Domination, Justice and the Cult of Violence

Stephen P Wink
I. INTRODUCTION

Law originates and is preserved in these stories about violence, the violence which founds and the violence which conserves, this duality which is said to be at the heart of law. [FN1] The most fundamental stories of our global culture are about violence. Violence is so deeply imbedded in these stories that even when we question many other details within them, we tend to accept the violence without challenge. Violence is part of nature and part of our nature as beings. Our notions of law and justice are intimately wrapped up with violence. Violence breaks the peace and violence keeps the peace.

Violence is the henchman of domination. It keeps the powerful in power and the oppressed oppressed. When violence is used to overthrow the powerful, the old regime is replicated in the new. The play of power remains the same; only the actors change. [FN2] Society continually retells the story of our cultural cosmology--a story about domination.

The contention that violence is inevitable is one of the great unexamined assumptions of society. The assumption of violence preserves the system that dominates others. It is the lock to the cell of our existence. The fact that violence seems so inevitable, so intimately and intrinsically related to the species, obstructs even the notion of another possibility. It is precisely this fact that makes the examination of this assumption so important. Examining violence as an assumption initiates the possibility of an existence without violence. In other words, before escape from the cell can be addressed we must establish the possibility of the existence of an outside of the cell.

Understanding the system that creates domination through violence brings to light the choice available to individuals and societies: either continue in the complacency that is complicit in its evil and the reactionary violence that feeds it, or engage the system in a way that demands a new possibility for justice--a possibility that does not include domination violence. It is precisely this possibility that the system in which we live desperately tries to keep hidden.

In Part II of this Article, we question whether domination violence is really necessary for the establishment and propagation of human societies. Part III discusses the origins of domination violence and the pervasive system it founded. Part IV provides a brief sketch of the development of law and its attendant inequality as instrument and exemplar of this system of domination violence. Part V then offers not an alternative paradigm, but interim methods for extricating ourselves from the grip of the current system--a task we believe to be a moral imperative.
A. Violence Distinguished

Within the current theoretical and interpretive closure, violence and justice appear to demand each other, both in theory and in practice; and if violence is not necessary for any possibility of justice, it appears to be necessary for the possibility of life. At least the violence of our language (and our closure) compels us, at this point in history, to conclude so. [FN3]

The assumption of violence is so difficult to expose because it is identified with the very fabric of our existence. In a recent symposium, *On the Necessity of Violence for Any Possibility of Justice*, [FN4] the above quote was practically the only attention paid to what otherwise is the primary question implied by the symposium's title. The authors may have disagreed about the necessity for violence in different contexts, but the assumption of violence as an inherent part of existence was implicit throughout. Generally, no one bothers to question or examine violence as an assumption for the same reason we do not question why our bodies are fitted with a head and two arms. [FN5] Violence is thought to be a condition of humanity and, more particularly, of law. “Physical violence is inseparable from law, like a shadow that cannot be shrugged off.” [FN6]

Communication is said to be violent: “Before it is a practice, language is a body--a body of sounds. There is violence in a scream.” [FN7] “[W]riting cannot be thought outside of the horizon of intersubjective violence . . . .” [FN8] Under this rubric, violence is not only fundamental but the mark of our humanity--our intelligent life as human beings. Violence is thus necessary not only for existence, but for our greatest achievements and creations. Accordingly, the violence of our language can be said to “compel us” to acknowledge that violence is necessary for justice. [FN9]

It is not surprising, then, to find violence analyzed as a fundamental principle and even elevated to the level of divinity. In *Force of Law: The Mystical Foundations of Authority*, [FN10] Jacques Derrida examined the distinctions made between types of violence in the work of Walter Benjamin. The assumption that violence is necessary for some form of justice serves as the starting point for both authors. Benjamin's vision seeks a violence that is pure, one that is divine in its origin and application--essentially, a violence that is justifiable, uncontaminated by the ends/means relationship of human actions. [FN11] The impetus for this quest is that, absent such a justification, it can be argued that the state has no legitimate basis--since all modern states ground their authority on the violence of conquest, be it the overthrow of a tyrant or merely a land-grab. [FN12] Derrida, though not endorsing Benjamin, [FN13] makes the same assumption as to the necessity of violence for law and reiterates Benjamin's deflection of traditional attacks on the legitimation of violence: “Law (droit) in its very violence claims to recognize and defend said humanity as end, in the person of each individual. And so a purely moral critique of violence is as unjustified as it is impotent.” [FN14] The attempt to measure the use of violence as a means for good ends (i.e., just war theory, tyrannicide) uses as a yardstick its own bloodied sword. [FN15] As both authors state, any critique that appeals to standards within a corrupt system (e.g., which has its basis in violence) is bankrupt. So is any attempt to create a measure of violence inside the system--the system is violence. In the current system, violence is not the means to escape the conundrum. [FN16] Nonetheless, if violence is not fundamental, not necessary, not intrinsic, this logic turns to ash. Violence becomes incident to this system, not all systems.

This attention to and treatment of violence underscores the pervasive perception of the ultimacy of violence. The danger lies in violence as an assumption that goes unquestioned; an assumption that lies at the core of society. This fundamental assumption encourages the use of the term violence in a large range of contexts that diffuses its meaning. The idea of violence is kept general and vague. [FN17] It remains less threatening, far less so than in reality. It is curious that this one word covers such vast territory. How is it that our language fails to make distinctions between types of violence, from the more subtle violence of language referred to above--the intrusive nature of communication--to the overt violence that our system of justice confronts and perpetrates?

Without distinguishing between the micro-violence of language or communication, and what we all know as violence (the violence of domination), violence as an abstraction remains elusive. [FN18] By equating all action,
even life itself, with violence, no decisive ethical/moral choices can be made with respect to domination violence. The failure to make this distinction allows for the continuing justification of all types of violence and inhibits the consideration of possibilities beyond violence. This Article is concerned with the violence used to dominate others; a distinction that allows the possibility of justice without violence to emerge, as the micro-violence of language no longer “contaminates” the moral choice to oppose domination violence.

B. Are Humans Violent by Nature?

1. Primitives Now

In the Philippines, Borneo, New Guinea, Malaysia and Africa there are a number of preliterate peoples that are remarkably free of violence. [FN19] These societies are characterized by an absence of domination hierarchies, rigid specialization and gender-specific roles.

The Batek Negrito of the Malay peninsula are representative. [FN20] Numbering only about 350 persons, they live a nomadic existence in camps of five to eight nuclear families, subsisting by hunting and gathering. Hunters share all the meat they obtain, but there is no special status or social reward for being a successful hunter, nor shame at being unsuccessful or too lame or blind to hunt. There are loosely defined gender roles, but they are not stereotyped or ranked. There are no words for “boy” or “girl,” only “children,” until puberty. Women can hunt whenever they want, but usually do so only for small game and near the camp. Women usually dig for tubers, but men often join them.

Both men and women collect and trade rattan. All share the earnings, since some have had to gather extra food to support those collecting rattan. Women specialize in building lean-tos when setting up a new camp, while the men leave to hunt before the game is frightened away. Both sexes collect firewood and water. Men seldom weave or plait rattan. Men specialize in hunting because, the Batek say, they have stronger breath for the blowguns. They are also more expendable in case of tiger attack (the camps have a fairly constant ratio of 11 men to 8 women).

The Batek have no sense of property or ownership. The area they forage is not “theirs,” nor do they prohibit others from camping or foraging in it. Leaders emerge naturally, through age, wisdom and strength. Sometimes (as in the camp studied) the leader is a woman. Leaders have no power to impose their will on anyone, however. Disputes are settled only by reasoning. An aggrieved or offending party may decide to leave the camp for another, but there are no punishments or retribution, not even exile. Each evening the whole camp plans its moves or activities for the next day.

Children's games are non-competitive and non-aggressive. Small children are not punished, but simply diverted or ignored. Aggression toward others is discouraged. Children are taught not to be possessive by the general devaluing of private ownership. If people are angry, they will sit in a shelter and speak loudly about what is bothering them, without addressing anyone in particular. Others may join in. Thus, the Batek model for children the use of communication to resolve aggression.

By devaluing violence in their culture, the Batek have created a social environment in which women and men interact as equals. Despite exposure to the modern world, the Batek maintain a remarkably egalitarian society. Men do not dominate women in Batek society. Independence is valued equally by men and women, yet theirs is a society of unusual closeness, physical touching, and interdependence, without any social need for prestige and status from wealth, political power, or social position.

Clearly, the Bateks live in a much different context from contemporary western society. Although their lives and societal needs may not be analogous to our culture, the very existence of these peoples shows that human beings, at least in some contexts, are capable of living without violence.
2. Primitives Then?

To whom can I speak today?

Gentleness has perished

And the violent man has come down on everyone.

-Anonymous Song, circa 1990 B.C.E. [FN21]

Warfare seems to be a rather late human invention. The societies that appeared in Mesopotamia after 3000 B.C.E. provide the first evidence of extensive warfare. The Sumerians and Babylonians were patriarchal, conquest-based societies, and their ascension as developed cultures marked their triumph over Neolithic societies and the eventual annihilation of that earlier civilization.

The work of recent anthropologists and archaeologists has led to a startling revision of what has been called prehistory. These scholars [FN22] postulate that *348 from the Neolithic period to the historical period a number of advanced societies flourished without reliance on violence. These societies appear to have been neither patriarchal nor matriarchal, but rather maintained egalitarian relationships despite some gender-specific roles. [FN23]

There is a striking absence of evidence of warfare in the Neolithic period from 9000 to 4000 B.C.E. [FN24] “As far as we can judge, the fourth millennium and the ages before it had been moderately peaceful. Wars and raids were not unknown; but they were not constant and they did not dominate existence.” [FN25] Some cities existed for hundreds of years, undisturbed, unplundered and unwalled; located in choice valleys rather than on fortifiable hilltops. The tools they made were predominantly for agricultural purposes and there is little evidence of weapons-making. Homes throughout the cities tended to be of similar size and comparable grandeur. Burial grounds also reflect this nonhierarchical temperament; there are no lavish graves for a privileged caste or leaders. [FN26]

[T]he archeological evidence indicates that male dominance was not the norm. “A division of labor between the sexes is indicated, but not the superiority of either.”

[In Crete power was primarily equated with the responsibility of motherhood rather than with the exaction of obedience to a male-dominant elite through force or the fear of force. [FN27]

*349 These societies were characterized by a highly developed religion that permeated all aspects of life, a developed agriculture and a sophisticated art. Yet, unlike the cultures that followed, Neolithic art contains no trace of warriors or heroic conquerors. Instead, the Goddess is prominently featured and neither she nor her son-consort are pictured with weapons as symbols of power. [FN28]

Though much is speculative, [FN29] Riane Eisler concludes from this revision of “prehistory” that these societies were based on a “partnership” between persons and sexes rather than the hierarchical domination of others by powerful leaders. Thus, not only have these findings pushed back the beginning of human civilization well before the rise of the first empires, [FN30] but they also offer the distinct possibility that a reasonably developed culture can exist without domination violence.

Nevertheless, hierarchical, warlike groups of nomadic herding peoples eventually garnered sufficient numbers to attack the more advanced agrarian communities. Under the onslaught of these nomadic tribes over several millennia, the peaceful Neolithic cultures finally collapsed or were absorbed by their conquerors. These conquerors became the founders of the Sumerian and Babylonian empires.

The conquest civilizations that arose at what we have misconstrued as the beginning of our history were
monuments to the warrior-hero. These societies were based on maintaining or acquiring power through the domination of others by warfare or the threat of war.

The one thing they all had in common was a dominator model of social organization: a social system in which male dominance, male violence, and a generally hierarchic and authoritarian social structure was the norm. Another commonality was that, in contrast to the societies that laid the foundations for Western civilization, the way they characteristically acquired material wealth was not by developing technologies of production, but through ever more effective technologies of destruction (e.g., the evolution of metals for weapons use). [FN31]

The regulation of the society reflected this social organization. Law, or the rules and conditions for co-existence, was enforced by violence or the threat of violence. Legal violence was also directed toward stamping out all vestiges of the former, more egalitarian relationship between the sexes. Among the earliest documented law codes, Urukagina's edict (circa 2300 B.C.E., Mesopotamia), declares: “The women of former days used to take two husbands [[[but] the women of today [if they attempt this] are stoned with stones [upon which is inscribed their evil] intent. . . . If a woman speaks . . . disrespectfully to a man, that woman's mouth is crushed with a fired brick.” [FN32] The subsequent code of Ur-Nammu states: “If a man violated a virgin slave girl without the owner's [not her] consent, that man pays five sheqels of silver [to the owner, not the slave girl].” [FN33]

This newly violent society created a matching cosmology to legitimate the system, justify the new status quo and inculcate the conquered. [FN34] The new myths served to socialize women, the poor, and captives into their now inferior status, [FN35] and to rationalize the loss of their Goddess. [FN36]

In some Middle Eastern myths this is accomplished by a story of how the Goddess is slain. In others she is subdued and humiliated by being raped. For instance, the first mention of the powerful Sumerian god Enlil in Middle Eastern mythology is associated with the rape of the Goddess Ninlil. Such tales served a very important social purpose. They both symbolized and justified the imposition of male dominance. [FN37]

Priesthoods (usually male), backed by armies, courts of law, and executioners, indoctrinated people with the fear of terrible, remote, and “inscrutable” deities. *351 Earlier songs, tales, myths, and rituals from a more egalitarian time were suppressed. [FN38] Wife-beating and child-beating began to be seen as not only normal but right. Evil was blamed on women such as Tiamat and Eve. [FN39]

III. REDEMPTIVE VIOLENCE AND THE DOMINATION SYSTEM

A. The Myth of Redemptive Violence

One of the world's oldest surviving myths enshrines both the suppression of women and the glorification of violence as the means to world domination by males. That myth is the Enuma elis, dated from around 1250 B.C.E. in the versions that have survived, and based on traditions considerably older. This ancient story still provides the mythic substratum of civilization today, no matter how secular our society may seem. It is the myth that violence redeems.

In the beginning, according to this myth, the first gods, Apsu and Tiamat, give birth to a succession of younger gods, whose frolicking makes so much noise that the elder gods resolve to kill them so they can sleep. When this plot is discovered by the younger gods, they kill Apsu. Tiamat pledges to revenge Apsu's death. The rebel gods are terrified and turn for salvation to their youngest, Marduk. He exacts a steep price: if he succeeds, he must be given absolute power in the assembly of the gods. Having extorted this promise, he catches Tiamat in a net, drives an evil wind down her throat, and shoots an arrow that bursts her distended belly and pierces her heart. He then splits her skull with a club, stretches out her corpse full length, and from it creates the cosmos. [FN40]

According to this story, creation is an act of violence: Tiamat is murdered and dismembered, and from her
cadaver the universe is formed. Order is established out of chaos through violence. Violence is thus redemptive. Chaos (symbolized by Tiamat) is prior to order (represented by Marduk, god of Babylon); hence, evil is prior to good. Evil is an ineradicable constituent of ultimate reality and possesses ontological priority over good. [FN41]

The Biblical myth is diametrically opposed to all this. There, a good God creates a good creation. Chaos does not resist order. Good is ontologically prior to evil. [FN42]Evil and violence enter as a result of the first couple's sin and the machinations of the serpent. A basically good reality is thus corrupted by free decisions made by creatures. In this far more complex and subtle cosmology, evil emerges for the first time as a problem requiring solution.

In the Babylonian myth, however, there is no “problem” of evil. Evil is simply a primordial fact. Its simplicity caused its basic mythic structure to spread everywhere. Typically, a male war god residing in the sky—Wotan, Zeus, or Indra, for example—fights a decisive battle with a female divine being, usually depicted as a monster or dragon residing in the sea or abyss (representing chaos). [FN43] Having vanquished the original Enemy by war and murder, the male victor fashions a cosmos from the female monster's corpse. Cosmic order is thus derived from the violent suppression of the feminine and is mirrored in the social order by the subjugation of women to men.

According to this myth, humanity is created from the blood of a murdered god. [FN44] Our very origin is violence. Humanity does not originate evil, but finds evil always and already present and merely perpetuates it. Human beings are thus naturally incapable of peaceful coexistence; order must continually be imposed upon us through violence. The myth reflects a highly centralized state in which the king rules as Marduk's representative on earth. Resistance to the king is treason against the gods. Unquestioning obedience is the highest virtue, and order the highest religious value.

In their New Year's festival, the Babylonians re-enacted the original battle by which world order was won and chaos subdued. This ritual was not only cultic, but military. As Marduk's representative on earth, the king's task was to subdue all those enemies who threatened the order he established on behalf of the god. Salvation was gained through politics; that is, by identifying with the god of order against the god of chaos and offering oneself up for the king's holy wars. Because chaos remained an incessant threat, in the form of attacks from other warrior states, an ever-expanding imperial policy was the necessary correlate to Marduk's ascendancy over all the gods.

The ultimate outcome of this type of myth is a theology of war founded on the identification of the enemy with the powers that the god vanquishes in the drama of creation. Every coherent theology of holy war ultimately reverts to this basic mythology. [FN45] Unlike the Biblical myth, which sees evil as an intrusion into a good creation and war as a consequence of the fall, this myth regards war as older than the created world and a constituent element of reality.

The distinctive structure of the myth is the victory of order over chaos by means of violence. This myth served as the basic ideology of a system of domination in which the gods favored the conquerors. The lower castes existed to perpetuate that power and privilege which the gods conferred upon the king and, in turn, on the aristocracy and priesthood. Religion was at the service of the King, as the god's representative, to legitimate power and privilege. According to the myth, any form of order is preferable to chaos. Ours is neither a perfect nor a perfectible world; it is a theater of perpetual conflict in which the prize goes to the strong. “Peace through war” and “security through strength” are the core convictions that arise from the myth of redemptive violence.

This primordial myth is far from finished. It is as universally present and earnestly believed today as at any time in its long and bloody history. It is the dominant myth of the contemporary world. It undergirds popular culture (e.g. video games, comics, cartoons, westerns, spy thrillers, cop shows, combat movies), foreign policy, militarism, televangelism and nationalism. [FN46] It enshrines a cult of violence at the very heart of the state.
B. The Domination System

The owners of the land came onto the land, or more often a spokesman for the owners came. . . . If a bank or a finance company owned the land, the owner man said, The Bank--or the Company--needs--wants--insists--must have-- as though the Bank or the Company were a monster, with thought and feeling, which had ensnared them. These last would take no responsibility for the banks or the companies because they were men and slaves, while the banks were machines and masters all at the same time. . . . The owner men sat in the cars and explained. You know the land is poor. You've scrabbled at it long enough, God knows.

The squatting tenant men nodded and wondered and drew figures in the dust, and yes, they knew, God knows. If the dust only wouldn't fly. If the top would only stay on the soil, it might not be so bad. . . .

Well, it's too late. And the owner men explained the workings and the thinkings of the monster that was stronger than they were. . . . You see, a bank or a company . . . those creatures don't breathe air, don't eat side-meat. They breathe profits; they eat the interest on money. If they don't get it, they die the way you die without air, without side-meat. It is a sad thing, but it is so. It is just so . . . The bank--the monster has to have profits all the time. It can't wait. It'll die. No, taxes go on. When the monster stops growing, it dies. It can't stay one size. . . . We have to do it. We don't like to do it. But the monster's sick. Something's happened to the monster. . . .

*354 Sure, cried the tenant men, but it's our land. We measured it and broke it up. We were born on it, and we got killed on it, died on it. Even if it's no good, it's still ours. . . .

We're sorry. It's not us. It's the monster. The bank isn't like a man.

Yes, but the bank is only made of men.

No, you're wrong there--quite wrong there. The bank is something else than men. It happens that every man in a bank hates what the bank does, and yet the bank does it. The bank is something more than men, I tell you. It's the monster. Men made it, but they can't control it. [FN47]

The fundamental belief in domination and redemptive violence provides the normative bias of our culture. Though times change and the superstructure of society is occasionally realigned, the normative consensus continues to fall in line behind the powers portrayed in the *Enuma elis*. We name this unconscious system of beliefs the domination system.

With the inauguration of the domination system five thousand years ago, human destiny was driven in a direction that people did not intend and most would not have consciously chosen. The new capacity for expansion and enrichment through conquest created a moral anarchy in which all were effectively powerless to stem the tide of domination. As violence between groups increased, humanity inadvertently stumbled into a chaos that may have never before existed. “The relations among societies were uncontrolled and virtually uncontrollable. Such an ungoverned system imposes unchosen necessities: civilized people were compelled to enter a struggle for power.” [FN48]

Within this context, societies felt constrained to defend themselves against power-maximizing aggressors by taking up the tactics of the aggressor society. Thus domination is a contaminant, a disease which, once introduced, inexorably spread throughout the system of societies. People inadvertently stumbled into a struggle for power beyond their ability to avoid it or to stop. “[N]o one is free to choose peace, but anyone can impose upon all the necessity for power.” [FN49]

The self-interests of individuals were subordinated or sacrificed to the interests of the larger systems in which they were imbedded. Nonetheless, a great deal of effort was devoted to formulating laws that would limit violence--though always in a context that preserved advantage for the strong. [FN50] New myths were created to socialize women, the poor, and captives *355 into their now inferior status. [FN51] Priesthoods (usually male), backed by armies, courts of law, and executioners, inculcated people with the fear of terrible, remote, and inscrutable deities. Earlier songs, tales, myths, and rituals from a more egalitarian time were suppressed. Wife-beating and child-beating began to be seen as not only normal but right. Evil was blamed on women (Tiamat, Eve). [FN52]
The nation, the institution of domination, came to be regarded as the highest earthly and heavenly good. There could be no other gods before it. The myth of redemptive violence not only established a kind of patriotic religion at the heart of the state, but it fostered that nation's imperialistic imperative. “All war is metaphysical; one can only go to war religiously.” [FN53] The myth of redemptive violence is the spirituality of militarism. The state has the power to order its citizens to sacrifice their lives. And the name of god-- any god, including the God of Jews or Christians or Muslims--can be invoked as having specially blessed and favored the supremacy of that nation and its ruling caste. (Marduk continues to live on under assumed names.) [FN54]

At once isolated and yet absorbed into the homogenous culture, contemporary individuals, stripped of the values, rites and customs that give a sense of belonging to persons in traditional cultures, live under the illusion that the views and feelings they have acquired by attending to the media are their own. [FN55]

Overwhelmed by the giantism of corporations, bureaucracies, universities, the military and celebrities, individuals sense that the only escape from utter insignificance lies in identifying with these giants and idolizing them as the true bearers of their own human identity. As people are induced to worship the system, they become immune to truth. Worshippers, as studies of cognitive dissonance show, [FN56] do not surrender their beliefs in the presence of disconfirming facts. They simply adjust their beliefs to neutralize the adverse facts.

A search for norms or a normative basis for relations in such a society is thus meaningless. The system has claimed its prize already; individuals merely play out the dice game for the remaining garments.

Moreover, the discontented, dissident voices that take up arms to oppose the system usually end by strengthening it. Each use of violence further *356 legitimizes violence and affirms its ultimacy. By making violence the alternative of “last resort,” we insure its place as the definitive redeemer. In war, regardless of the victor, the domination system remains the fundamental construct for the victor's authority. Though the particular vantage point of the powerful may shift as a result of the struggle for power, the system of domination remains in place. Regardless of whether a struggle ends with power shifting to the left or the right, the game remains one of control and power over other peoples' lives. Thus, whether one remains complicit with the system or takes up arms against it, the system preserves its power and the cycle of violence retains the appearance of inevitability. [FN57] People become resigned to this seemingly inevitable and invincible system of domination. Their resignation, in turn, drains any hopes of escape.

In all this, law came to play a crucial role. Law was one of the few successful dikes against the flood of violence let loose by the rise of domination societies. By means of law, the violence of the powerful could be regulated to a certain extent. Excessive brutality could be checked. The rights of the less powerful could be championed, if not always enforced. But it also enshrined regulations that diminished women, disadvantaged the poor, legitimated land seizures, sheltered the privileged from prosecution, and institutionalized patriarchy. In the Apostle Paul's dialectic, law is “holy and just and good,” because it is able to contain, control or mitigate some forms of violence, and it expresses fundamental values necessary for the survival of human communities. But it has been co-opted by greed and domination and has become captive to violence for its enforcement. [FN58] Law was sucked into the vortex of the contest for power; thus it became an instrument of violence and a generator of violence, limiting significantly its utility as a means of reducing or eliminating violence. Law is thus seen to be good, corrupted and capable of reclamation (in theological terms: created, fallen and redeemable).

IV. JURISPRUDENCE: THE DELUSION OF LAW

A. The Foundations of our Legal System

We take it as axiomatic that our Anglo-American legal structure began with the principle of might is right--the rule of conquest. “[T]he victor becomes master and sovereign of the state.” [FN59] Kings made laws to effectuate
their rule, consolidate their authority and ensure its perpetuity. Early common law lawyers found themselves already situated in this king-made order. Empirically, they found that the source of the law was the sovereign; resort to further authority was unnecessary. [FN60]

Anglo-American property law, the justification for private and national boundaries and one of the pillars of the common law, remains based on this theory of might: the conqueror as owner.

The notion of conquest [as a basis for ownership] grated on the civilized [European] mind, and the tendency of the European settlers who “discovered” America was to regard many of the Native American tribes, first in time though they were, as something less than legitimate owners, as mere occupants who happened to be on (rather than holding any title to) the lands discovered, not conquered by the Europeans. The settlers could righteously support this view by imposing their own ethnocentric concepts of what amounted to actual possession; the Indians, after all, had not generally cultivated and improved their lands the way a white man would. This amounted to little more than a rationalization for an ideology of conquest, but it was the only rationalization at hand, and it was maintained in the face of arguments that the Indians had a full claim to the land by right of first possession. [FN61]

After a “claim” to territory was made by the sovereign, the sovereign manufactured the authority to make grants of property. [FN62] The common law of property rests on this transparent rationalization of the violence of conquest and the power of the sovereign.

In the Middle Ages, the rise of the aristocratic caste of nobles and landholders brought with it power-sharing with the potentate. The scope of shared power depended on the particular political and economic weaknesses of rulers. As a result, some tyrants were toppled and certain general rights of the people were asserted. [FN63] As a further protection of the power of the aristocracy, law was elevated above the king. Law became the ruler—the institutionalization of domination. [FN64] Though authority was thus somewhat decentralized, the story of society remained a tale of power and the powerful.

The advent of democratic institutions put a different gloss on the power of the sovereign. The state became the sovereign, the source of law. Individuals were purported to have a consensual, though a priori, relation with the state—the social contract. [FN65] Of course, there was no actual bargain. Others had haggled over that long before the individual's arrival as a party to the contract. And the stake or bargaining power of the particular individual was limited to that which his social status permitted. In practice, the social contract served to legitimize the status quo. [FN66] It merely rationalized the transfer of power from the king as sovereign to the aristocracy, and later to a plutocracy, that effectively ruled as the sovereign state. [FN67]

B. Positivism: Law's Delusionary Methodology

Legal positivism is the fundamental methodology of the practice of Anglo-American law. Positivism divorces morality from law and purports to establish an objective basis for law.

Legal scholars from Stanley Fish to Richard Posner have agreed that objectivity in law is impossible. [FN68] Moreover, the latent uncertainty of meaning in language itself creates an infinite array of gaps and variables. [FN69] Thus, not only is law fundamentally indeterminate and not objective, but in operation legal positivism essentially serves no higher purpose than to legitimize the sovereign. “[L]aw is not neutral: It is a mechanism for creating and legitimizing configurations of economic and political power.” [FN70]

The positivist separation of law from morality frustrates any attempt to address specific instances of injustice. [FN71] This positivist tradition descends in part from David Hume's assertion that one cannot derive an “ought” (moral phenomena) from an “is” (empirical phenomena). [FN72] Thus, one could not *360* indict the system based on the morality of a specific case of injustice, because (i) the invalidity of the specific instance is not viewed as
discrediting the general principle but merely a misapplication of the principle or combination of principles; [FN73] and (ii) any resort to moral philosophy is now ruled irrelevant at least as to the specific instance--thereby relegating moral discourse to the purely abstract. [FN74] Because the Western (empiricist) tradition accepted the is/ought distinction, it was not (and in this context still is not) persuasive to cite a particular wrong or injustice perpetrated by the system itself (what is) and then make a statement as to why it ought not be that way. To address the problem at all, the system requires that one start at the very beginning with fundamental abstractions. Subsequently, the dialogue winds up focusing on the structural defects of the abstractions involved rather than on the injustice that provided the inspiration for the attempt in the first place.

The abstraction of injustice is the domination system's most effective method of rendering moral objections impotent. [FN75] Moreover, the near total indoctrination of our society in positivism ensures that all attacks on the system are made on its own terms. This is precisely why positivism is one of the domination system's most potent weapons. [FN76]

Liberalism was offered as an alternative system--a humane positivism. But Ronald Dworkin's liberalism maintained the separation of law and *361 morality, thus continuing to inhibit attacks upon the domination system. His work represents less of a true alternative to the current paradigm than "an account of the law as practiced within the Anglo-American legal tradition." [FN77] In fact, the same criticism leveled at Benjamin can be made here. [FN78] Dworkin merely carves distinctions within the system, by which the system itself remains essentially unaffected. The exercise is more descriptive than transformational and acts to provide the illusion of an alternative. [FN79] The tolerance of seeming alternatives and ideas on the margin is a particularly effective method of survival and one employed to great effect by the domination system. It thus adapts as if it were an organism to the changing topography of culture. The particular pattern of the system's constructs are generally of no concern to it. Rather, it is the fundamental creed of redemptive violence that it jealously protects. Although within the system the theory may have utility, the danger is that the pursuit of abstract reasons for law as it exists may be more useful in drawing attention away from the actual injustice practiced by the system than it is as a tool of liberation. [FN80]

In the context of the domination paradigm, all theories originating within the system are susceptible to the contamination of the system and thus are *362 suspect as to their particular complicity. [FN81] These theories or stories of humanity inevitably retain the perspective of their authors and thus almost certainly retain at least trace elements of the domination system as either reaction or complicity. “Such a history, which surreptitiously suppresses certain oppressed peoples' histories, hides the operation of power-- both domination and resistance--in the past and present, even when this history undergirds sophisticated anti-epistemological and antimetaphysical tastes of postmodern avant-gardists.” [FN82]

A more blatant attempt at justifying the status quo is found in the law and economics movement. Their guiding principle is efficient use of resources-- maximization of efficient resource allocation--or, as Posner puts it, “wealth maximization.” The theory justifies the retention of power by the status quo, ensuring the continuing domination of others. [FN83]

Law and economics theory is based on the assumption that rational persons will choose to maximize their resources through efficient means. [FN84] The marketplace and the rational buyer/seller assumed by this theory, however, only exist as abstractions. The marketplace does not begin as a level playing field nor does it end as such and, moreover, human beings may not be capable of consistently rational economic behavior. [FN85] As Oliver Wendell Holmes *363 said, “[T]he condition of our thinking about the universe is that it is capable of being thought about rationally . . . . The danger of which I speak is . . . . the notion that a given system, ours, for instance, can be worked out like mathematics from some general axioms of conduct.” [FN86]

Ultimately, under an economic analysis, the decision is made to allocate resources to current efficient users. Those inevitably are the already powerful--as it is beyond the resources of the oppressed to exercise much in the way of economic “rights.” Posner admits: “Another implication of the wealth-maximization approach, however, is
that people who lack sufficient earning power to support even a minimum decent standard of living are entitled to no
say in the allocation of resources unless they are part of the utility function of someone who has wealth.” [FN87]
Thus, the theory, at least as expounded most commonly, conveniently justifies wealth and power consolidation,
ensuring the perpetuation of the domination system. [FN88]

C. The Equality Pretense: Stories of Delusion

The value of naming the domination system is that it may act to unify opposition to the current system. We frequently accede to one of the system's most effective methods of diffusing resistance: divide and conquer. By identifying an enemy, an “us against them,” each opposition movement serves to marginalize itself in society, thus playing into the hands of power. Rather, by identifying the common theme of each of the stories told by opposition groups we find the ground on which we may stand together.

One area in which these stories are told that contains a common thread of the unmasking of the domination system is equal protection law. The Constitution established a principle of equality, but the system has twisted and gnarled that principle. The doctrine of equal protection under the laws exists in a fallen state. Equality law exists largely as a pretense provided by the system that serves to diffuse resistance. The normative bias of domination in the subsystems of society ensures that despite the principle of equal protection the interests of the system prevail.

Feminist legal scholars have meticulously depicted the endemic subjugation of women through law and critical race scholars have exposed the hollow victory of anti-discrimination law. Both clarify aspects of our law that at times are/were particularly opaque to many of us: the law of equality refers to an equality on white male terms. [FN89] The opacity caused by the current paradigm has the same source as that of the skewed playing field of law and economics, where welcoming one to the table does not ensure a fair chance to play the game. Moreover, it is no act of charity. The reality is that inviting women and people of color to the table, for the most part, has merely ensured ample rewards for the preordained winners.

Catharine MacKinnon, among others, has demonstrated that the domination of women is sanctioned by the law of rape, sexual harassment and pornography. “Rape is an act of dominance over women that works systemically to maintain a gender-stratified society in which women occupy a disadvantaged status as the appropriate victims and targets of sexual aggression. . . . Sexual aggression by men against women is normalized.” [FN90] Rape law's requirement that the prosecution prove lack of consent illustrates the law's adoption of the male perspective of the accused rapist, rather than the perspective of the victim. [FN91] “Rape is typically defined as intercourse with force against one's will. Apparently this is not considered redundant, implying that women consent to sex with force all the time.” [FN92] This perspective directly places the victim's credibility on trial, further traumatizing the victim and ensuring the silence of other victims.

Sexual harassment claims originated under the rubric of equal protection. Some of these claims, however, are kept distinct from other discrimination cases in that employers may escape liability in certain circumstances. [FN93] In *365 other Title VII cases, such as race or religious harassment, courts generally find employers vicariously liable for the acts of their supervisory personnel. [FN94] In sexual harassment hostile environment claims, however, the Supreme Court has suggested a lower standard. [FN95] Presumably, this is because the Court found that “while ‘racial slurs are intrinsically offensive and presumptively unwelcome, sexual advances and innuendo are ambiguous.’” [FN96] The law languishes in the confusion between “acceptable” sexual innuendo and contact and those that are unacceptable--a confusion or ambiguity found only in the minds of men as it is never ambiguous to the victim. Yet, the standard the law applies is the standard of the perpetrator, not the victim. [FN97] “Sex discrimination may appear different from racial discrimination because sex discrimination is a traditionally accepted cloak for historic male attitudes of dominance and paternalism.” [FN98]
A similar development has occurred with respect to the battered woman defense. In New Jersey, a battered woman defendant is judged on a reasonable “person” standard, a standard imbued with the normative bias of men, rather than that of a person similarly situated--a battered woman. [FN99] Again, the domination system deludes by cloaking itself in an otherwise benign sounding standard of reasonableness and objectivity. [FN100]

*366 The regulation of pornography is another example of how the blind spots of injustice are created and maintained by the domination system. Certainly most would agree that some forms of pornography are at least degrading to women. But whether pornography causes actual harm to women is an issue of sharp debate. Those who support the regulation of pornography ask that plaintiffs be given the opportunity to prove it.

The Canadian Supreme Court has now recognized that pornography that is harmful to women is obscene and is not protected speech. [FN101] First Amendment purists in the United States have resisted such a definition of obscenity, citing First Amendment erosion. [FN102] Of course, because obscenity has never been protected by the First Amendment, it is unclear that there is beachfront there to protect.

The Miller test set the parameters of protected speech in this area for the United States. [FN103] The Canadian approach shifts speech-rights jurisprudence from the Miller test's focus on the community's determination of value to a standard of identifiable harm. “This makes Canada the first place in the world that says what is obscene is what harms women, not what offends our values . . . . In the United States the obscenity laws are all about not liking to see naked bodies, or homosexual activity, in public.” [FN104] Nonetheless, just the mere attempt to regulate pornography in the United States, much less change the parameters of First Amendment protections, has generated considerable criticism. [FN105]

*367 The system by nature tends to objectify the subjects of its domination in order to rationalize their subservient status. [FN106] Pornography, meaning the stuff found in “adult” bookstores, at best reiterates the mythic cosmology of male dominance by presenting women as objects; at worst, it leads to the physical abuse of women. The institution of domination powerfully resists all threats to men's position of dominance. Thus, the idea that this new standard might actually be less intrusive on speech rights is anomalous. A standard based on an actual showing of harm could be fundamentally less chilling to speech than the Miller test, where the community “knows it when they see it.” Given the uncertainty voiced by many commentators prior to the outcome of the Mapplethorpe exhibit trial in Cincinnati, [FN107] it cannot be said that Miller has established any consistent or clear boundaries between obscenity and art. It seems possible that under a purely harm-based test, at least this sort of speech could be less vulnerable to the kind of obscenity attack the Mapplethorpe exhibit received in Cincinnati. [FN108] The standard remains a locally applied “value” test and endangers free expression by the uncertainty of its application. Though the Miller test has proved resilient in protecting some “valued” speech, it curiously seems designed for the domination system: those in power (euphemistically called the “community” [FN109]) maintain the right to determine what is protected speech regardless of the harm to members *368 of a subservient group. [FN110] The same issues arise in the context of racial discrimination, where people of color are held to the standard of white males. Rarely has law recognized this. [FN111] Equal protection law has offered little actual protection from the daily effects of discrimination. Whatever efforts are made in the direction of true equality often result in advances in name only. [FN112] The Equal Protection Clause of the Constitution has, in effect, guaranteed only marginally more than a pretense of racial equality. “[E]qual protection essentially functions as a vehicle for servicing majoritarian interests.” [FN113]

Modern equal protection jurisprudence . . . is characterized by denial and evasion. With the exception of the desegregation mandate of Brown v. Board of Education, as originally enunciated, equal protection principles have been a function of majoritarian convenience. Modern jurisprudence continues to be characterized by sophisticated fictions and glosses that deny the reality of racial discrimination and inequality. Like the separate but equal doctrine, de facto segregation, discriminatory intent, and color-blindness have represented analytical methodologies for avoiding meaningful confrontation with racial discrimination. [FN114]
Racial inequality has long been recognized in economic terms. [FN115] Although significant strides have been made in certain areas, [FN116] if the only right currently enforced is the right to play on a skewed playing field, any such victory is a hollow one. As Ian Ayres found in his study of car sales, though a significant countervailing economic motivation may be present, people continue to act based on irrational racist and sexist beliefs. [FN117] Even where individual economic power is mostly irrelevant, the market is not colorblind. Rather, it continues to implement the system of domination.

The enactment of English language laws is yet one more example where individuals are “guaranteed” equal treatment but on the condition that they conform to the standards of the dominant segment of society. Ostensibly, the movement behind the passage of these laws is dedicated to establishing English as an official language of the United States. Nevertheless, the underlying motive appears to be prejudicial. Although the movement has found some success, many of the actual provisions are declaratory, so that little or no specific harm results. [FN118] But a number of others contain provisions that may impact upon the ability of non-English speaking persons to exercise rights or utilize government services to which they are otherwise entitled. [FN119] In addition, English-only rules in the workplace can inhibit the personal freedoms of workers. [FN120] These efforts limit the equal treatment of non-English speaking citizens and thereby support the relegation of these peoples to the system's subservient class.

V. THE THIRD WAY

[H]e who dominates over you has only two eyes, only two hands and only one body, no more than is possessed by the least . . . among the infinite numbers dwelling in your cities; he has indeed nothing more than the power that you confer on him to destroy you. How has he acquired enough eyes to spy upon you, if you do not provide them yourselves? How can he have so many arms to beat you with, if he does not borrow them from you? The feet that trample down your cities, where does he get them if they are not your own? How does he have any power over you, except through you? What could he do to you if you yourselves did not connive with the thief who plunders you? If you were not accomplices of the murderer who kills you? If you were not traitors to yourselves? . . . I do not ask that you place hands upon the tyrant to topple him over, but simply that you support him no longer; then you will behold him, like a great colossus whose pedestal has been pulled away, fall of his own weight and break into pieces. [FN121]

Why do large masses of the non-privileged submit to domination? Why, for example, do blue-collar workers, who are among those victimized by the ruling elite, continue not only to support their oppressors but to be among their most vociferous fans? The answer is quite simple: the promise of salvation. The myth of redemptive violence offers salvation through identification with Marduk and his earthly regents.

The values, loyalties, and assumptions of the domination system are internalized not only by its beneficiaries but its victims. [FN122] The myth of redemptive violence permeates all levels of our culture and ensures adherents to the system. [FN123] Domination and redemptive violence are so tightly bound to our psyches--our identity, culturally and individually--that it is not only difficult to extricate oneself from its tangles, but it is hard to differentiate the system from the self.

The rapist and the raped, the master and the slave, are all victims of the domination system and are in many ways powerless to resist it. This does not excuse the rapist or slave owner any more than growing up on the streets of Harlem excuses a crack dealer. But excuse and blame are not the issue; they, in fact, fuel the cycle of domination. The issue is how to find a way out of that cycle for each--both the dominated and the dominator. Without liberation for both, the system will simply continue to perpetuate domination.

A. Violent Domination: A Moral Wrong

Few would seriously entertain the notion that at least some forms of violent domination of others is wrong as an
ethical or moral principle. Yet many find the retributive violence of the state justified in some cases, at least on an interim basis. [FN124] While there may exist practical justifications for some state-sanctioned violence (i.e., from capital punishment to mere confinement), it is not clear that there is any justifiable moral basis for the distinction between perpetrators of violence generally—between state sanctioned violence and non-sanctioned violence, particularly given the state's participation in the conspiracy of domination. [FN125]

It is beyond the scope of this Article to attempt to delineate the moralethical parameters of principled nonviolence. This is so primarily because we do not wish to get caught up in the justifications and positivistic proofs concerning the validity of whatever moral or ethical principles underlie such a determination. [FN126]

The current discussion is an attempt to postulate the possibility of an alternative paradigm. [FN127] The difficulty is that arguments launched from outside a prevailing cultural paradigm are generally nonsensical to those within it. [FN128] Such ideas remain outside the cognitive context as anomalies of the system, like the extra-dimensional world of three dimensions was to Flatland—the land of two dimensions. [FN129] Accordingly, our task is to engage the domination system without succumbing to the delusion of the system or the seduction of violence. We must have a different kind of conversation or tell a different kind of story; one that rather than affirming the system, enables individuals a glimpse beyond the system. Wittgenstein referred to a similar process:

My propositions serve as elucidations in the following way: anyone who understands me eventually recognizes them as nonsensical when he has used them as steps to climb beyond them. He must, so to speak, throw away the ladder after he has climbed up on it. He must surmount these propositions, then he sees the world rightly. [FN130]

B. A Third Way: Recognizing the Other's Essential Humanity

Violent opposition to the dominating system risks perpetuating precisely the system it seeks to transcend. “Whoever fights monsters,” warned Nietzsche, “should see to it that in the process he does not become a monster.” [FN131] For the most part, where movements of the oppressed lash out at the dominant group the cycle of violence escalates and it ends by either destroying or further marginalizing that movement in society, or by establishing that movement as the new oppressor. But if we sit passively by, we become accessories by our inaction to the injustice of the system. Somehow, we must swim against the tide of the current paradigm in an effort to find another way to oppose this system.

The principle of nonviolence is grounded in the immorality of domination. We assert this immorality without resorting (for the moment) to stories about absolute truths, practical reasonableness, or pragmatic principles for support. We need not address these issues to talk about the palpable effects of the system and assert that our lives need not include these effects. Nonviolence, or the recognition of the other's essential humanity, provides a methodology for transforming the current system without simply replicating it: it shows the promise of transcending the current paradigm.

If domination is to be transcended, it will require a critique and methodology from outside that system. The Judeo-Christian tradition provides one such standpoint, though it is pierced with ambiguity, since both religions have been deeply penetrated by domination and violence. When one strips away later creedal assertions and simply regards the teachings of the biblical prophets and Jesus of Nazareth as a critique of domination, however, one discovers an astonishing strategy for transforming the prevailing paradigm. In his teachings on nonviolence and the love of enemies, Jesus articulated a vision of the possibility of a domination-free order. It was not until Mahatma Gandhi (and, later, Martin Luther King, Jr.), however, that nonviolence was operationalized and used effectively in modern society. More recently, the year 1989 witnessed thirteen nonviolent revolutions, all but one of them successful, involving a third of the human race. [FN135] Though still in its infancy, nonviolence as a means of social change has at last demonstrated its viability.
Nonviolence, as a practice, allows individuals to engage the system without ultimately succumbing to its methods. In this sense, nonviolence is less a moral edict than it is a practical tool for dismantling the mechanism of domination. As de la Boétie pointed out, we are the dominator's eyes, hands and feet; the power he exerts is in the myth that is internalized by both the dominated and the dominator. This is the source of the leverage of domination. The myth provides an intentional blindness toward the humanity of those the dominator must suppress as objects of his power. The myth teaches that these objects are incapable of wielding the responsibility for maintaining order that has been thrust upon the dominator by virtue of his place in society. The acceptance of this story as true and natural allows for its perpetuation. By exposing the myth and its supporting ideology of objectification and resulting superiority, its power evaporates like a mirage in the desert. The dominator is forced to come to terms with the humanity of the other as he is no longer protected by the story of his “rightful” position.

In the same way that it is difficult for those who live in a two-dimensional world to visualize a cube, it can be difficult to conceptualize just how nonviolence disarms the dominator. Moreover, nonviolence has been repeatedly confused with nonresistance, passivity, and supine acceptance of wrong. Jesus told several stories that concretely illustrate the practical effects of nonviolence and, yet, the popular misinterpretation of these stories has led to much of the confusion between passivity and nonviolence. An example of this is Jesus’ teaching about turning the other cheek. In the historical context of this story, Jesus was not enjoining his peasant audience to compound injury by deliberately inviting additional blows. Rather, he was urging his hearers to neither capitulate to evil, nor oppose it violently, but to seek a third way. He taught, “If anyone strikes you on the right cheek, turn the other also.” [FN136]

This refers, not to a blow with the fist to the right cheek (which would require use of the left hand [FN137]), but a backhand. The backhand was not intended to injure physically but psychically: its purpose was to humiliate, dehumanize, demean, and shame an upstart inferior and re-insert such a person into his or her social role. It was administered by a superior to an inferior: master to slave, husband to wife, parent to child, Roman to Jew.

“Turning the other cheek” is an act of defiance. The “inferior” refuses to be re-inserted into the inferior role. By physically turning the other cheek, the oppressed person creates a logistical problem: it is now impossible to repeat the backhand since the other's nose is now in the way. (This scene can only be fully understood by physically demonstrating it.) Because of the Semitic taboo against using the left hand, the aggressor's only alternative is to actually strike a blow. But a blow with the fist would establish the parties as equals and destroy the dominator's leverage. Jesus is urging his hearers, who are accustomed to such treatment (“if anyone strikes you”), to refuse to accept it any longer, thus forcing the dominators to recognize them as human beings. He challenges them to refuse to be humiliated any longer. This forced acknowledgment of equality is certainly no way to avoid trouble; the master or parent may respond with a flogging. But it breaks the cycle of domination by an act of defiance that shatters the myth and changes the existing power relations. [FN138]

There are two other examples Jesus gives that have been similarly misunderstood. “If anyone sues you for your outer garment, give him your under garment as well” [FN139] does not mean, as it has been so often taken, that one should submit to every injustice. Rather, the poor person whose long cloak is being possessed as collateral for a loan in default is counseled by Jesus to strip off his undergarment and subject the court to his or her nakedness. In those times, the taboo of public nakedness placed the greater shame on the onlookers rather than on the naked person. The effect of this command was that the creditor could only take advantage of the debtor at the creditor's social peril. Thus, a negotiation is fostered that by its very existence acknowledges the power of the debtor. The tables are turned, the truth is unveiled and the oppressed discover that they can assert power even when the legal system is rigged to their disadvantage. [FN140] The remarkable thing about this exercise is that it illuminates the nakedness of the dominator once the mythic cloak of power is removed. The myth of redemptive violence and domination is a tale spun from invisible thread.

In a third example, Jesus alludes to the Roman legal right of angaria, whereby a soldier could force a civilian to carry his pack one mile but no further. [FN141] To force a civilian to carry his pack a second mile would be an infraction of Roman military law. When Jesus suggests carrying the soldier's pack two miles, he is not advising his peasant audience simply to be nice and extend themselves, but to put the soldier in legal jeopardy. One can
imagine the soldier's confusion and consternation as the civilian strides boldly ahead after the mile marker is passed. Why is he doing this? Will he report this to the centurion? Is the soldier in danger of punishment? The soldier, so used to exercising power, has lost control of this situation entirely. Once again, the peasant has found a way to step outside of the domination system and force the soldier to confront him as an equal.

We are taught that biological evolution prepared us for two responses to threat: flight or fight. Either we submit, withdraw, flee, surrender, or we strike back in kind. [FN142] Nonviolence represents a third way, neither passive nor violent: active nonviolent resistance. Jesus, through these teachings, exhorted his usually supine hearers to seize the moral initiative and find a creative alternative to violence. The system is confounded when people refuse to accept their assigned roles. Just by refusing to sit in the back of a bus, Rosa Parks catalyzed an avalanche of social change in this country. The powerful can be forced by non-injurious coercive action to recognize and acknowledge the humanity of those whom they normally suppress, and, in the process, recover their own humanity. Similarly, the capacity to recognize the humanity of one's oppressors (loving one's enemies) makes it possible for each party to a conflict to be reconciled. Nonviolence is the only truly viable option for the powerless.

We scarcely have begun to tap the power of this ancient but recently burgeoning method for overcoming domination. Tolstoy wrote Mahatma Gandhi in 1910 stating that the non-violent resistance campaign in South Africa “[is] the most important activity the world can at present take part in, and in which not Christendom alone but all the people of the earth will participate.” [FN143]

As we saw earlier, the myth of redemptive violence is fundamentally a religious perspective. The power of the domination system is not ultimately political, but spiritual. The dichotomy between secularism and religion is illusory; all questions of value entail a war of myths. Domination has in every age been supported by rituals, symbols, creeds, and all the trappings of religion, and our age is no exception. It is simply one more measure of the strength of the ruling paradigm that it can appear not to be a religion at all, but simply the way things are. The belief that modern societies are secular and irreligious is one of the delusions that serve to perpetuate domination. It is vital that we, as individuals and as communities, come to terms with the neoreligious myths and stories that we have internalized and propagate.

*377 There may be other effective means that may be utilized from other traditions. We have chosen Jesus' teachings on nonviolent resistance, not just because we were raised in the Judeo-Christian tradition, but because in it we have rediscovered a critique of domination that is fundamentally more cogent than anything we find in the prevailing paradigm of redemptive violence. We thus find ourselves standing in the place where we are, where we live. [FN144] And we find in the essence of our tradition, corrupted as it is, the possibility of a new paradigm.

VI. CONCLUSION

That we are at the end of an era is not something that can be proved scientifically. One senses it or one does not. One knows by intuition that the old images, as Archibald MacLeish says in The Metaphor, have lost their meaning. [FN145]

The old images may yet have some meaning, but their grip has loosened sufficiently to allow us to consider alternatives. We are now faced with the opportunity to dismantle the myth of redemptive violence and break the cycle of domination. The fragmented exclusivity of our separate struggles for justice must be discarded for the common ground of opposition to the domination system in all its forms; it is the common enemy. Through the recognition and acknowledgment of each other's humanity, we can open a way to a new possibility for life. Life outside this cycle.

In the legal context, this principle requires the recognition and rectification of inequality under the law. It requires the recognition of the humanity of those oppressed by the operation of law as practiced. It requires the acknowledgment by the legal system of the objectification and subsequent harm to women by pornography. It
requires the recognition that the law's perspective remains that of men. It requires the recognition that the colorblindness of the constitution means that it mainly sees white. It requires that people acknowledge and celebrate their cultural and linguistic differences and support each other's full participation in society.

How can violence be redemptive when it only begets more and more violence and exacts a continuing price from each participant. That is not the path to victory, only defeat. The battle we must fight is not against the dominators as individuals, but the system in which all are victims. The struggle must be joined, not against something so as to overcome or dominate it, but rather to transcend the domination system itself--the paradigm of our existence. The choice between joining the system or fighting against it remains a choice that serves the system in either case--it is a zero-sum game, a Hobson's choice. The alternative is to seek a third way in every human endeavor; a way that shifts the context from domination to a partnership among people; a way that affirms the humanity of one's enemies and seeks their well-being along with our own in a community of equals where the humanity of all is affirmed.

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[FNaa1]. Associate, Cleary, Gottlieb, Steen & Hamilton, New York City; J.D., Notre Dame Law School.

[FNaaal]. Professor of Biblical Interpretation, Auburn Theological Seminary; Th.D., Union Theological Seminary.


[FN2]. See text accompanying note 57, infra.


[FN5]. See KONRAD LORENZ, ON AGGRESSION (1969) (popularized the belief that there is an “aggressive instinct” that requires constant discharge or release and drives human beings to war). See also ROBERT ARDRY, AFRICAN GENESIS: A PERSONAL INVESTIGATION INTO THE ANIMAL ORIGINS AND NATURE OF MAN (1968); DESMOND MORRIS, THE NAKED APE (1967) (comparing aspects of human life to those of other species). Aggression may be inherited, but acting it out is learned. A wolf raised in a kennel will, on being released in the wild, stare lackadaisically at caribou nearby even though it is starving. It must be taught to hunt. ASHLEY MONTAGU, THE NATURE OF HUMAN AGGRESSION 236-37 (1976). Cf. SUE MANSFIELD, THE GESTALTS OF WAR 1-19 (1982) (aggression that is driven by anger can be disadvantageous in warfare because it clouds judgment). The intraspecies violence evident in primates is only part of the story. Frans de Wall demonstrates that primates avoid conflicts and, when they do occur, afterward repair and normalize relationships. Monkeys, apes, and humans all engage in reconciliatory behavior: grooming, hugging, kissing, third party interventions, and submission. Forgiveness, he asserts, is 30 million years old. There is simply no other way of living for any animal that prefers group life to a solitary existence. FRANS DE WALL, PEACEMAKING AMONG PRIMATES (1989).

[FN6]. NIKLAS LUHMANN, RECHTSIZIOLOGIE 110 (1972).

[FN8]. JACQUES DERRIDA, OF GRAMMATOLOGY 127 (Gayatri C. Spivack trans., 1976) ("Is there a knowledge, and above all, a language, scientific or not, that one can call alien at once to writing and to violence?").

[FN9]. See supra note 3 and accompanying text.


[FN11]. Benjamin distinguished between founding violence (that used to found the state, i.e., revolution) and conserving violence (that used to maintain the power of the state, i.e., the police). Through these and other distinctions he sought to discover “pure” violence by breaking violence down into its various essences, just as physicists of his time searched for the smallest particles of matter. And just as the physicists' efforts were confounded by the apparently infinite regress of matter/energy, so Benjamin is unable to locate a violence uncontaminated by domination. Derrida finds in this an archetype of deconstruction. Nevertheless, the distinction between founding and conserving violence is only useful in examining the system of violence itself, not for addressing other possibilities. Founding and conserving violence have the same source and effect: they both dominate others through violence. As Derrida points out, Benjamin's attempt is doomed to failure by its very premise—the attempt to find a justifiable violence. Derrida, supra note 10, at 1005, 1007.

[FN12]. See infra notes 60, 61 and accompanying text.


[FN14]. Derrida, supra note 10, at 1003.

[FN15]. Derrida states:
  
  On the one hand, it appears easier to criticize the violence that founds since it cannot be justified by any preexisting legality and so appears savage. But on the other hand, and this reversal is the whole point of the reflection, it is more difficult, more illegitimate to criticize this same violence since one cannot summon it to appear before the institution of any preexisting law: it does not recognize existing law in the moment that it founds another.
  
  Derrida, supra note 10, at 1001. See Cornell, supra note 13, at 1049.

[FN16]. See infra note 57 and accompanying text.

[FN17]. The uncertainty of meaning in language is in large part due to the generality and vagueness of words and the ambiguity of their syntactical context. The term violence is enigmatic because it is too general and vague. The term is too general because it is used to describe everything from language to lethal aggression, intrusion to deadly impact. Moreover, this generality can lead to problems of ambiguity depending on the syntactical context. “Violence” is also too vague because it is capable of connoting an extreme range of degrees.

  The first problem is generality. It is present when a term “is not limited to a unique referent and thus can denote more than one.” The term “permits simultaneous reference,” therefore, the reader [or listener] may be unable to choose the correct referent from a finite number of possible referents.

  The second problem is vagueness. Vagueness “refers to the degree to which, independent of equivocation, language is uncertain in its respective application to a number of particulars.” Vagueness differs
from generality because a term’s generality leaves the reader uncertain as to what members of a given group the term refers, while a term’s vagueness leaves the reader uncertain as to the boundaries of the term’s meaning. A term’s vagueness is “indicated by the finite area and lack of specification of its boundary.”

The third problem is ambiguity. In its most basic sense, ambiguous language is equivocal; it is “capable of double interpretation.” An ambiguous term differs from a general term in that an ambiguous term permits alternative, “either-or” reference, while the general term permits simultaneous reference. Ambiguity differs from vagueness because the uncertainty that stems from ambiguity leaves the reader with alternative interpretations, while the uncertainty that stems from vagueness leaves the reader with questions of degree. Ambiguity differs from both generality and vagueness because generality and vagueness are not always diseases of language but can instead serve as useful drafting tools whereas ambiguity always hinders the interpretation of language.


[FN18]. “Indeed, not all violence is alike, as the violence involved in reducing another to a subservient position clearly seems more objectionable than the (counter) violence required to establish abstract equality or the self-directed violence associated with promoting the singularity of the concrete other.” Michel Rosenfeld, Derrida, Law, Violence and the Paradox of Justice, 13 CARDOZO L. REV. 1267, 1271 (1991). See infra note 75 and accompanying text.


[FN23]. A broad consensus seems to exist that the earliest human societies were egalitarian. See MORTON FRIED, THE EVOLUTION OF HUMAN SOCIETY 32 (1967) (defining an egalitarian society as one in which there are as many positions of prestige in any given age-sex grade as there are people capable of filling them); see also C. R. HALLPIKE, THE PRINCIPLES OF SOCIAL EVOLUTION 226 (1986); Ronald Cohen, State Origins: A
Reappraisal, in THE EARLY STATE 67 (Henri J.M. Claessen & Peter Skalnik, eds. 1978); THE ORIGINS OF THE STATE: THE ANTHROPOLOGY OF POLITICAL EVOLUTION 7-8, 141-60 (Ronald Cohen & Elman R. Service, eds. 1978). Some of the data is documentary; Herodotus, for example, described a group of Issedones in which “the women have equal authority with the men.” 1 THE HISTORIES OF HERODOTUS 297 (E.H. Blakeney trans., 1982).

[FN24]. Evidence of warfare increases somewhat between 4000 and 3000 B.C.E. and increases dramatically after that.


[FN26]. See EISLER, supra note 22, at 25.

[FN27]. Id. at 14, 38 (quoting MARIJA GIMBUTAS, EARLY CIVILIZATION OF EUROPE 32-33 (1980)).

[FN28]. Id. at 17-20.

[FN29]. Eisler has been criticized for overstating her case. See Elizabeth Fox-Genovese, Androcrats Go Home, N.Y. TIMES, Oct. 4, 1987, § 7, at 32 (asserting that Eisler's research and scholarship is inadequate). Nevertheless, the argument that violence and patriarchy were not integral parts of several neolithic cultures remains compelling in the instant discussion. See David Loye, Letter to the Editor, N.Y. TIMES, Nov. 1, 1987, § 7, at 38 (refuting Fox-Genovese, stating that numerous reputable scholars from many different fields had given the book's empirical and theoretical evidence their stamp of approval).

[FN30]. History's beginnings have generally been identified with the first literate cultures. Until recently Babylon was thought to be the earliest literate culture. Four different scripts have been found in Crete dating from the Neolithic period. This discovery brought “Cretan civilization, by archeological definition, into the historical or literate period.” EISLER, supra note 22, at 30.

[FN31]. Id. at 44.


[FN34]. “Inculcate” is from the Latin inculcatus, meaning to tread on, to trample, to cram in. It is currently defined as: “To endeavor to force (a thing) into or impress (it) on the mind of another by emphatic repetition; to urge on the mind, esp[ecially] as a principle, an opinion, or a matter of belief; to teach forcibly.” VII OXFORD ENGLISH DICTIONARY 832 (1989).

[FN35]. For example, Social Darwinism.
Despotic rule was a new phenomenon requiring divine authorization. The *Sumerian King List* states: “When kingship was lowered from heaven the kingship was in Eridu [Sumer].” SAGGS, *supra* note 32, at 35. See also GERDA LERNER, THE CREATION OF PATRIARCHY (1986); BERTRAND DE JOUVENEL, POWER: THE NATURAL HISTORY OF ITS GROWTH 68-70 (J.F. Huntington trans., 2d ed. 1952).

See EISLER, *supra* note 22, at 92.

Id. at 84.

Id. at 86-7.

*Akkadian Myths and Epics* (E.A. Speiser trans.) in ANCIENT NEAR EASTERN TEXTS 60-72 (James. B. Pritchard ed., 2nd. ed. 1955) (text of the *Enuma Elis*).


*Genesis* 1-3.

JAMES A. AHO, RELIGIOUS MYTHOLOGY AND THE ART OF WAR 60 (1981); ADELA YARBRO COLLINS, THE COMBAT MYTH IN THE BOOK OF REVELATION 57 (1976). The same mythic pattern was carried into the European Middle Ages by the Cathari and the Knights Templars. NORMAN COHN, EUROPE'S INNER DEMONS 79 (1975).


Id. at 198.

For further development of these ideas, see WALTER WINK, ENGAGING THE POWERS: DISCERNMENT AND RESISTANCE IN A WORLD OF DOMINATION ch. 1 (1992).


Id. at 21. This statement should be taken as a generalization from within the context of domination, not as an ontological necessity. See infra Section V.

Urukagina, whose brutal legislation against women is cited *supra* at note 32, has been lauded by historians as a great legal reformer who lowered taxes and protected the economically weak against victimization. Hammurabi also saw it as his role as lawmaker to protect the weak from the strong. SAGGS, *supra* note 32, at 47-48, 72.

For example, Social Darwinism.

EISLER, *supra* note 22, at 87.


[FN56]. LEON FESTINGER ET AL., WHEN PROPHECY FAILS (1956).

[FN57]. See text accompanying note 16, supra.


[FN59]. MARCUS T. CICERO, DE HARUSPICUM RESPONSIS XXV.54, in THOMAS BENFIELD HARBOTTLE, DICTIONARY OF QUOTATIONS (CLASSICAL) 155 (1897). This is an interesting instance of a mistranslation taking on a life of its own. Cicero has for centuries been understood as legitimating power gained at the point of the sword. In fact, he is merely making the observation that states are subjected to “the despotic domination of the triumphant person.” MARCUS T. CICERO, DE HARUSPICUM RESPONSIS XXV.54, in XI CICERO 389 (N.H. Watts trans., 1923).

[FN60]. JOHN AUSTIN, LECTURES ON JURISPRUDENCE: OR, THE PHILOSOPHY OF POSITIVE LAW 208 (5th ed. 1885).


[FN62]. Johnson v. M'Intosh, 21 U.S. 543 (1823). The Court stated:

Thus has our whole country been granted by the crown while in occupation of the Indians.

The power now possessed by the government of the United States to grant lands, resided while we were colonies, in the crown or its grantees. The validity of the titles given by either has never been questioned in our courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with, and control it.

Id. at 579, 587-88.

[FN63]. The right and duty of tyranicide was asserted by John of Salisbury (d. 1180). This was one of the first rights to be cleaved from the power of the ruler. HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 282 (1983).

[FN64]. “Thus the concept of the rule of law was supported [rationalized] by the prevailing religious ideology. It was also supported by the prevailing political and economic weakness of rulers and by the pluralism of authorities and jurisdictions.” Id. at 293 (emphasis added).

[FN65]. THOMAS HOBBES, LEVIATHAN (C.B. MacPherson ed., 1968); JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., 1988). The social contract was a fiction whereby the individual was assumed to have bargained away his individual allegiance (or consent) to the state for certain rights and privileges afforded the individual and the community.

[FN66]. JEAN-JACQUES ROUSSEAU, DISCOURSE ON THE ORIGINS AND THE FOUNDATIONS OF INEQUALITY AMONG MEN pt. II (1755) (the social contract is an instrument designed to protect the interests of
the rich, since the only persons who have an interest in establishing a law of possession are those who are already in possession. Rousseau attempted his own egalitarian version, SOCIAL CONTRACT (1762), but fell prey to the same problems. See LOUIS ALTHUSSER, POLITICS AND HISTORY: MONTESQUIEU, ROUSSEAU, HEGEL AND MARX (1972) (Althusser asserts that Rousseau's social contract conceals the fact that one of its two signatory parties—the community of individuals—is actually its own product. By pretending that what follows the contract as its consequence could be a party to it, the contract projects the state of affairs it creates onto its own prehistory).

[FN67] Montesquieu further developed these ideas with the argument that individuals are bound to follow the laws of the state lest they tread on others' rights. MONTESQUIEU, THE SPIRIT OF LAWS (J.V. Pritchard ed. & Thomas Nugent trans., 1897). Though this appears at first to represent an increase in individual rights at the expense of the sovereign, again, the power to make the determination with respect to the parameters of rights remains solely in the state. Except for those rare moments of revolution, the state always exists prior to individuals and individuals have little or no bargaining power with regard to their individual rights. Accordingly, those that control the state control the parameters of individual freedoms. Meanwhile, the state gains an additional rationale for demanding obedience from its citizens to the rule of law.

[FN68] “The hidden authoritarianism of claims to legal or moral objectivity in legal reasoning is presently a tenet of faith held not only by left wing critics, and certainly not only by the critical legal studies movement, but by legal scholars across the political spectrum.” Robin West, Relativism, Objectivity, and Law, 99 YALE L.J. 1473, 1487 (1990). See RICHARD POSNER, THE PROBLEMS OF JURISPRUDENCE 454-60 (1990); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); STANLEY FISH, DOING WHAT COMES NATURALLY (1989); RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1979); THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962) (rather than a progress toward “truth,” science, and by analogy law, is a series of frameworks in which to view phenomena (i.e., Copernican, Newtonian), where no framework is inherently more “true” or “right” than another); Singer, The Player and the Cards: Nihilism and Legal Theory, 94 YALE L.J. 1 (1984); Paul Brest, Interpretation and Interest, 34 STAN. L. REV. 765 (1982) (discussing the myth of objectivity in the judiciary and pointing out that the gender and racial composition thereof is determinative of the “objectivity” produced). See also Martin P. Golding, Jurisprudence and Legal Philosophy in Twentieth-Century America--Major Themes and Developments, 36 J. LEGAL EDUC. 441, 443 (1986).

[FN69] See supra note 17. See also Lon L. Fuller, Positivism and Fidelity to Law--A Reply to Professor Hart, 71 HARV. L. REV. 630 (1958).

[FN70] Singer, supra note 68, at 6. “Objectivism in all its forms--aesthetic, literary, political, and moral--is thus one way among others that the stronger members in a society maintain their position.” West, supra note 68, at 1474.

[FN71] John Austin was the founder of legal positivism. He reiterated that the source of law is the command of the sovereign, enforced by the threat of sanctions. See AUSTIN, supra note 56, at 208. H.L.A. Hart was this century's preeminent legal positivist. His description of positivist thinking did not necessarily include Austin's formulation above, yet maintained the fundamental separation of law and morality. H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 HARV. L. REV. 593 (1958).

The separation of law and morals may also be a legacy of the separation of ecclesiastical law and secular law with the establishment of canon law in the 12th century. See Berman, supra note 63, at 273-94.

[FN72] Hume asserted:

In every system of morality, which I have hitherto met with, I have always remark'd, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surpriz'd to find, that instead of the usual copulations of propositions, is and is not, I meet with no proposition that is not connected with an ought, or an ought not. This change is imperceptible; but is, however, of the last consequence. For as this ought, or ought not, expresses some new relation or affirmation, 'tis necessary that it shou'd be observ'd and explain'd; and at
the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others which are entirely different from it.

DAVID HUME, A TREATISE OF HUMAN NATURE 245-46 (T.H. Green & T.H. Grose eds., 1878). This provided the logical basis for empiricism and positivism. Thus, the description of what is--specific instances of injustice--are regarded as irrelevant with respect to determining what ought to be.

[FN73]. This is the fallacy of insufficient instances. Of course, the result of this logical construct is that no group of specific instances, no matter how large or formidable, can topple the theory, as long as it remains sufficiently broad.

[FN74]. It should be noted that attempts have been made within the dominant context to bridge the is/ought gap. See, e.g., infra note 82; ALAN GEWIRTH, REASON AND MORALITY 1-7 (1978).

[FN75]. “‘Simple abstractions,’ in short, are neither so simple or so abstract as they at first sight appear. They always articulate, even as they obscure, some more concrete ‘substration’ --dare I say it, some material basis?” DEREK SAYER, THE VIOLENCE OF ABSTRACTION 140-41 (1987). See also infra note 114.

[FN76]. Stanley Fish's brand of anti-foundationalism served to debunk legal positivism. Yet he now is accused of being a “complex positivist”--that is, his analysis winds up in the same place--justifying the status quo. See Cornell, supra note 12, at 1050. Nevertheless, Fish's analysis of contracts, for instance, shows the utility of contract law in much the same way that Newtonian mechanics remains useful to mechanical engineers, though the basic tenets of the theory have been long since subsumed by relativity, quantum mechanics and other theories. See STANLEY FISH, NO SUCH THING AS FREE SPEECH (1993) (in particular, the chapter titled “The Law Wishes to Have a Formal Existence”).


[FN78]. See supra note 11 and accompanying text.

[FN79]. Dworkin's liberalism, or specifically his theory of law as integrity is “probably the most highly refined, most highly sophisticated trans-ideological legitimation package to come out of the legal academy in recent memory.” Pierre Schlag, “Le Hors de Texte, C'est Moi”: The Politics of Form and the Domestication of Deconstruction, 11 CARDOZO L. REV. 1631, 1664 (1990).

[FN80]. Natural law theory has likewise been swept up in the positivist tide. John Finnis proposed a “new” natural law, but attempted to do so within the structure of the positivist system. His attempt thus appeared to compromise the fundamental attraction of natural law itself--that morality is fundamental to law. Finnis' tack is to avoid “oughts” as part of the basic structure of his argument. Finnis finds morality as a product of certain principles of “practical reasonableness.” JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS ch. 5 (1980). His goods are found to be “self-evident” and they need not be maximized lest they run afool of a consequentialist argument. William H. Wilcox, Book Review, 68 CORNELL L. REV. 408 (1983) (reviewing JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980)).

Finnis somehow could not shake himself loose from the veritable mortmain of contemporary English philosophy, as a result of which one cannot even begin to philosophize about ethics, without suddenly finding oneself paralyzed by a rigor mortis that seems ever to be brought on by the mere mention of such things as the naturalistic fallacy, or the impossibility of deriving an ‘ought’ from and ‘is’, et al.

Henry B. Veatch, Book Note, 26 AM. J. JURIS. 247, 259 (1981) (reviewing JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980)). Those who live by the sword that cleaves the is/ought distinction may well die
by it.  

[FN81]. See supra note 68.

[FN82]. CORNEL WEST, THE AMERICAN EVASION OF PHILOSOPHY: A GENEALOGY OF PRAGMATISM 208 (1989). Though we utilize the anti-foundationalist critique of the current system, it is important to note that we do not follow the nihilist current in that argument. Though it is true that a nihilist might make the same initial arguments (i.e., “The nihilist would argue that for any text--particularly such a comprehensive text as the Constitution--there are any number of possible meanings, that interpretation consists of choosing one of those meanings, and that in this selection process the judge will inevitably express his own values. All law is masked power.” Singer, supra note 68, at 4 n.6 (quoting Fiss, Objectivity & Interplay, 34 STAN. L. REV. 739, 741 (1982))), we do not wind up in the same place. Though the current system or overarching paradigm in which we live is without foundation in this sense, we do not believe that there cannot be some basis for belief or knowledge beyond that system.


[FN86]. Oliver W. Holmes, The Path of Law, 10 HARV. L. REV., 457 (1897).


[FN88]. One commentator states that Posner’s theory ultimately forces him to support what should be a morally indefensible position: “He acknowledges that ownership of all goods by one person would not violate the norm of wealth maximization.” Hager, supra note 85, at 23. In an effort to assuage our consciences, Posner assures us that the wealthy do not perpetuate their wealth for too long--“the initial distribution may dissipate rapidly,” RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 375 (1990), because, “‘[a]lmost all earnings advantages and disadvantages of ancestors are wiped out in three generations.’” Id. at n.24 (quoting Becker & Tomes, Human Capital and the Rise and Fall of Families, 4 J. OF LABOR ECON. § 1, at 32 (1986)).


[FN90]. See MacKinnon, supra note 89, at 1302.

N.W. 536, 538 (1906), where the defendant's conviction was reversed on the ground that “there must be the most vehement exercise of every physical means or faculty within the woman's power to resist the penetration of her person”).

[FN92]. MacKinnon, supra note 89, at 1303.


[FN96]. Anderson, Note, supra note 93, at 1267 (citing the Brief for the United States and the EEOC as Amici Curiae at 13, Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986)) (emphasis added). The Solicitor General advocated a standard based on the knowledge or constructive knowledge of the employer. See also LINDEMAN & KADUE, supra note 89, at 223-224.

[FN97]. But see Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991) (applying reasonable woman standard rather than reasonable man in determining whether the work environment had become hostile, offensive, or abusive). The dissent in Ellison has difficulty with this standard because it is not gender neutral. Id. at 884. However, this may be precisely why the standard is necessary. The problem with a “gender neutral” standard is that its application is unconsciously shaped by the cultural system that is dominated by men. Without the specific directive to consider the issue from the point of view of the woman involved--that is, a woman similarly situated--a “gender neutral” standard may be no more than jargon for the familiar “reasonable man.”

[FN98]. See Note, supra note 93, at 1277 (arguing that the legal distinction confuses natural sexual attraction with illegal sexual harassment. This confusion very much inures to those in power.).


[FN102]. Thomas I. Emerson, Pornography and the First Amendment: A Response to Professor MacKinnon, 3 YALE L. & POL`Y REV. 130, 132-37 (1984) (noting that ban on pornography goes to the impact of speech itself--thus, it is content based).
The court stated the test as follows:

The basic guidelines for the trier of fact must be: (a) whether “the average person applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. 15, 24 (1973) (citations omitted). The first two are local standards and the last is considered not based on local, community values, but rather some more objective basis. Pope v. Illinois, 481 U.S. 497 (1987).


See Tamar Lewin, Pornography Foes Push for Right to Sue, N.Y. TIMES, March 17, 1992, § 1, at 16. Congress is considering allowing a cause of action against producers of pornography by those who can show that the product caused an assault. The Pornography Victims Compensation Act is currently in committee. Massachusetts is considering a similar measure, the Act to Protect the Civil Rights of Women and Children.

For an example of the criticism of these efforts see John Irving, Pornography and the New Puritans, N.Y. TIMES, March 29, 1992, § 7, at 1. Irving’s claim that the scene in The World According to Garp in which a man’s penis is bitten off did not cause women to bite off men’s penises actually cuts against his own argument; it in fact illustrates how art may be distinguished from pornography through the causal analysis required under the statutes in question. Cf. Andrea Dworkin, Letter to the Editor, in Pornography and the New Puritans: Letters from Andrea Dworkin and Others, N.Y. TIMES, May 3, 1992, § 7, at 15. The regulations do not prohibit material that does not cause harm. The causality determination is the saving grace of these statutes for First Amendment purposes, but it may yet prove to be their Achilles’ heel, for as courts determine the relevant ambit of harm, they determine its effectiveness as a remedy. If the ambit of harm is drawn narrowly the statute may be of little practical use.

See, e.g., supra note 61 and accompanying text.

See Cincinnati v. Contemporary Arts Ctr., 566 N.E.2d 214 (1990) (concerning the indictment alleging that photographs by Robert Mapplethorpe were obscene).

A harm-based standard is more commensurate with judicial practice. “[T]he Hudnut court held that no amount of harm from group-based speech can justify legal action by its victims. This is simply legally wrong. Courts are supposed to measure value against harm, not by harm.” Catharine A. MacKinnon, Pornography as Defamation and Discrimination, 71 B.U.L. REV. 793, 814 (1991). Thus, a harm-based standard may have the advantage of providing a more certain standard.

The community's beliefs and values are determined by the paradigm-- the domination system. See infra note 128 and accompanying text and supra note 56 and accompanying text.

In the context of sexual harassment claims, a district court held that “sexually oriented pictures and sexual remarks standing alone” form the basis for Title VII liability. Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 1525 (Fla. Dist. Ct. App. 1991). This case may signal the coming acceptance of such a limitation on speech rights.

In an example of the exception that proves the rule, a black plaintiff won a Title VII action against the Memphis Police Department when he argued “that [the department's] policy requiring all officers to be clean-shaven
had a disparate impact upon black men, many of whom, unlike white men, suffer from a specific skin condition that renders them medically unable to shave on a daily basis.” Note, Invisible Man: Black and Male Under Title VII, 104 HARV. L. REV., 749 (1991) (citing Johnson v. Memphis Police Dept, 713 F. Supp. 244, 248 (W.D. Tenn. 1989)).

[FN112]. See ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (1992) (historically analyzing the persistently unequal treatment of African-Americans in our society--treatment that shows no sign of abating).


[FN114]. Id. at 1313. Indeed, one of the Supreme Court's recent opinions in the area, Richmond v. J.A. Croson Company, 488 U.S. 469 (1989), is yet another example of the institutionalization of domination and its power to delude. One of Derrick Bell's students described this as follows:

In City of Richmond v. Croson, a majority of the Supreme Court chose for the first time to subject an affirmative action plan enacted by the former capital of the Confederacy to the stringent review it applies to the most repugnant forms of racism. The Court's decision to treat all racial classifications identically possesses the same superficial symmetry of the “separate but equal” analysis in Plessy v. Ferguson, and it suffers from the same flaw. The Court denies the reality of racism when it isolates race-conscious actions from their context and concludes that benign racial classifications warrant the same standard of review as invidious acts.


[FN115]. White males earn significantly more than women or minorities. “These differences are attributable to many factors. Employment discrimination is only one aspect of the systemic subordination of women and people of color to whites and men, particularly white men, under rules, practices, and standards made by white men and preserving their power.” Mary E. Becker, Needed in the Nineties: Improved Individual and Structural Remedies for Racial and Sexual Disadvantages in Employment, 79 GEO. L.J. 1659 (1991).

[FN116]. It should be noted that this Article does not address how far society has come or has yet to go with regard to equal protection law or discrimination. Rather, the purpose of the discussion is to illuminate the workings of the domination system. Racial discrimination provides a good example because the injustice is so obvious.

[FN117]. Ayres, supra, note 85.


[FN119]. See, e.g., CAL. CONST. art. III, § 6(c); TENN. CODE ANN. § 4-1-404 (“English is hereby established as the official and legal language of Tennessee. All communications and publications, including ballots, produced by governmental entities in Tennessee shall be in English, and instruction in the public schools and colleges of Tennessee shall be conducted in English unless the nature of the course would require otherwise.”). The Voting Rights Act guarantees multilingual ballots under certain circumstances. These statutes, however, may serve to limit the assistance available to non-English speaking voters generally. See Sandra Guerra, Note, Voting Rights and the Constitution: The Disenfranchisement of Non-English Speaking Citizens, 97 YALE L.J. 1419, 1430-31 (1988); Antonio J. Califa, Declaring English the Official Language: Prejudice Spoken Here, 24 HARV. C.R.-C.L. L. REV. 293, 300-302 (1989) (arguing also that English-only laws do not survive equal protection's rational basis test).


[FN122]. This works much the same way as the “learned helplessness” of battered women. The domination model is accepted as the truth, then survival within that model, as opposed to escape, becomes the sole focus. LENORE E. WALKER, THE BATTERED WOMAN 47-48 (1984). See also Martha R. Mahoney, Legal Images of Battered Woman: Redefining the Issue of Separation, 90 MICH. L. REV. 1, 22-23 (1991) (describing the disconnectedness of victims of battering).

[FN123]. Randall L. Kennedy, Racial Critiques of Legal Academia, 102 HARV. L. REV. 1745 (1989). But see Leslie G. Espinoza, Masks and Other Disguises: Exposing Legal Academia, 103 HARV. L. REV. 1878 (1990) (asserting that Kennedy wrongly attempts to apply the standards and values of white male positivism to Critical Race Scholarship, a scholarship that attempts to work outside these very constraints). Cf. Kathryn Abrams, Hearing the Call of Stories, 79 CAL. L. REV. 971 (1991) (seeking to establish a normative relation among the work of feminist narrative scholars--essentially, the establishment of an alternative to the positivist critique of this scholarship that remains sensitive to some of the values of positivists).


[FN125]. See supra note 11.

[FN126]. See supra note 74 and accompanying text.

[FN127]. Here the term paradigm is used in its most expansive sense to mean the overarching cultural context in which Western society has developed and operates.

[FN128]. As Kuhn has explained, only hypotheses based on the overarching theories of science currently prevalent are given credence within the community. Research, what he calls “normal science,” is limited to organizing the minor matters of the paradigm.

   [The paradigm] is at the start largely a promise of success discoverable in selected and still incomplete examples. Normal science consists in the actualization of that promise, an actualization achieved by extending the knowledge of those facts that the paradigm displays as particularly revealing, by increasing the extent of the match between those facts and the paradigm's predictions, and by further articulation of the paradigm itself. . . . Closely examined, . . . that enterprise seems an attempt to force nature into the preformed and relatively inflexible box that the paradigm supplies.

Each succeeding paradigm is a different interpretation of phenomena, but not necessarily a more true or even better interpretation. Rather, the paradigm merely provides a framework in which to answer those questions currently considered important in the community. See supra note 68. Kuhn's insight with respect to “normal science” appears to have been misunderstood and applied to law as a sort of goal instead of an explication of the process of the paradigm, which otherwise has no real meaning or value. Peter Ziegler, A General Theory of Law as a Paradigm of Legal Research, 51 MOD. L. REV. 569 (1988).

[FN129]. EDWIN ABBOTT, FLATLAND (5th ed. 1963). Nevertheless, it is important to note that the discussion does not discount the value of a great deal of work within the system. See supra note 76.


[FN132]. FINNIS, supra note 80, at 360-62.


[FN134]. See, e.g., WINK, supra note 46, at 341 n.59 (noting that there are certain statements of the prophets rejecting sacrifice, condemning violence and domination).

[FN135]. The 13 nations were Poland, East Germany, Hungary, Czechoslovakia, Bulgaria, Romania, Albania, Yugoslavia, Mongolia, the Soviet Union, Brazil, Chile, and China, comprising approximately 1,695,100,000 people, over 32% of humanity. These nonviolent revolutions succeeded beyond anyone's wildest expectations in every case but China, and were completely nonviolent (on the part of the participants) in every case but Romania and parts of the southern U.S.S.R. Since then Nepal, Palau, and Madagascar have undergone nonviolent struggles, and Latvia, Lithuania and Estonia have achieved independence nonviolently.


[FN137]. A blow by the left fist would land on the right cheek, but it was shameful to use the left hand in public, since it was reserved for unclean tasks. At Qumran, anyone who gestured with his left hand was excluded from the community for 10 days and had to do an act of penance. The Qumran Community Rule, 1 QS VII.15b; see MICHAEL A. KNIBB, THE QUMRAN COMMUNITY 124-27 (providing an English translation and explanation of the Qumran Community Rule). So Jesus must be referring to striking the right cheek with the right hand, and thereby, a backhanded strike.

[FN138]. For a more thorough treatment of this text, see WINK, supra note 46, at ch. 9; See also WALTER WINK, VIOLENCE AND NONVIOLENCE IN SOUTH AFRICA 12-34 (1987).

[FN139]. Matthew 5:40.

[FN140]. See WINK, supra note 46, at 177-79.
[FN141]. Matthew 5:41.

[FN142]. Jesus' thesis statement in this passage, “Do not resist one who is evil,” must be understood as meaning, “Do not fight evil with evil. Do not mirror your opponent's evil. Do not let your opponent set the terms of your response. Do not be simply reactive to evil.” See Wink, supra note 46, at 184-86.


[FN145]. Berman, supra note 63, at v.

[I]n law, as in other intellectual spheres, there are signs of a reaction, connected with the feeling that empiricism and positivism are not enough, and that some new mystique must be found to underpin the ethos of man and human society. Lawyers are once again to be found engaged in the search for some ethical basis for law, inspired by the desire to arrive at some absolute scheme of values which can be held to support and enshrine their own sense of what is right and wrong, just or unjust.

DENIS LLOYD, INTRODUCTION TO JURISPRUDENCE 695 (1985).
38 St. Louis U. L.J. 341

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