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# A LOOK AT GOD, FEMINISM, AND TORT LAW

RANDY LEE\*

Through the veil of tears they may see the face of God deformed, and His countenance full of revengeful arrogance. No. Do not be scandalised! It is only a hallucination brought about by the fever of grief. Assist them so that their temperature may abate.<sup>1</sup>

## I. INTRODUCTION

At some point during the women's movement of the last thirty years, the popular perception of feminism began to see the Judeo-Christian God as an enemy. Perhaps, on a political level, it was the abortion issue or issues surrounding home and family. Perhaps, on a religious level, it was the imposing number of male clergy leading churches or apprehensions about the writings of Paul.<sup>2</sup> Perhaps, on a personal level, it was a perception of religious institutional indifference to years of sexual abuse, discrimination, and injustice. Or perhaps, it was because Mary was a virgin<sup>3</sup> or because Eve ended up with so much of the blame for the apple.<sup>4</sup> Theories abound and sorting them out is beyond the scope of this paper. For the purposes of this article, it is enough to recognize that at some point in many minds it became inconsistent to be feminist and Christian, so much so that some feminists, in the same breath, group Christianity with neofascism<sup>5</sup> and racism.<sup>6</sup>

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1. MARIA VALTORTA, *THE POEM OF THE MAN-GOD 765* (Nicandro Picozzi trans., 1987).

2. Taken out of context, some passages from Paul's letters to the early churches can be troubling to feminists. See I *Corinthians* 7:10-11; *Ephesians* 5:21-33. Reading these passages more fully, however, one can see that they are not as harsh on women as they might appear. For example, *Ephesians* 5:22 does say that wives should "be subject to your husbands," but *Ephesians* 5:25 commands husbands to "love your wives, as Christ loved the Church." Thus, while a woman is called to be subject, she is called to be subject to someone who has given his being totally for her. Further, in the command to the husband to love, there is a requirement not to "insist on [one's] own way." I *Corinthians* 13:5.

3. *Matthew* 1:18-25.

4. *Genesis* 3:1-16.

5. BETTY FRIEDAN, *THE SECOND STAGE* 39-40 (1981).

6. Leslie Bender, *A Lawyer's Primer on Feminist Theory & Tort*, 38 J. LEGAL EDUC. 3, 10 (1988).

While the view that the Judeo-Christian God is opposed to women has never been accurate, the perception that there is a war being waged between feminists and those who believe in God continues.<sup>7</sup> Yet, opportunities have begun to surface to debate whether Judeo-Christian values really run counter to feminism. These opportunities result from two trends in feminism. First, the public has begun to grow more aware that not all feminists hold the same beliefs. People can be cultural feminists or assimilational feminists.<sup>8</sup> They can be radical feminists or moderate feminists.<sup>9</sup> They can be "working-class"<sup>10</sup> feminists of "raw eloquence,"<sup>11</sup> or elite, professional, or intellectual feminists.<sup>12</sup> People now recognize that many different people holding a variety of beliefs share the same label; that recognition requires them to wonder whether all of those different beliefs really can be inconsistent with Judeo-Christian values.

Second, a trend has emerged calling for a new awakening for all feminism. Ten years ago, Betty Friedan recognized that women were already growing discontent with the popular perception of the feminism of the 1960s and 1970s.<sup>13</sup> At that time, Friedan began calling for a "second stage" in the women's movement; a stage that would require all people to re-ex-

7. Robert J. Hutchinson, *Can Feminists Really Be Pro-Life?* CATH. TWIN CIRCLE, Jan. 19, 1992, at 10.

8. The assimilationist position is that men are dominating, so let's be like men. The cultural feminist point of view is that what women have been doing all along—all through history—is plenty important, and no one should tell us it isn't important just because women have been doing it.

*Id.* (quoting Rachel MacNair, President of Feminists for Life of America). For a discussion of the struggle between these two positions, see Georgie Anne Geyer, *'70s Women's Movement Ran Aground*, THE PATRIOT-NEWS, Dec. 8, 1989, at A15 (referring to "cultural feminists" as "classic feminists"):

The impulse of classic feminism was not only equality, however, but a strengthening and a legitimizing of the female values: compassion and cooperation, love of the other, the civilizing qualities of womankind that have historically resided, appreciated or not, in "woman."

. . . [C]lassic feminism died in the lemminglike rush of many women to law school (the fastest way up), to the corporate ladder (direct express to success), and to the "balancing" of career and marriage (having it all). What happened was that much of our society thus lost the truly feminine as women en masse slipped or climbed into the male value system . . . . And men, in turn, moved out away from women into even more violent and aggressive behavior . . . as if they were daring women to emulate them. It left behind the humanly impoverished society we find ourselves in today.

*Id.*

9. Georgie Anne Geyer, *Today's Malignant Sexual Politics Rules Out A Healthy Feminism*, THE PATRIOT-NEWS, Nov. 13, 1991, at A13.

10. Nancy Gibbs, *The War Against Feminism*, TIME, Mar. 9, 1992, at 50, 53.

11. *Id.*

12. *Id.*

13. FRIEDAN, *supra* note 5, at 15.

amine society in light of the freedoms women had recently won.<sup>14</sup> While Friedan's calls went unheeded, the discontent that she had detected among women continued to grow. Now, only twenty-nine per cent of American women consider themselves feminists.<sup>15</sup> Although women have rejected the current popular perception of feminism, they have not done so because they think society is now perfect in its approach to women.<sup>16</sup> In fact, polls show that while most women feel a need for social change, they do not see the popular notion of feminism as understanding the manner or the direction of that change.<sup>17</sup> Given this failure of the popular notion of feminism, the concept of "feminism" must redefine itself, and it must do so in exactly the way that Friedan instructed ten years ago: Feminism must let go of past grief and past glory, it must see the world in a new light, and it must seek whole new ways of ordering that world.<sup>18</sup>

As people begin to see "feminism" for all the diverse concepts it can be and as each of these concepts opens itself up to re-examination in a new light, a dialogue can occur between feminism and Judeo-Christian values. To restructure feminism in line with these values, however, does not mean returning to life in the 1950s. Judeo-Christian concepts like "justice" and "love" have been historically as misunderstood as feminism. These values have as much to gain from an honest review as feminism does.

The purpose of this article is not to present the one view of Judeo-Christian values, nor to present the one mold for the Judeo-Christian feminist, nor to present the perfect Judeo-Christian-feminist social structure. Such models cannot be presented because they do not exist. This article seeks simply to begin a healthy discussion. Hopefully, it will be a discussion between many participants, and from that discussion we shall gain a sense of what Judeo-Christian values mean, of what they have to offer a new feminism, and of how the world might be structured consistent with such a Judeo-Christian feminism.

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14. *Id.* at 29.

15. Gibbs, *supra* note 10, at 54; *cf.* Geyer, *supra* note 9, at A13 (33% of women consider themselves feminists).

16. For example, although most women did not follow the lead of feminist organizations in believing Anita Hill over Clarence Thomas, see Suzanne Fields, *Feminists Without Followers*, THE PATRIOT-NEWS, Oct. 25, 1991, at A15, that event did rally women to perceive a problem in the Senate's approach to the process. Gibbs, *supra* note 10, at 54.

17. A Time/CNN poll taken on February 20, 1992, of 625 American women showed that although 57% of those polled felt a need for a strong women's movement, only 39% felt that the current movement reflected the views of most women, and a mere 29% considered themselves feminists. Gibbs, *supra* note 10, at 54.

18. FRIEDAN, *supra* note 5, at 32.

This article first examines the challenge that Betty Friedan presented to feminists ten years ago to re-examine themselves and their surroundings and to begin to seek new ways of ordering society.<sup>19</sup> It then reviews one attempt to accept that challenge, an attempt by Professor Leslie Bender to restructure negligence law to reflect feminist values.<sup>20</sup> Finally, this paper examines how Professor Bender's goals in restructuring negligence law could have been furthered more effectively by introducing Judeo-Christian values into her feminism.

## II. SEEKING A "SECOND STAGE" AND RETHINKING OLD VALUES IN THE WOMEN'S MOVEMENT

To many, 1963 marked the beginning of the modern version of the American Women's Movement. In that year, Harvard graduated its "first generation of [S]uperwomen,"<sup>21</sup> and Betty Friedan published *The Feminine Mystique*,<sup>22</sup> which exploded traditional views of women's roles. The movement gained momentum through the 1960s and celebrated its first nationwide strike for equality on August 26, 1970, when hundreds of thousands of women marched down Fifth Avenue in New York carrying banners for "Equal Rights to Jobs and Education," "The Right to Abortion," "24-Hour Child Care," and "Political Power to the Women."<sup>23</sup> Although the right to abortion had been granted by 1973,<sup>24</sup> other goals were not so quickly attained.

In 1981, Betty Friedan published another book, *The Second Stage*,<sup>25</sup> in which she called for a refocus of the Women's Movement.<sup>26</sup> Battles had been won since the early 1970s. Friedan noted that the movement had opened doors for women to find themselves<sup>27</sup>—it had broken down barriers that had prevented women "from moving, working, earning and speaking in their own voice in the mainstream of society."<sup>28</sup> This movement had given women choices.<sup>29</sup> Yet, Friedan sensed "something off, out of focus, going wrong, in the terms by which [women] are trying to live the equality

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19. *Id.*

20. Bender, *supra* note 6, at 10.

21. FRIEDAN, *supra* note 5, at 32.

22. BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1963).

23. FRIEDAN, *supra* note 5, at 23-24.

24. *Roe v. Wade*, 410 U.S. 113 (1973).

25. FRIEDAN, *supra* note 5.

26. *Id.*

27. *Id.* at 30.

28. *Id.*

29. *Id.* at 30-31.

we fought for."<sup>30</sup> Among women, Friedan had "begun to hear undertones of pain and puzzlement, a queasiness, an uneasiness, almost a bitterness that they hardly dare admit."<sup>31</sup> Some of the early victories had begun to look, at least in part, illusory. Despite laws against sex discrimination in education and employment, women were earning less income in proportion to men than they had ever earned before<sup>32</sup> and remained "crowded into the poorly paid service and clerical jobs traditionally reserved for females."<sup>33</sup> The victory in abortion rights had required constant defense and by 1980 had been substantially lost for poor women.<sup>34</sup> The Equal Rights Amendment was slowly dying despite the efforts of nearly 100,000 marchers on Mother's Day 1980, in Chicago.<sup>35</sup> Finally, even the choices were starting to look "illusory":

What worries me today is "choices" women have supposedly won, which are not real. How can a woman freely "choose" to have a child when her paycheck is needed for the rent or mortgage, when her job isn't geared to taking care of a child, when there is no national policy for parental leave, and no assurance that her job will be waiting for her if she takes off to have a child?<sup>36</sup>

In response to this, Friedan saw the need for a "second stage" in the Women's Movement "to keep from getting locked into obsolete power games and irrelevant sexual battles that can never be won, or that we will lose by winning."<sup>37</sup> For Friedan, the second stage presented itself not so much as a clear model, but as a set of parameters or challenges:

The second stage cannot be seen in terms of women alone, our separate personhood or equality with men. The second stage involves coming to new terms with the family—new terms with love and with work. The second stage may not even be a women's movement. Men may be at the cutting edge of the second stage. The second stage has to transcend the battle for equal power in institutions. The second stage will restructure institutions and transform the nature of power itself. The second stage may even now be evolving, out of or even aside from what we have thought of as our battle.<sup>38</sup>

30. *Id.* at 15.

31. *Id.*

32. *Id.* at 17.

33. *Id.*

34. *Id.*; see also *Harris v. McRae*, 448 U.S. 297 (1980) (no constitutional right to federal funding of medically necessary abortions); *Maher v. Roe*, 432 U.S. 464 (1977) (no constitutional right to state funding of nontherapeutic abortions).

35. FRIEDAN, *supra* note 5, at 24.

36. *Id.* at 23.

37. *Id.* at 29.

38. *Id.* at 28 (entire passage italicized in original).

Regardless of what else might have to happen in this second stage, Friedan clearly believed that it would have to involve a transcendence of existing social structures, not merely a continued reaction to existing structures.<sup>39</sup> The answers this stage required would not come from conventional wisdom, but from life experience and a personal search for truth:

There is no going back. The women's movement was necessary. But the liberation that began with the women's movement isn't finished. The equality we fought for isn't livable, isn't workable, isn't comfortable in the terms that structured our battle. The first stage, the women's movement, was fought within, and against, and defined by that old structure of unequal, polarized male and female sex roles. But to continue reacting against that structure is still to be defined and limited by its terms. What's needed now is to transcend those terms, transform the structure itself. Maybe the women's movement, as such, can't do that. The experts of psychology, sociology, economics, biology, even the new feminist experts, are still engaged in the old battles, of women versus men. The new questions that need to be asked—and with them, the new structures for the new struggle—can only come from pooling our experience: the agonies and ecstasies of our own transition as women, our daughters' new possibilities, and problems, and the confusion of the men. We have to break out of feminist rhetoric, go beyond the assumptions of the first stage of the women's movement and test life again—with personal truth—to turn this new corner, just as we had to break through the feminine mystique twenty years ago to begin our modern movement toward equality.<sup>40</sup>

Friedan suggested that women may be blocked from beginning this process because they were tied too deeply to the first stage of their movement.<sup>41</sup> The second stage required a complete openness to redefining all social structures, based on both women's and men's opportunities to see and live in the world from perspectives never before available.<sup>42</sup> That openness, however, could only come about if women were willing to let go of old perspectives and profoundly felt loyalties to the first stage:

There's almost a religious feeling many women share about the women's movement that keeps us from asking these questions. A sacredness, a reverence, an awe, a pride beyond arrogance and an incredulous humility that we who made this movement share truly as sisters, overriding our ideological differences and power battles:

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39. *Id.* at 40.

40. *Id.*

41. *Id.* at 29.

42. *Id.*

the grandiose heroics of knowing that in our lifetime we have changed history more basically than women ever before, and more than most men; the grounding certainty that the women's movement "changed our whole lives," and the very terms by which the new generations of women and men approach life.<sup>43</sup>

In order for the Women's Movement to move past the glory of the first stage, however, the movement must understand what was truly glorious about it. The glory of the first stage is not in any of the answers it provided. As Friedan notes, the views of the movement's goals as well as the proper method to pursue those goals have differed vastly among the movement's members.<sup>44</sup> In a movement holding together groups with very real differences, it cannot be expected that uniform answers will emerge. Therefore, to the extent that the Women's Movement has generated uniform answers, these are answers with which many women have not been comfortable.<sup>45</sup> What has been glorious about the movement is that it has placed all social values, all social structures, all notions of "power" up for grabs and now demands that each person look at these from a wholly new perspective and try to find his or her own personal truth.

We can only bask in that glory in the second stage if we kill off our prejudices from and reactions to the past.<sup>46</sup> "[A]s long as women remain locked in reaction to what was, they will be obsessed with false fears and unreal options instead of confronting the new problems that have to be solved in Stage Two."<sup>47</sup> All this, however, is easier said than done. The calling is no longer to think in terms of restructuring, repairing or reorienting, but to have the courage to build anew and to be open to building in ways never before attempted. Perhaps even more difficult, the calling may be to open ourselves to the possibility that we need not build at all. Some things, which were wrong when we were forced to accept them, may have been wrong only for that reason. Now that we are free to choose them, those things may be right. If the direction of the second stage is truly to be

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43. *Id.*

44. *See id.* at 47. Friedan recalls:

Around 1969, when that anti-man, anti-family, bra-burning image of "women's lib" was built-up in Newsweek and Time cover stories exaggerating the antics of the most extremist voices in the movement, I remember the helpless feeling shared by the founding mothers of NOW [National Organization for Women]: "But that's not what we meant, not at all." For us, with our roots in the middle American mainstream and our own fifties' families, equality and the personhood of women never meant destruction of the family, repudiation of marriage and motherhood, or implacable sexual war against men.

*Id.*

45. *See generally id.* at 15-41.

46. *See generally id.* at 43-81.

47. *Id.* at 45.



found in a search for personal truth, we must rise above our pride in having overcome our individual differences to form one common front for change. We must celebrate that ideological differences are free to manifest themselves, even as we work together to build structures that are understanding enough to accommodate the expression of those differences.

To start fresh, we must forgive the past. One cannot confront and re-examine old fears to see if they are false without forgiving and without realizing that there is vulnerability in doing so. We may well ask how this can happen in the context of a movement which was for so long a reaction to pain and oppression. Perhaps the answer lies in our being open not only to new structures, but also new values. Perhaps strength can no longer mean "power" but rather "perseverance." Perhaps power must surrender to notions of compassion and understanding. Perhaps the days of besting our oppressors by bringing them down must give way to a day of besting them by ascending above them. Perhaps we may even find that having choices still requires that some things be taken and others let go.<sup>48</sup>

When we begin to rely on values of vulnerability and forgiveness, and on values that respect the better heart rather than the stronger position, we begin to appear to be turning toward Christian values.<sup>49</sup> For the feminist, this is not an easy direction to follow. For Friedan, the Vatican offers "a

48. Robert Coles comments:

But I believe the issue, finally, becomes a moral one—and yes, one of renunciation as well as further "fulfillment." These days in America the latter is on so many of our minds—how to get more, be more. Women don't have this, men don't have that—well, let's all be "liberated," meaning we're as free now to acquire more and more attributes, experiences, opportunities, advantages. But how well can anyone do just about everything? There are only so many possibilities for attempted perfection, so to speak: as in the workplace, one learns by doing, and in this case, by *being*—and that means, being a mother, being a father, or alternatively, not being one or the other. Where in the world did we get the notion that it is our destiny to master all "roles," be all things to each other, including our growing children?

ROBERT COLES, *HARVARD DIARY* 78 (1988) (emphasis in original); see also Geyer, *supra* note 8, at A15:

[F]ar from having the new freedom and dignity to make exactly those choices that traditional women were not permitted to make, the modern young woman was faced with still a new cult that told her she didn't have to make choices at all. She would be the first human being in history to have what no man or woman can ever have: everything.

Thus, the exhaustion. Thus, despite all the extraordinary successes for women, the eternal groping. Thus, the sullenness on the faces of the victorious as more and more they drag weary and unresolved selves through their unfulfilling 16-hour days.

49. See, e.g., *Matthew* 18:21-22 ("Lord how often shall my brother "sin" against me, and I forgive him? As many as seven times?") Jesus said to him, "I do not say to you seven times, but seventy times seven.""); *Matthew* 5:38-42 ("You have heard that it was said, 'An eye for an eye and a tooth for a tooth.' But I say to you, do not resist one who is evil. But if anyone strikes you on the right cheek, turn to him the other also; and if anyone would sue you and take your coat, let

real backlash against the equality and the personhood of women"<sup>50</sup> and fundamentalism is a "dehumanizing force[]" sharing company with "neofascism and . . . autocratic communism."<sup>51</sup>

Before we disregard these values, however, we need to reflect on three points:

- (1) Whether we are in a position to disregard these values,
- (2) Whether the negative reactions of the feminist movement to various churches are simply the fears of the past of which Friedan warns, and
- (3) Even if these are not simply past fears, whether there is a difference between the experience of "church," which may be negative to a person, and the experience of Christian values, which may be necessary to the feminist movement.

First, we must reflect on whether we can choose to disregard these values. Friedan clearly states that we must build a new social order, but we cannot transcend the old order if we build from the same values. If we do not escape a value system based on power and oppression, on self rather than community, and on receiving rather than giving, then we cannot help but create a society where many are oppressed, excluded, and denied. Many of these disadvantaged will be women. We can see this already—although we now have women lawyers, life for the law firm secretary remains the same, and although the female executive may share lunch with the "guys," the waitress who serves them has seen little change in her life. The women's movement is in danger of erasing gender lines only to have similar lines drawn according to class.<sup>52</sup> To avoid this, women in the movement must be open to values of compassion that radically diverge from the old order; Christian values fit that bill.

This need to adopt one set of values, for lack of a better alternative, calls to mind moments in the spiritual evolution of the apostles.<sup>53</sup> Often, the

him have your cloak as well; and if anyone forces you to go one mile, go with him two miles. Give to him who begs from you, and do not refuse him who would borrow from you.").

50. FRIEDAN, *supra* note 5, at 39.

51. *Id.* at 40.

52. COLES, *supra* note 48, at 78; Bender, *supra* note 6, at 10 n.23.

53. For example, after Jesus proclaimed: "he who eats my flesh and drinks my blood has eternal life, and I will raise him up at the last day," *John* 6:54, many of his followers ceased to follow Him. *Id.* at 6:66. At that point Jesus looked to the twelve apostles who were left with Him and asked: "Will you also go away?" *Id.* at 6:67. Simon Peter responded: "Lord, to whom shall we go? You have the words of eternal life, and we have come to know, that you are the Holy One of God." *Id.* at 6:68-69. Simon Peter did not joyfully proclaim here: "Sounds great; let's eat." The twelve no doubt shared the same apprehensions about this teaching as did the many who had departed. Unlike those who left, however, Simon Peter's words indicate that the twelve realized

apostles had to rise above their initial reactions to the teachings of Jesus and trust that Jesus was the only road leading to their destination.<sup>54</sup>

Certainly, compassionate values do not have to come from a Christian faith. From the Hebrew tradition, we could be calling to mind the values of Ruth<sup>55</sup> or those of the God too gentle for Jonah's tastes.<sup>56</sup> We see compassionate values in the starving Hindu family that gave half their rice to the starving Moslem family across the street.<sup>57</sup> Outside of religious circles, we see these values reflected in the life of an agnostic William Carlos Williams<sup>58</sup> and in the popular writings of Robert Fulghum.<sup>59</sup> The point here is not that the Women's Movement must become a "Christian Revival," but that it must be open to the way of life to which such a revival might call people.<sup>60</sup>

that despite their initial reactions, they had to humble those reactions and continue to follow because no other path led where they needed to go.

54. *John* 14:6. In the Islamic faith the teachings of Jesus are recognized as prophetic. *Koran* 4:163.

55. In a classic passage often read at weddings, the widowed Ruth refuses to leave her desperate mother-in-law alone, saying:

Entreat me not to leave you or to return from following you; for where you go I will go, and where you lodge I will lodge; your people shall be my people, and your god my God; where you die I will die, and there will I be buried. May the Lord do so to me and more also if even death parts you from me.

*Ruth* 1:16-17.

56. After Jonah's reluctant warnings, the City of Nineveh repented and God spared the City. *Jonah* 3:1-10. Jonah responded to this:

I pray thee, Lord, is not this what I said when I was yet in my country? That is why I made haste to flee to Tarshish; for I knew that thou art a gracious God and merciful, slow to anger, and abounding in steadfast love, and repentest of evil.

*Jonah* 4:2.

57. MOTHER TERESA, ONE HEART FULL OF LOVE 9 (1989).

58. COLES, *supra* note 48, at 156-59.

59. ROBERT FULGHUM, ALL I REALLY NEEDED TO KNOW I LEARNED IN KINDERGARTEN 3-6, 189-92 (1988). Mr. Fulghum is, himself, a former parish minister, but his writings still appeal to many with no Christian bend.

60. On the other hand, many people who live that "way of life" feel they are able to do so only because of their faith. For example, Mother Teresa said: "The work we do is only our love for Jesus in action." MOTHER TERESA, WORDS TO LOVE BY . . . 22 (1983). Similarly, Sister Faustina Kowalska, a Polish mystic for whom Pope John Paul II began the informative process for beatification, attributed to her faith her ability to overcome the pain of her own advanced stages of tuberculosis so that she could go to the bedsides of dying people in need of comfort and prayer. MARIA TARNAWSKA, SISTER FAUSTINA KOWALSKA—HER LIFE AND MISSION 318-19 (Anne Hargest-Gorzela trans., 1989). Sister Faustina wrote in her diary:

I feel distinctly that strength is flowing to me from Your Cross, that You and You alone are my perseverance. Although I often hear the voice of temptation calling to me, "Come down from the Cross!" the power of God strengthens me. Although loneliness and darkness and sufferings of all kinds beat against my heart, the mysterious power of God supports and strengthens me.

We now turn to the second and third points for reflection: the possibility that our negative responses, even Friedan's, are the very reactions to past fears of which Friedan warns, and the possibility that even if they are not, there may well be a difference between an experience of church and an experience of Christian values.

It could be that the past fears, which Friedan calls us to rise above, are at the heart of both the negative responses to Christian institutions that we see from feminists and in my own responses to separate the message, Christian values, from the messenger, Jesus. Without question, that negativity and defensiveness is a response to something real, but that something may not really be centered in Christian values. In fact, the reality of the Christian message may bear little resemblance to the characterizations placed upon it.

It should come as no surprise that one recent poll indicates that what people perceive as Christian values are often not consistent with the reality of Christianity.<sup>61</sup> As our perceptions depart from the reality of Christian values and we conform the message of Christian values to a less challenging way of life, we open the church life experience to something sometimes far-removed from a compassionate community. William Carlos Williams knew this

phony side of 20th-century Christianity, not to mention its long and sad institutional history: persecutions, wars, greed and plunder, murders of so many people—all in the name of this or that credal orthodoxy. He had his own way of saying what the Catholic philosopher Romano Guardini asserted with these words: "The Church is the Cross on which Christ was crucified." Williams's words went like this: "They keep nailing Him—in His Name!"<sup>62</sup>

Williams is not alone in this knowledge. Many have grown up with the idea that the difference between Protestantism and Catholicism is reason enough to kill in Northern Ireland, and today it is suggested that there is not a

*Id.* at 329-30 (entire passage italicized in original).

On March 7, 1992, in the presence of the Holy Father, the Congregation for the Causes of Saints promulgated the Decree of Heroic Virtues of the Servant of God Maria Faustina Kowalska, of the Congregation of Sisters of Our Lady of Mercy in Poland. . . .

. . . .  
 . . . This signifies that, because of her heroic virtue, she is worthy of special honor and respect - a model for all of how to respond to God's grace and thus attain holiness.

*Sr. Faustina Now Venerable*, MARIAN HELPERS BULL., June/July 1992, at 12, 12 (italics omitted).

61. George W. Cornell, *U.S. Survey Shows Realignment Of Religious Beliefs*, THE PATRIOT-NEWS, Sept. 6, 1991, at 1.

62. COLES, *supra* note 48, at 157.

church large enough to hold a Croatian Catholic and an Orthodox Serbian. Stories abound of imperfect clergy and harsh and rigid congregations, golden chalices in the face of desperate poverty, and an unfeeling and harsh God. It all suggests a structure deserving of fear and distrust.

Yet, throughout the twentieth century, good people have risen above these images, both to reinvigorate old churches and to inspire new Christian structures. Often the women in this group have been women of choice, class, intellect, and even opportunity, who traded their status for a life immersed in Christian values. This group included women who saw not only the dark side of Christian life, but also the truth of the calling: women like Dorothy Day,<sup>63</sup> Edith Stein,<sup>64</sup> and Catherine De Hueck Doherty,<sup>65</sup> the

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63. "[B]efore her conversion to Catholicism [Dorothy Day] lived a 20th-Century American life, the radical intellectual version, to the full." *Id.* at 47. She wrote for a socialist paper, was friends with Eugene O'Neil, marched with the suffragettes, and spent brief periods in prison. ROBERT COLES, *DOROTHY DAY* 2-4 (1987). She also had an affair, an abortion, a marriage, a divorce, a common law marriage, and then a daughter. *Id.* at 3, 7-8. She was drawn to Christianity, particularly during her common law marriage, and shortly after the baptism of her daughter. *Id.* at 9. She became a leader of the Catholic Workers Movement and throughout the remainder of her life provided food and clothing in a "hospitality house" in New York. *Id.* at 9-16. She was, as she put it, "a fool for Christ." COLES, *supra* note 48, at 6. Robert Coles described her in this way:

She was an utterly devout Catholic who, with Bernanos and Maurice, knew that the church today will falter, will fail in its mission, will become badly flawed—and yet, is a chosen instrument of [God's]. . . . Dorothy Day knew where to look for [hope]: not in the pagan state; not in the dreary banalities and faddish abstractions of social science; not in the cultivation of self; not in a rampant, crazy consumerism; but in the daily struggle to obey God and live a life that does as much justice as possible to His constantly demonstrated lovingkindness[sic].

*Id.*

64. Edith Stein was the daughter of a Jewish woman, a single-parent, who ran the family business. COLES, *supra* note 48, at 61. Stein herself was a well-educated author and scholar who felt called into a life first of service, then of prayer. *Id.* at 63. She became a Carmelite nun and died a prisoner at Auschwitz, providing comfort to "the hurt, the sick, the agitated and frightened" who shared that place with her. *Id.*

65. Catherine De Hueck Doherty fled Russian communism in 1920 and came to America. She began working as a salesclerk, waitress, laundress, and maid, but, eventually became a wealthy executive. In 1930, she sold everything to live among the poor and serve them. She wrote extensively on Christian values and the community and received awards for her work both in Canada and the United States. CATHERINE DE HUECK DOHERTY, *SOBORNOST* (1977) (back cover biographical).

Reverend Hydie Houston,<sup>66</sup> Sister Ligouri,<sup>67</sup> Jan Connell,<sup>68</sup> and Sister Virginia McGarry.<sup>69</sup>

Similarly, in order to rise above these negative images, or our prejudices from past fears of them, we must acknowledge that this Christian set of values may make more sense retrospectively than it does prospectively.<sup>70</sup> The athlete preparing to train knows prospectively training will hurt: the abdomen will cramp, muscles will be sore, breath will be short. That knowledge, by itself, would not inspire training. However, the athlete realizes that training is not simply what it feels like today; when one trains, benefits occur simultaneously which can only be seen after one is well into training. It is the recognition that training will look better from a different perspective that allows one to train. Similarly, the impact of Christian values on feminism may look very different once the movement is immersed in those values.

To illustrate this point, we can ask what God and the world might have looked like to Mother Teresa when she left the Loreto Sisters in India with five rupees<sup>71</sup> and found herself faced with a woman lying in the streets half eaten by rats and ants.<sup>72</sup> Somehow, Mother Teresa saw her situation in a different light than most of us would. As a result of her unique perspective,

66. See *infra* notes 75-86 and accompanying text.

67. Sister Ligouri has served Pittsburgh's poor for many years with her "special" firm but gentle hands directing the various activities of the Jubilee Soup Kitchen.

68. Ms. Connell left her securities law practice to spread world-wide a Marian message of "peace, prayer, penance, conversion, and fasting." She is the author of *Queen of the Cosmos* (1990) and a founder of the Pittsburgh Center for Peace.

69. Sister Virginia grew up in a wealthy family in New Jersey but dedicated her life to serve those in need in her area. After taking her vows and becoming a "spouse of Jesus," Sister Virginia recalled that while growing up her father had told her that given her expensive taste, she would have to marry the wealthiest man on Earth. Sister Virginia smiled and added, "and I did."

70. For an extensive discussion of how even the apostles and "Holy Women" who followed Jesus had to rise above similar limitations, see generally VALTORTA, *supra* note 1. This is a five volume work that "neither substitutes nor changes the Gospel, but rather narrates it, integrating and illuminating it, with the declared purpose of reviving in men's hearts the love for Christ and His Mother." *Id.* at XII. But see generally Fr. Mitch Pacwa, *Maria Valtorta and 'The Poem of the Man-God,'* CATH. TWIN CIRCLE, Aug. 9, 1992, at 10-11. For a discussion of the experience of Mary Magdalene in particular, see VALTORTA, *supra* note 1, at 476-528.

For a general discussion pertaining to this process and the evolution of character, see Anthony J. Fejfar, *In Search of Reality: A Critical Realist Critique of John Rawls' A Theory of Justice*, 9 ST. LOUIS U. PUB. L. REV. 227, 289-94 (1990). "On the level of moral decision, the drive towards transcendent absolute value finds its initial realization in a shift of the criterion of one's decisions and choices from mere satisfaction to mature values." *Id.* at 289.

71. MALCOLM MUGGERIDGE, *SOMETHING BEAUTIFUL FOR GOD—MOTHER TERESA OF CALCUTTA* 64-65 (1977).

72. *Id.* at 67.

she responded to that woman.<sup>73</sup> Thirty-five years later, Mother Teresa had saved 42,000 people from dying in the streets.<sup>74</sup>

Mother Teresa, although an extreme example, may not be the exception. We see the same need to rise above current perceptions in the life of the Reverend Hydie R. Houston. We see once again that someone rising above those perceptions has been able to change the world in a very positive way. Reverend Houston, a graduate of Mount Holyoke College,<sup>75</sup> describes herself as having been happy in very traditional wife and mother roles during the 1960s.<sup>76</sup> She enjoyed financial advantages and social prestige.<sup>77</sup> However, her comfortable life was subsequently shattered when her two-month old daughter became sick on Good Friday and died two days later on Easter.<sup>78</sup> Shortly thereafter, Houston developed breast cancer and underwent a radical mastectomy.<sup>79</sup> Understandably, Houston initially saw these events as tragedies,<sup>80</sup> but as she allowed herself to ascend to a new set of perspectives, she came to see them as "life-molding, direction-changing experiences in disguise."<sup>81</sup> As her perspective gradually changed, her focus changed from "material things and social roles she was raised to fulfill"<sup>82</sup> to "visit[ing] the sick, the downtrodden, and the elderly,"<sup>83</sup> to whom Houston found she could feel compassion, particularly because of her own suffering.<sup>84</sup> Through all this, and by overcoming some additional old fears,

73. *Id.*

74. MOTHER TERESA, *supra* note 60, at 79.

75. Jerry Sharpe, *Enthusiasm is Written on Her Face*, PITT. PRESS, May 19, 1984, at B5.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* Reflecting on this transformation, Reverend Houston said: "Jesus Christ was the same age—33—when he was crucified and rose to new life. I was broken and, through faith in Him, I also rose to new life. I discovered that my faith grew stronger during both incidents." *Id.* In the life of Sister Faustina Kowalski, we can see a similar transformation of perspectives in the face of apparent personal tragedy. See TARNAWSKA, *supra* note 60. Through that transformation, Sister Faustina came to write in her diary:

I have asked You, O my Master, to take no heed of the pain of my heart, but to cut away whatever might hold me back from the path of love. I did not understand You, Lord in times of sorrow, when You were effecting Your work in my soul; but today I understand You and rejoice in my freedom of spirit.

*Id.* at 334 (entire passage italicized in original).

82. Sharpe, *supra* note 75, at col. 8.

83. *Id.*

84. *Id.*

Houston felt the need to become Reverend Houston,<sup>85</sup> and to celebrate each day that “[p]eople are wonderful.”<sup>86</sup>

Perhaps a poem anonymously written by a Civil War soldier best captures how radically different one’s life can look as one ascends old fears about Christian-based values to perspectives consistent with those values:

I asked God for strength, that I might achieve  
 I was made weak, that I might learn humbly to obey . . .  
 I asked for health, that I might do greater things  
 I was given infirmity, that I might do better things . . .  
 I asked for riches, that I might be happy  
 I was given poverty, that I might be wise . . .  
 I asked for power, that I might have the praise of men  
 I was given weakness, that I might feel the need of God . . .  
 I asked for all things, that I might enjoy life  
 I was given life, that I might enjoy all things . . .  
 I got nothing that I asked for—but everything I had hoped for.  
 Almost despite myself, my unspoken prayers were answered.  
 I am, among all men, most richly blessed!<sup>87</sup>

There is a bit of irony in having to defend Christian values to feminists in the 1990s, particularly when one recalls that at the same time as the Women’s Movement was beginning to challenge the values and shapes of the traditional social power structures, a Christian revival or “Jesus Movement” was underway calling people away from those same structures.<sup>88</sup>

85. *Id.*

86. *Id.* In support of this, Reverend Houston tells this story:

A transient man came in a couple days in a row. He kept saying how he’d love to have a loaf of good bread. I got one for him and went with him for coffee. But I didn’t want to embarrass him by paying for his coffee in front of everyone, so I gave him the money to buy a cup of coffee for himself. He took that money—the only money he had to his name—and wanted to buy me coffee with it. That’s what you call graciousness.

*Id.*

87. (copy on file with author) (omissions in original). However, a “Hagar the Horrible” cartoon by Dik Browne in which Hagar scales a snowy mountain to ask the wise man “the key to happiness” illustrates the other possible reaction. When the wise man responds, “Abstinence, poverty, fasting and celibacy,” Hagar asks, “Is there someone else up there I could talk to?”

88. Nancy Ward, *A Troubadour for the Lord*, NEW COVENANT, Apr., 1985, at 8, 11. Describing that movement, John Michael Talbot said: “[T]here was such a childlike openness, a childlike attitude regarding what Jesus was going to do in our midst.” *Id.*

So apparent was this movement in American society during this time that even among Top Forty music stations, a month seldom went by without some song with explicit or implicit Christian values making the charts. *Id.* In addition to the songs from STEPHEN SCHWARTZ, *Godspell on GODSPELL* (Arista 1971), and ANDREW LLOYD WEBBER & TIM RICE, *Jesus Christ, Superstar on JESUS CHRIST, SUPERSTAR* (Decca Records 1970), and songs by the Gospel group, the Edwin Hawkins Singers, and by Bob Dylan in his Christian phase, these hits included GLENN CAMPBELL, *Less of Me, on COAL MINER’S DAUGHTER* (Beechwood Music Corp. 1965); CHET POW-



One might try to downplay the irony by arguing that although the two movements called people away from some of those same structures, they did call them in different directions. Still, the reality persists that the two movements have come to invest incredible amounts of energy struggling against each other, while the structures they originally sought to escape or challenge have been for the most part free to watch those battles from a safe distance.

The experiences of Mother Teresa, Reverend Houston, and our Civil War soldier may ease past fears of the implications that Christian values may have for us. However, those experiences do not address the fears that we may have of the institutions that we perceive as having departed from those values. Those experiences, however, do not necessarily have to ease those fears. Returning to our third point, it may well be that one can live a life immersed in Christian values without endorsing Christian institutions. Although some find it easier to pursue these values in a Christian context or institution,<sup>89</sup> others do not. The agnostic leanings and disdain for the church felt by William Carlos Williams did not prevent him from living a compassionate, caring life providing medical treatment in the tenement houses of northern New Jersey's largely immigrant poor.<sup>90</sup> In defending that life, he said in words reminiscent of Reverend Houston's:<sup>91</sup> "Look, the rewards are great. All the time there is the satisfaction of doing something

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ERS, *Get Together*, on TICKET TO RIDE (Irving Music, Inc. 1963); GENE MACLELLAN, *Put Your Hand in the Hand*, on ANNE MURRAY COUNTRY (Beechwood Music of Canada 1970); RUSSELL AND SCOTT, *He Ain't Heavy; He's My Brother*, on HOLLIES' GREATEST HITS (Harrison Music Corp. 1969); TOMMY JAMES, MIKE VALE, AND EDDIE GRAY, *Crystal Blue Persuasion*, on CRIMSON & CLOVER (Roulette Records 1970); RADO AND RAGNI, *Easy to Be Hard*, on BEST OF THREE DOG NIGHT (United Artists Music Co. 1982); DON MCLEAN, *American Pie*, on AMERICAN PIE (Pickwick Records 1968); PAUL STOOKEY, *Wedding Song*, on CAPTAIN & TENILLE'S GREATEST HITS (Public Domain Foundation, Inc. 1971); GEORGE HARRISON, *My Sweet Lord*, on ALL THINGS MUST PASS (EMT 1970); RAY STEVENS, *Everything Is Beautiful*, on GREATEST HITS (Ahab Music Co., Inc. 1970); ELEANOR FARGEON AND CAT STEVENS, *Morning Has Broken*, on TEASER & THE FIRECAT (Freshwater Music LTD. 1971); CAROLE KING, *You've Got a Friend*, on TAPESTRY (Screen Gems-Columbia Music, Inc. 1971); CAROLE KING, *Natural Woman*, on TAPESTRY (Screen Gems-Columbia Music, Inc. 1967); ADRIENNE ANDERSON AND BARRY MANILOW, *Daybreak*, on MANILOW'S GREATEST HITS (Kamakazi Music Corp. 1976); and JOHN DENVER, *I Want to Live*, on JOHN DENVER'S GREATEST HITS (Cherry Lane Music Co. 1977). Judy Collins added to this explosion of new music by "climbing the charts" with the classic hymn *Amazing Grace*. JUDY COLLINS, *Amazing Grace*, on COLORS OF THE DAY: THE BEST OF JUDY COLLINS (Elektra Records 1972).

89. "In Community we see more clearly and more easily that we can live a message [of charity]." Larry Eck & Mary Sue Eck, *Our Lady Visits Birmingham*, 2 MEDJUGORJE MAG., Summer 1991, at 30, 36 (quoting Terry Colafrancesco who left a successful landscaping business to found Caritas [meaning "charity" or "love"] of Birmingham); see also *supra* note 60.

90. COLES, *supra* note 48, at 156-59.

91. See *supra* notes 75-86 and accompanying text.

half worthwhile—and being helped to feel better about yourself by the appreciative affection of those you've treated. *They treat you!*<sup>92</sup>

Even if one has reservations about Christian institutions but, unlike Williams, chooses to engage, rather than avoid, those institutions, the form of engagement may be flexible. At one extreme, the obedient St. Francis called the Catholic Church to a more intimate relationship with Christian values and succeeded in doing so in the context of his obedience to the Church.<sup>93</sup> At the other extreme, however, Kahlil Gibran loved the teaching of the Catholic Church while denouncing its methods; his fiery relationship with the institution found him a member, then an excommunicated member, and, just before his death, a member once more.<sup>94</sup> We might add to this group the spiritual author Simone Weil, who sought to live at the heart of Christian values while remaining apart from what she saw as the excesses of the church.<sup>95</sup> To those called to pursue Christian values within Christian contexts despite their misgivings about Christian institutions, the critical element seems not so much their approach but their commitment to the values. Although Francis, Gibran, and Weil had different approaches, all were committed to Christian values and sought to further those values rather than some personal or secular agenda.

This section has discussed the calling for the women's movement to enter a "second stage" in which it examines all aspects of society free from old fears and reactions. It further discussed the need to adopt compassionate Christian values during this process so that the structures we adopt in this stage transcend, rather than recreate, old structures. In order to illustrate all this and in the process more clearly define "Christian values," the next section will review the new approach to negligence tort analysis proposed by Professor Leslie Bender. The structure of her proposal suggests the kind of radical innovation that is needed in the second stage. However,

92. COLES, *supra* note 48, at 157 (emphasis in original).

93. TOMLE DE PAOLO, FRANCIS: THE POOR MAN OF ASSISI 13 (1982). We might also count Dorothy Day at this extreme; for Ms. Day, the response was to pray for the Church and recall her own weakness. COLES, *supra* note 63, at 10-11.

94. Martin L. Wolf, *Editor's Preface* to KAHLIL GIBRAN, THE SECRETS OF THE HEART (1971).

95. COLES, *supra* note 48, at 28-29. Simone Weil was a daughter of a well-to-do agnostic, Jewish family in Paris and became a brilliant writer at an early age. *Id.* at 29. Robert Coles described her in this way:

Simone Weil is often called a secular saint, but she would bristle at such a designation, and mock those who use it. She refused entrance to the Catholic Church because she wanted to be with hurt and sad outsiders at all costs. The Church was the property of too many contented, self-important burghers, she felt. She was a primitive Christian, I suppose—very much, one suspects, like those women who revered Christ, yearned to attend Him.

*Id.* at 30.

unless equally radical, compassionate values invigorate this proposal, the promise of the proposal will be broken and a negligence approach almost identical to the current one will remain.

### III. ILLUSTRATING THE IMPACT OF CHRISTIAN VALUES THROUGH A LOOK AT NEGLIGENCE LAW

It may seem paradoxical that for our illustration we are working with the integration of Christian values and our legal structure. Admittedly, there is something artificial in trying to inject Christian values into the legal system. This artificiality goes beyond a smug attempt at lawyer-bashing or all the problems Jesus had with lawyers.<sup>96</sup> At the core of this artificiality is the question of whether a set of values focused on love responding to need can exist within a legal structure built on duties and rights. This question arises because it would seem that once we impose a duty on someone to respond, we eliminate the possibility for the unselfish giving assumed in love. Similarly, while love can give unselfishly to one who has a need, there is no giving associated with responding to a right; there is only a taking by the one who has the right.

Perhaps on an equally fundamental level, one might ask whether those same values have a place in a legal system, which insists that liability must, at the very least, only be assessed against those who have caused an injury. As the "Good Samaritan" story contained in this section illustrates,<sup>97</sup> Christian values call us to help not because we have created a need but simply because a need exists. Finally, one might also ask whether liability would be an issue in a legal system based on Christian values where forgiveness plays a central role.<sup>98</sup>

Truly, we could not determine whether any legal system was saturated with Christian values without answering these questions. However, such a determination, valuable as it might be, remains beyond the scope of this section. The purposes of this section are to identify how difficult it is to reform social structures unless one radically changes values; and to identify Christian values and show how even their partial incorporation can greatly alter a social structure. This can be accomplished by simply looking at the impact of Christian values on the duty element of the negligence analysis.

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96. See, e.g., *Luke* 10:27-37.

97. See *infra* text accompanying notes 162-65.

98. See *supra* note 49. For an attempt at determining a strictly Judeo-Christian model for tort law, see Douglas Cook, *Negligence or Strict Liability? A Study in Biblical Tort Law*, 13 *WHITT. L. REV.* 1 (1992).

Thus, we need not determine how differently tort law would look if every one of its elements reflected Christian values.

This section will consider the current standard of care for negligence and discuss the standard of care suggested by Professor Bender. It will then analyze how Professor Bender's standard falls back into the current standard. Finally, it will explore how her standard might retain its integrity by accepting an infusion of Christian values.

*A. Moving from a "Reasonable Person" to a "Good Neighbor"  
Negligence Standard*

The current standard of care in negligence cases is the reasonable, prudent person standard, which is normally determined by using either the Learned Hand test<sup>99</sup> or a similar test from the *Restatement Second of Torts*.<sup>100</sup> Under the Hand test, to determine what care the reasonable person must exercise, one identifies the burden on the reasonable person of taking adequate precautions to avoid the injury.<sup>101</sup> That burden is balanced against the gravity of the injury should it occur multiplied by the probability that it will occur.<sup>102</sup> Traditionally this balance has been expressed as the algebraic equation:

$$\begin{aligned} \text{Burden} &< \text{Probability} \times \text{Loss} \\ &\text{or more simply} \\ \text{B} &< \text{PL.}^{103} \end{aligned}$$

The Restatement approach differs from the Hand test only in that it measures the burden and loss, factors in terms of social burden and loss rather than in terms of the burden and loss to the parties.<sup>104</sup>

In her article, *A Lawyer's Primer on Feminist Theory & Tort*,<sup>105</sup> Professor Leslie Bender rejects both the focus of these tests and their algebraic format.<sup>106</sup> To devise a replacement for these tests, Professor Bender attempts to build a new standard from what she believes to be different and more compassionate values than those upon which the old tests have been built.<sup>107</sup>

99. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

100. RESTATEMENT (SECOND) OF TORTS §§ 291-93 (1977).

101. *Carroll Towing*, 159 F.2d at 173.

102. *Id.*

103. *Id.*

104. RESTATEMENT (SECOND) OF TORTS §§ 291-93 (1977).

105. Bender, *supra* note 6.

106. *Id.* at 31.

107. *Id.*

For Professor Bender, the need to alter current negligence standards arises out of society's need to abandon "the masculine voice of rights, autonomy and abstraction,"<sup>108</sup> a voice that "protects efficiency and profit,"<sup>109</sup> and to adopt instead a "feminine voice."<sup>110</sup> Unlike the masculine voice, the feminine voice "encourages behavior that is caring about others' safety and responsive to others' needs or hurts, and . . . attends to human contexts and consequences."<sup>111</sup> Given "the feminine voice's ethic of care—a premise that no one should be hurt,"<sup>112</sup> Professor Bender would "convert the present standard of 'care of a reasonable person under the same or similar circumstances' to a standard of 'conscious care and concern of a responsible neighbor or social acquaintance for another under the same or similar circumstances.'"<sup>113</sup>

This standard of care would extend not only to one's actions but also to one's failure to act.<sup>114</sup> To operate this "responsible neighbor" standard appropriately, one would have to accept "a feminist focus on caring, context, and interconnectedness."<sup>115</sup> Acceptance of that focus would allow us to "move beyond measuring appropriate behavior by algebraic formulas to assessing behavior by its promotion of human safety and welfare."<sup>116</sup>

Within the feminist focus, Professor Bender defines "caring" not "in the sense of nurturing,"<sup>117</sup> as we might respond "to our children or lovers,"<sup>118</sup> but as "a conscious concern for the consequences our actions or inactions might have on another's safety or health."<sup>119</sup> It is primarily by building on this concern for others that Professor Bender attempts to limit negligence liability according to what we can respond to "without exhausting our ability to care,"<sup>120</sup> rather than utilizing a "decontextualized" algebraic equation<sup>121</sup> such as the Hand test.<sup>122</sup> In fact, Professor Bender's opposition to algebraic tests is at the heart of her view that we need a new negligence standard. In rejecting such tests, Professor Bender asks rhetorically: "What

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108. *Id.*

109. *Id.* at 32.

110. *Id.* at 28.

111. *Id.* at 32.

112. *Id.* at 31.

113. *Id.*

114. *Id.* at 32.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 35.

122. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

gives us the authority to take contextual, actual problems and encode them in a language of numbers, letters, and symbols that represents no reality in any actual person's life?"<sup>123</sup>

As Professor Bender's question indicates, she believes that the negligence standard must be applied to the context of the event. The purpose of "interconnectedness" in the feminine focus is to allow us to understand the full extent of that context. For Professor Bender, interconnectedness communicates the "recognition that we are all interdependent and connected and that we are by nature social beings who must interact with one another."<sup>124</sup> Having recognized this, one can no longer look at the negligence victim's injury as the sole damage done by the act. Rather, one must accept that the victim

is not the only person affected by the lack of care. He is not detached from everyone else. He no doubt has people who care about him—parents, spouse, children, friends, colleagues; groups he participates in—religious, social, athletic, artistic, political, educational, work-related; he may even have people who depend upon him for emotional or financial support. He is interconnected with others.<sup>125</sup>

Thus, once we are open to considering the context of our actions, we must see how interconnected we all are and how expansive the implications of our actions can be. Once we realize how many people are affected or injured by our actions, we must become more responsible, and both our capacity to care and, consequently, the scope of our liability for negligent actions must increase. Thus, while our capacity to care may create the new standard within Professor Bender's perspective, context and interconnectedness dictate how large that capacity, and hence, that standard must be.

To illustrate the working of her standard, Professor Bender applies it to a traditional "failure to act" hypothetical where a person chooses not to rescue a drowning stranger.<sup>126</sup> In applying her standard, Professor Bender theorizes:

How would this drowning-stranger hypothetical look from a new legal perspective informed by a feminist ethic based upon notions of caring, responsibility, interconnectedness, and cooperation? If we put abstract reasoning and autonomy aside momentarily, we can see what else matters. In defining duty, what matters is that someone, a human being, a part of us, is drowning and will die without some

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123. Bender, *supra* note 6, at 35.

124. *Id.* at 31.

125. *Id.* at 34-35.

126. *Id.* at 33-36.

affirmative action. That seems more urgent, more imperative, more important than any possible infringement of individual autonomy by the imposition of an affirmative duty.<sup>127</sup>

The hypothetical not only looks different from a feminine legal perspective than it does from a traditional perspective, but also it is resolved differently within the feminine perspective. The traditional perspective will not impose liability in this situation because it does not impose an affirmative duty in the absence of a special relationship. The feminine perspective, however, would impose liability because an interconnected human being's life is at stake.<sup>128</sup>

Although Professor Bender's presentation of this hypothetical highlights differences between the traditional and feminist perspectives, those differences are not as great as they initially appear. First, despite Professor Bender's dislike of algebraic equations,<sup>129</sup> her standard seems to drift into one. This occurs primarily because Professor Bender cannot impose upon people an absolute duty to care for others; she concedes that at some point a person's ability to care can be exhausted.<sup>130</sup> Once we lack that definitive standard, we drift into the following balance described by Professor Bender: "[W]e could evaluate behavior as negligent if its care or concern for another's safety or health fails to outweigh its risk of harm."<sup>131</sup> This balance drifts even closer to the traditional negligence equation<sup>132</sup> as Professor Bender clarifies the weights on her balance. Professor Bender does this when she applies her standard in the context of the drowning stranger hypothetical:

If we used feminist theory and feminist perspectives to choose how we wanted our society structured, which is what we do when we establish laws or rules of law (whether through legislative or judicial actions), we would not choose a society that legally condoned *one person's allowing a stranger to drown when saving that life could have been accomplished at no cost or minimal cost.*<sup>133</sup>

On the "risk of harm" side, Professor Bender weighs the victim's interest, which is that person's life, and also the risk or certainty of that harm, which is certain if the nonactor allowed it to proceed. On the "care or concern" side, Professor Bender weighs the saving that "could have been

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127. *Id.* at 34.

128. *Id.*

129. See *supra* text accompanying notes 116, 120-23.

130. Bender, *supra* note 6, at 32.

131. *Id.*

132. See *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947); RESTATEMENT (SECOND) OF TORTS §§ 291-93 (1977).

133. Bender, *supra* note 6, at 36 n.125 (emphasis added).

accomplished at no cost or minimal cost,"<sup>134</sup> suggesting that the care or concern exhibited can be measured by the burden assumed or rejected. Thus, despite her best intentions, Professor Bender formulates a negligence test that balances the weight of the victim's interest together with the risk of harm to that interest against the weight of the burden on the nonactor in avoiding the harm. The similarity between that and Learned Hand's (Burden) < (Probability) (Loss) test<sup>135</sup> is unmistakable. In both equations, the weights on the scales are the victim's interest, the risk or probability of harm to that interest, and the defendant's burden or cost of avoiding the harm.

Critical to the merger of the two standards is Professor Bender's link between her "care or concern" side and the burden in terms of the cost of avoiding the drowning. This link may well have arisen because "care or concern" is not easily measured and hence not easily weighed in a balance test. Each side of the balance must be measurable if we are to use the balance to determine the limits of liability. Professor Bender acknowledges this problem in the administration of her test in a footnote:

How we would implement or enforce such rules, in which situations our duty to aid would be too attenuated to enforce, and how we would determine where the limits on our personal energies and resources to aid should be defined seem to be inappropriate questions at this juncture. Although they may be relevant, they arise in all situations in which there are rules and would be resolved in much the same manner that we now resolve line-drawing and enforcement problems.<sup>136</sup>

Professor Bender's proposed solution to her administrative problems is to resolve them in "much the same manner that we now resolve line-drawing and enforcement problems."<sup>137</sup> Although surprising, that proposal is entirely consistent with how we see the feminine standard work in the drowning person hypothetical. We currently resolve similar line-drawing problems by taking the concept of "reasonable" and dividing it into elements to which we can arbitrarily assign monetary values to reflect "utility or economic efficiency."<sup>138</sup> This solves our administrative problems by allowing us to avoid comparing different things like concern and injury and allowing us instead to compare assigned monetary or utility values. It does

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134. *Id.*

135. *Carroll Towing*, 159 F.2d at 172.

136. Bender, *supra* note 6, at 34 n.120.

137. *Id.*

138. *Id.* at 30.



not, however, solve those problems in a manner consistent with an ethic of care over efficiency.

One might suggest that this inconsistency is overcome if we acknowledge that monetary interests can breed "caring": that in the end, we can communicate "caring" by speaking the language of money.<sup>139</sup> As Professor Bender notes, the imposition of a duty of care, carrying with it the effect of monetary liability, "require[s] the actor to consider the human consequences of her failure to rescue"<sup>140</sup> and "encourages behavior that is caring about others' safety and responsive to others' needs or hurts."<sup>141</sup> If by "caring," however, the feminine voice means that people fearing liability will seek to expand the attention they pay to others, then it would seem that the feminine voice has the same tone of "efficiency and profit"<sup>142</sup> heard in the masculine voice.

Despite the ways in which the feminist standard seems to merge with the traditional standard, Professor Bender would still maintain that consideration of interconnectedness, by itself, makes the feminist standard significantly different from the traditional approach:

Even though it is easier to understand the problem if we hone it down to "relevant facts," which may include abstracting the parties into letter symbols (either A and B or P and D) or roles (driver and passenger), why is it that "relevant facts" do not include the web of relationships and connected people affected by a failure to act responsibly with care for that person's safety? Why is it that our legal training forces us to exclude that information when we solve problems and make rules governing social behavior or for compensating some victims of accidents? Why should our autonomy or freedom not to rescue weigh more heavily in law than a stranger's harms and the consequent harms to people with whom she is interconnected?<sup>143</sup>

The manner in which Professor Bender defines "interconnectedness" provides answers to the questions she asks of the traditional system to determine why that system does not consider interconnectedness. For Professor Bender, interconnectedness, as applied, does not seem to define a relationship shared by the victim and defendant, because they are both human beings.<sup>144</sup> Rather, interconnectedness represents the large number of potential relationships that the victim enjoys as part of a community.

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139. *But see infra* text accompanying notes 167-72.

140. Bender, *supra* note 6, at 35.

141. *Id.* at 32.

142. *Id.*

143. *Id.* at 35.

144. *See also infra* note 186 and accompanying text. *But see id.* at 34.

Through interconnectedness, Professor Bender asks the traditional system why it does not include, on the injury side, all the emotional suffering that the victim's friends and family members would suffer from the victim's injury. We first may find the response of the traditional system to be a refusal of recovery to those people in their own right for negligent infliction of emotional distress—their interests would not be weighed here because these injuries are too remote<sup>145</sup> and too speculative.<sup>146</sup> Simply stated, at the time of her action or inaction, the defendant had no way of knowing whether her victim had an uncle and, even if the victim did have one, the defendant had no way of knowing whether that uncle would feel injured. Second, advocates of the traditional system might add that if we were to determine that the uncle's injury was foreseeable for the purpose of making the defendant liable to her original victim, we would also have to say the uncle's injury was foreseeable for the purpose of making the defendant liable for the uncle's emotional distress. Thus, by accepting this view of interconnectedness, we would remove all limits on negligent infliction of emotional distress and expose all negligence defendants to limitless liability.

Regardless of the validity of the second argument, the first argument presents a problem. We are not all interconnected to the same degree, and some of us are not interconnected at all.<sup>147</sup> The reality of some people's isolation has not escaped Professor Bender, but she maintains that even these people are interconnected.

Even if he is a hateful, alienated person who lives a reclusive existence, the "no duty" rule in this case would have repercussions beyond the two individuals involved. There are those who are negatively affected by the knowledge that it is lawful in our society to do nothing, when one could easily help, while another is drowning. The detrimental effect on one's belief in the legitimacy of our social, political, and legal arrangements is frequently accounted for in "rule utilitarian" analyses.<sup>148</sup>

If in some cases interconnected means that some people do not like the existence of a rule, while in other cases it means that hundreds of people will be distressed for the loss of a loved one, then the value of interconnectedness can vary radically; and if weighed heavily, it could become the determinative factor in the negligence equation. Thus, behavior that in-

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145. WILLIAM PROSSER & PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 360-61 (5th ed. 1984).

146. *Id.*

147. See, e.g., CHARLES DICKENS, A CHRISTMAS CAROL (Bonanza Books 1985) (Scrooge is a fine example).

148. Bender, *supra* note 6, at 35 n.122.

jured a beloved public figure, such as a Bruce Springsteen or Lucille Ball, would be negligent simply because that person was so interconnected, but the same behavior might not be negligent if it injured Ebenezer Scrooge.<sup>149</sup> The irony in this is that while the feminist perspective seeks to stress the importance of life simply because it is life, it introduces into the issue a factor that makes some lives more valuable than others.

As one brings all of this together, one might ask if the feminist perspective offers us anything we do not already have. In this perspective, "care and concern" suggest a different standard, but they are eventually defined in a way that leaves them looking remarkably like the current burden factor. "Context and interconnectedness" reflect values unique to this perspective, but they are defined in a way that makes them too unpredictable and variable to carry much weight in the overall evaluation. Professor Bender at one point indicates a potential value in her approach because this caring standard allows us to adjust the degree of care to the relationship of the parties.<sup>150</sup> However, the current negligence standard already allows for that as demonstrated by the flexibility in the standards of care for owners and occupiers of land.<sup>151</sup>

Still, if the two approaches are so similar, one might wonder why they generate different results in the drowning person hypothetical. One might think initially it was because the feminine perspective weighs life more heavily than the traditional view. This, however, is not necessarily true. In fact, many cases in the traditional approach weigh life and limb very heavily.<sup>152</sup> The answer lies in the fact that the current doctrine for liability for inaction does not use the Hand test, which the feminine perspective resembles. In fact, the rule that excludes liability for negligent inaction is an absolute rule, isolated in the realm of its application, and predates the Hand balancing test.<sup>153</sup> As that absolute rule erodes and is replaced by the Hand balancing test, we would expect to see results much more consistent with those generated by the feminine perspective. In fact, Professor Bender notes a trend in this area of no duty associated with a failure to act<sup>154</sup> that bears out this very point.

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149. DICKENS, *supra* note 147.

150. Bender, *supra* note 6, at 32.

151. PROSSER & KEETON, *supra* note 145, at 383. *But see* Bender, *supra* note 6, at 33.

152. *See, e.g.*, Katko v. Briney, 183 N.W.2d 657 (Iowa 1971); Delair v. McAdoo, 188 A. 181 (Pa. 1936).

153. PROSSER & KEETON, *supra* note 145, at 373-76.

154. Bender, *supra* note 6, at 36 n.125; *see also* PROSSER & KEETON, *supra* note 145, at 376-77.

This discussion does not suggest that Professor Bender has offered us nothing new. On the contrary, if we go back to her standard as proposed, rather than as applied, we see the kind of radical restructuring of a social institution for which the second stage calls. The problem arises in the application of her test, because Professor Bender fails to maintain the values introduced to us when she presented her test. Perhaps this results from a "false fear" manifesting itself in the application process.

The values upon which Professor Bender initially builds her test call to mind Christian values. Professor Bender, however, may have very negative notions of what Christian values are. At one point she groups them with "ethnocentric, androcentric, racist, . . . and class-based" values.<sup>155</sup> These negative notions preclude her from developing her values along Christian value lines, and the result is that which we were warned of earlier:<sup>156</sup> Because Professor Bender is not conscious of, or open to, Christian values, the application of her new legal structure turns to current "worldly" values and transforms itself back into the current legal structure. That, however, need not be the fate of Professor Bender's test. If we infuse Professor Bender's test with the same values on which she initially begins to build, then when construction is complete, we end up with a test with all the promise that her test initially offered.

### *B. Introducing the "Responsible Neighbor" to the "Good Neighbor"*

Professor Bender initially offers us a "responsible neighbor standard"<sup>157</sup> focused "on caring, context, and interconnectedness"<sup>158</sup> and limited only by our "exhausting ability to care."<sup>159</sup> Such a standard will, among other things, end the need to measure "appropriate behavior by algebraic formulas."<sup>160</sup>

To understand this standard in a Christian context, we must first define it in the terms of Christian values, "neighbor," "care," and the point at which our ability to care would be exhausted. In the New Testament, Jesus instructs us to love "your neighbor as yourself."<sup>161</sup> In response to this a lawyer asks Jesus:

"And who is my neighbor?" Jesus replied, "A man was going down from Jerusalem to Jericho, and he fell among robbers, who stripped

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155. Bender, *supra* note 6, at 10.

156. See *supra* text accompanying notes 49-60.

157. Bender, *supra* note 6, at 30.

158. *Id.* at 32.

159. *Id.*

160. *Id.*

161. Luke 10:27.

him and beat him, and departed, leaving him half-dead. Now by chance a priest was going down that road; and when he saw him he passed by on the other side. So likewise a Levite, when he came to the place and saw him, passed by on the other side. But a Samaritan, as he journeyed, came to where he was; and when he saw him, he had compassion, and went to him and bound up his wounds, pouring on oil and wine; then he set him on his own beast and brought him to an inn, and took care of him. And the next day he took out two denarii and gave them to the inn-keeper, saying "Take care of him; and whatever more you spend, I will repay you when I come back." Which of these three, do you think, proved neighbor to the man who fell among the robbers?" He said, "The one who showed mercy on him." And Jesus said to him, "Go and do likewise."<sup>162</sup>

Having read the response, we can see that in a Christian context, "neighbor" is not a pre-existing relationship from which a duty to care can be imposed. Rather, "neighbor" is a relationship that is created when one shows mercy to another. A clever lawyer might argue, therefore, that to follow the initial command of Jesus, one need only love as oneself those people whom she has made a neighbor by first showing mercy. That, however, ignores Jesus' final instructions—"Go and do likewise," have mercy even on your enemies, make the world your neighbors, and love all those neighbors as yourself.<sup>163</sup> This episode is particularly striking when we recognize that Jesus makes a Samaritan the hero of the parable, and a Samaritan village had only recently refused to receive him.<sup>164</sup>

If in this context, Professor Bender's test is a call to go out and care for the world, we must move to our next two questions: What is the Christian view of "caring" and what are its limits? From Jesus, the instruction on how to care comes in this form: "[L]ove one another as I have loved you. Greater love has no man than this, that a man lay down his life for his friends."<sup>165</sup> Given the immenseness of this instruction, to give to all people as Jesus did, down to our very life, it is almost impossible to understand it at first glance. Therefore, we need to pause for a moment to reflect on the meaning of that instruction. To do so, we may consider the depth of feeling that pervaded the love of Jesus:

The compassion that Jesus felt was obviously quite different from superficial or passing feelings of sorrow or sympathy. Rather, it ex-

162. *Luke* 10:29-37.

163. See *Luke* 6:27-38; *Matthew* 5:43-48.

164. *Luke* 9:51-53. This is also striking because Jews and Samaritans did not generally associate with one another. *John* 4:9.

165. *John* 15:12-13.

tended to the most vulnerable part of his being. It is related to the Hebrew word for compassion, *rachamin*, which refers to the womb of Yahweh. Indeed, compassion is such a deep, central, and powerful emotion in Jesus that it can only be described as a movement of the womb of God. There, all the divine tenderness and gentleness lies hidden. There, God is father and mother, brother and sister, son and daughter. There, all feelings, emotions, and passions are one in divine love. When Jesus was moved to compassion, the source of all life trembled, the ground of all love burst open, and the abyss of God's immense, inexhaustible, and unfathomable tenderness revealed itself.

This is the mystery of God's compassion as it becomes visible in the healing stories of the New Testament. When Jesus saw the crowd harassed and dejected like sheep without a shepherd, he felt with them in the center of his being. When he saw the blind, the paralyzed, and the deaf being brought to him from all directions, he trembled from within and experienced their pains in his own heart. . . . And so it was with the two blind men who called after him, the leper who fell to his knees in front of him, and the widow of Nain who was burying her only son. They moved him, they made him feel with all his intimate sensibilities the depth of their sorrow. He became lost with the lost, hungry with the hungry, and sick with the sick.<sup>166</sup>

Thus, if we rely on Christian values, our standard of care must call us to love all those in need of mercy and to love them so that we give up our very lives and are lost with the lost, hungry with the hungry, and sick with the sick.<sup>167</sup>

Before we may move on to the implications this has on Professor Bender's work, we must understand one more thing about love as a component of Christian values: love is not a standard to which one conforms but

166. DONALD MCNEIL ET AL., *COMPASSION: A REFLECTION ON THE CHRISTIAN LIFE* 16-17 (1983) (italics in original).

167. We may see the totality of this giving of self in the progression of Jesus through the Passion. First, in the Garden of Gethsemane, Jesus gives His Will over to God: "Father, if thou art willing, remove this cup from me; nevertheless not my will, but thine be done." *Luke* 22:42-43. Second, before Pilate when Jesus allows Himself to be scourged, He gives over His body. *Mark* 15:15. Third, when Jesus is mocked by the soldiers, He gives his majesty or dignity. *Mark* 15:16-20. Fourth, as the process of separating Jesus from His friends is completed and a stranger is called to help Jesus carry the cross, Jesus gives up His sense of community. *Mark* 16:21. Finally, on the cross, Jesus gives not only His life but His power to see God: "My God, My God why hast thou forsaken me?" *Matthew* 27:46. It is only after Jesus has given His will, His body, His dignity, His community, His omnipotence, and His life that Jesus says, "It is finished." *John* 19:30.

is a process in which one grows.<sup>168</sup> Thus, as love functions in Christianity, it is not the traditional, objective yardstick that tort law has demanded as a device against which to measure behavior. While negligence law might ask “were you reasonable?” or “were you caring?” the question to be asked within the Christian context would be “did you try to love?” This distinction is illustrated in a statement by Jesus in Maria Valtorta’s *Life of Jesus, The Poem of the Man-God*.<sup>169</sup> “Convince them that it is enough to do one’s best and God is satisfied.”<sup>170</sup> Although not result oriented, this focus on trying to do one’s best is not, to be sure, an excuse for half-hearted effort. To succeed here the effort must be “with all your heart.”<sup>171</sup>

Demanding as it may be to seek with all one’s heart to be, for example, hungry with the hungry, the standard is perhaps still less demanding than the result-based value from which Professor Bender begins—“the feminine voice’s ethic of care—a premise that no one should be hurt”<sup>172</sup>—if only because the Christian value requires only perfect effort and the feminine ethic requires perfect success. Professor Bender retreats from this by suggesting that we could not abide by such demanding standards “without exhausting our ability to care.”<sup>173</sup> Under Christian values, however, there is

168. Having recognized this distinction of love as a process in which we grow, rather than as a standard, we can understand why Christian writings often focus so much on how love begins for a person rather than on what the perfectly loving person would be. In the writings of Mother Teresa, for example, we find the commencement of loving to be a regular theme: “Remember where your love starts: in the home.” MOTHER TERESA, *supra* note 57, at 84. “[S]miling is the beginning of love. . . . And once we begin to love one another, the desire to do something more naturally follows.” *Id.* at 86. “So you begin . . . I begin. I picked up one person - maybe if I didn’t pick up that one person I wouldn’t have picked up 42,000.” MOTHER TERESA, *supra* note 60, at 79.

169. VALTORTA, *supra* note 1.

170. *Id.* at 764. These thoughts are echoed in a prayer of Thomas Merton, a twentieth century pilgrim who wandered through a worldly life until he found peace as a Trappist Monk. See generally, THOMAS MERTON, *THE SEVEN STOREY MOUNTAIN* (1948). In the prayer, Merton says:

Dear God:

I have no idea where I am going. I do not see the road ahead of me. I cannot know for certain where it will end. Nor do I really know myself, and the fact that I think that I am following your will does not mean that I am actually doing so. But I believe this: I believe that the desire to please you does in fact please you. I hope I have that desire in everything I do. I hope I never do anything apart from that desire. And I know that if I do this you will lead me by the right road though I may know nothing about it at the time. Therefore I will trust you always for though I may seem to be lost, and in the shadow of death, I will not be afraid because I know you will never leave me to face my troubles all alone.

Thomas Merton, *MARY’S PEOPLE*, June 23, 1991, at M17.

171. *Jeremiah* 29:13 (“[W]hen you seek me [God] with all your heart, I will be found by you . . .”).

172. Bender, *supra* note 6, at 31.

173. *Id.* at 32.

no such limitation on love's capacity or ability: "Love bears all things, believes all things, hopes all things, endures all things."<sup>174</sup> The only limit is the extent to which we have grown in our ability to turn ourselves over to loving.

There is something reassuring in Professor Bender's concession here and in hearing her say that "we could not possibly have the energy to care about every person as we do our children or lovers."<sup>175</sup> The idea that we can give this much, share this much, suffer this much and, hence, love this much "strikes us as naive, romantic, or at least unrealistic . . . For those who do not live in a dream world and keep their eyes open to the facts of life, compassion can at most be a small and subservient part of our competitive existence."<sup>176</sup>

Such reassurance in our limitations and skepticism about our capacity to love, however, are not the kin of the bold and radical approaches that must mark the second stage. Rather, they steer us back to the utilitarian, competitive structures we now have. Thus, as noted earlier, Professor Bender's decision to balance interests rather than pursue an absolute standard of caring is the critical thread that ties her back to a Hand-type algebraic balance.<sup>177</sup> If we are to escape such a test, we must put to rest our old reservations about our own capacity to love.

People do try to love selflessly. Although we would like to believe that these people are different from us, they are not. They have the same flesh, the same blood, the same heart, the same feeling, and surprisingly, the same fears and frustrations. For example, as much as we would like to distinguish Mother Teresa as some unobtainable aberration in human behavior, she is the first to acknowledge the frailty she shares with the rest of us. Once when asked if she was married, she admitted: "Yes, and sometimes I find it very difficult to smile at Jesus because he can be so demanding."<sup>178</sup>

174. *I Corinthians* 13:7.

175. Bender, *supra* note 6, at 32.

176. MCNEIL ET AL., *supra* note 167, at 5. *But see id.* at 7-9.

177. *See supra* text accompanying notes 129-42.

178. MOTHER TERESA, *supra* note 57, at 22. Particularly touching is Mother Teresa's discussion of the love shown to her by a dying woman and Mother Teresa's acknowledgment that she herself could not have been so loving at that moment. *Id.* at 10.

In the Catholic tradition, there is also acceptance that even God recognizes that acceptance of this call is intimidating. In the writings of one Catholic mystic, we find Jesus offering these words of encouragement:

Cling to Me ever so closely as I call your soul to an espoused union of love. Be at peace and rejoice! Do not fear the heights! They are where I dwell and where you must dwell if you are to remain in constant union with Me. The rocky cliff upon which you have climbed is the way to Me. Do not be frightened or discouraged by the steepness of the climb. Be at peace with your struggle. If you but make the effort, I will reach out My hand and grasp



These people do, however, have a different vision of the world than most of us, and in that vision, they see love not as draining but as fulfilling. As Sister Faustina Kowalska<sup>179</sup> explained: "God so created the world, that in giving to others, we make ourselves rich. Our own souls grow in proportion to the greatness of our love of neighbors."<sup>180</sup> Nowhere in the Bible is this vision of love more strikingly shown than in the story of the widow called by the prophet Elijah to share with him her last bit of flour and oil.<sup>181</sup> Although the widow gives away all she believes she has, her jar of meal and jug of oil never run out but instead become full and feed her and her son for many days.<sup>182</sup> Thus, rather than draining her, her love both saves and fulfills her.

Both the Old and New Testaments are filled with language that testify to love doing for everyone what it does for the widow. For example, in the Old Testament we are told that those who love God will "not want,"<sup>183</sup> will be "restored,"<sup>184</sup> and "shall renew their strength, they shall mount up with wings like eagles, they shall run and not be weary, they shall walk and not faint."<sup>185</sup> This message is taken even further in Matthew of the New Testament where we are told that "whoever would save his life will lose it, and whoever loses his life for my [Jesus's] sake will find it."<sup>186</sup> Thus, all efforts to preserve oneself will be fruitless, and only by trying to love with all one's heart can one begin to gain oneself.

Certainly this runs counter to a culture bent on goals of self-fulfillment, self-awareness, self-esteem, and the emancipation of self, a culture convinced that only by turning inward does one achieve these goals. But perhaps, we need an alternative to that culture. In our struggle to find ourselves, are we just bounding from relationship to relationship, job to job, addiction to addiction, distraction to distraction? In our struggle to identify ourselves, are we simply defining ourselves in terms of a type of car, a brand of soda, or a kind of jeans? And is our path toward "self" any more than

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you, drawing you closely to Me where you will find your rest and the joy which surpasses earthly pleasures. How shallow they are in comparison to the joy which My love brings to My espoused souls. Blissful and eternal love is yours for the asking, but first you must desire this above all else in your life and proceed in courage and faith in your ascent to Me.

MARIAMANTE, *THE APOSTOLATE OF HOLY MOTHERHOOD* 104 (1991).

179. See TARNAWSKA, *supra* note 60.

180. *Id.* at 323.

181. *I Kings* 17:8-16.

182. *Id.* at 15-16.

183. *Psalms* 23:1.

184. *Id.* at 2.

185. *Isaiah* 40:31; see also *Matthew* 11:28-30 ("Come to me [Jesus], all who labor and are heavy-laden, and I will give you rest.").

186. *Matthew* 16:25.

an expedition through mass movements, self-help books, and popular psychological theories all designed to reduce all people to a common set of responses to a common set of experiences? If that is truly "the search for self," then we truly are lost.

So much of this dichotomy is captured in the reflections of Dorothy Day,<sup>187</sup> for fifty years a Christian servant of the poor and working classes:

Something happened to me when I was around twenty-five. I think I began to feel myself drifting toward nowhere. I had lived a full and active life, and I was glad I had met so many good people, interesting and intelligent people. But I yearned for something else than a life of parties and intense political discussions, though I still like to sit and discuss what is happening in the world: 'current events,' as they say in high school. When I fell in love with Forster I thought it was a solid love—the kind we had for a while—that I had been seeking. But I began to realize it wasn't the love between a man and a woman that I was hungry to find, even though I had enjoyed that love very much and Forster and I were as close as could be. When I became pregnant I thought it was a *child* I had been seeking, motherhood. But I realized that wasn't the answer either: I loved Forster, I was as happy as I had ever been when pregnant, and when Tamar was born I was almost delirious with joy, and I could hold and hold and hold her, and feel that with her in my arms my life's purpose had been accomplished.

But only for so long did I feel like that, I have to admit.<sup>188</sup>

When Ms. Day stopped drifting, it was to embrace God and join the church. Echoing the passage from Matthew, she explained that decision: "I wanted to die in order to live, to put off the old man and put on Christ . . . I loved, in other words, and like all women in love, I wanted to be united to my love."<sup>189</sup>

After deciding to "die in order to live," Dorothy Day did not become an empty jar, or in modern terms a hollow shell; rather, her life became fuller, and she became one of the most dynamic women of the twentieth century. Similarly, although Mother Teresa has given more of herself than any of us contemplate giving in the immediate future, one could hardly suggest that this determined woman has no identity. In fact, the more of herself she gives away each day, the more of her that is available to give away the next

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187. See COLES, *supra* note 63.

188. *Id.* at 61-62.

189. *Id.* at 60-61.

day, and the more clearly defined it becomes to her, to her order, and to the world exactly who she is and what she is about.<sup>190</sup>

Once we liberate ourselves to the perspective that love is fulfilling, difficult as that may be, we have no need for weighing interests or pricing the value of what we give or what we save. The act of caring sustains itself:

[T]o love God, and out of that love for Him to love souls. In the brain of Sister Faustina, weakened and battered by suffering, this single thought was retained, clearly, precisely and obstinately. She had no strength to reflect on other problems of sanctity. She was wholly consumed in what she was giving, neither weighing nor pricing the greatness of her gift.<sup>191</sup>

Similarly, Dorothy Day explained her work providing for the poor:

We are here because *we* are in need. We are here because *we* are hungry. I am always being told how nice it is that *we* feed *them*; but I know in my heart that *we* are being fed all the time, and if it is hard to explain that to others, then we have to keep trying, because Christ asked it of us—the recognition that He is part of suffering, wherever it takes place, and of course, so are we.<sup>192</sup>

The work of Professor Anthony Fejfar indicates that our feelings of apprehension about unrestrained compassion toward all people represent a stage in our ethical maturity leading ultimately to our embracing such compassion.<sup>193</sup> Professor Fejfar would point out that when Professor Bender leads us away from a self-motivated negligence standard to a standard focused on caring for others, she is advancing us toward more mature val-

190. Professor Fejfar and others associate this process of loving with transcending “ego-centricity” or “unauthentic selfhood” and, thus, leaving behind “neurotic distortion” to gain a “truly free authentic self.” Fejfar, *supra* note 70, at 238 n.45.

191. TARNAWSKA, *supra* note 60, at 338.

192. COLES, *supra* note 48, at 48 (emphasis in original); see also “Prayer of St. Francis”:

Lord, make me an instrument of Thy peace:

Where there is hatred let me sow love,  
Where there is injury let me sow pardon,  
Where there is doubt let me sow faith,  
Where there is despair let me sow hope,  
Where there is darkness let me sow light,  
Where there is sadness let me sow joy.

O Divine Master, grant that I may  
not so much seek to be understood as to understand,  
to be consoled as to console,  
to be loved as to love.

For it is in giving that we receive,  
and it is in pardoning that we are pardoned,  
and it is in dying that we are born to eternal life.

193. Fejfar, *supra* note 70.

ues.<sup>194</sup> However, our emotional maturity need not stop there. While Professor Bender posits a need for a sliding scale of caring because "we all care differently for family and friends than we do for strangers,"<sup>195</sup> Professor Fejfar recognizes that such differences in caring represent not a necessity of life but only an intermediate stage in our maturity.<sup>196</sup> Professor Fejfar argues that if we pursue maturity in values, we will transcend the stage in which Professor Bender places us and eventually even that of Sister Faustina and Ms. Day:

The exigence of the affective conversion process is the thrust toward transcendent absolute Love. An initial affective conversion extending only to a significant other or immediate family member, will, if not interfered with, expand according to the exigence of transcendence to include neighbors, all of humanity, the earth, and ultimately, culminating into a cosmic being-in-love which can be characterized as the full integration of loving transcendence.<sup>197</sup>

The views of Mother Teresa of Calcutta bear out Professor Fejfar. Mother Teresa would agree that love takes on a special role in the home: "Love begins at home. If we do not love one another who we see 24 hours how can we love those we see only once?"<sup>198</sup> For Mother Teresa, however, our call to love does not stop in the home. Rather, once we understand how love asks us to respond to our family in the home, we can know how to respond with love to our family of all people beyond the home:

The same loving hand that has created you  
has created me.  
If he is your Father  
he must be my Father also.  
We all belong to the same family.  
Hindus, Muslims and all peoples are our brothers  
and sisters.  
They too are the children of God.  
Our work among the Hindus proclaims that  
God loves them  
God has created them  
they are my brothers and sisters.<sup>199</sup>

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194. *Id.* at 291. "A person integrates *affective* transcendence when one 'acts not just for self, but for others as well,' in the dynamic state of being-in-love." *Id.* (emphasis added).

195. Bender, *supra* note 6, at 32.

196. Fejfar, *supra* note 70, at 292.

197. *Id.* (citations omitted). This process may in fact have been exhibited in the life of Dorothy Day. See, e.g., COLES, *supra* note 63, at 45.

198. MOTHER TERESA, *supra* note 60, at 54.

199. *Id.* at 35.

As Professor Bender points out, although “[t]he legal standard of care may serve as the minimally acceptable standard of behavior, failing which one becomes liable . . . the standard need not be set at the minimum—we do not need to follow Justice Holmes’ advice and write laws for the ‘bad man.’”<sup>200</sup> Thus, nothing prevents us from creating a standard that assumes we all wish to proceed along Professor Fejfar’s road to moral maturity and a standard that, therefore, will tell us when we fall short of that destination. Under such a standard, liability would not be viewed as a stick with which to alter prospective behavior but as an opportunity to grow beyond past limitations. In this context, the standard would assume that people act out of caring and compassion rather than for motives of profit and efficiency.

Although Professor Bender labels her standard as one designed to look for caring, old values and perceptions draw her into the traditional deterrence and incentive liability discussions which require that people are money-, rather than caring-, oriented. Professor Bender speaks of using liability to “encourage behavior”<sup>201</sup> or to “require the actor to consider the human consequences,”<sup>202</sup> but liability can only have that effect on people who want to avoid paying money. In effect the standard “pays” people to care, which from a Christian perspective is not caring at all. In that respect, Professor Bender’s standard is no different from the current standard, which works only to the extent that people seek to protect “efficiency and profit.”<sup>203</sup>

From the Christian perspective, only love can allow someone to achieve the caring to which we are called. When we work for money, we will eventually become tired in any task, and the money involved will cease to be enough to prevent us from getting careless. As discussed earlier,<sup>204</sup> however, when we are motivated by love, that love not only sustains us but strengthens us. This dichotomy is reflected in a passage from the revelations to a Spanish mystic, Sister Josefa Menendez:

Contemplate Me [Jesus] on the way to Calvary loaded with My heavy Cross; watch Simon carrying it behind Me and consider two things; though he was a man of good will, yet he was mercenary, and if he carried My Cross, it was for pay. So when he began to tire, he allowed the weight to bear more and more on Me, and that is how I fell twice.

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200. Bender, *supra* note 6, at 31.

201. *Id.* at 32.

202. *Id.* at 36.

203. *Id.* at 32.

204. See *supra* notes 176-87 and accompanying text.

Secondly, this man helped Me to bear part of My Cross, but not the whole of it.

.....

When a soul loves truly, she neither measures what she does nor weighs what she suffers; never looking for reward, and seeking only what she believes to be for God's greater glory, she never says 'enough' when labour or fatigue are in question . . . and because of the purity of her aim, whatever the result, she neither excuses herself nor protects her good intentions; her motive being love, her efforts and sufferings always give glory to God. She is not troubled nor does she lose her peace of mind if she meets with contradiction or persecution or humiliation, as her sole motive is love and she leaves results in Love's hands.

These souls are not mercenary; they only want me to be consoled. They desire only My rest and glory. That, too, is why they have shouldered the whole of My Cross and carry its full weight.<sup>205</sup>

The Christian "good neighbor" and Professor Bender's "responsible neighbor" differ then in several respects. While both seek to care, the good neighbor is refueled by her caring; the responsible neighbor is ultimately exhausted by his. The good neighbor cares for all people as family; the responsible neighbor cares for some people more than others. Finally, the good neighbor seeks only to care and views liability as a means to atone for past failures in not caring; the responsible neighbor recognizes the value of a dollar and will alter his behavior in response to liability. Because these differences exist, the good neighbor standard is an absolute standard of caring. The responsible neighbor standard must be a balance which weighs whether the burden of caring is outweighed by the likelihood of injury and its seriousness.

To some extent Professor Bender's notion of interconnectedness could overcome these differences, but once again the promise of that standard fades in its application. As applied by Professor Bender at one point, the term "interconnected" refers to the notion that the defendant and the victim are interconnected, so much so that they are "a part of" one another: "In defining duty what matters is that someone, a human being, a part of us is drowning and will die without some affirmative action. That seems more

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205. SISTER JOSEFA MENENDEZ, *THE WAY OF DIVINE LOVE* 294-96 (pocketbook ed. 1981) (omission in original). Sister Josefa was a co-adjutrix sister of the society of the Sacred Heart of Jesus stationed in France. *Id.* She lived from 1890-1923. *Id.* *The Way of Divine Love* was published with the good wishes and blessings of Pope Pius XII and does not contradict Catholic teaching, although the Catholic church has yet to make final determination on the source of her revelation. *Id.*

urgent, more imperative, more important than any possible infringement of individual autonomy by the imposition of an affirmative duty."<sup>206</sup>

Although the Christian voices we have heard so far did not suggest this kind of actual intimate "oneness" between people, referring instead to extreme empathy and a sense of family with the world,<sup>207</sup> "interconnectedness" is defined this way in Christian expression. Echoing Professor Bender's thoughts, John Donne wrote: "Any man's death diminishes me because I am involved in mankind, and therefore never send to know for whom the bell tolls; it tolls for thee."<sup>208</sup> and more simply: "All mankind is of one author and is one volume."<sup>209</sup> Paul also mirrors this concept of oneness in his First Letter to the Church at Corinth:

For by one spirit we were all baptized into one body—Jews or Greeks, slaves or free—and all were made to drink of one Spirit . . . . God has so adjusted the body, giving the greater honor to the inferior part, that there may be no discord in the body, but that the members may have the same care for one another. If one member suffers, all suffer together; if one member is honored, all rejoice together.<sup>210</sup>

Conforming a standard of care, even one that balances interests, to this idea expressed by Professor Bender, John Donne, and Paul, we find ourselves back to our Christian standard of caring. In this context, I suffer no burden in protecting my victim because what I give to her I give to myself, whether the gift comes in the form of avoiding her injury initially or making

206. Bender, *supra* note 6, at 34. Many of Professor's statements call to mind Christian principles, and, thus suggest the opportunity for dialogue between Christians and feminists of orientations similar to her own. This particular statement by Professor Bender could be used almost as it is by Christians who oppose abortion. Another statement of hers, "Just as we would not want 'strangers' to discount the human consequences of their actions to someone about whom we care, we must recognize that the person we affect by our 'carelessness' is interconnected to other people as well—family, friends, colleagues, neighbors, communities," Bender, *supra* note 6, at 32, closely resembles the "Golden Rule" in *Luke* 6:31: "[a]s you wish that men would do to you, do so to them."

207. See *supra* text accompanying notes 164-91.

208. John Donne, *Meditation XVII* in *THE NORTON ANTHOLOGY OF ENGLISH LITERATURE* 1214, 1215 (M.H. Abrams ed., 3d ed. 1974). In words consistent with the notion of love as energizing, Donne goes on to say:

Neither can we call this a begging of misery or a borrowing of misery, as though we were not miserable enough of ourselves but must fetch in more from the next house, in taking upon us the misery of our neighbors. Truly it were an excusable covetousness if we did; for affliction is a treasure, and scarce any man hath enough of it. No man hath affliction enough that is not matured and ripened by it and made fit for God by that affliction.

*Id.* at 1215.

209. *Id.* at 1214.

210. *I Corinthians* 12:13, 24-26; see also, TARNAWSKA, *supra* note 60, at 338 ("I felt inter-iorly as if I were responsible for all souls. I know very well that I do not live for myself alone, but for the entire Church.").

her whole later in response to liability. In either event, whether she is never hurt or I make her whole after she is hurt, we both in response to that event will "rejoice together."<sup>211</sup>

Thus, if Professor Bender were content with this definition of interconnected, she could avoid drifting back into the utility-based algebraic balance she seeks to avoid. However, she instead varies the focus of "interconnected." Ultimately, interconnectedness ceases to look to the relation between the defendant and the victim and looks to the relation between the victim and the world.<sup>212</sup> As noted earlier, when this happens, the factor becomes so variable in weight that it must either take over the test or be weighted so lightly that it becomes meaningless.<sup>213</sup>

Professor Bender need not have shifted focus here, and consequently slipped back into old structures. As she notes, "we are all interdependent and connected and . . . we are by nature social beings who must interact with one another."<sup>214</sup> This does not say that we are connected to only those people to whom we choose to be connected and only to the extent to which we choose to be connected. We are all connected.<sup>215</sup> Inevitably we will interact with those to whom we are connected; and when those interactions hurt those to whom we are connected, they hurt us. To limit that, or deny it totally, is to accept the popular notions of "the overriding value . . . of individual emancipation and fulfillment"<sup>216</sup> and with that accept the disintegration of community<sup>217</sup> and the "divisions, disparities of power, and isolation"<sup>218</sup> that accompany those notions. Such acceptances cannot be what is called for in the second stage.

#### IV. CONCLUSION

Professor Bender's negligence standard is the stuff of which the second stage must be made. She is prepared not only to re-examine existing structures, but also the existing values upon which these structures are based. Without such re-examinations, the victories won in the last twenty-eight years will be hollow. Yet, in leading us through those re-examinations, Professor Bender, like Betty Friedan, must cast aside the old prejudices viewing Christian values as an oppressive enemy. Such women leaders must be

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211. *I Corinthians* 12:26.

212. Bender, *supra* note 6, at 34-35, 35 n.122.

213. *See supra* text accompanying notes 144-49.

214. Bender, *supra* note 6, at 31.

215. *See generally*, RAFFI, ONE LIGHT, ONE SUN (1988).

216. *The Talk of the Town*, THE NEW YORKER (on file with author).

217. *Id.*

218. Bender, *supra* note 6, at 31.



open to the notion that, as much as love, caring, and compassion may call for humility, suffering, and sacrifice, those three values in their purest form are not exhausting but liberating and energizing. It is only when we realize this that we, like Dickens' Mr. Scrooge, can enter the second stage seeing the world as no longer "business" as usual but as a place to "follow our star":

"But you were always a good man of business, Jacob," faltered Scrooge, who now began to apply this to himself.

"Business!" cried the Ghost, wringing its hand again. "Mankind was my business. The common welfare was my business; charity, mercy, forbearance, and benevolence, were all my business. The dealings of my trade were but a drop of water in the comprehensive ocean of my business!"

It held up its chain at arm's length, as if that were the cause of all its unavailing grief, and flung it heavily upon the ground again.

"At this time of the rolling year," the spectre said, "I suffer most. Why did I walk through crowds of fellow-beings with my eyes turned down, and never raise them to that blessed Star which led the Wise Men to a poor abode! Were there no poor homes to which its light would have conducted *me!*"<sup>219</sup>

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219. DICKENS, *supra* note 147, at 27 (emphasis in original).