derivatively as representational. It was this power that kept us in our places at our schools, our churches, our temples, our family gatherings. Various threats of punishment were used to direct our behavior into requisite ceremonial form.¹³⁰

When you learn about power in such an offensive environment, you tend to despise it. However, our actual situation is not this simple. It won't hurt you to consider the ways in which you resent ceremonies and the ways in which you love them, the ways in which you rebel against ceremonies and the ways in which you manipulate and take advantage of them, the ways in which you mock and decry

129. See FREUD READER, *supra* note 3, at 715 (speaking of religion as engendering feelings of intimidation and hostility towards civilization).

A believer is bound to the teachings of religion by certain ties of affection. But . . . countless others . . . are not . . . believers. They obey the precepts of civilization because they let themselves be intimidated by the threats of religion, and they are afraid of religion so long as they have to consider it part of the reality which hems them in They cease to fear religion when they observe that others do not fear it.

Id.

How has it happened that so many people have come to take up this strange attitude of hostility to civilization? I believe that the basis of it was a deep and long-standing dissatisfaction with the . . . existing state of civilization and on that basis a condemnation of it was built up

Id. at 735.

130. See *id.* at 740 (arguing that it is civilization through its regulation of social relationships which exerts coercive force and subjugates the power of the individual to that of community).

[C]ivilization enters . . . with the first attempt to regulate . . . social relationships The power of [the] community is then set up as "right" in opposition to the power of the individual, which is condemned as "brute force". This replacement of the power of the individual by the power of the community constitutes the decisive step of civilization.

Id.

The existence of [the] inclination to aggression . . . is the factor which disturbs our relations with our neighbor and which forces civilization into such a high expenditure [of energy]. . . . Civilization has to use its utmost efforts in order to set limits to man's aggressive instincts and to hold manifestations of them in check by psychical reaction-formations It hopes to prevent the crudest excesses of brutal violence by itself assuming the right to use violence

Id. at 750.

ceremonies and the ways in which they evoke from you heartfelt responsiveness.

Your mixed bag won't be identical to my mixed bag. Neither your bag nor my bag will match our neighbors. What we can say for sure is that ceremonies exert powerful influences on us and that these influences are deeply conflicted.

c

Ritual is ritual. Established ritual creates order. The order gives rise to norms. Norms give rise to judgments. Judgments give rise to interpretations, explanations, justifications. The explanations give rise to follow up actions. Over and over again we experience this process. This process is the method of "enculturation".¹³¹ In the context of power be aware of the ways in which and the degree to which power in one form or another, in one setting or another, was employed, was an integral part of the process of enculturation.¹³²

131. See ARENDT, PAST, *supra* note 28, at 213 (offering as a concept of culture a "mode of intercourse . . . with the things of the world."). "Culture, word and concept, is Roman in origin. The word 'culture' derives from *colere*—to cultivate, to dwell, to take care, to tend and preserve . . . in the sense of cultivating and tending nature until it becomes fit for human habitation." *Id.* at 211-12. "While the Romans tended to regard even art as a kind of agriculture, of cultivating nature, the Greeks tended to consider even agriculture as part and parcel of fabrication, as belonging to the cunning, skillful, 'technical' devices with which man . . . tames and rules nature." *Id.* at 212-13; see also 5 THE COMPLETE EDITION OF THE OXFORD ENGLISH DICTIONARY 199 (2d ed. 1989) (identifying the prefix 'en' as substantially identical with the Latin 'in' which was and is used to suggest putting something into the identified condition or state, or investing something with the stated quality). In this case, 'enculturation' is used to refer to the processes by which each of us is educated in life to know "what the world is like" from the perspective of the ordering traditionally, or dominantly, associated with and by those who raise and educate us. See ARENDT, PAST, *supra* note 28, at 221 ("Judging is one, if not the most, important activity in which this sharing-the-world-with-others comes to pass.").

Culture and politics, then, belong together because it is not knowledge or truth which is at stake, but rather judgment and decision, the judicious exchange of opinion about the sphere of public life and the common world, and the decision what manner of action is to be taken in it, as well as how it is to look henceforth, what kinds of things are to appear in it.

Id. at 223.

132. See FOUCAULT, POWER/KNOWLEDGE, *supra* note 19, at 187-88 (arguing that a government's function derives from existing and independent relations of domination between individuals).

Between every point of a social body, between a man and a woman, between the members of a family, between a master and his pupil There exists relations of power which are not purely and simply a projection of the sovereign's great power over the individual; they are rather the concrete, changing soil in which the sovereign's power is grounded, the conditions which make it possible for it to function. The family . . . is not a simple reflection . . . of the power of the State; it does not act as the representative of the State in relation to the children, just as the male does not act as its representative with respect to the female. For the State to function the way that it does, there must be, between male and female or adult and child, quite

352 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 9:2]

Rather than think of these situations as “natural” or as “inevitable,” rather than pass over them with a minimum of concern, slow down. Pay attention. Study them as constructs. Study them as processes of constraint, restraint. Study them as personality programming, as value indoctrination. Concern yourself with identifying emblematic underpinnings without forming allegiances or resentments. Ask about the relationship of this process to integrity, ask about its relationship to invasiveness, ask about its violence. In these studious ways you may be able to exercise intelligence, sense, and flexibility. You may find yourself freer.

d

Let’s consider one of the processes by which we understand ourselves. That is, let’s consider ways of meaning.¹³³

specific relations of domination which have their own configuration and relative autonomy.

Id.

133. See S. I. HAYAKAWA, LANGUAGE IN THOUGHT AND ACTION 60 (1964) (arguing that “one of the premises upon which modern linguistic thought is based . . . [is] that *no word ever has exactly the same meaning twice.*”) (emphasis in original); see also MICHEL FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE & THE DISCOURSE OF LANGUAGE 99 (1972) [hereinafter FOUCAULT, ARCHAEOLOGY] (arguing that “a statement always belongs to a series or a whole, always plays a role among other statements, deriving support from them and distinguishing itself from them: it is always part of a network of statements, in which it has a role . . . to play.”); Stanley Fish, Fish v. Fiss, 36 STAN. L. REV. 1325, 1332 (1984) (asserting the proposition that a word’s meaning is shaped by its context). “To be . . . ‘deeply inside’ a context is to be already and always thinking (and perceiving) with and within the norms, standards, definitions, routines, and understood goals that both define and are defined by that context.” *Id.*; see also Michel Rosenfeld, *Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism*, in DECONSTRUCTION AND JUSTICE, *supra* note 97, at 171 (citing Stanley Fish for the proposition that “plain meaning is ‘made’ - that is that it is fashioned or contrived - through the force of rhetoric.”); FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS 9 (1966) (stating that “[language] is both a social product of the faculty of speech and a collection of necessary conventions that have been adopted by a social body to permit individuals to exercise that faculty.”).

If we could embrace the sum of word-images stored in the minds of . . . individuals, we could identify the social bond that constitutes language. It is a storehouse filled by members of a given community through their active use of speaking, a grammatical system . . . ; it exists perfectly only within a collectivity Language is not a function of the speaker; it is a product that is passively assimilated by the individual.

Id. at 13-14; see also COVER, *supra* note 8, at 223 (proposing that meaning is dependent on social cooperation). “[N]either effective action nor coherent meaning can be maintained, separately or together, without an entire structure of social cooperation.” *Id.*

Creation of legal meaning entails subjective commitment to an objectified understanding of a demand. It entails the disengagement of self from the ‘object’ of law, and . . . requires engagement to that object as a faithful ‘other.’ The metaphor of separation permits the allegory of dedication. This objectification of the norms to which one is committed frequently, perhaps always, entails a narrative—a story of how the law, now object, came to be. And, more importantly, how it came to be one’s own. Narrative is the literary genre for the objectification of value.

How does it happen that people can say the same words and mean different things? How does it happen that we know they mean different things despite the sameness of their words? What would you identify as determining the differences? Is it culture? History? Mental states like intent? Faith? Community pressure? Support groups?

As part of my general education I was taught to look in the dictionary for the meaning of words. In dictionaries each word is given one or several definitions along with an abbreviated etymology identifying the word's root or source. The inspirations for its meaning and the broad outlines of its range of meaning are provided. As part of legal education, students are trained to look to context to help determine meaning. "Necessary & Proper" are words whose meanings are not solely determined by reference to dictionaries.¹³⁴ That lesson learned early and often sticks long and hard.

Additional information about the meaning of words is gathered from the specific context of their employment. The nature of the document, the nature of the subsection of the document in which they appear, special "term of art" associations, if any, are brought in as relevant aids in the determination of meaning. In philosophy classes I was taught that meaning comes from usage and that usage is

Id. at 145.

134. See *McCulloch v. Maryland*, 17 U.S. 316, 413-15 (1819) (interpreting the word "necessary" in the "necessary and proper clause" of the Constitution as requiring a construction that considers the subject, context and intention of a person's usage and ultimately holding that the law passed by the Maryland Legislature was unconstitutional and void.).

Congress is not empowered by . . . [the Constitution] to make all laws, which may have relation to the powers conferred . . . but such only as may be 'necessary and proper' for carrying them into execution. The word 'necessary' is considered . . . as limiting the right to pass laws . . . as are indispensable . . . [this understanding] excludes the choice of means, and leaves to [C]ongress . . . that only which is most direct and simple Is it true, that this is the sense in which the word "necessary" is always used? . . . We think . . . not. If reference be had to its use, in the common affairs of the world, or in approved authors, . . . it frequently imports no more than that one thing is convenient, or useful, or essential to another It is essential to just construction, that many words which import something excessive should be understood in a more mitigated sense [The word "necessary"] admits of all degrees of comparison A thing may be necessary, very necessary, absolutely or indispensably necessary [This] comment on the word is well illustrated by the passage cited . . . from the 10th section of the 1st article of the constitution. It is . . . impossible to compare the sentence which prohibits a state from laying "imposts, or duties . . . except what may be absolutely necessary . . . with that which authoriz[es]" [C]ongress to make all laws which shall be necessary and proper . . . without feeling a conviction that the convention understood itself to change materially the meaning of the word 'necessary' by prefixing the word "absolutely." This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

Id. at 413-15.

354 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 9:2

determined in relevant discourse.¹³⁵

All of this to inform us that even our simplest words are not free standing in their concrete meaning. Meaning, instead of emanating from the words themselves, emanates from the way the words are used in relation to one another and by the way the words are used by the relevant peer group of people using them.

You are with me so far, right?

This discursive meaning base applies to more than just word "definitions." We might have been trained to refer to these differences as subjectivities. We might have been trained to contrast these subjectivities with freestanding objectivities, which served as standards or measures or norms against which subjectivities could be measured for deviancy. In such a system meaning emerges from the space covered by standard deviations from normative centers.¹³⁶

135. See LUDWIG WITTGENSTEIN, ON CERTAINTY 10 (D. Paul & G.E.M. Anscombe trans., Harpertonch Books 1969) ("A meaning of a word is a kind of employment of it. For it is what we learn when the word is incorporated into our language."). "Our talk gets its meaning from the rest of the proceedings." *Id.* at 30e; see also HAYAKAWA, *supra* note 133, at 314 (finding that the "meanings of words are NOT in the words; they are in Us.") (emphasis in original); SAUSSURE, *supra* note 133, at 13 ("If we could embrace the sum of word-images stored in the minds of . . . individuals, we could identify the social bond that constitutes language. It is a storehouse filled by members of a given community through their active use of speaking . . ."). Saussure warns that "starting from words in defining things is a bad procedure." *Id.* at 14. Instead, he suggests starting from an understanding of the process of language acquisition. Language, he teaches:

can be localized in the limited segment of the speaking-circuit where an auditory image becomes associated with a concept. It is the social side of speech, outside the individual who can never create or modify it for himself; it exists only by virtue of a sort of contract signed by members of a community.

Id. "Language is checked . . . by the weight of the collectivity . . ." *Id.* at 74. "[L]anguage never exists apart from social fact Its social nature is one of its inner characteristics." *Id.* at 77.

136. See SAUSSURE, *supra* note 133, at 15 ("Language is concrete Linguistic signs, though basically psychological, are not abstractions; associations which bear the stamp of collective approval – and which added together constitute language – are realities that have their seat in the brain."). "Of all social institutions, language is least amenable to initiative. It blends with the life of society, and the latter, inert nature, is a prime conservative force." *Id.* at 74. Although Saussure notes that "language . . . always appears as a heritage of the preceding period," he is not to be understood as claiming that language does not change. *Id.* at 71. "[L]anguage changes, or rather it evolves, under the influence of all the forces which can affect either sound or meaning. The evolution is inevitable . . ." *Id.* at 76; see also FOUCAULT, ARCHAEOLOGY, *supra* note 133, at 217, 224. The first story concerns the way mad people were treated during the Middle Ages:

From the depths of the Middle Ages, a man was mad if his speech could not be said to form part of the common discourse of men. His words were considered null and void, without truth or significance, worthless as evidence, inadmissible in the authentication of acts or contracts [T]he madman's speech did not strictly exist. It was through his words that one recognized the madness of the madman; but they were certainly the medium within which this division became active; they were neither heard nor remembered. No doctor before the end of the eighteenth century had ever thought of listening to the content . . . yet it was these [words] which signaled the difference between reason and madness.

How is communication possible in a system like the one described? Do we actually agree to abide by standard deviation measurements of meaning? Are we expected to bring our emotional responses in line along with our intellectual understanding of the situation? What does the process of communication have to do with power? I suspect that those who understood that knowledge is power are not bothered by this last question. Obviously those who can influence the shape of the normative curve will exercise power. They will determine meaning and deviancy for the community. And, whether that community is as large as the globe or as small as the home, individuals with power have the capacity to set the forms and standards of measurement and establish the objective.¹³⁷

Id. at 217. The second story concerns Mendel, the nineteenth century geneticist:

People have often wondered how on earth nineteenth century botanists and biologists managed not to see the truth in Mendel's statements. But it was precisely because Mendel spoke of objects, employed methods and placed himself within a theoretical perspective totally alien to the biology of his time Naudin . . . suggested that hereditary traits constituted a separate element before him; and yet, however novel . . . the principle may have been, it was nevertheless reconcilable, if only as an enigma, with biological discourse. Mendel on the other hand, announced that hereditary traits constituted an absolutely new biological object . . . he detached them species, from the sex transmitting them, the field in which he observed being that infinitely open series of generations in which hereditary traits appear and disappear with statistical regularity. Here was a new object calling from new conceptual tools, and for fresh theoretical foundations. Mendel spoke the truth, but he was not *dans le vrai* (within the truth) of contemporary biological discourse Mendel was a true monster, so much so that science could not even properly speak of him.

Id. at 224. But see Rosenfeld, *supra* note 133, at 160 ("Meaning . . . is neither subjective nor objective, but intersubjective").

All meaning – or at least all meaning relating to events and transactions in the social and political sphere where the community of legal actors is located – is intersubjective in that it requires some collective consensus or compromise In other words, all meaning – endowing interpretations in the context of the social and political sphere require a collaborative collective rewriting of historically situated textual materials.

Id. at 162.

137. See FOUCAULT, *ARCHAEOLOGY*, *supra* note 133, at 227 ("Every educational system is a political means of maintaining or . . . modifying the appropriate of discourse What is an educational system . . . if not the ritualisation of the word"); see also COVER, *supra* note 8, at 96-97.

The very phrase 'special treatment' when used to describe pregnancy or maternity leave, posits men as the norm and women as different or deviant from that norm. The problem was not women, or pregnancy, but the effort to fit women's experiences and needs into categories forged with men in mind The assumption of able-bodiedness as the norm is manifested in architecture that is inaccessible to people who use wheelchairs, canes or crutches to get around. Implicit norms often work subtly, through categories manifested in language. Reasoning processes tend to treat categories as clear, bounded, and sharp edged.

Id.; see also Charles R. Lawrence III, *The Id, the Ego, and Equal Protection Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 336 (1987) (stating that cognitive psychology theorizes that culture transmits beliefs and preferences through experiences. These beliefs and preferences become part of the individual's perceptions of the world and like other perceptions, they are not articulated or experienced at a conscious level); BENDER & BRAVEMAN, *supra* note 96, at 77

356 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 9:2]

When these people operate with love, respect, regard, inclusivity and kindness we experience power as caring, nurturing, and supportive. When these people operate dictatorially, when they disdain or disregard those within their influence, we experience power as uncaring, cold, and harsh. Power, experienced as uncaring and harsh, is experienced intrusively, invasively, oppressively and is experienced as an injury and as violence.¹³⁸

From another perspective, consider what it means to be the standard bearer. As the standard bearer, you are establishing meaning, you are the reference which sets the measure against which contrast, judgment, and evaluation takes place. By establishing these factors, you are the example of meaning. Therefore, if you want to establish non-violence as a basis for communication, you must behave without violence. You must avoid intrusivity, overbearingness, and invasiveness. As someone who establishes meaning, you are an example of what is meaningful. This becomes a vicious circle or a magnificent opportunity, or, as I experience it, a bit of both.

e

Remember that managed communication is very different from open communication. For many, managed or manipulated, highly regimented, formalized, stylized, communication is what passes for communication. We are trained to send and receive according to preset forms or formulas.¹³⁹ There is no shame in this. Without structure, information and data come in as noise.¹⁴⁰ There is no way to have a free-for-all, do your own thing communication system. Some limits in the form of structure are obligatory.¹⁴¹ Someone must

(discussing Cultural Imperialism as universalization of the dominant group's values and goals. The dominant group, having access to the means of communication, projects "their own experiences as representative of humanity.").

138. See BENDER & BRAVEMAN, *supra* note 96, at 68 ("[O]ppression is the inhibition of a group through the vast network of everyday practices, attitudes, assumptions, behaviors, and institutional rules . . ."). "Marginalization is perhaps the most dangerous form of oppression. A whole category of people expelled from useful participation in social life . . ." *Id.* at 72. "Exploitation, marginality and powerlessness all refer to relations of power and oppression . . ." *Id.* at 76.

139. See SAUSSURE, *supra* note 133, at 68 (stating that "polite formulas . . . though often imbued with a certain natural expressiveness . . . are nonetheless fixed by rule; it is this rule and not the intrinsic value of the gestures that obliges one to use them"); see also DECONSTRUCTION AND JUSTICE, *supra* note 96, at 258 (describing how we respond to receiving a court summons).

140. See SIU, *supra* note 10, at 129 (arguing that "one of the weakest links in dealing with human beings is the translation of raw data into useable information. Until your data can be converted into action, they remain just so much noise.").

141. See SAUSSURE, *supra* note 133, at 111-13 (arguing that the expression of thoughts through language allows for substantive meaning to be brought to otherwise shapeless and

follow the rules more or less. Indeed, all of us must cooperate to some degree. In that sense, it is similar to the law. It isn't polite to criticize the foundations that support you although it is appropriate to examine them critically.

The problem is that preformulated communications cannot always carry depth of heart or flavor of spirit. Constructed dialogue is inhibiting; it limits, controls.¹⁴² It rests on repetitive formulas. It tends toward deadness rather than spontaneity. It can be deadening.¹⁴³ Some things cannot be said, can almost not be thought, cannot be expressed.¹⁴⁴ In that sense, some things are prohibited, made difficult if not impossible.

What does not fit the means, models and ways of coordinated communication can be experienced as disempowered. There are ways and means to prevent falling victim to that trap. Others before

vague thoughts, ideas, and sounds).

142. See SIU, *supra* note 10, at 129 (pointing out that the high technological advances of modern day data collection have created a need to limit and summarize information that, on one hand, is much more succinct and efficient, and on the other hand, exposes information to the possible biases of those handling it).

143. See COVER, *supra* note 8, at 139 (comparing and contrasting jurisgenerative principles). The state, particularly through adjudication, creates law, norms, standards, and meaning with jurispathic principles. The state kills off, destroys, and through the force of its empowerment, violently denies the legal ideas, values, and norms, offered by unsuccessful contestants. *Id.* "By exercising its superior brute force . . . the agency of state law shuts down the creative hermeneutic of principle that is spread throughout our communities." *Id.* at 144. Cover comments that judges "are people of violence. Because of the violence they command, judges characteristically do not create law, but kill it. Theirs is a jurispathic office. Confronting the luxuriant growth of a hundred legal traditions, they assert that *this one* is law and destroy or try to destroy the rest." *Id.* at 155. See also FOUCAULT, POWER/KNOWLEDGE, *supra* note 19, at 1 ("Now my hypothesis is not so much that the court is the natural expression of popular justice, but rather that its historical function is to ensnare it, to control it and to strangle it . . .").

144. BARTLETT & HARRIS, *supra* note 55, at 1098-99. Hooks, speaking about the narrow, confining construction of blackness that continues to define, restrict and inhibit a more fully developed understanding of the ways in which "black identity has been specifically constituted in the experience of exile and struggle," says: "Considering that it is a subject one comes to voice Should we not be suspicious of postmodern critiques of the 'subject' when they surface at a historical moment when many subjugated people feel themselves coming to voice for the first time?" *Id.* See also Robin West, Symposium, *Feminism in the Law: Theory, Practice and Criticism*, 1989 U. CHI. LEGAL F. 59, 62 (stating that "if feminist legal theorists want to understand, much less challenge, patriarchal power, we need to come to grips with its utterly non-discursive and silencing violence"). West also states that "so long as silence rather than discourse remains the primary product of modern patriarchy, then . . . [w]e ought . . . to study the production of silence." *Id.* at 66. But, West warns that

[I]f we want to understand how we should begin to remake and reclaim the world in a way that is more loving . . . we should be extremely wary of the postmodern, poststructuralist and social-theoretic claim that this non-discursive, woman-bonded, creative, erotic and quietly rebellious self within is but another product of a political, patriarchal, liberal and societal discourse. We should instead seek to protect and nurture and give voice to that most tentative, unschooled, and . . . undisciplined female self that lies within. For it is that self who will show us . . . new ways to judge, new ways to legislate, and new ways to order.

Id. at 96.

358 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 9:2]

you found escape routes. You too can find ways of sharing what you want to share. There is no need to give up. On the other hand, you cannot expect those who maintain order to reach out with understanding and acceptance. Changes to the forms, styles and regulations of communications are rightfully treated as revolutionary. Those who benefit from the changes may very well see your offering as a threat to their power. And, you know, threatened people often fight.

Foucault teaches us that fighting is one of the many forms of communication.¹⁴⁵ It, too, expresses and asserts.

I would have preferred to end this section on communication with some upspirited statement about the wonders of poetry. In actual fact, I wanted to write you a poem. Instead, I find myself moved to end with the acknowledgment that power is insistently expressive in all available forms. I never intended to say that. Maybe it will help.

V

Power plays come in many forms.
Some games are fast like basketball, others slow like baseball.
Sometimes we play team sports, other times we engage in
individual competitions.
Power plays are not always as clearly delineated as sporting
events.
Sometimes they're not sporting at all.

People often think of others as fuel, fodder, willing or
unwilling victims,
characters in a screenplay, or just plain "theirs" to do with as
they wish.
As a result people suffer.
It is hard to imagine adequate justification for this.
Surprising,

145. See FOUCAULT, POWER/KNOWLEDGE, *supra* note 19, at 90-91 (discussing the author's thesis, which replaces a liberal contract-oppression schema for analyzing power with a domination-repression or war-repression schema built, at least in part, on Clausewitz's assertion that war is politics continued by another means). War, fighting, force, and violence, comes again, through Clausewitz, a relation to, an expression of, and a communication of, power. *Id.* Moreover, Foucault's perspective allows him to substitute problems of domination and subjugation for those of sovereignty and obedience. *Id.* at 96. Then, instead of asking why certain people might wish to dominate others, he turns toward how things operate at the levels of subjugation. *Id.* There, focused on "those continuous and uninterrupted processes which subject our bodies, govern our gestures, dictate our behaviors," he begins to explore "how it is that subjects are gradually, progressively, really and materially constituted." *Id.* He offers, "[S]ubjection in its material instance as a constitution of subjects." *Id.* at 98. In this mode power is characterized as circulating, as functioning in the form of a chain, individuals are not its targets, but elements of its articulation, not points of application, but vehicles, transporters, expressers, communicators. Our every action - speaking, working, fighting - expresses and communicates the web of power that defines our existence and our relation to all that is part of our social reality. *Id.*

2001]

REDEFINING VIOLENCE

359

our casual rationalizations.

People can be compelled, pushed, pulled, coerced, bribed,
intimidated, tricked, persuaded or seduced.

Methodological choice, a mask for ethical or moral
considerations.

To think of the choice between violent and non-violent
obscures
everyday violence.¹⁴⁶

a

On a personal level, I know that rationalization is a process associated with getting what I want, justifying my wants or desires. Wanting something, the wanting aligns my thinking, generates ideas, brings about an ordering of objects, people and events. The created ordering supports my ambition. It becomes obvious to me that I should get what I want, that what I want is justified. Objectivity, described to me in legal studies hardly sounds like this personal process.

My first year law professors would not validate images of a greedy judge who, preferring a specific outcome, allowed her mind to generate rationalizations. In fact, when asked about this possibility, my professors denied the applicability or utility of this model.

“No,” the professors told the class, “objectivity is not about the subjective desires of the judge or decision maker. It is about an objective or impersonal perspective.”

In this frame the term “objective” came to be associated with impartiality, impersonality, and neutrality. The rationalizing opinions studied to teach the method of legal reasoning were described as grounded in principle, in the rule of law, in a tradition of logic. As a result, as I understand it, legal education trains us to align personal objectives, our objectives as lawyers, with the established objectives that govern the rationalization process of the cases.¹⁴⁷

146. Sharon S. Harzenski, unpublished poem (revised Mar. 2000) (on file with author).

147. POLANYI, *supra* note 42, at 162.

Consider a judge . . . deciding a difficult case . . . pondering his decision, he refers consciously to dozens of precedent and unconsciously to many more. Before him numberless other judges have sat and decided according to statute, precedent, equity and convenience . . . his mind, while he analyses the various aspects of the case, is in constant contact with theirs [T]he decision . . . represents an interpretation of . . . existing Law, reinforcing or modifying its system in some respect. It makes it appear . . . in a somewhat new light. Public opinion has received a new response and a

360 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 9:2

This methodology substitutes a set of “communal” objectives for personal taste. Accepting, as limitations, the rightful dominance of these communal values, is what we refer to as gaining objectivity.

b

A process which moves us to generate a desired response to a particular set of circumstances is a power process.¹⁴⁸ We are trained in law school to participate as functionaries in a huge dominating power process. Does power require us to learn to substitute one set of objectives for another?

So, where is the opportunity for integrity in that? Is the minimum cost of power the loss of personal integrity?¹⁴⁹ Examine that issue. Consider how the imposition of will, the manipulated accomplishment of personal preferences involve us in conflicts which often, or perhaps inevitably, involve us in degrading others and compromising ourselves. We were reminded power corrupts.¹⁵⁰

Surrounded by power in all places, forms, and experiences, we acknowledge the inescapability of the net. In a situation where our social status is created by power, our education is shaped by power, our personal relations are sculpted by power, our economic well being is determined by power, our own deepest thoughts, what we might like to think of as privacy or subjectivity, are the result of the interplay of powerful people and institutions, we acknowledge that net. We bring almost nothing to the table that hasn't already been

new stimulus. Every new decision . . . gives guidance to all future judges for their decisions of cases yet unthought of. The operation of the Common law thus constitutes a sequence of adjustments between succeeding judges, guided by a parallel interaction between the judges and the general public Such coherence and fitness as this system possesses at any time is the direct embodiment of the wisdom with which each consecutive judicial decision is adjusted to all those made before and to any justified changes in public opinion. Accordingly, the operations of a judicial system of case law is an instance of spontaneous order in society.

Id.; see also RONALD DWORKIN, LAW'S EMPIRE 228-32 (1986) (discussing his chain novel theory that echoes this theme of judicial interpretation and opinion writing). But see, e.g., Rosenfeld, *supra* note 133, at 152, 155-56 (noting that Dworkin's theory of a chain novel type of judicial interpretation has not gone unchallenged).

148. See SIU, *supra* note 10, at 31 (stating that “power is the intentional influence over the beliefs, emotions, and behaviors of people One person exerts power over another to the degree that he is able to exact compliance as desired. No power is exhibited without an empowering response.”).

149. See *id.* at 76 (providing that the “minimum fee you should be willing to pay for entry into any major tournament of power . . . is personal integrity. It is easy . . . to justify the compromises as being a sacrifice for the general good. But be that as it may, pay with inner honor you must if you are to get to the very top”).

150. See *id.* at 119 (discussing the relation between power, wealth, and corruption).

marked by the ways in which power plays itself out in and around us.¹⁵¹ What, then, can we mean by integrity?

c

Power is responsibility. If you want power you must accept the responsibility.¹⁵² That is a new homily. Some quippy words, a cliché we are to learn from and about.

I find the fact of extensive and extreme irresponsibility to be one of the saddest facts about the culture that nourished me. If it were not so obviously true, it would be inconceivable to me that leaders, politicians, judges, administrators, political and economic theorists

151. FOUCAULT, POWER/KNOWLEDGE, *supra* note 19, at 189.

Every relation of force implies at each moment a relation of power . . . (its momentary expression) and every power relation makes reference, as its effect but also as its condition of possibility, to a political field To say that 'everything is political', is to affirm this ubiquity of relations of force and their immanence in a political field." Further, "[I]n reality power means relations, a more-or-less organised, hierarchical, co-ordinated cluster of relations.

Id. at 198. "One impoverishes the question of power if one poses it solely in terms of legislation and constitution, in terms solely of the state Power is quite different from and more complicated, dense and pervasive than a set of laws or state apparatus." *Id.* at 158.

What makes power . . . good, what makes it accepted, is . . . the fact that it doesn't only weigh on us as a force that says no, but that it traverses and produces things, it induces pleasure, forms knowledge, produces discourse. It needs to be considered as a productive network which runs through the whole social body

Id. at 119.

152. LOUIS ALTHUSSER, WRITINGS ON PSYCHOANALYSIS: FREUD AND LACAN 133 (1996) ("[W]hen one does politics . . . it is never without consequences."); *see also* TSUNETOMO, *supra* note 50, at 33-34 (discussing how the degradation of the samurai custom has left the society with men who are proud of their material wealth but lacking in duty and self respect); LAO TZU, *supra* note 76, at 66.

If the sage would guide the people, he must serve with humility./ If he would lead them, he must follow behind./ In this way when the sage rules, the people will not feel oppressed;/ When he stands before them, they will not be harmed./ The whole world will support him and will not tire of him./ Because he does not compete,/ He does not meet competition.

Id. at 72. "When men lack a sense of awe, there will be disaster." *Id.* at 78. "He who takes upon himself the humiliation of the people is fit to rule them./ He who takes upon himself the country's disasters deserves to be king of the universe." *Id.* at 72.

[W]e must be careful to maintain the right attitude. Everything proceeds as if of its own accord, and this can all too easily tempt us to relax and let things take their course without troubling over details. Such indifference is the root of all evil. Symptoms of decay are bound to be the result He who understands . . . is in [a] position to avoid . . . [these] effects by dint of unrelenting perseverance and caution. And, In a time of flowering culture, an occasional convulsion is bound to occur, uncovering a hidden evil within society and at first causing great sensation Then everything is forgotten and peace apparently reigns complacently once more. However, to the thoughtful man such occurrences are grave omens that he does not neglect. This is the only way of averting evil consequences.

WILHELM, *supra* note 39, at 245.

362 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 9:2]

across the entire history of the USA have been able to slough off on others the responsibility for their choices and actions.

I think there is some relationship between my frustrated inability to comprehend the general acceptance of careless conduct and my intolerance for Social Darwinistic theories.¹⁵³ Perhaps I refuse to accept that the fittest among us are those who can externalize the greatest responsibilities. That seems mad to me, perverse and counterintuitive. Do you see what I mean? It must be retrograde to empower the grabby greedy self indulgent while disabling honest, respectful behavior. That is not evolutionary. That is not developmental. That empowers lower mental functions instead of higher mental functions. Something is just not right about that as a biological fact.

My sister says that our culture got itself twisted into this perversity because lions, not chimpanzees, were the animal kingdom analog for human behavior. Our cultural ancestors did not know we share ninety-nine percent of our DNA with chimps.¹⁵⁴ They identified more with the lion family, seeing in them a model for thinking about society.

Considering widespread personal and social irresponsibility and its relationship to power and leadership brings us to certain specifics. Was there any excuse for early European settlers to continue to pour into the Americas when they discovered that their diseases were killing off indigenous populations? Is ignorance, poor cause and effect knowledge, the only excuse available? Is it available? If

153. SABINE, *supra* note 19, at 721 (discussing the fact that Herbert Spencer was not influenced by Darwin because Spencer's work was published nine years before CHARLES DARWIN, *THE ORIGIN OF SPECIES* (1909)).

Spencer undertook the amazing task of 'deducing' organic evolution from the conservation of energy. And from this beginning the system proceeded successively to the principles of biology, of psychology, of sociology, and of ethics. Allowing for temporary eddies of 'dissolution,' nature advances upon a straight line from energy to life, from life to mind, from mind to society, from society to civilization and to more highly differentiated and integrated civilizations.

Id. at 722. According to Sabine, Spencer's hope was that the growth of society would provide clear indicia of its lower and higher stages allowing observers to distinguish the obsolete from the suitable, the fit from the unfit. *Id.* at 723.

[M]oral improvement was made to seem merely an extension of the biological concept of adaptation, and social well-being appeared to be equated with the survival of the fittest . . . socially valuable behavior, once established, by moral prescription as habits, is translated into anatomical changes that are transmitted by inheritance.

Id.

154. See Thaddeus Herrick, *Chimp Seems Unique, But Not a Missing Link*, HOUSTON CHRON. (1997), at <http://www.chron.com/content/chronicle/metropolitan/97/01/12/oliver.2-0.html> (quoting Gordon Gallup of the University of New York at Albany, who stated "[h]umans and chimps are 99% identical in terms of basic biological chemistry.").

ignorance doesn't excuse them, we wouldn't want to opt into allowing them to plead self-centeredness, would we? They, of course, did plead self-centeredness—at the time and for centuries afterward—this justification rang clear, true and sufficient. But, what does it sound like to you? Would you find the careless invasion of your body by an HIV infected individual excusable because the person had a strong desire for sexual gratification?

We do need to learn to think this way because we have for too long been indoctrinated into excuse modalities. If we want to behave responsibly with the power we inherit, grasp, earn, develop, we need to rethink the examples provided by prior generations. People who exercise careless power are everywhere. They are being raised for the experience by careless parents who were raised by careless parents. It is a bit like families where domestic abuse is passed on generation to generation. And, like physically abusive households, families who teach their children about using power without assuming responsibility, teach the natural inevitability of the behavioral patterns along with the patterns themselves.

Do you want your children to inherit this violence? If you don't, what are you willing to do?

d

First, the exercise of power involves others. When others are involved, they must be attended to. What this means, what this requires, varies from situation to situation.

A despot, for instance, won't cater to the needs of others. He will simply override those needs or concerns, favoring his own preferences as far as possible.¹⁵⁵ We can learn from history,¹⁵⁶ from

155. SIU, *supra* note 10, at 185.

The master of power instantly transformed a mass of conflicting events and risks into a sure course of action This trait was impressively manifested by young Temujin during the successful escape for his life. Temujin was a prisoner of his murderous brother, Targoutai. He was awaiting his execution with a huge wooden yoke resting on his shoulders to which his hands were tied. As soon as darkness fell, Temujin slipped away with the guards in pursuit. He jumped into a river with his eyes barely above water watching. As the soldiers roamed the banks, one of them saw him but said nothing. Temujin noticed it and then and there he knew exactly what to do. He followed the horsemen back into his brother's camp. Then he crept into the tent of the stranger who had not given him away. At great danger to himself, the soldier removed the yoke, burnt the evidence, and carted him away under a pile of loose wool. Temujin galloped off to freedom on a fresh horse. There is no stopping such a man in a struggle for power. He became Genghis Khan.

Id.

156. ARENDT, *REVOLUTION*, *supra* note 31, at 95 (discussing "[t]he war upon hypocrisy that

364 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 9:2]

personal experience,¹⁵⁷ from books and movies, that despots and tyrants of many descriptions, whether political or personal, are unceasingly creative in the ways, means and excuses they develop for overriding others.¹⁵⁸

Cleverer or more cunning individuals may not be as overt in displaying their disregard for the needs of others. On some occasions it is best to understand these individuals as autocrats of stealth. Stealthful autocrats, no less willing than their brothers to oppress, repress, suppress others in order to attain their purposes, should be approached with extreme caution. Not all clever people are stealthful despots. Some cunning people prefer to exercise power by trickery than give effect to overt expressions of authority and control. Think of their way of socializing as deceitful. Do you know people like that? Sometimes it comes with a sense of humor, or maybe more accurately stated, sometimes deception-based predilections are revealed in attempts at humor as well as attempts at manipulation. Or, put another way, cunning people often manipulate in a variety of settings. Some are stimulated to manipulate to “get a laugh” or to humiliate in circumstances where other power gains are obscure or even absent.

Of course, most power players are neither consistently tyrannical nor consistently foxy. They may use overt domination or cunning manipulation from time to time, however, they also have and use a collection of other techniques. Quite often it is the variety of

transformed Robespierre’s dictatorship into the Reign of Terror.”).

[There was a] fateful mood of suspicion so glaringly omnipresent throughout the French Revolution . . . [which] arose directly out of . . . [a] misplaced emphasis on the heart as the source of political virtue. The heart . . . keeps its resources alive through a constant struggle that goes on in its darkness and because of its darkness The consequence of this hiddenness is that our entire psychological life, the process of moods in our souls, is cursed with a suspicion we constantly feel we must raise against ourselves, against our innermost motives. Robespierre’s insane lack of trust of others, even in his closest friends, sprang ultimately from his not so insane but quite normal suspicion of himself. Since his very credo forced him to play the ‘incorruptible’ in public every day . . . how could he be sure that he was not the one thing he probably feared most in his life, a hypocrite?

Id. at 92. This eighteenth century terror, Arendt tells us, “was still enacted in good faith, and . . . became boundless . . . only because the hunt for hypocrites is boundless by nature.” *Id.* at 95.

157. Doesn’t everyone know someone who they believe has consciously or, more likely, unconsciously, selected physical illness or incapacity as a means of exercising personal control over intimate others? Isn’t everyone familiar with people who employ emotional instability or immaturity as a manipulative method? Haven’t you ever pouted to get your own way? Perhaps you have deliberately bullied or intimidated a friend or family member to ensure the success of your plans; perhaps not. Perhaps instead, you have been bullied, harassed or nagged into producing a desired course of conduct.

158. See ARENDT, *REVOLUTION*, *supra* note 31, at 95-96 (discussing the use of terror as an “institutional device,” which helped to guide many historical revolutions to victory).

techniques and the individual's capacity to select appropriate techniques that make for frequent success.

Hence, the advice to appreciate the general need of power players for cooperation. Cooperation smoothes the way. Cooperation may be temporarily generated through trickery. Some forms of apparent cooperation can be developed through intimidation or fear. Fear or fraud-grounded cooperation is seeded with discontent and therefore with resistance and rebellion. Knowing this, serious long-term power players do not rely over much on these methods. Knowledgeable people might be able to teach you formulas for optimum mixes of fear, fraud, coercion, kindness, mutuality, and reciprocity.

e

The lessons about power as relationship come directly from Foucault. Accordingly, you are instructed to direct your research about power away from the juridical edifice of sovereignty and away from the apparatus of the state and its accompanying ideologies.¹⁵⁹ Look instead towards domination by material operators of power. Look towards forms of subjection, towards the inflections and utilizations of domination and subjection in localized systems, towards the deployment and employment of strategic methodologies to establish patterns of dominating, subjugating relations among various people.¹⁶⁰

The state, according to Foucault, is superstructural in relation to a

159. FOUCAULT, POWER/KNOWLEDGE, *supra* note 19, at 60 ("Power isn't localized in the State . . . and . . . nothing in society will be changed if the mechanisms of power that function outside, below and along side the State . . . , on a much more minute and everyday level, are not also changed."). Foucault further asserts that

[P]ower would be a fragile thing if its only function were to repress, if it worked only through the mode of censorship, exclusion, blockage and repression . . . exercising itself only in a negative way [P]ower is strong . . . it produces effects at the level of desire — and also at the level of knowledge [P]ower is . . . deeply rooted and the difficulty of eluding its embrace are effects of . . . these connections.

Id. at 59.

160. *Id.* at 96-97.

[S]ubstitute the problem of domination and subjugation for that of sovereignty and obedience [T]he analysis . . . should not concern itself with the regulated and legitimate forms of power in their central locations, with the general mechanisms through which they operate [I]t should be concerned with power at its extremities, in its ultimate destinations Its paramount concern . . . should be with the point where power surmounts the rules of right which organise and delimit it and extends itself . . . , invest itself in institutions, . . . equips itself with instruments and eventually even violent means of intervention [O]ne should try to locate power at the extreme points of its exercise, where it is . . . less legal in character.

Id.

366 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 9:2]

whole series of power networks (or relationships). The state is a meta-power that takes hold and secures itself only when rooted in a series of multiple and indefinite power relationships that supply it a necessary basis or supportive foundation.¹⁶¹ In Foucault's view, your study of power is impoverished if you concentrate exclusively on legislation, enforcement, constitutional and juridical mechanisms.¹⁶² Power is more complicated, denser and more pervasive than laws and the formal institutions associated with the State.¹⁶³

Human practices, he says, are possible only within relations and subject to conditions that are finitely modifiable at particular points and times.¹⁶⁴ Power is exercised in accordance with dynamics established by the relations and conditions that function, from a power perspective, as the material and as the terrain of operation. The conditions of possibility define the field of action. For Foucault power is omnipresent in the social body because power is coterminous with the conditions of social relations.¹⁶⁵

161. *Id.* at 122 (stating that "the State is far from being able to occupy the whole field of actual power relations" and that "the State can only operate on the basis of other, already existing power relations. The State is superstructural in relation to a whole series of power networks."). "[E]very power relation makes a reference, as its effect but also as its condition of possibility, to a political field of which it forms a part." *Id.* at 189.

162. *Id.* at 158 ("One impoverishes the question of power if one poses it solely in terms of legislation and constitution, in terms solely of the state and state apparatus. Power is quite different from and more complicated, dense and pervasive than a set of laws or state apparatus.").

[W]e should direct our researches on the nature of power not towards the juridical edifice . . . the State . . . and the ideologies which accompany them, but towards domination . . . the material operators of power, towards forms of subjection . . . the inflections and utilisations of . . . localised systems, and towards strategic apparatuses.

Id. at 102. "The idea that the State must . . . be invoked to account for all the apparatuses in which power is organised does not seem to me very fruitful for history, or one might rather say that its fruitfulness has been exhausted." *Id.* at 188.

163. See FOUCAULT, POWER/KNOWLEDGE, *supra* note 19, at 158 (stating that "[o]ne cannot confine oneself to analysing the State apparatus alone if one wants to grasp the mechanisms of power in their detail and complexity.").

164. *Id.* at 245.

[A]ll human practices are possible only within relations and subject to conditions which are only finitely modifiable at a given point and time [T]he exercise of power can be conceived as the general aspect of practice within which these relations and conditions function as a material and a terrain of operation.

Id.

165. *Id.* at 142.

I would suggest [sic] hypotheses which . . . need exploring: (i) [P]ower is co-extensive with the social body; there are no spaces of primal liberty between the meshes of the network; (ii) [R]elations of power are interwoven with other kinds of relations . . . for which they play . . . a conditioning and a conditioned role; (iii) [T]hese relations don't take the sole form of prohibition and punishment . . . ; (iv) [T]heir interconnections delineate general conditions of domination. And that this domination is organised into a more-or-less coherent and unitary strategic form . . . ; (v) [P]ower relations do . . . 'serve' . . . because they are capable of being utilised in

What does this mean for us?

I am learning to pay attention to the networks or clusters of relationships which influence my personal life, my professional life, and my intellectual life.

Intellectually I existed in a universe that was collapsing behind me; underneath me is probably a better metaphor to describe the loci of collapse. The weakness was not experienced as the impossibility of looking back—into history or prior scholarship—for guidance; it was the impossibility of resting comfortably within the given knowledge supplied, presumed and required by dominant authority that fueled my insecurity. The way the world was viewed by those who provided me with guidance was not the way the world appeared to me. As a result I have spent lots of scholarship time adrift at sea, searching for the source of the flaws in inherited knowledge or in my own understanding of the world. Searching for flaws is not entirely fruitless. But, the ability to identify defects is not the equivalent of establishing solutions. Flaw identification, critical analysis, only goes so far.

For years I wandered around considering myself alone in this venture. To some degree this alienated wandering resulted from personal defects and can be passed by without much public comment. However, isolated, alienated, searching is a common experience for intellectuals in my generation. Out of this lonely perusal we emerge, one after the other, with related observations of our condition. Reading one another we recognize the efficacy of the other's endeavor, we recognize the accuracy of the other's contribution, we recognize the authenticity of the other's search. As Michel Foucault might characterize it, we are clustering around a theme, a nodule is forming, a bubble rises up in the foaming surf.¹⁶⁶ A possible version of knowledge comes into being. For the purposes of this work, thinking in terms of power, thinking in terms of the violence or invasiveness of power, what is happening is that across culture, experience and focus, concepts like nation-state, sovereignty,

strategies; (vi) [T]here are no relations of power without resistances

Id. Colin Gordon also asserts: "Hence for Foucault power is omnipresent in a social body because it is coterminous with the conditions of social relations in general." *Id.* at 246.

166. FOUCAULT, POWER/KNOWLEDGE, *supra* note 19, at 71. My imagery suggests more fluidity than does Foucault's. In speaking about power, he employs the following terms: "[A]n implicit model of power emerges: the dissemination of micro-powers, a *dispersed network* . . ." *Id.* at 71. "Power is employed and exercised through a *net-like* organisation." *Id.* at 98. "[Power] presupposes a *tightly knit grid* of material coercions . . ." *Id.* at 104 (emphasis added). "[The] fight was located in the *fine meshes of the web* of power." *Id.* at 116 (emphasis added). "There is a *network or circuit* of bio-power . . ." *Id.* at 186 (emphasis added). "[P]ower means . . . a . . . *co-ordinated cluster* of relations." *Id.* at 198 (emphasis added).

368 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 9:2

and rule of law are opening up to provide opportunities for serious scholars to concentrate on the smaller scaled but equally vital roles of accumulated power in the daily conditioned life of the people. For example, Catharine MacKinnon speaks about the pervasive influence of sex-based domination.¹⁶⁷ Robert Cover asks us to examine how law as violence insidiously infects our experience of life.¹⁶⁸

f

The following lengthy quote from Siu captures some of the flavor of his book, *The Craft Of Power*, while communicating a disturbing vision of human relationships.

In the harnessing of people, you should understand as much of their behavior as the engineer knows of the tensile strength, ductility, expansion coefficient, and other properties of his structural materials before designing and building a bridge. Human beings should be appreciated in each of four distinct roles, namely, as resources, target, opposition and milieu.

167. See Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 635 (1983) [hereinafter MacKinnon, *Feminist Jurisprudence*] (stating “[m]ale and female are created through the erotization of dominance and submission. The man/women difference and the dominance/submission dynamic define each other.”). MacKinnon states:

the male point of view forces itself upon the world as its way of apprehending it. [M]ale dominance is perhaps the most pervasive and tenacious system of power in history Its point of view is standard for point-of-viewlessness, its particularity the meaning of universality. Its force is exercised as consent, its authority as participation, its supremacy as the paradigm of order, its control as the definition of legitimacy.

Id. at 640 (continuing “[f]eminism distinctly as such comprehends that what counts as truth is produced in the interests of those with power to shape reality, and that this process is as pervasive as it is necessary as it is changeable . . .”).

[T]he state is male in that objectivity is its norm. Objectivity is legal liberalism’s conception of itself. It legitimizes itself by reflecting its view of existing society, a society it made and makes by so seeing it, and calling that view, and that relation, practical rationality The rule form, which unites scientific knowledge with state control in its conception of what law is, institutionalizes the objective stance as jurisprudence.

Id. at 644-45.

168. See COVER, *supra* note 8, at 1605, 1609-10.

A legal world is built only to the extent that there are commitments that place bodies on the line [T]he interpretive commitments of officials are realized . . . in the flesh. As long as this is so, the interpretive commitments of a community which resists official law must also be realized in the flesh, even if it be the flesh of its own adherents. The judges deal pain and death. That is not all they do. Perhaps that is not what they usually do. But they do deal death and pain. From John Winthrop through Warren Burger they have sat atop a pyramid of violence, dealing It will not do to insist on the violence of strong poetry, and strong poets. Even the violence of weak judges is utterly real – a naïve but immediate reality, in need of no interpretation, no critic to reveal it. Every prisoner displays its mark.

Id.

They behave radically differently in their hotch-potch of inconsistencies in each of these roles and under varying circumstances in each case.

*Just as an engineer does not count on his suspension cables to stretch beyond their elastic limits without breaking, so should you not expect people to act in ways other than their nature allows. This kind of knowledge is technological rather than humanitarian. It is important that the two not be confused. The former is knowing how to use people as tools; the latter is knowing how to care for them as human beings.*¹⁶⁹

It is possible to work very hard trying to understand people so you can use them better and make better use of them. Humans are tools. Know your tools, know the conditions under which they operate effectively, understand the circumstances that generate threats of overheating, slippage, deteriorating coordination, breakdown. In the social sciences humans-as-tools analysis used to be called “social engineering.” When I was young, many people associated social engineering with social reform and with law reform. More recently the engineering aspect of the process has received a bad name.¹⁷⁰ I am far from certain the recent disassociation represents a move away from technological management of people. That attitude seems to have survived.

A lot of political reasoning,¹⁷¹ a lot of formal legal reasoning,¹⁷² a lot of professional reasoning,¹⁷³ and a lot of interpersonal reasoning¹⁷⁴

169. SIU, *supra* note 10, at 115.

170. BATESON, *supra* note 1, at 161-62.

Dr. Mead . . . point[ed] out . . . a discrepancy . . . between “social engineering,” manipulating people in order to achieve a planned blue-print society, and the ideals of democracy . . . [T]he conflict is now a . . . struggle over the role which social sciences shall play in the ordering of human relationships . . . [T]his war is ideological . . . Are we to reserve the techniques and the right to manipulate people as the privilege of a few planning, goal-oriented, and power hungry individuals . . . ? Now that we have the techniques, are we, in cold blood, going to treat people as things?

Id.

171. BARTLETT & HARRIS, *supra* note 55, at 997.

172. See *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697, 698 (8th Cir. 1987). In *Chambers*, the Omaha Girl’s Club fired a single, pregnant female employee in accordance with their “role model rule.” *Id.* at 699. The resulting Title VII suit considered whether the “role model rule” was a business necessity or a bona fide occupational qualification. *Id.* The appellate court relied on the lower court, which found that the Girls Club established that it honestly believed that to permit single pregnant staff members to work with the girls would convey the impression that the Girls Club condoned pregnancy for the girls in the age group it serves. The Eighth Circuit is satisfied that a manifest relationship exists between the Girls Club’s fundamental purpose and its single pregnancy policy. *Id.* at 702-03. The Court of Appeals upheld the firing. *Id.* at 703.

173. HAYAKAWA, *supra* note 133, at 284 (“Thoughtful purchasing is the last thing many merchandisers want. Once the customer is hooked on a brand name, all sorts of tricks can be played . . . A . . . widespread practice . . . [was] to reduce the contents of a package without reducing its size or price . . .”).

174. I know a family that sets its clocks ten minutes fast in order to encourage themselves to

370 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 9:2]

rest on a technological view of people. Power-based justifications are almost inevitably the explanation for this treatment.¹⁷⁵ Consider how the dynamic works. When I explain my conduct as necessitated by power, how have I “justified” that conduct? Or, having offered a power-based explanation for my behavior, how did I come to believe it would be accepted as an explanation, as a justification?

There are consequences to every act. When I was young and would act out in some way against my little sister I would say to my mom, “She made me do it.” My mom invariably replied, “No one can make you do anything. You *choose* to do it.” I never understood my mom. I believed deeply and for most of my life that my sister had goaded me into misconduct. I remember President George H.W. Bush telling the nation that Iraqi policy required a warring response. “He asked for it” is frequently offered as an explanation for an assault. “If you don’t eat your meat how can you expect to get any pudding” is a famous line from a Pink Floyd song.¹⁷⁶ No one I knew bought the ‘we bombed the village to save it’ assertion, but in Doris Lessing’s autobiography¹⁷⁷ she details her youthful association with Communism by saying that many relied on the “You can’t make an omelet if you don’t break any eggs” to talk about the horrors of Stalin’s regime.¹⁷⁸ What exactly are we saying? Why does anyone listen?

It is possible to work very hard to understand people so that you can care for them adequately and appropriately as human beings.¹⁷⁹ Too often when care is mentioned in the context of human-to-human conduct, we are inclined to think in terms of nurturing, which

leave the house early enough to reach their appointments on time. This example, though, reveals how this family exercises discipline rather than how they use others to their own ends. It isn’t ‘that kind’ of family. I know another family where the distribution of trust fund monies may be conditioned on the recipient getting and keeping a job which meets the approval of the fund’s administrator, not because the trust provides for this judgment but because in the family-member-administrator’s judgment the recipient ought to work.

175. BATESON, *supra* note 1, at 160 (“We have learnt, in our cultural setting, to classify behavior into ‘means’ and ‘ends’ and . . . we go on defining ends as separate from means and apply the social sciences as crudely instrumental means, using the recipes of science to manipulate people.”).

176. PINK FLOYD, *THE WALL* (Capitol, Apr. 25, 2000).

177. DORIS LESSING, *WALKING IN THE SHADE: VOLUME TWO OF MY AUTOBIOGRAPHY* 1962, 191-93 (1968) (discussing Lessing’s experiences in the former Soviet Union).

178. *Id.* at 191.

179. See BATESON, *supra* note 1, at 160-61 (agreeing with Dr. Mead’s suggestion that we replace the ends/means goal-oriented habits of mind associated with western civilization with a habit of thought that looks for the direction and values implicit in the means). “We have to find the value of a planned act implicit in and simultaneous with the act itself, not separate from it in the sense that the act would derive its value from reference to a future end or goal.” *Id.* at 161.

inclines us to think in terms of coddling, soothing, making the way as easy as possible for another. How this confusion arose or what holds it in place is a mystery to me. I hope we aren't haunted by caring-for images appropriately associated with nursery environments because that is basically the only referent we share for communicating a sense of caring. You see what I mean? Have we been so brainwashed to think of humans in technological terms, in terms of their utility to us and our plans, that we cannot easily imagine a series of complimentary settings to hold or to signify care based relationships with each other? Lacking other experiences are we obliged to build our care constructions out of infancy and romantic attachments? If raising a baby or finding new love is pretty much the only model we have to help us develop caring behaviors, we are bound to make serious mistakes. The best we could hope for, if that is our condition, is to retain enough open-mindedness to learn from our errors.

g

Eldridge Cleaver said that "Power comes out of the end of a gun."¹⁸⁰ Where I went to school the unmitigated power of armed force was called "naked" power. Eldridge Cleaver, a well-known Black Panther, conceptualized facing the cops as confronting naked power. Power, as pure force, absent any pretense of authority, reasonability, or right order, is undressed, exposed, naked, and obviously violent. Power becomes visible as directed violence. In a naked-power situation there is only the unmasked reliance on the compulsiveness of deadly force.

180. ELDRIDGE CLEAVER, *SOUL ON ICE* 128 (1968).

The police department and the armed forces are two arms of the power structure, the muscles of control and enforcement. They have deadly weapons They use force, to make you do what the deciders have decided you must do.

Every country . . . has these agencies of force They punish. They have cells and prisons to lock you up in

The techniques of the enforcers are many: firing squads, gas chambers, electric chairs, torture chambers, the garrote, the guillotine, the tightening rope around your throat

Which laws get enforced depends on who is in power

The police do on a domestic level what the armed forces do on an international level: protect the way of life of those in power.

Id.; see also REISMAN & SCHREIBER, *supra* note 1, at 56 (quoting Mao Zedong that "[p]olitical power grows out of the barrel of a gun."). *But see id.* at 79 (stating that FRIEDRICH WILHELM NIETZSCHE, *ON GENEALOGY OF MORALS* (Walter Kaufman & R.J. Hollingdale trans. & Walter Kaufman ed., Vintage Books ed., 1989) takes a contrasting perspective promoting a view of law as a technique employed by the weak to limit the powers of the strong).

Oddly enough even in naked-power situations a symbol is used. The gun is the symbol. The gun symbolizes the forcefulness, the reliance upon force, which is the basis for the assertion of power. The gun symbolizes the direct immediacy, the inescapability, of the violence of power, the power of violence.

As naked power relies on force and violence, other forms of power rely on symbols suited to their nature or message. Monetary rewards constitute a powerful inducement for some people. Others, less responsive to money, can be moved by a sense of achievement, making accolades and awards, conferring 'job well done' recognition. Still others are influenced by fame, publicity, institutional or community status. What moves us takes on a symbolic role. That is, the moving influence, the carrot, the stick, the push, the pull, the avoidance, and the attraction, are all substitutes for money in a "medium of exchange" construction. A certain kind of "distancing" occurs here. The offeror, i.e., the one seeking an empowering response, the one desiring a particular action, is separated from his willfulness by the intermediary of the symbol offering. Domination is depersonalized. (I am not telling you what to do. I am making an offer in which you might be interested.) The actor, the one delivering the desired response, is separated from her willingness through the intermediary of the symbolic acceptance. Submission is depersonalized. (I did not give in to you. I responded to an offer that appealed to me.)

The personality is less able to distinguish than the intellect. And, the intellect makes the distinctions at a high and hidden cost. What happens is, the process of separation suggests the value of what was offered/accepted. This valuation is recorded. Having registered the transaction and its value, a person will be a bit more inclined next time to use a similar formula for a similar transaction. Repetition of this formula embeds it deeper and deeper into memory. It becomes habitualized.¹⁸¹ It is something that just gets done. In effect, it

181. See BATESON, *supra* note 1, at 287 ("[T]he phenomenon of habituation . . . [is the] change from responding to each occurrence of a repeated event to not overtly responding.").

Insofar as we think of adaptability as achieved by stochastic process, we let in the notion of an economics of adaptability

We may, in the first instance, solve a given problem by trial and error; but when similar problems recur later, we tend to deal with them out of a range of stochastic operation and hand over the solution to a deeper and less flexible mechanism which we call "habit."

Id. at 257. In contradiction to my suggestion that these habits develop from repetition, Bateson remonstrates,

When we equated "learning to learn" with acquired apperceptive habits, this did not exclude the possibility that such habits might be acquired in other ways. To suggest

disappears from view, from consciousness. It becomes part of “the way things are.” It becomes background, context, presumed, instead of considered. It spreads out. That is, in the intellect’s effort to organize data, to “make sense” of the multifaceted universe of options, the influence from a particular habit invades other choices. Someone might reason: “If it was important to me to achieve in situations X, Y & Z, maybe I find achievement pleasurable. Maybe I like achievement.” Such a person might seek out, or at least be willing to respond agreeably, to other achievement-based situations. Ego defensiveness being what it is, that person may find themselves coming to believe that achievement-based responsiveness, a willingness to construct their behavior to accomplish available tasks, was valuable, good, desirable conduct.

An ethical or moral framework could be built in this way. And, if that were to happen, if one’s ethical framework was constructed in this response to symbol system manipulation—even if unconsciousness prevailed on everyone’s part—the resulting morality rests on power relationships. It is a power-grounded, power-based, and power-instituted morality.

Symbols are powerful for thinking beings.

h

Foucault says there are two primary schemes for the analysis of power.¹⁸² There is the contract-oppression scheme, according to which people claim power as a right but are compelled, conjoled, bargained with, tricked or persuaded to share or part with it.¹⁸³ It is the theory that lies at the root of liberal ideologies.¹⁸⁴ Employing this theory, shared power becomes troublesome, i.e., oppressive, when it

that the only way of acquiring one of these habits is through repeated experience [is wrong] [I]n human education such habits are acquired in various ways. We are . . . concerned with . . . real individuals who have complex emotional patterns of relationship with other individuals. In such a real world, the individual will be led to acquire or reject apperceptive habits by the very complex phenomena of personal example, tone of voice, hostility, love, etc.

Id. at 169-70.

182. See FOUCAULT, POWER/KNOWLEDGE, *supra* note 19, at 92 (“[W]e have two schemes for the analysis of power. The contract-oppression schema, which is the juridical one, and the domination-repression or war-repression schema for which the pertinent opposition is not between the legitimate and the illegitimate, as in the first schema, but between struggle and submission.”).

183. See *id.* at 88 (discussing power as a commodity that can be treated as such).

184. See *id.* (“I would call this common point an economism in the theory of power Power is that concrete power which every individual holds, and whose partial or total cession enables political power or sovereignty to be established.”).

374 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 9:2]

is overextended because it goes beyond the overt or covert terms of “the contract.”¹⁸⁵ The contract-oppression construct fits nicely into economic analysis. So too does the Marxian power model, which ties political power and economic power into an inseparable knot.¹⁸⁶ Foucault’s alternative, the domination-repression or war-repression scheme, presents power as a relationship of force.¹⁸⁷ The way I think of this is that instead of attempting to build a relationship with my dad, or my lover, to please him and to please me, what if I set about building that relationship to keep him appeased, to keep me safe? However we might characterize the mutual pleasure relationship, the latter appeasement-based relationship would be based on force. It would clearly be a power-focused relationship. Dropping the exchange imagery wherein power could be given, transferred, alienated, Foucault’s domination-repression or war-repression model visualizes power as existing only in action. And, the basic or definitional action of power—how you “know it when you see it”—is repression. Foucault uses Clausewitz’s view that “war is an extension of politics” and Nietzsche’s view to get from a repressive focus to an aggressive focus within this same framework.¹⁸⁸

When the exchange-based constructions of liberalism are replaced by domination-based constructions, power is everywhere marred by violence. While not all power is expressed “at the end of a gun” as in

185. See *id.* at 94-95 (explaining this balance of power in terms of royal power).

186. See *id.* at 88-89 (“[T]he Marxist conception . . . the historical *raison d’être* of political power is to be found in the economy.”).

187. See *id.* at 89. Foucault initiates a discussion of a non-economic analysis of power thusly:

We have in the first place the assertion that power is neither given, nor exchanged, nor recovered, but rather exercised, and that it only exists in action [W]e have at our disposal another assertion to the effect that power is not primarily the maintenance and reproduction of economic relations, but is above all a relation of force.

Id.

188. See FOUCAULT, POWER/KNOWLEDGE, *supra* note 19, at 90-91.

[N]one of the political struggles, the conflicts waged over power, with power, for power, the alterations in the relation of forces, the favouring of certain tendencies . . . that come about within . . . ‘civil peace’—that none of these phenomena in a political system should be interpreted except as the continuation of war Even when one writes the history of peace and its institutions, it is always the history of . . . war that one is writing [T]he end result . . . is . . . a contest of strength to be decided in the last analysis by recourse to arms [P]ower as continual war

So, no sooner do we attempt to liberate ourselves from economistic analyses of power, than two solid hypotheses offer themselves: the one argues that the mechanisms of power are those of repression. For convenience sake, I shall term this Reich’s hypothesis. The other argues that the basis of the relationship of power lies in the hostile engagement of forces. Again for convenience, I shall call this Nietzsche’s hypothesis.

Id.

Cleaver's or Mao's naked power metaphor, in the domination/war-repression scheme of analysis, comparative force is the quintessential source of action and response. Hence, trespass,¹⁸⁹ infringement,¹⁹⁰ intrusiveness,¹⁹¹ compulsion,¹⁹² duress,¹⁹³ injuriousness,¹⁹⁴ discordancy,¹⁹⁵ and violation,¹⁹⁶ are terms which characterize the forcefulness of power based activity.

For some of you, dialogue after dialogue hidden by fogs of confusion are lifting. Foucault's work might help you put Cover, MacKinnon and other more modern authors into place alongside Locke, and the Founding Fathers.¹⁹⁷ The competing theories of power should, for some of you, help clarify ideas, evaluations, assertions, about institutions and attitudes previously obscured by lack of information. For some, power is always, or almost always, invasive.

The seeking of an empowering response, when carried by something other than simple request, is almost always experienced as disrespectful and repressive. The power-seeker wants what he wants regardless of what the responder wishes. The power-seeker wants his desired response in place of what the responder might wish; any action that seeker takes to maximize his preferred outcome will intrude on the responder.

Of course, this is an exaggerated, oversimplified model of action. Nevertheless, this model does not lack a certain accuracy. We have

189. See BLACK'S LAW DICTIONARY 1674 (4th ed. 1951) (defining trespass as "[a]n unlawful act committed with violence, actual or implied, causing injury to the person, property or relative rights of another.").

190. See *id.* at 920 (defining infringement as "[a] breaking into; a trespass or encroachment upon.").

191. *Id.* at 958-59 (comparing intruder, "[o]ne who enters upon land without either right of possession or color of title," with invasion, "[a]n encroachment upon the rights of another; the incursion of an army for conquest or plunder.").

192. See *id.* at 359 (defining compulsion as "[c]onstraint; objective necessity; duress. Forcible inducement to the commission of an act. It is likened to coercion.").

193. See *id.* at 595 (defining duress as "[u]nlawful constraint exercised upon a man whereby he is forced to do some act that he otherwise would not have done.").

194. See *id.* at 925 (defining injurious as "associated with 'injurious words'"). In Louisiana this was another way of describing slander or libel. The more general term is injury, for which there is a full page of definitions. Injury is defined as "an act which damages, harms, or hurts." *Id.*

195. See 4 THE COMPLETE EDITION OF THE OXFORD ENGLISH DICTIONARY 748 (2d ed. 1989) (defining discordant as "not in accord, not harmonious, at variance, disagreeing.").

196. See BLACK'S LAW DICTIONARY, *supra* note 189, at 1741 (defining violation as "[i]njury; infringement; breach of right, duty or law; ravishment; seduction.").

197. See ARENDT, REVOLUTION, *supra* note 31, at 293 (explicating revolutionaries including those who, as philosophers or as political leaders, are known to us in terms of the American Revolution).

376 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 9:2

all been there, haven't we, backing down from some small conflict because the issue wasn't worth the battle for cooperation. We select to appease rather than to confront. We "go along to get along." Not that this is necessarily bad behavior. Neither the seeker nor the responder are essentially or irrevocably compromised in character or integrity by a single episode, or several episodes. However, repeated episodes generate patterns. Patterns generate expectations. Expectations generate credible assertions of authority (right). Rights contribute additional support. What began as a simple decision to appease can end up an established ordering with built in normative judgments.

VI

In ever moving, coming, going, rising, falling, gaining,
losing life, conflict is inevitable.
Conflicts change shape, form, participants.
They appear, disappear, erupt, retreat, morph.
They flower, seed, mutate.
The question is: Do they ever end?

The more of the world you crave to dominate, the more
impersonal your relations with others.
Craving less,
enriches human relationships.
Touched and touching, we contact all living beings.
Nothing is without effect, without affect.

What counts as "goodness" in your world of action?
The answer establishes your moral center.
Relationships of power, justice, law and morality
Hang in the balance for you
And for those whose life you touch.¹⁹⁸

a

198. Sharon S. Harzenski, untitled poem (Mar. 2000) (on file with author).

Why do people go on fighting?¹⁹⁹ Have you ever asked yourself that question? Is it worth asking why we go on fighting, or should we instead focus on finding out why we fight at all? Don't we often presume the naturalness of fighting? Fighting, or so it seems, is an ordinary, anticipated outcome of conflict, while conflict is treated as an ordinary outcome of power.²⁰⁰ Some people move quickly from

199. See FREUD READER, *supra* note 3, at 749.

[M]en are not gentle creatures who want to be loved, and who at the most defend themselves if they are attacked; they are, on the contrary, creatures among whose instinctual endowments is to be reckoned a powerful share of aggressiveness [T]heir neighbor is . . . someone who tempts them to satisfy their aggressiveness on him, to exploit his capacity for work without compensation, to use him sexually without his consent, to seize his possessions, to humiliate him, to cause him pain, to torture and to kill him. *Homo homini lupus* [Man is wolf to man] As a rule this cruel aggressiveness waits for some provocation or puts itself at the service of some purpose, whose goal might have been reached by milder measures.

Id.

200. See FOUCAULT, POWER/KNOWLEDGE, *supra* note 19, at 91 (discussing how political systems should "be understood as episodes, factions, and displacements in . . . war"); see also ARENDT, REVOLUTION, *supra* note 31, at 10-11 (offering a similar theory).

[T]he hypothesis of a state of nature implies the existence of a beginning that is separated from everything following it as though by an unbridgeable chasm. The relevance of the problem of beginning to the phenomenon of revolution is obvious. That such a beginning must be intimately connected with violence seems vouched for by the legendary beginnings of our history as both biblical and classical antiquity report it: Cain slew Abel, and Romulus slew Remus; violence was the beginning and, by the same token, no beginning could be made without using violence, without violating The tale[s] spoke clearly: whatever brotherhood human beings may be capable of has grown out of fratricide, whatever political organization men may have achieved has its origin in crime. The conviction, In [sic] the beginning was crime . . . has carried through the centuries

Id.; see also FREUD READER, *supra* note 3, at 500. To appreciate Freud's thinking, one first must establish the trauma of the totem. Freud, relying on Darwin's theory of the primal horde—a violent and jealous father who keeps the females for himself and drives away his young adult sons—hypothesizes the brothers unifying, turning on their father, slaughtering and then devouring him.

Psycho-analysis has revealed that the totem animal is in reality a substitute for the father; and this tallies with the contradictory fact that, though the killing of the animal is as a rule forbidden, yet its killing is a festive occasion—with the fact that it is killed and yet not mourned. The ambivalent emotional attitude, which to this day characterizes the father-complex in our children and which persists into adult life, seems to extend to the totem animal in its capacity to substitute for the father. Totemic religion not only compromised expressions of remorse and attempts at atonement, it also served as a remembrance of the triumph over the father Thus it became a duty to repeat the crime of parricide again and again in the sacrifice of the totem animal For a long time afterward, the social fraternal feelings . . . continued to exercise profound influence on the development of society In thus guaranteeing one another's lives, the brothers were declaring that no one of them must be treated by another as their father was treated by them jointly [murdered] To the religiously-based prohibition against killing the totem was now added the socially-based prohibition against fratricide Society was now based on complicity in the common crime; religion was based on the sense of guilt and the remorse attached to it; while morality was based partly on the exigencies of this society and partly on the penance demanded by the sense of guilt.

378 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 9:2

disagreement to embattlement; for them, no settlement opportunity occurs until after violence sets in. Others move more slowly, stretching out stages of escalating intensity. With some of these, intervention might bring resolution before what we call “fighting” begins. With others, entering the process locks the parties into a dynamic that can only end with hostilities.²⁰¹

Studying the progression of disagreements from inception to settlement, we can begin to develop maps, abstracting patterns from the particulars of disputes. What we are looking for are ways to characterize the movements from power play to armed resistance, from assertiveness to aggression to fighting, from a simple “no, I’d rather not” to a weapon drawn in self-defense. Look for examples in your personal life, in professional settings, on the news. The fuller our catalogue of examples, the more beneficial.

Second, we can begin to explore, in available literature and through the practical application of the principles described in this literature, techniques for redirecting escalating conflicts.²⁰² This

Id. at 500-03.

201. BATESON, *supra* note 1, at 68. Bateson uses the term schismogenesis to describe a dynamic of progressive differentiation. *Id.* In a chapter dedicated to a discussion of cultural contact, various dynamic interfaces are investigated. Bateson begins with three broad models: complete fusion of interfaced groups; absolute elimination of one group; and persistence of both groups in dynamic equilibrium. *Id.* Schismogenesis-progressive differentiation-is an option associated with dynamic equilibrium. *Id.* Bateson offers us the following example of symmetrical differentiation.

[T]here is a likelihood, if boasting is the reply to boasting, that each group will drive the other into excessive emphasis of the pattern, a process which if not restrained can only lead to more and more extreme rivalry and ultimately to hostility and to the breakdown of the whole system.

Id. at 68. Bateson also offers the following example of complementary differentiation. If one group habitually expressive assertiveness to which members of the other group routinely respond by exhibiting submissiveness.

It is likely that the submissiveness will promote further assertiveness which in turn will promote submissiveness. This schismogenesis, unless it is restrained, leads to a progressive unilateral distortion of the personalities of the members of both groups, which results in mutual hostility between them and must end in the breakdown of the system.

Id.

202. *Id.* at 70-72. For example, given his observations Bateson makes a series of tentative suggestions:

- (a) [I]t is possible that a very small admixture of complementary behavior in a symmetrical relationship, or a very small admixture of symmetrical behavior in a complementary relationship, may go a long way toward stabilizing the position. The squire is in a predominately complementary . . . relationship with his villagers, but if he participates in village cricket (a symmetrical rivalry) but once a year, this may have a curiously disproportionate effect upon his relationship with them.
- (b) [If] group A sell sago to B while the latter sell fish to A, complementary patterns may . . . promot[e] a mutual dependence

literature is being produced fast and furiously. We are in a period of rapid growth. Attention has been directed toward the study of violence, toward identifying and developing ways to avoid the intensification of conflicts.²⁰³

b

Life in general is teaching me to be extremely careful with or about offensive/defensive perspectives. Offensiveness and defensiveness correspond to a “life as battle” metaphor. Like the adversarial system, like competitiveness, like debating, and maybe even dialectics, the embattled view of life suggests the essentiality of conflict. The suggestion goes deep. It is repeated frequently. We are educated to the point of habituation. We are programmed. We are trained. Over and over we are directed to look for, to observe, to recognize, to respect, and to anticipate repetitions of conflict. As a result, we add, by our own conduct, further reinforcement to preexisting tendencies or trends.

We are not entirely free. We are “victimized” by our expectations. If you learn from this section how to avoid being victimized by your expectations, you will have learned enough to make the work worth while.

What strategies and tactics are available to free you from the snares, the entanglements, of expecting embattlement? Awareness is a first step.

c

The subject is the inevitable suffering of some as an element of the exercise of power.²⁰⁴ The fact works this way: If power is the ability of

(c) [T]he presence of a number of truly reciprocal elements in the relationship may tend to stabilize it

(d) [E]ither type of schismogenesis . . . can be checked by factors which tend to unite the two groups in loyalty or opposition to some outside element

(e) [C]ontrol by diversion of attention to outside circumstances . . . [whereby] . . . those responsible . . . cooperate in an attempt to solve the difficulties.

Id.

203. See generally BARRY RUBACK & NEIL ALAN WEINER, INTERPERSONAL VIOLENT BEHAVIORS 1-2 (1995) (noting that violence has been studied by a number of academics and many have examined theories on how to rectify violence in a culture).

204. See SIU, *supra* note 10, at 6 (“Of course, thousands of people will be fired Of course, millions will be bombed to fleshy scraps The remorse can be washed away with the universal absolution: ‘Too bad, just can’t be helped.’ . . . Let not the wailing and groaning of the innocent weaken your will to win and keep.”) (ellipses in original). “One man’s gain so often rests on another man’s pain.” *Id.* at 62. And, quoting a poem of Robert Southey written

380 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 9:2]

a person to get another person to accede to the power player's wishes or desires, then in every power play there is a dominant, willful individual and a submissive individual.²⁰⁵ If one thinks of it in the most benign setting—parent and child—the image is clear without setting up a strong antagonistic emotional reaction.²⁰⁶ That, of course, presupposes that you had decent parents to guide you. If your parents were less than completely honorable, even in the parent-child set-up you could find yourself victimized by negative judgment.²⁰⁷

That fact alone may be enough to warn some of you about the complexity of studying suffering in the context of human power. In a universe where the people who exercise power, the people who ask, conjole, demand, that others do their will, do things their way, suffering is added to the world. Selfish actions result in suffering.²⁰⁸

about a long ago battle, "[t]hey say it was a shocking sight/ After the field was won;/ For many thousand bodies here/ Lay rotting in the sun;/ But things like that, you know, must be/ After a famous victory." *Id.* at 62.

The misfortunes of humans may be divided into two classes: First, those inflicted by the nonhuman environment, and, second, those inflicted by other people. As mankind have progressed in knowledge and technique, the second class has become a continually increasing percentage of the total [I]t is now man that is man's worst enemy [M]uch the most important evils that mankind have to consider are those which they inflict upon each other through stupidity or malevolence or both.

RUSSELL, *supra* note 28, at 146-47.

205. MacKinnon, *Feminist Jurisprudence*, *supra* note 167, at 636. "[T]he male point of view forces itself upon the world as its way of apprehending it [M]ale dominance is perhaps the most pervasive and tenacious system of power in history." *Id.* at 638.

Power is the intentional influence over the beliefs, emotions, and behaviors of people One person exerts power over another to the degree that he is able to exact compliance as desired. No power is exhibited without an empowering response. The techniques of eliciting empowering responses of the kind and at the time desired from targeted individuals constitute the craft of power.

SIU, *supra* note 10, at 31.

206. See FREUD READER, *supra* note 3, at 744.

The love which founded the family continues to operate in civilization both in its original form, in which it does not renounce direct sexual satisfaction, and in its modified form as aim-inhibited affection. In each, it continues to carry on its function of binding together considerable numbers of people, and it does so in a more intensive fashion than can be effected through the interest of work in common.

Id.

207. See BATESON, *supra* note 1, at 243 ("I believe . . . that the schizophrenic family is an organization with a great ongoing stability whose dynamic and inner workings are such that each member is continually undergoing the experience of negation of self.").

208. RUSSELL, *supra* note 28, at 163 ("Selfishness beyond a point, whether individual or national, is not wise."); see also FREUD READER, *supra* note 3, at 741.

A good part of the struggles of mankind centre round the single task of finding an expedient accommodation—one, . . . that will bring happiness—between this claim of the individual and the cultural claims of the group; and one of the problems that touches the fate of humanity is whether such an accommodation can be reached by means of some particular form of civilization or whether this conflict is irreconcilable.

d

I was thinking about the warnings, “Never let them see you sweat” and, “Whatever you do, don’t let them see you cry.” If sweating reveals too much of the reality of effort involved in an endeavor and if tears reveal too much of the underlying emotionality, cruelty, actual overt cruelty, reveals too much of its underbelly. Cruelty strips away the masks of agreed-upon pretense, the acquiescence to ritualized or regularized relations, the economy of facial compliance. It lays bare and opens the risks of casual compliance and shallow cooperative arrangements. The harshness of too much cruelty burns into the complex nets of our social or political associations. It awakens dread, resistance, independent analysis and action.

I want to say that few ceremonies are distracting enough, powerful enough, to incorporate cruelty; but that just isn’t accurate. Masters at cruelty seduce people into ceremonializing the infliction of pain and suffering.²⁰⁹ History provides too many examples to tolerate denial.²¹⁰

Id.

The development of the individual seems to . . . be a product of the interaction between two urges, the urge toward happiness, which we usually call ‘egoistic’, and the urge toward union with others . . . which we call “altruistic” [T]he two urges . . . must struggle with each other in every individual But this struggle . . . does admit of an eventual accommodation.

Id. at 768-69; *see also* NOSS, *supra* note 112, at 197.

209. *See* ARENDT, *TOTALITARIANISM*, *supra* note 119, at 472-73.

The preparation of victims and executioners which totalitarianism requires . . . is not ideology itself . . . but its inherent logicity. The most pervasive argument . . . of which Hitler like Stalin was very fond is: You can’t say A without saying B and C and so on [T]he coercive force of logicity . . . springs from our fear of contradicting ourselves. To the extent the Bolshevik purge succeeds in making victims confess to crimes they never committed, it relies chiefly on this basic fear and argues as follows: We are all agreed on the premise that history is a struggle of classes and on the role of the Party in its conduct. You know therefore that, historically speaking, the Party is always right At this historical moment . . . certain crimes are due to be committed which the Party, knowing the law of history, must punish. For these crimes, the Party needs criminals; it may be that the Party, though knowing the crimes, does not quite know the criminals; more important than to be sure about the criminals is to punish the crimes, because without such punishment, History will not be advanced You, therefore, either have committed the crimes or have been called upon by the Party to play the role of criminal—in either case, you have objectively become an enemy of the Party. If you don’t confess, you cease to help History through the Party, and have become a real enemy. The coercive force of the argument is: if you refuse, you contradict yourself and through this contradiction, render your whole life meaningless

Id.

210. *See* RUSSELL, *supra* note 28, at 109.

When the Romans won victories in the Punic wars, the Carthaginians became persuaded that their misfortunes were due to a certain laxity which had crept into the

382 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 9:2]

What should not be possible seems almost easy when viewed through historic lenses. Exactly the cruelty that ought to alert a population, instead becomes the very thing uniting them. The resulting corruption spreads and lasts. Whether in public squares, splashed across the media or in our homes, the ceremonialization of cruelty is not easily overcome.²¹¹ I do not want to assist anyone toward the

worship of Moloch. Moloch liked having children sacrificed to him, and preferred them aristocratic; but the noble families of Carthage had adopted the practice of surreptitiously substituting plebian children for their own offspring. This, it was thought, had displeased the god, and . . . even the most aristocratic children were duly consumed in the fire.

Id.; see also ARENDT, *REVOLUTION*, *supra* note 31, at 100-02 (presenting the Reign of Terror as the complex result of a profoundly human experience). I've cut and pasted together her rendition hoping to convey its depth and clarity. She begins by weaving together two strands of an already integrated fabric. *Id.* Everyone involved is French and everyone was deeply touched by the extreme corruption of the French Court. *Id.* The hypocrisy issue eating away at the secret center of Robespierre's heart reflected the ill-fated cabals and intrigues of Louis XVI's Court with its broken oaths, unkept promises, willfully corrupt manners. *Id.* Arendt reports:

War upon hypocrisy was war declared upon society as the eighteenth century knew it, and this meant first of all war upon the Court at Versailles as the center of French society. Looked at from without, from the viewpoint of misery and wretchedness, it was characterized by heartlessness; but seen from within . . . it was the scene of corruption and hypocrisy. That the wretched life of the poor was confronted by the rotten life of the rich is crucial for an understanding of what Rousseau and Robespierre meant when they asserted that men are good 'by nature' and become rotten by means of society [T]he Revolution offered the opportunity of tearing the mask of hypocrisy off the face of French society . . . of tearing the façade of corruption down and of exposing behind it the unspoiled, honest face of the people.

Id. at 101-02.

[T]he men of the French revolution had no . . . respect for the legal personality which is given and guaranteed by the body politic They believed that they had emancipated nature herself . . . liberated the natural man in all men, and given him the Rights of Man to which each was entitled, not by virtue of the body politic . . . but by virtue of being born For the people who now appeared were not 'artificially' hidden behind any mask, since they stood just as much outside the body politic as they stood outside society. No hypocrisy distorted their faces and no legal personality protected them From then on, the 'real wants' determined the course of the Revolution For the masses, once they . . . discovered that a constitution was not a panacea for poverty, turned against the Constituent Assembly as they had turned against the Court When this force was let loose, when everybody . . . [became] convinced that only naked need and interest were without hypocrisy, the *malheureux* changed into *enragés*, for rage is . . . the only form in which misfortune can become active. Thus, after hypocrisy had been unmasked and suffering been exposed, it was rage and not virtue that appeared It was the unequal contest of these rages, the rage of naked misfortune pitted against the rage of unmasked corruption, that produced the 'continuous reaction' of 'progressive violence' of which Robespierre spoke For rage . . . is the mode in which impotence becomes active in its last stage of final despair. The *enragés* . . . were those who refused to bear or endure their suffering any longer, without, however, being able to rid themselves of it or even to alleviate it [S]uffering, once . . . transformed into rage, can release overwhelming forces.

Id. at 104-07.

211. ARENDT, *REVOLUTION*, *supra* note 31, at 83 (stating that "from this deed of violence the same chain of wrongdoing will follow, only that now mankind will not even have the consolation that the violence it must call crime is indeed characteristic of evil men only?").

accomplishment of such a goal. I would rather point to the establishment of disciplines that help us develop effective techniques suitable to other characters and inclinations.

Is it possible to promote power while censuring some of its expressions? The endeavor is common enough. Use your own judgment to determine the degree, extent and conditions of success.

e

No one offering you ideology or domination as a path toward the right ordering of the community is contributing directly toward non-violence.

Many people cannot separate theory from ideology.²¹² They cling

212. See 17 THE COMPLETE EDITION OF THE OXFORD ENGLISH DICTIONARY 902 (2d ed. 1989) (offering at least seven different definitions of the word 'theory'). For our purposes the relevant definitions include:

a systemic statement of rules or principles to be followed; a system of idea held as an explanation of a group of facts or phenomena; a hypothesis that has been established by observation or experiment and is propounded as accounting for known facts; systemic conception or statement of the principles of something.

Id. The dictionary also reminds us that 'theory' is used to identify abstraction as distinguished from or in contrast to "practice." See *id.* The dictionary revealed that the root of the word is Greek. See *id.* In the original language the word was used to refer to viewing or contemplating and probably came into the English language when Aristotle's works were translated. See *id.* The dictionary taught me that 'ideology' was originally associated with the science of ideas, that branch of philosophy or psychology that deals with the nature and origin of ideas. While it suggests that it might have been associated with Condillac and the belief that all ideas are derived from sensations, it also offers the extension of application into the realm of idealistic, non-literal, speculative, visionary; warning that in this context the term is understood in a depreciatory sense. See *id.* Frankly, I do not know - except by familiar usage - how I got my sense of ideology, a sense which employs the term to refer to the assertions or beliefs constituting a political, social, economic or even psychological program or paradigm. And, since the section which contains this footnote rests on a capacity to distinguish between theory and ideology by using the second term in extreme contrast to the way it is defined in my dictionary, I set out in search of an explanation. The emergent pattern pleases me insofar as it supports my assertions and displeases me insofar as it lends a peculiar and, I fear, ideological cast to a great deal of the material I rely upon in my footnotes, as well as to some of my own views. Living and learning is what my dear friend and now dean of Temple Law School told me early on was the purpose of legal scholarship. Being somewhat humiliated in the here-and-now, I can only add that I wish more of my learning were not quite so publicly exposed. But, then, I've known all along that what I write is an exposure of my ignorance. The emergent pattern, according to my sources, follows a pattern generated by Marxist influence. See also SABINE, *supra* note 19, at 772-77 (asserting that Marx used the word 'ideology' in a peculiar way). "The [or 'this'] notion of ideology was at once one of Marx's most pregnant ideas and also one of the vaguest and most subject to abuse." *Id.* at 773. The notion which Sabine found novel, pregnant, vague and potentially dangerous is that: "The individual counts mainly through his membership in the class, because his ideas—his moral convictions, his esthetic preferences, even the kind of reasoning that seems to him convincing—are in the main a reflection of the ideas generated by the class." *Id.* at 772. The idea that "[i]deas reflect and more or less misrepresent an underlying economic reality . . .," *id.* at 773, when generalized to "[i]t is not the consciousness of men that determines their existence, but, on the contrary, their social existence determines their consciousness . . .," *id.* at 775, is laced throughout this paper; articulated by a number of sources as a statement of incontrovertible fact. It is far too late in the game for this paper for

to theories, form allegiances to theories. They allow theories to replace experiential learning. When this happens the theory is transformed into an ideology.²¹³ Ideologies organize evidence, structure thoughts, manage material. With an ideology, analysis proceeds along preset, established, patterns.

This analysis may make for efficiency, but it does not provide for

me to invert the construction and treat this idea as 'ideological' in its own (source) terms; I cannot now examine the degree to which my social existence determined for me the appeal of this construction. I can, however, project a future research project in which I undertake this inquiry. *Id.*

213. See also RUSSELL, *supra* note 28, at 23-24 (telling us that philosophy seeks a theoretical understanding of the structure of the world while seeking to inculcate the best way of living in the world; in effect philosophy seeks "a theory of the universe upon which to base a practical ethic."). He admits that because of its theoretical aspect "philosophy consists . . . in the framing of large general hypotheses which science is not yet in a position to test." *Id.* at 25. He adds: "Those who have a passion for quick returns and for an exact balance sheet of effort and reward may feel impatient of a study which cannot, in the present state of our knowledge, arrive at certainties . . ." But, he warns: "The demand for certainty is one which is natural . . . but is nevertheless an intellectual vice." *Id.* at 26. "So long as men are not trained to withhold judgment in the absence of evidence, they will be led astray . . ." *Id.* at 27. "[I]t is not enough to recognize that all our knowledge is . . . uncertain and vague; it is necessary . . . to learn to act upon the best hypothesis without dogmatically believing it." *Id.* at 28; see also ARENDT, TOTALITARIANISM, *supra* note 119, at 466 (employing the term 'ideology' in a way closely aligned with my propositions).

What totalitarian rule needs to guide the behavior of its subjects is a preparation to fit each of them equally well for the role of executioner and the role of victim. This two-sided preparation, the substitute for a principle of action, is [the] ideology . . . ideologies—isms which to the satisfaction of their adherents can explain everything and every occurrence . . . are a very recent phenomenon . . . Ideologies are known for their scientific character: they combine the scientific approach with results of philosophical relevance and pretend to be scientific philosophy. The word 'ideology' seems to imply that an idea can become the subject matter of science, just as animals are the subject matter of zoology, and that the suffix-*logy* in ideology, as in zoology, indicates nothing but the *logoi*, the scientific statements made on it An ideology is quite literally what its name indicates . . . the logic of an idea. Its subject matter is history The ideology treats the course of events as though it followed the same 'law' as the logical exposition of its 'idea.' ideologies pretend to know the mysteries . . . the secrets of the past, the intricacies of the present, the uncertainties of the future.

Id. at 468-69. "Ideologies . . . assume that one idea is sufficient to explain everything . . . and that no experience can teach anything because everything is comprehended in this consistent process of logical deduction." *Id.* at 470.

[T]here appear three . . . totalitarian elements . . . peculiar to . . . ideological thinking. First, in their claim to total explanation, ideologies . . . explain not what is, but what becomes, what is born and passes away Secondly, . . . ideological thinking becomes independent of all experience Thirdly, since ideologies have no power to transform reality, they achieve . . . emancipation of thought from experience through certain methods of demonstration. Ideological thinking orders facts into an absolutely logical procedure . . . it proceeds with a consistency that exists nowhere in the realm of reality Once it has established its premise, its point of departure, experiences no longer interfere with ideological thinking, nor can it be taught by reality The device . . . totalitarian rulers used to transform . . . ideologies into weapons . . . was deceptively simple and inconspicuous: they took them dead seriously [S]tringent logicity as a guide to action permeates the whole structure of totalitarian movements and governments.

Id. at 470-72.

personal understanding, integration or responsibility. People who substitute ideology for understanding end up making up slogans when the situation calls for reasoning.²¹⁴ A person dependent upon slogans for guidance is incapable of proceeding to justice.²¹⁵

The practice of justice is not the practice of domination.²¹⁶ Finding ways to get people to agree with you, to go along with your program, may lead to situations organized to your taste and to your benefit. That path, however, inclines you to move “against” people, which is contrary to the requirements of justice. Within the contours of the practice of justice no one is the ‘enemy’, no one can be treated for long as an antagonist.²¹⁷ When we find ourselves opposed to others

214. See ARENDT, *REVOLUTION*, *supra* note 31, at 32 (noting that the words “rebellion” and “revolt” never indicated liberation and even less did they point to the establishment of a new freedom).

215. See LEVINAS, *TOTALITY & INFINITY*, *supra* note 52, at 246.

Justice would not be possible without the singularity, the unicity of subjectivity. In this justice subjectivity does not figure as a formal reason, but as individuality The deepening of the inner life can no longer be guided by evidences of history. It is given over to risk and to the moral certainty of the I—to horizons more vast than history, in which history itself is judged To place oneself . . . under the . . . judgment of God—but equally failing to recognize the subjectivity.

Id.

[J]ustice summons me to go beyond the straight line of justice, and henceforth nothing can mark the end of this march; behind the straight line of the law the land of goodness extends infinite and unexplored, necessitating all the resources of a singular presence. I am therefore necessary for justice, as responsible beyond every limit fixed by law.

Id. at 245.

216. CORNELL, *IMAGINARY DOMAIN*, *supra* note 26, at 4-5.

There are three conditions that insure a minimum degree of individuation which I defend as *necessary* for the equivalent chance to transform ourselves into individuated beings who can participate in public and political life as equal citizens For a person to be able to shine through, she must first be able to imagine herself as whole [T]he freedom to struggle to become a person is a chance or opportunity which depends on a prior set of conditions that I refer to as minimum conditions of individuation Given my understanding of the person as involving an endless process of working through, each of us must have the chance to take on this struggle in his or her own unique way.

Id.

217. LEVINAS, *PHILOSOPHICAL WRITINGS*, *supra* note 35, at 146 (“The religious discourse that precedes all religious discourse is not dialogue. It is the ‘here I am’ said to a neighbor to whom I am given over, by which I announce peace, that is, my responsibility for the other.”). “The fact that the other, my neighbor, is also a third in relation to another, likewise a neighbor, is the birth of thought, of consciousness, of justice, and of philosophy.” *Id.* at 95. “Responsibility goes beyond being. In sincerity, in frankness, in the veracity of this saying, in the uncoveredness of suffering, being is altered.” *Id.* at 121. “My responsibility for the other . . . *testifies* to Infinity.” *Id.* at 103; *see also* Derrida, *supra* note 110, at 21. Derrida is not entirely at home with Levinas’ characterizations of justice. *See id.* Nor can I attribute to Derrida direct support for the statement. However, in part his framework is shareable. Describing the aporia, the deconstructive tension, the seemingly paradoxical and meaning giving relation, the privileged instability between law and justice. *See id.* Derrida states that “I shall . . . propose . . . a difficult and unstable distinction between justice and *droit*, between justice (infinite, incalculable,

386 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 9:2]

we can be sure that domination, not justice, is at work as the shaping force in the situation.

f

Force is associated with tension, anxiety, disturbance, and stress. Harmony is associated with easier ways of achieving cooperative behavior. Sharing may be an attribute of safety and security.²¹⁸ Hoarding and other selfish, self-centered behaviors are associated with experiences of deprivation, need, and desperation.²¹⁹ Getting things right through domination, direction, control may appeal at a superficial level toward the construction of ordered liberty. In the justice context, though, superficial orderings are not the goal. We yearn for a level of mutual ease that is inconsistent with compulsion.²²⁰ What we need is to learn how to be sensitive to our

rebellious to rule and foreign to symmetry, heterogeneous and heterotropic) and the exercise of justice as law or right, legitimacy or legality, stabilizable and statutory, calculable, a system of regulated and coded prescriptions." *Id.* at 22. Derrida is tempted to compare the concept of justice he is working out to Levinas' construction because both arise out of infinitude, both emphasize a heteronomic relation to others— "to the faces of otherness that govern me, whose infinity I cannot thematize and whose hostage I remain." *Id.* "Levinas's notion of justice," Derrida tells us, "might sooner be compared to the Hebrew equivalent of . . . 'sanctity'." *Id.* at 22. Nevertheless, Derrida tells us that borrowing these conceptualizations from Levinas would create an undue risk of confusion, as he thrusts us back into the unstable and vitalizing relation, the aporia, between justice and *droit* (right/law). *See id.*

218. SIU, *supra* note 10, at 206.

The degree of human warmth and naturalness with which persons relate to others is a reflection of their self-confidence, which, in turn, is a function of their native capability, relative to the increment of change being pursued. Should the latter lie fully within their own capacity to accomplish, they can deal with the world . . . on a . . . more personal basis [C]ontented with minimum levels of material goods and power, while going around sprinkling sunshine into people's lives . . . it is conceivable that practically all their dealings with the world . . . can be human and personal.

Id.

219. *Id.* at 156 (stating that in Brazil in the 1950s, Francisco Juliao was organizing revolutionary peasant leagues.) Padre Antonio Costa, a parish priest in Cabo, a village located in the path of the revolutionary organizer, was asked about Juliao's appeal. "They do not believe in Juliao," he responded, "they do not believe in the Church; they do not believe in anything," answered the Padre. "They are too hungry to believe." *Id.*

220. LAO TZU, *supra* note 76, at 30.

Whenever you advise a ruler on the way of the Tao,/ Counsel him not to use force to conquer the universe./For this would only cause resistance./ Thorn bushes spring up wherever the army has passed./Lean years follow the wake of a great war./Just do what needs to be done./Never take advantage of power.

He who stands on tiptoe is not steady./He who strides cannot maintain the pace. /He who makes a show is not enlightened./He who is self-righteous is not respected./ He who boasts achieves nothing./ He who brags will not endure./ According to followers of the Tao,/ 'These are extra food and unnecessary luggage.'/ They do not bring happiness./Therefore followers of the Tao avoid them.

Id. at 24.

own relative ease or comfort as well as how and when others experience safety. Somewhere formulas for options distinguishable from emotional blackmail or mutual irritation passed off as tolerance can emerge from committed practice.²²¹

g

The strong force of expectations pushes, pulls, limits, inhibits and often drives us. Unless and until you learn to make constant adjustments to your expectation maps, you may find yourself victimized by your own judgments.

First, your expectations may become universalized for you.²²² By projecting your personal expectations outside the contexts of their relevancy, you judge yourself and others: as just; as unjust; using tests and standards inappropriate to the circumstances.

Second, if you have a tendency to dominate, a taste for control, you may start manipulating situations to correspond with your expectations.²²³ Anyone who controls a situation in order to satisfy her expectations, and thereby, satisfy her sense of justice runs a serious risk of finding herself criticized when she expected respect. Disappointment follows.

The secret is to learn to separate your personal expectations from those of other participants in a situation. Learn to integrate all relevant perspectives to generate a comprehensive understanding of the expectations of all participants.²²⁴ This will allow you to move with

221. *Id.* at 13.

Accept disgrace willingly./Accept misfortune as the human condition./What do you mean by 'Accept disgrace willingly?'/Accept being unimportant,/do not be concerned about gain and loss./That is called 'accepting disgrace willingly.'/What do you mean by "Accepting misfortune as the human condition?"/ Misfortune comes from having a body./Without a body, how could there be misfortune?/Surrender yourself humbly; then you can be trusted to care for all things./Love the world as your own self; then you can truly care for all things.

Id.; see also WILHELM, *supra* note 39, at 152.

When one encounters an obstruction, the important thing is to reflect on how best to deal with it. When threatened with danger, one should not strive blindly to go ahead, for this only leads to complications. The correct thing is . . . to retreat for the time being . . . to await the right moment for action.

Id.

222. See BARTLETT & HARRIS, *supra* note 55, at 1007 (explaining that "[t]he authors warn of false universalisms, in which overgeneralizations or unstated reference points implicitly attribute to all members of a group the characteristics of a dominant subset of that group.").

223. See ARENDT, *REVOLUTION*, *supra* note 31, at 250 (describing the way the Bolsheviks interpreted as mandatory revolutionary conduct patterns of suspiciousness established during the French revolution).

224. See BARTLETT & HARRIS, *supra* note 55, at 1102-05 (citing Bartlett, *Feminist Legal Methods*,

388 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 9:2]

grace to achieve a balanced result instead of compelling or dominating by violence those with less power to accede to the wishes of those with more power.

h

Putting down the ways of violence, the ways of force, power, compulsion is easier when we remember that beyond the bare necessities none of the things society offers can satisfy human need or desire.²²⁵ There is nothing any of us can do about this formulation except to demean others or ourselves in our attempts to deny this simple fact of life. The world has little of value to humans beyond the necessities of secure existence, except insofar as life offers us an opportunity to share in the experience of life.

103 HARV. L. REV. 829, 880-85 (1990)). According to Bartlett, Positionality is a stance or perspective, which utilizes a concept of experientially determined knowledge. *Id.*

Experience interacts with an individual's current perceptions to reveal new understandings [P]ositionality rejects the perfectibility, externality, or objectivity of truth Truth is situated in that it emerges from particular involvements and relationships No individual can understand except from some limited perspective [T]he key to increasing knowledge lies in the effort to extend one's limited perspective [P]erspective [can be improved] by stretching . . . imagination to Identify and understand the perspective of others.

Id.; see also REISMAN & SCHREIBER, *supra* note 1, at 577-78 (citing Lasswell & McDougal, *Theory About Law*, *supra* note 1, at 374-94) (defining 'participant observer' as the term Lasswell taught me to employ to identify what, in their literature, is referred to as the 'observational standpoint'). In this article, Lasswell and McDougal take pains to note that a participant must be able to distinguish the observational standpoint of a scholar and decision-maker. *Id.* A scholar, they warn must not permit "the perspectives and communication signs of the participants in legal and social process, which are a part of the data he is observing, to dominate his own perspectives and instruments of inquiry and communication . . ." lest confusion and distortion cloud scholarly perception. *Id.* at 577. To serve an enlightening function, Lasswell and McDougal recommend that scholars develop acute consciousness of their own community identifications

seek[ing] to make appropriate discount for the biases of [personal] cultural background, class and group memberships, personality formation and previous experience - to assume a vantage point different from that of the active community participants who make claims before processes of authoritative decision or of the authoritative decision-makers who respond to such claims, and from this vantage point to clarify and Identify for the different participants in community process the common interests which they . . . may not have been able to perceive.

Id. at 578.

225. RUSSELL, *supra* note 28, at 45. See also LAO TZU, *supra* note 76, at 53.

When the court is arrayed in splendor,/The fields are full of weeds,/ And the granaries are bare. / Some wear gorgeous clothes,/Carry sharp swords,/And indulge themselves with food and drink;/ They have more possessions than they can use./ They are robber barons./ This is certainly not the way of Tao.

Id.; SANTIDEVA, *supra* note 36, at 99 (considering "wealth as an unending misfortune because of the troubles of acquiring, protecting, and losing it. Those whose minds are attached to wealth on account of their distracted state have no opportunity for liberation.").

The best thing you can do for yourself and for others is to go through life with yourself and with others in as kind and gracious a way as possible.²²⁶ Seen from the perspective of someone trying to “make it” in life, this statement strikes a discordant note. It suggests foolishness. But it is not foolish. It is wise.²²⁷ Conveniently—and, I suggest, not at all coincidentally - justice, the practice of justice, the art of justice, is a direct way to work toward and to achieve a mature, caring regard for the value of life.²²⁸

226. See POLANYI, *supra* note 42, at 45 (speaking admiringly about the fact that “[e]verywhere in the world there are people who are trusted . . . to tell the truth or to be fair; there are consciences touched by compassion, struggling against ties of comfort or the callousness born of harsh custom.”); see also RUSSELL, *supra* note 28, at 165 (“The world . . . stands in need of . . . certain moral qualities The qualities most needed are charity and tolerance”); FREUD READER, *supra* note 3, at 744.

A small minority . . . find happiness . . . along the path of love [F]ar-reaching mental changes in the function of love are necessary before this can happen. These people make themselves independent of their object’s acquiescence by displacing what they mainly value from being loved on to loving; they protect themselves against the loss of the object by directing their love . . . to all . . . alike; they avoid the uncertainties and disappointments of genital love by turning away from sexual aims and transforming the instinct into an impulse with an inhibited aim. What they bring to themselves in this way is a state of evenly suspended, steadfast, affectionate feeling Perhaps St. Francis of Assisi went furthest in thus exploiting love for the benefit of an inner feeling of happiness.

Id.; see also SABINE, *supra* note 19, at 928.

[T]he moral problem of human beings oblige[s them] to meet and conduct their transactions in situations such that simple coercion is beyond the reach of either party [I]t is the problem of finding . . . a reserve of good will and good faith [I]t is not a new problem The solution . . . can[not] be reduced to a ‘system’ or formula, for it is in substance a moral attitude or temper of mind Aristotle suggested . . . these capacities underlie the human ability to form communities [I]n them men can meet as . . . equals [D]ifferences of rank and authority can be matters of mutual acceptance and . . . mutual respect . . . rather than matters of coercion and deception

Id.

227. SABINE, *supra* note 19, at 929 (“[H]owever it may have been formulated, the idea of natural law expressed the conviction that men can meet in a spirit of fairness, of mutual goodwill and good faith The belief that some such attitude is humanly possible . . . was ingrained in the long tradition of Western humanism” And, these ideas, Sabine says, “are the best that the wisdom of the democratic tradition has created”); see also POLANYI, *supra* note 42, at 47.

The general foundations of coherence and freedom in society may be regarded as secure to the extent to which men uphold their belief in the reality of truth, justice, charity and tolerance, and accept dedication to the service of these realities; while society may be expected to disintegrate and fall into servitude when men deny, explain away, or simply disregard these realities and . . . obligations.

Id.

228. POLANYI, *supra* note 42, at 29-30.

The ideal of a free society is . . . to be a *good* society; a body of men who respect truth, desire justice, and love their fellows. It is only because these aspirations coincide with the claims of . . . conscience, that the institutions which secure their pursuit are recognized by us as the safeguards of our freedom. It is misleading to describe a society thus constituted, which is an instrument of our consciences, as established for

One final story to end this piece. This story is about another friend of mine, not the friend whose father killed her mother, but a friend whose brother murdered her sister-in-law, a woman who was also her best friend and co-worker. Sadly and horribly, in a fit of jealous rage, my friend's brother slaughtered his wife.²²⁹

This occurred over six years ago. The brother is in prison for life. The children of that tragic marriage live with their mother's sister, isolated from everyone in their father's family for fear of contamination. You see, the sister, who is now the caretaker, is convinced that the family that produced the murderous husband is sickening and threatens to spread its violent disease to whoever comes and stays in close proximity. My friend continues to work in the same factory with pretty much the same people where she and her sister-in-law had been employed.

My friend recently has been allowed to visit with her niece and nephew. She has begun to examine the role she played in events leading up to the murder. Deep within herself she believes she might have some guilt concerning her brother's actions, since she told her mother who told her brother that his wife was talking flirtatiously at a bar with some other guy. My friend told her mother for "something to talk about:" probably not thinking at all; or thinking only that her sister-in-law was flirting with danger in one way or another; thinking to get some "quality" time with her mother by relating this tasty morsel of gossip; or maybe thinking her mother could talk to her

the sake of our individual selves; for it protects our conscience from our own greed, ambition Morally, men live by what they sacrifice to their conscience; therefore, the citizen of a free society . . . depends on society for his moral existence. His social responsibilities give him occasion to a moral life

Id.

229. See FOUCAULT, *POWER/KNOWLEDGE*, *supra* note 19, at 193.

I am well aware that I have never written anything but fictions. I do not mean to say, however, that truth is therefore absent. It seems to me that the possibility exists for fiction to function in truth, for a fictional discourse to induce effects of truth, and for bringing it about that a true discourse engenders or "manufactures" something that does not as yet exist, that is, "fictions" it.

Id.; see also ARENDT, *TOTALITARIANISM*, *supra* note 119, at 474 (contributing a troublesome rejoinder). "The ideal subject of totalitarian rule is not the convinced Nazi or the convinced Communist, but people for whom the distinction between fact and fiction (*i.e.*, the reality of experience) and the distinction between true and false (*i.e.*, the standards of thought) no longer exist." *Id.* The facts underlying this section occurred about two years ago. As with the first story, I cannot provide enough information to allow others to identify the people I write about. Their privacy, already shockingly invaded by my use of these individuals as subjects, entitles them to as much confidentiality as possible under the circumstances.

2001]

REDEFINING VIOLENCE

391

daughter-in-law about her conduct; or thinking her own conduct was equally troublesome so throwing some guilt around was a way of handling internal pressures of conscience.

My friend loved her sister-in-law. Her bloody body in her bloody trailer sits in my friend's mind, on her mind; you might say it haunts her. She wants freedom from her guilt. She wants to identify the points and degree of her responsibility so she can find a way to amend the situation. She wants to bring peace to her disquieted conscience. She has been to counseling. The process is long and hard and she does what she can. Every day she confronts people at work who, she imagines, talk behind her back about her role in this awful deed. Someday, she reassures herself, she will be able to talk this over with them. They will be able to come to some acceptance with each other.

Like the protagonist in *Qui Ju*, my friend seeks justice.

This week at work an event occurred that threw her into turmoil. As part of the company's participation in United Way, speakers from funded community groups are invited in to give brief informative talks to the assembled work force. This week's speaker was from a support group for victims of violent crime and for the families of the victims of violent crime. The speaker—we can only imagine unknowingly—decided to focus her remarks on a six year old area murder. My friend found herself front-row-center for the retelling of her family horror story. Too shaken to move, she remained in her seat, sobbing and tearful, as the awful facts of this murder and of the effects of this murder on the parents, sisters, brothers children, neighbors of her sister-in-law were addressed.

There are two things I want to say about the event. First, even though it was an immediately disturbing event for my friend, in the long run I believe this episode will lead her toward her goal. The refreshed publication of the murder in a working community intimately involved with it resulted in trauma. The trauma elicited counseling. As a result, everyone was provided with professional assistance. This may enable them to expiate long held disturbances. My friend is more able to talk with her co-workers about the situation now. That is a positive development. Second, it is an odd fact, a positive but concerning coincidence, that the speaker brought in to talk about the suffering of people affected by violent crime inhabited a world so circumscribed that she identified the victims in a one-sided way. Maybe we are not used to thinking about how violence damages those who commit it as well as those who are the selected victims of the perpetrators. It affects those close to the victims. It affects those

close to the perpetrators. Eventually, it affects the people close to the people immediately involved. Then, it effects the neighborhoods, the schools, the streets, the places we meet and work, the way we relate to one another, how we behave, what we do and what we think, how we teach our children, how we treat each other. It affects the laws we write, the laws we enforce, our attitudes, and our values.

In the face of violence, there is no hard barrier of impenetrability that stops the osmosis of damage. Pebble-in-the-pond ripples spread out in all directions. Who would doubt the devastation my friend suffers because of this crime? Who would doubt the damage to her children, to her mother? Who would doubt the damage to the other co-workers at this company, or to that unidentified man in the bar who spoke with the deceased?

In the face of pervasive, invasive, hostile, antagonistic negative judgment carried along by willfully and/or carelessly disregarding the dignity of each person, how are we to conduct ourselves? When we have been infected ourselves, when we carry into action the resenting, alienated, self-absorbed personality characteristics of sufferers,²³⁰ how are we to avoid inflicting like suffering on others?

230. See ARENDT, TOTALITARIANISM, *supra* note 119, at 476-78.

Solitude can become loneliness; this happens when all by myself I am deserted by my own self What makes loneliness so unbearable is the loss of one's own self which can be realized in solitude, but confirmed in its identity only by the trusting and trustworthy company of my equals What prepares men for totalitarian domination in the non-totalitarian world is the fact that loneliness, once a borderline experience usually suffered in certain marginal social conditions like old age, has become an everyday experience"

Id.; see also ARENDT, PAST, *supra* note 28, at 88-90 (considering the human experience "world alienation" buffeted by "frightening arbitrariness," "melancholy haphazardness"). These processes, according to Arendt, devour objectivity, render meaningless traditions counted on to create common memory, i.e., history, subject the boundaries of nature to human manipulation, leaving behind "a society . . . without a common world." People "live in desperate lonely separation or are pressed together into a mass." *Id.* at 89-90; see also FREUD READER, *supra* note 3, at 296. "[T]he devil is . . . nothing else than the personification of the repressed unconscious instinctual life." And, "[P]ermanent character-traits are either unchanged prolongations of original instincts, or sublimations of those instincts, or reaction-formations against them." *Id.* at 297. In terms of specifics, Freud mentions: "[T]he intense 'burning' ambition of people who earlier suffered from enuresis." *Id.* "The connections between the complexes of interest in money and of defaecation." *Id.* at 296. "[T]hese character-traits of orderliness, parsimony and obstinacy, which are so often prominent in people who were formerly anal erotics" *Id.* at 295. In another section of the book Freud states that "[w]hen an instinctual trend undergoes repression, its libidinal elements are turned into symptoms, and its aggressive components into a sense of guilt." *Id.* at 767. Further, "[T]he price we pay for our advance in civilization is a loss of happiness through the heightening of the sense of guilt." *Id.* at 763. "[C]ivilization," Freud tells us, "is built upon a renunciation of instinct This 'cultural frustration' dominates the . . . field of social relations [I]t is the cause of the hostility against which all civilizations have to struggle." *Id.* at 742. Finally, a Freudian insight inconsistent with the general emphasis of this article, but one we need to ponder, the founder of psycho-analysis posits: "It is not easy to understand how it can be possible to deprive an instinct of satisfaction. Nor is doing so without danger. If the loss is not compensated for economically, one can be certain that serious disorders will ensue." *Id.* at 742.

2001]

REDEFINING VIOLENCE

393

When we redefine violence, let's do it in ways that include us.²³¹ Like my friends, most of us need help. I certainly do not mean we should limit or inhibit extending assistance to obvious sufferers. Instead, I mean we should not imagine those who inflict violence as alien monsters while casting ourselves in the role of objective observers. We are sometimes victims, sometimes victimizers. We are perpetrators and sufferers. Let's study how it works so we can take responsibility for our actions.

231. See ARENDT, *TOTALITARIANISM*, *supra* note 119, at 474-75.

Isolation and impotence, that is the fundamental inability to act . . . have always been characteristic of tyrannies What we call isolation in the political sphere, is called loneliness in the sphere of social intercourse [W]hen the most elementary form of human creativity, . . . the capacity to add something of one's own to the common world, is destroyed, isolation becomes unbearable [T]otalitarianism . . . bases itself on loneliness, on the experience of not belonging to the world at all, which is among the most radical and desperate experiences

Id.; see also ARENDT, *PAST*, *supra* note 28, at 111 ("[V]iolence is inevitably inherent in all activities of making, fabricating, and producing, that is, in all activities by which men confront nature directly The building of . . . human artifice always involves some violence").

The very emergence of justice and law, the founding and justifying moment that institutes law implies a performative force, . . . power or violence. Justice . . . [i]ts very moment of foundation . . . the operation that amounts to founding, inaugurating, justifying law (*droit*), making law, would consist of a *coup de force*, of a performative . . . violence . . . that no justice and no previous law with its founding anterior moment could guarantee or contradict or invalidate.

DERRIDA, *supra* note 110, at 13. And, more simply "[T]he violence of an injustice has begun when all the members of a community do not share the same idiom throughout." *Id.* at 18.