

# Chicago-Kent Law Review

---

Volume 83

Issue 3 *Symposium: Recalling Vico's Lament:  
The Role of Prudence and Rhetoric in Law and  
Legal Education*

Article 10

---

June 2008

## Law and Politics as Play

Lief H. Carter

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>



Part of the [Law Commons](#)

---

### Recommended Citation

Lief H. Carter, *Law and Politics as Play*, 83 Chi.-Kent L. Rev. 1333 (2008).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol83/iss3/10>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact [jwenger@kentlaw.iit.edu](mailto:jwenger@kentlaw.iit.edu), [ebarney@kentlaw.iit.edu](mailto:ebarney@kentlaw.iit.edu).

## LAW AND POLITICS AS PLAY

LIEF H. CARTER\*

### ABSTRACT

Liberal theory fails to cope effectively with the common human tendency, and particularly in circumstances that humans perceive as zero sum games, to brutalize other humans. Liberal theory does not adequately accommodate the reality that humans contest concepts of rights, justice, and truth. The necessarily contextual, contested, and contingent character of substantive liberal principles necessarily prevents them, qua principles, from effectively inhibiting human brutality. Liberal theory also does not take adequate account of the passionate and non-rational character of the human animal. Giambattista Vico's remarkably prescient and comprehensive eighteenth century vision of the human condition anticipates these two barriers to achieving liberalism's pacific political and social vision. Vico suggests that the visceral experiences of competitive human play can, and in fact do, displace the political and social conditions and practices that commonly trigger brutal human behavior. Thus framed, the liberal tradition moves humans from righteousness to playfulness.

\* Professor, The Colorado College. The author earnestly thanks the Rockefeller Foundation and the staff of the Villa Serbelloni, Bellagio, Italy, the Institute of Governmental Studies at the University of California, Berkeley, and the Benezet Foundation at The Colorado College for their research support. Professors Susan Silbey, Thomas Pyszczynski, Robert Lee, the late Richard Rorty, and Jonathan Lee also made particularly important specific contributions to this analysis. Readers will see for themselves how greatly Professor Donald Verene's writings on Vico contributed to it. *Chicago-Kent Law Review* Executive Articles Editor Hunter Hogan significantly improved this final product by insisting on substantive and expository precision without sacrificing his much-appreciated enthusiasm for the project itself. Only those who know Marilyn Vickers, a clinical psychologist, will appreciate the full extent of my wife's immensely important contributions to all aspects of this project.

## INTRODUCTION AND NORMATIVE FRAME

[Caesar:] And so, to the end of history, murder shall breed murder, always in the name of right and honor and peace, until the gods are tired of blood and create a race that can understand.

—George Bernard Shaw<sup>1</sup>

[T]he greatest thing a human soul ever does in this world is to *see* something, and tell what it *saw* in a plain way. Hundreds of people can talk for one who can think, but thousands can think for one who can see. To see clearly is poetry, prophecy, and religion,—all in one.

—John Ruskin<sup>2</sup>

When we academics honor our greatest intellectual forbearers, we presumably carry the highest obligation of fidelity to their ideas. This symposium's obligation of fidelity to Giambattista Vico, however, poses a problem. Throughout his writings Vico condemned, for the same reasons he opposed the Cartesian worldview in his 1708 lecture, the analytical methods that we academics would most instinctively use to praise him.<sup>3</sup> How do we “intellects” honor one who condemned *la barbarie degl'intelletti*—“the barbarism of the intellect”?<sup>4</sup> How do we avoid “the vanity of scholars”?<sup>5</sup> How can we bookish academics work within Vico's claim that “for purposes of this inquiry, we must reckon as if there were no books in the world”?<sup>6</sup> Vico believed that all great human action is necessarily passionate and creative; our proto-Cartesian methods—formal theory and moral philosophy, for example—cannot access this reality.<sup>7</sup> Reality is sense and experience, not analysis. What can we habitually analytical folks do with Vico?<sup>8</sup>

1. 3 GEORGE BERNARD SHAW, *Caesar and Cleopatra*, in THREE PLAYS FOR PURITANS 194 (1900).

2. 3 JOHN RUSKIN, MODERN PAINTERS 262 (John Wiley & Sons 1888) (1856).

3. See Frances J. Mootz III, *Introduction to Recalling Vico's Lament: The Role of Prudence and Rhetoric in Law and Legal Education*, 83 CHI.-KENT L. REV. 1097 (2008).

4. GIAMBATTISTA VICO, LA SCIENZA NUOVA SECONDA ¶ 159 (Bari 5th ed. 1967) (1744) [hereinafter VICO, LA SCIENZA NUOVA SECONDA]; see DONALD PHILLIP VERENE, VICO'S SCIENCE OF IMAGINATION 195 (1981).

5. VICO, LA SCIENZA NUOVA SECONDA, *supra* note 4, ¶ 127.

6. *Id.* ¶ 330; see VERENE, *supra* note 4, at 134.

7. *Cf.* VICO, LA SCIENZA NUOVA SECONDA, *supra* note 4, ¶ 338.

8. Readers familiar with the work of the late philosopher Richard Rorty will find many parallels to Vico. Rorty, eschewing academic philosophy, finished his career, at Stanford, as a professor of comparative literature. In his short autobiographical essay, *Trotsky and the Wild Orchids*, Rorty rejected the idea that academic philosophy could contribute to social betterment:

This essay responds to the challenge. It does not parse Vico's thought in his time and culture, describe in any detail its lineage in the course of the history of ideas, or comment on modern Vico scholarship. Instead, this essay honors Vico by practicing his preaching: it constructs, as Vico did over his lifetime of writing, a unified vision of the human condition, and it uses Vico's insights to do so.<sup>9</sup> In 1708, Vico lamented that "we neglect ethics, and in particular that part which deals with the nature of the human mind, its passions, and how they are related to civil life and eloquence."<sup>10</sup> Vico also lamented the neglect of, as Leon Pompa puts it, "the whole question of the acquisition of rules of conduct suitable to practical civil life and to politics."<sup>11</sup> This essay describes how Vico's passionate, poetic, amoral, and non-rational people acquire "rules of conduct" that enable civil—that is, peaceful—living.

Vico asked his audience at the University of Naples in 1708 to debate two competing ways of knowing: Cartesian rationality versus the poetic world of the ancients. Vico, the "pre-law advisor" of his day, saw law as a rhetorical game. That is, he understood the civic (ethical) value of competition itself.<sup>12</sup> He understood that Cartesian rationality, like religious and ideological fundamentalism, generates a kind of certainty that shuts down robust debate. Vico's comprehensive vision suggests, in effect, that people should practice law and politics not as the search for the most rational or logically correct outcomes but rather as passionate and embodied yet peaceful competitive play.

Vico inspires this vision of law and politics as play *because* he sees that all things in the human mind, including law and politics, are at one with the human body. As Vico put it as he concluded his 1708 address, "[T]he soul should be drawn to love by means of bodily images; for once it

The more philosophers I read, the clearer it seemed that each of them could carry their views back to first principles which were incompatible with the first principles of their opponents, and that none of them ever got to that fabled place 'beyond hypotheses'. There seemed to be nothing like a neutral standpoint from which these alternative first principles could be evaluated. But if there were no such standpoint, then the whole idea of 'rational certainty', and the whole Socratic-Platonic idea of replacing passion by reason, seemed not to make much sense.

RICHARD RORTY, *Trotsky and the Wild Orchids*, in *PHILOSOPHY AND SOCIAL HOPE* 3, 10 (1999).

9. "To approach Vico's work in less than the spirit of the whole is counter to his advice and his understanding of the education of the soul." VERENE, *supra* note 4, at 21.

10. GIAMBATTISTA VICO, *On Method in Contemporary Fields of Study*, in *VICO: SELECTED WRITINGS* 33, 41 (Leon Pompa ed. & trans., 1982) [hereinafter *VICO, SELECTED WRITINGS*].

11. Leon Pompa, *Introduction* to *VICO, SELECTED WRITINGS*, *supra* note 10, at 3.

12. Cf. ROBERT P. BURNS, *A THEORY OF THE TRIAL* (1999) (describing the trial as a contest of narratives). Vico saw "figures of speech[] as the logic for the narration of topics." VERENE, *supra* note 4, at 160.

loves it is easily taught to believe; and when it believes and loves it should be inflamed so that it wills things by means of its normal intemperance.”<sup>13</sup> Vico had no hope that such abstract moral principles as liberty, equality, justice, and tolerance could effectively offset the “crude and rough” nature of men.<sup>14</sup> The Holy Bible and the Qur’an contain normative principles of love, tolerance, equal respect, and peace, but these commands have not forestalled ancient and modern religious warfare.

This essay proposes that humans learn how to keep the peace not by obeying the norms, rules, and principles of civil conduct but by learning how to play, and thereby reintegrating the mind and the body. People do law, politics, and economic life well when they do them in the same ways and by the same standards that structure and govern good competitive sports and games. The word “sport” derives from “port” and “portal” and relates to the words “disport” and “transport.” The word at least hints that the primitive and universal joy of play carries those who join the game across space to a better, and ideally safer, place—a harbor that Vico himself imagined.

This essay’s bold proposition honors Vico in many ways. Its “grand theory” matches the scope of Vico’s comprehensive and integrated vision of the human condition. It plausibly confirms Vico’s hope for a “conception of a natural law for all of humanity” that is rooted in human historical practice.<sup>15</sup> Seeing these core social processes as play helps us to escape from arid academic habits and to “learn to think like children,” just as Vico urged.<sup>16</sup> Imagining law and politics as play honors Vico above all because,

13. VICO, *SELECTED WRITINGS*, *supra* note 10, at 44.

14. Pompa, *supra* note 11, at 10.

15. VERENE, *supra* note 4, at 60.

16. *Id.* at 196. In this spirit, this essay should not and does not analyze exhaustively the important academic works on human play, e.g., ROGER CAILLOIS, *MAN, PLAY, AND GAMES* (Meyer Barash trans., Univ. of Illinois Press 2001) (1958); JAMES P. CARSE, *FINITE AND INFINITE GAMES* (1986); J. HUIZINGA, *HOMO LUDENS: A STUDY OF THE PLAY-ELEMENT IN CULTURE* (Beacon Press 1955) (1950). The implicitly Cartesian approach of such books is deeply non-Vichian. Popular literature—e.g., PHIL JACKSON & HUGH DELEHANTY, *SACRED HOOPS: SPIRITUAL LESSONS OF A HARDWOOD WARRIOR* (1995), DEAN SMITH WITH JOHN KILGO & SALLY JENKINS, *A COACH’S LIFE* (1999), and JOE TORRE WITH HENRY DREHER, *JOE TORRE’S GROUND RULES FOR WINNERS* (1999)—provide Vichian empirical confirmation of this essay’s arguments in ways that academic writing cannot match. This essay thus steps at times outside the explicitly Cartesian game that academics play to advance their careers. See JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* (Geoff Bennington & Brian Massumi trans., Univ. of Minnesota Press 1984) (1979); JEAN-FRANÇOIS LYOTARD & JEAN-LOUP THÉBAUD, *JUST GAMING* (Wlad Godzich trans., Univ. of Minnesota Press 1985) (1979) (suggesting that playing their best in their locally framed games is the best anyone can do in life). For a theoretical framework consistent with that of this paper, see BRADD SHORE, *CULTURE IN MIND: COGNITION, CULTURE, AND THE PROBLEM OF MEANING* 75–100 (1996).

if we attain Ruskin's epigraphic ideal,<sup>17</sup> we will see that the peace-tending qualities of sports and games already operate under our noses. Seeing law and politics as play enables us "to reach out past our inclination to make experience familiar through the power of the concept and to engage the power of the image. We must reconstruct the human world not through concepts and criteria but as something we can practically see."<sup>18</sup> If at its end readers realize that they could have seen, under their noses, the world as this essay sees it without ever having read it, this essay will successfully honor Vico.

As Vico would have predicted, formal academic theory has played at best a marginal role in the construction of competitive games. Ordinary people have created cricket and football, and common law and electoral politics and fair market games, more from the experience of doing them than from formal theories of competitive games. When they play international football today, ordinary people in virtually every culture in the world recreate the experience of competitive games. Playing competitive games unites people across cultures in a common normative world.<sup>19</sup> Within Vico's social anthropological and proto-scientific framework, the claim that competitive play can generate peaceful civic life is purely empirical: law and politics in progressively peaceful political systems *already are* nothing more or less than competitive games.

17. RUSKIN, *supra* note 2, at 262. Ruskin, echoing Vico's "*barbarie degl'intelletti*," gives greater credit to "Seers" than to "Thinkers." "[A]n affected Thinker, who supposes his thinking of any other importance than as it tends to work, is about the vainest kind of person that can be found in the occupied classes." *Id.* Compare with Woodrow Wilson's defense of changing the U.S. Constitution when circumstances warrant:

When we shall have examined all its parts without sentiment, and gauged all its functions by the standards of practical common sense, we shall have established anew our right to the claim of political sagacity; and it will remain only to act intelligently upon what our opened eyes have seen in order to prove again the justice of our claim to political genius.

WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 332–33 (15th ed. 1900), *quoted in* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 181 (2006).

18. VERENE, *supra* note 4, at 158; *see* LUDWIG WITTGENSTEIN, THE BLUE AND BROWN BOOKS 18 (Harper Torchbook 1965) (1958) ("I want to say here that it can never be our job to reduce anything to anything, or to *explain* anything. Philosophy really is 'purely descriptive.'") (first emphasis added).

19. During his campaign for the 2000 Democratic Party presidential nomination, former Princeton and New York Knickerbocker basketball star Bill Bradley, who had recently published his book *Values of the Game*, spoke of the collective and communal quality of sports language and experience:

The sports thing. . . it's kind of a language that most people understand. It's not language as language, necessarily, but it's experience, a shared experience.

That's why people come up to me now and say on a regular basis that "Values of the Game" struck a chord. . . It struck a chord because it was about their experience. All I did was find the words to capture their experience through mine.

Melinda Henneberger with Jane Gross, *For Bradley, a Strategic Love of the Game*, N.Y. TIMES, Nov. 12, 1999, at A1, A29 (quoting Bill Bradley).

All empirical description operates within some, though too often obscured, normative frame. This essay's normative frame is clear. It holds, with Shaw's epigraph, above: *Human brutalities waged against other humans—suicide bombings, genocides, tribal and religious wars that provoke the indiscriminate rape, murder, torture, and enslavement of men, women, and children, often because they are labeled “evil”—are the worst things that we humans do. We should learn not to do them.* In Vico's anti-Cartesian, non-foundational world, no method exists to demonstrate that this essay's normative core is “correct,” or even “better than,” say, the core norm holding that the worst thing humans do is dishonor God. Readers who reject Shaw's and this essay's normative frame may have every reason to reject the essay's entire argument.

However, this essay does describe empirically how those whose core norm requires honoring any absolute, including God, above all else regularly brutalize other human beings, and why those who live by the norms of good competitive play do not. People brutalize people, as Shaw's Caesar observed, in the name of right and honor and peace. Evaluated by the norm that human brutality is the worst thing humans do, the essay shows why and how the human invention of competitive play short circuits the psychology of a righteousness-humiliation-brutality cycle. We cannot help but see and experience on fields of contested play testosterone-charged males striving mightily to defeat one another. Yet at the end of play, losers and winners routinely shake hands and often hug; adult competitors may dine and raise a glass together.<sup>20</sup> Whether collectively invented as a species-wide survival adaptation or not, institutionalized competitive play undercuts the brutality cycle by displacing religious and other forms of fundamentalist righteousness with something contingent, amoral, and thus less lethal. Play thereby helps humans become Shaw's “race that can understand.”

Part I extends this introductory outline of the key elements, for our purposes, of Vico's thought. It then describes and very selectively illustrates current knowledge that strikingly confirms Vico's eighteenth-century vision. Part II describes the psychological and situational dynamics that trigger brutality. It describes a cycle of righteousness-humiliation-brutality

20. See, for example, the mutual congratulations between opponents at the line of scrimmage after the last play of the fiercely contested *Super Bowl XLII* (FOX television broadcast Feb. 3, 2008) and at 2:24–2:26 of the video at <http://www.youtube.com/watch?v=0td1tiuxpsc>. See also the images of burly white men throwing their bodies in sheer joy on the body of a black man, Plaxico Burress, after the latter's game winning touchdown at 3:45 and again at 3:53 of this series of still pictures, <http://www.youtube.com/watch?v=nJl14o7vFvg>, from *Super Bowl XLII*. Scenes of such utter obliviousness to race were far rarer before the racial integration of organized sports.

that operates as universally as do Vico's social universals of religion, marriage, and burial.<sup>21</sup> Part III describes how competitive sports and games short circuit this cycle, and Part IV samples a few of the many paths that, independently, support this conclusion.

### I. VICO'S THOUGHT IN OUR TIME

[Theseus:] And, as imagination bodies forth  
The forms of things unknown, the poet's pen  
Turns them to shapes, and gives to airy nothing  
A local habitation and a name.

—William Shakespeare<sup>22</sup>

So convenient a thing it is to be a *reasonable Creature*, since it enables one to find or make a Reason for every thing one has a mind to do.

—Benjamin Franklin<sup>23</sup>

Man aint really evil, he jest aint got any sense.

—William Faulkner<sup>24</sup>

In addition to the challenge of honoring Vico in an academic forum without straying from his deep skepticism about the value of conventional academic thought and methods, this essay must meet its own analytical challenge. It must make plausible the proposition that rough, crude, non-rational, and normally intemperate humans nevertheless can attain something we can, with Vico, plausibly call "universal principles of justice."<sup>25</sup>

21. VERENE, *supra* note 4, at 128. Readers unfamiliar with the skeptical core of the scientific method may mistake this essay's empirical descriptions for self-contradictory claims of universal truth. This essay's descriptions instead represent the scientific consensus of its time. Future findings may falsify them.

22. WILLIAM SHAKESPEARE, *A MIDSUMMER NIGHT'S DREAM* act 5, sc. 1, at 132 (Henry Cuninghame ed., Methuen & Co. 1905) (1600).

23. BENJAMIN FRANKLIN, *THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN* 88 (Yale Univ. Press 2d ed. 2003) (1791).

24. WILLIAM FAULKNER, *The Mansion*, in *SNOPE: THE HAMLET, THE TOWN, THE MANSION* 673, 884 (Modern Library ed. 1994).

25. What we might call Vico's "aspirational essentialism," his belief in the existence of "recollective" or "imaginative" universal laws, VERENE, *supra* note 4, at 19, 165–95, anticipates Tolstoy's comments on the battle of Borodino. Tolstoy, like Vico, observed that humans innately aspire to universal explanations or laws:

The combination of causes of phenomena is beyond the grasp of the human intellect. But the impulse to seek causes is innate in the soul of man. . . . Causes of historical events—there are and cannot be, save the one cause of all causes. But there are laws controlling these events; laws partly unknown, partly accessible to us.



To do so it must plausibly demonstrate how two central elements of Vico's thought—first, the socially constructed quality of reality and second, the deeply sensory and non-rational character of human experience and action—make conventional liberal solutions to the problem of human brutality ineffective yet simultaneously explain how the structure of competitive play nevertheless helps achieve liberalism's pacific goal. These two central elements in Vico's thought show that such liberally enlightened ideals as the commitment to the principles of due process and of scientific skepticism come less naturally to humans than do visions of attaining paradise by dying honorably in holy war, or than does the belief that the earth is a few thousand years old because the "fact" is so vividly displayed in the Creation Museum in Petersburg, Kentucky, or than do fears of the "mark of the beast" expressed in the number 666.<sup>26</sup> Yet, as Vico shows, it is the very constructed quality of reality and the non-rational, sensation-driven nature of human cognition that makes the ideal of a peaceful civil society attained through play possible.

#### A. *Verum-Factum*

Long before post-modernism replaced positivism in the twentieth century, Vico observed that humans construct their world. Vico's *verum-factum* principle stated that truth "is what is made or done,"<sup>27</sup> a finding expressed today as "the social construction of reality."<sup>28</sup> For Vico, humans (and God) "do" reality. Nothing unequivocally exists beyond "the artifacts which men make in the course of their history."<sup>29</sup> Particulars and universals, images and things, are one and the same<sup>30</sup> because all such constructions arise from the same primal human sense impressions (e.g., lightning and thunder), and from the visual experience of the human body—brought

LEO TOLSTOY, *WAR AND PEACE* 1123 (Constance Garnett trans., Modern Library ed. 2002) (1865–1869).

26. E.g., Evangelical Outreach, *The Mark of the Beast* (666), <http://www.evangelicaloutreach.org/markbeas.htm> (last visited Apr. 18, 2008) ("According to the Scriptures, the 'mark of the beast' is received on the right hand or forehead. With modern technology, it is very possible that this mark may be directly linked with a computer chip. But regardless if it is or isn't, everyone who is living immediately before the return of Christ will be forced to take this mark in order to buy or sell anything . . ."). See generally DANIEL C. DENNETT, *BREAKING THE SPELL: RELIGION AS A NATURAL PHENOMENON* (2006).

27. Pompa, *supra* note 11, at 5. The English word "fact" derives from the Latin "factum," a deed or a doing of something.

28. PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* (Anchor Books 1967) (1966).

29. Pompa, *supra* note 11, at 4–5.

30. VERENE, *supra* note 4, at 80.

into mythical being by language itself. Basic human thought is the “thought of sense.”<sup>31</sup>

Cultures are mythical and fabulous constructions, not in the sense that cultures are unreal or chimerical or evanescent, but in precisely the opposite sense: “Every fable is true speech.”<sup>32</sup> Cultures are literally the myths and fantasies by which all people construct their realities; these constructions, Vico observed, can take a nearly infinite number of forms. *Verum-factum* “makes possible any particular line of reasoning” and “permits the making of any truth.”<sup>33</sup> Language makes reality, and language can make virtually anything, from nuclear physics to suicide bombing manuals to the sport of international football to litigation under the game rules of evidence and due process. No objective principles exist by which to demonstrate the superior truthfulness, accuracy, morality, justice, or usefulness of any one manmade social system over another.<sup>34</sup>

Vico also denied that moral principles, given that they are socially constructed, can do much heavy lifting within their constructed frames. Their wise application so depends on the contexts of particular cases that principles themselves add little analytical value. “Men’s deeds cannot therefore be judged in accordance with an abstract and inflexible rule of moral conduct,”<sup>35</sup> “particular truths become false with the passing of time,”<sup>36</sup> and “[t]he imprudent academic, who moves from a universal truth straight to particular truths, uses force to make his way through the maze of life.”<sup>37</sup>

Vico thought that mathematics “was one of the most certain, indeed paradigmatic, areas of human knowledge,”<sup>38</sup> and therefore most closely approached the mind of man’s Creator. Modern mathematical knowledge itself confirms Vico’s constructivist description of reality. For example, a non-mathematician, asked whether in principle there can be only one correct and universal answer to the question “What is the circumference of Australia?”, will probably say “yes.” But the mathematician will respond, using basic calculus, that there is an infinite amount of possible correct answers to that question. Even holding tide and land erosion constant, as

31. *Id.* at 86.

32. *Id.* at 82.

33. *Id.* at 47.

34. See RORTY, *supra* note 8, at 15 (“[T]here is no neutral, common ground to which an experienced Nazi philosopher and I can repair in order to argue out our differences. That Nazi and I will always strike one another as begging all the crucial questions, arguing in circles.”).

35. VICO, *SELECTED WRITINGS*, *supra* note 10, at 42.

36. *Id.*

37. *Id.* at 42–43.

38. Pompa, *supra* note 11, at 9.

would a digitally-accurate photo from space, each correct answer will merely depend on what someone chooses to measure around, which choice in turn depends entirely on the socially-constructed goal the measurer seeks to achieve. The circumference lengthens as the unit measured around becomes smaller. It will lengthen as the measurer moves from outermost points of land (as a sailor would in a race to circumnavigate Australia) to boulders or rocks (as might a tax assessor who tries to maximize a taxpayer's assessment for waterfront property) to grains of sand (as might a company searching for geographical evidence of deposits of trace minerals).<sup>39</sup> Ask non-mathematicians if it is objectively and universally true that three plus four equals seven and they will probably answer "yes," but a mathematician will point out that that calculation is "correct" only in base ten, adding that base ten is itself merely a convention driven by the fact that humans happened to evolve possessing ten fingers.<sup>40</sup>

Shakespeare's Theseus accurately described reality well before Vico. Things come into being as people and their languages make them, and so give airy nothings shapes and names. "[T]he world of civil society has certainly been made by men, and . . . its principles are therefore to be found within the modifications of our own human mind."<sup>41</sup> No foundational standards exist by which to demonstrate that institutions built on moral principles of justice and human rights are in any way more truthful or accurate than are the institutions built upon religious or ideological fundamentalism or the amoral institutions of competitive play. Only the pragmatic question remains: which institutions *in practice* seem more likely to reduce the frequency of human brutality?

### B. Human Nature

Vico, near the end of the *New Science*, bemoans the fate of nations whose naturally crude, rough, amoral, and selfishly short-sighted people have lost their connections to passion, myth, and poetry. When people separate from the elemental conditions that they commonly experience in nature, they will

like so many beasts, have fallen into the custom of each man thinking only of his own private interests and have reached the extreme of deli-

39. If my students are typical, the layperson also believes that acts of taxonomic classification will reduce many to one. But Georg Cantor demonstrated in 1890 that there are always *more* ways to classify objects in a set than there are objects in the set to be classified. W.V. QUINE, *QUIDDITIES: AN INTERMITTENTLY PHILOSOPHICAL DICTIONARY* 96–99 (1987).

40. Humans do digital information processing in base two and play much of the game of baseball in base three.

41. VICO, *LA SCIENZA NUOVA SECONDA*, *supra* note 4, ¶ 331; VERENE, *supra* note 4, at 135.

cacy, or better of pride, in which like wild animals they bristle and lash out at the slightest displeasure. Thus no matter how great the throng and press of their bodies, they live like wild beasts in a deep solitude of spirit and will, scarcely any two being able to agree since each follows his own pleasure or caprice.<sup>42</sup>

People “become sociable [by] returning to the primitive simplicity of the first world of peoples.”<sup>43</sup> Human creative acts of memory, not moral principles, allow them to imagine that their interests dovetail with those of their social systems and then to live cooperatively in those systems.

Part II describes how passionate and intemperate humans, driven not by rational analytical calculations but by primal visual (and particularly bodily) images, are fully capable of supporting tyrants and fighting lethal wars all in the name of sublime ends and heroic virtue. Parts III and IV explain how humans nevertheless can and do learn to harness this “primitive simplicity” so as to serve equally sublime and heroic yet peaceful ends. The remainder of this section describes five confirmations of man’s non-rational, intemperate (passionate), and plastic nature. These five areas of modern research, like the constructed character of reality, provide extraordinarily rich confirmation of Vico’s description of the human animal.<sup>44</sup> These recent findings expose the weaknesses of liberal solutions to the problem of human brutality.<sup>45</sup> They simultaneously explain how competitive play in sports, law, commerce, and politics can short circuit the human brutality cycle.

### 1. Imagery and the Human Brain

Vico concluded that physical experiences of vivid primal things, particularly of thunder and lightning, drive human thought. Research findings in contemporary cognitive science strongly confirm this insight.<sup>46</sup> The hu-

42. VICO, *LA SCIENZA NUOVA SECONDA*, *supra* note 4, ¶ 1106; VERENE, *supra* note 4, at 193. This passage may seem prescient to those who bemoan how Americans strive to acquire wealth at the same time they know little of and care little for their common civic lives.

43. VICO, *LA SCIENZA NUOVA SECONDA*, *supra* note 4, ¶ 1106; VERENE, *supra* note 4, at 194. For Vico, humans are above all imaginative, creative makers because they replicate the image of God, himself a creator and maker.

44. Perhaps the most striking confirmation of Vico comes from Professor Bruce Hood’s experimental findings that the human brain is hard-wired for religious and related ways of thinking that “see” things that, judged by the observational methods of science, do not exist. He particularly attributes “magical thinking” to normal dopamine levels in the brain. Sharon Begley, *The Ghosts We Think We See*, *NEWSWEEK*, Nov. 5, 2007, at 56; James Randerson, *Humans ‘Hardwired for Religion’*, *GUARDIAN UNLIMITED*, Sept. 4, 2006, <http://www.guardian.co.uk/science/story/0,,1864748,00.html>.

45. For example, liberalism presumes a degree of free will and conscious agency that empirical evidence does not support. Dennis Overbye, *Free Will: Now You Have it, Now You Don’t*, *N.Y. TIMES*, Jan. 2, 2007, at F1, F4.

46. See STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, AND MIND* (2001); see also Vilayanur S. Ramachandran & Edward M. Hubbard, *Hearing Colors, Tasting Shapes*, *SCI. AM.*, May

man brain is deeply imaginative. Some process must narrow down its range of choices, and the brain simplifies its work by building on the concrete physical images it knows from personal experience. The brain is not a binary digital processor. "It follows that cognition is not principally representational, propositional, or computational, but rather involves processes that are imaginative, associative, and analogical."<sup>47</sup> Visual images shape language and thought simultaneously. Events and other stimuli trigger the reconstruction of concrete and vivid physical images in the brain.

Cognitive processes and imagination itself are hence "embodied."<sup>48</sup> They are as physical as are other more easily observed physical bodily functions. The images that underpin thought are themselves physical, spatial, and simple. Humans often construct thoughts from physical metaphors of motion. Retirement portfolios are "up" while crime is "down."<sup>49</sup> In law, "slippery slopes" and "the color of law" are legal realities, not abstractions.<sup>50</sup> Humans construct complex and abstract concepts and categories, which Steven Winter calls "idealized cognitive models," but they assemble these models from discrete physical associations.<sup>51</sup> Thus Justice Holmes concluded in *McBoyle v. United States* that an airplane is not a "vehicle" within the meaning of the National Motor Vehicle Theft Act.<sup>52</sup> In spite of the "plain meaning" of the statutory language defining a vehicle as "self-propelled" and "not designed for running on rails," and the fact that every linear principle of reasoning leads to the conclusion that a stolen airplane falls fully within the purpose of the act (to overcome the limits on state territorial jurisdiction to conduct criminal investigations and prosecutions in other states), not to mention that the defendant had ample notice that theft is a legal wrong, Holmes's mind could not construct a credible physical image of an airplane that made it seem like a Model A Ford.<sup>53</sup> Legal doctrines tend to shift, not when someone exposes the illogic of prior lines of reasoning, but when common mental maps of the physical world change.

2003, at 53. I borrow here from my book review, Lief Carter, *A Clearing in the Forest: Law, Life, and the Mind*, 12 LAW & POL. BOOK REV. 260 (2002), <http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/winterclear.html> (reviewing WINTER, *supra*).

47. WINTER, *supra* note 46, at 5.

48. The death threats provoked by the public cartoon images of the Prophet Muhammad published in Denmark in 2006 and then in Sweden in 2007 also confirm Vico's and Winter's description of the centrality of the image in human cognition. See Michael Kimmelman, *A Startling New Lesson in the Power of Imagery*, N.Y. TIMES, Feb. 8, 2006, at E1, E8.

49. WINTER, *supra* note 46, at 31.

50. *Id.* at 254–56, 166–85.

51. *Id.* at 88–89.

52. 283 U.S. 25 (1931).

53. WINTER, *supra* note 46, at 37.

## 2. Irrationality and Loss Aversion

Nearly a half century ago, William Barrett dismissed the Enlightenment possibility of individual and group rationality.<sup>54</sup> More recently, Steven Pinker noted that humans are loyal first to their families and that nepotism is natural; sharing with non-family members requires reciprocity; humans have a drive for dominance and use violence to attain it; ethnocentrism and xenophobia are common; the self-serving biases of most humans lead them to think that they are freer, wiser, and more honest than they are; moral sensibilities are linked to ideas of purity, beauty, and rank.<sup>55</sup> Psychologists Daniel Kahneman and the late Amos Tversky and their followers have generated an increasingly robust empirical refutation of rational models of economic man. In October of 2002, Kahneman received the Nobel Prize in economics for describing conditions in which rational choice models do not predict how humans make choices.<sup>56</sup> Kahneman and Tversky determined “that losses loom larger than gains, that first impressions shape subsequent judgments, that vivid examples carry more weight in decision making than more abstract—but more accurate—information.”<sup>57</sup>

In an interview on National Public Radio’s Weekend Edition Sunday,<sup>58</sup> and in *Why Hawks Win*,<sup>59</sup> Kahneman described three psychological dynamics that play a central role in human conflict:

(1) Humans inevitably tend to see themselves and their motives as well meant. If hostility arises, it is because “the other side” is acting out of malice and hostility. Each side in a conflict sees the other in just these terms.

54. WILLIAM BARRETT, *IRRATIONAL MAN: A STUDY IN EXISTENTIAL PHILOSOPHY* (Anchor Books 1962) (1958).

55. STEVEN PINKER, *THE BLANK SLATE* 294 (2002); see also Nicholas Wade, *In Nature vs. Nurture, a Voice for Nature*, N.Y. TIMES, Sept. 17, 2002, at E1, E4 (reviewing PINKER, *supra*).

56. Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263, 263 (1979). Tversky died prematurely in 1996 and thus was ineligible to share the prize. His obituary quoted him, in an echo of Vico, that the pair only studied scientifically what “advertisers and used car salesmen” already knew. Karen Freeman, *Amos Tversky, Expert on Decision Making, Is Dead at 59*, N.Y. TIMES, June 6, 1996, at B16. For the most recent extensions of Kahneman and Tversky’s approach, see DAN ARIELY, *PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS* (2008), and RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008), both reviewed in Elizabeth Kolbert, *What Was I Thinking?*, THE NEW YORKER, Feb. 25, 2008, at 77–79.

57. Erica Goode, *On Profit, Loss and the Mysteries of the Mind*, N.Y. TIMES, Nov. 5, 2002, at F1, F6.

58. *Weekend Edition Sunday: In Times of Conflict, the Hawk Prevails* (NPR radio broadcast Jan. 7, 2007), available at <http://www.npr.org/templates/story/story.php?storyID=6737026>.

59. Daniel Kahneman & Jonathan Renshon, *Why Hawks Win*, FOREIGN POL’Y, Jan.–Feb. 2007, at 34.

(2) When conflicts start, there are always “optimistic generals on at least one side . . . and very frequently on both sides . . . [S]omebody must be overestimating their likelihood of victory.”

(3) Humans are overly reluctant to make concessions for two reasons, both of them related to human “loss aversion.” First, the research findings, according to Kahneman, show that “losses are weighted at least twice as much as gains.” A concession the other side makes to one side is a gain to that side, but that side will weigh the concessions it makes to the other side by twice the value of the gain. Second, faced with two bad choices, either cutting one’s losses and admitting defeat or gambling that some miraculous event will save them, most people will double down, that is “most people will gamble. . . . Admitting that you’re losing is extremely difficult. . . .”<sup>60</sup>

### 3. Human Responses to Authority and Power

In 1961, Stanley Milgram’s simulated electrical shock experiments found that most people, given authoritative but uncoerced orders to inflict potential harm on another human, would do so.<sup>61</sup> In his 1971 Stanford prison experiment, Philip Zimbardo concluded that people, given unlimited power over others, will, as in the case of Americans operating the Abu Ghraib prison in Iraq, routinely abuse the powerless.<sup>62</sup>

### 4. Neuroscience

Antonio Damasio, currently Professor of Neuroscience at the University of Southern California, head of USC’s Brain and Creativity Institute, and for three decades prior Head of Neurology at the University of Iowa Hospitals and Clinics, has, in books spanning more than a decade, explained how the thinking brain and the physical body are fully integrated. Emotions and feelings drive human decision making. Specific regions in the frontal lobes interact with the deeper areas of the brain that store emo-

60. NPR presumably timed this interview on this first weekend of 2007 to complement the weekend’s headline story that President Bush would, contradicting the unanimous recommendations in the Iraq Study Group Report issued the previous month, double down by sending a “surge” of more than 20,000 additional troops to fight in Iraq. When the U.S. National Intelligence Estimate announced on December 3, 2007, contrary to recent and repeated statements by the Bush administration, that Iran had terminated active attempts to build a nuclear weapon four years earlier, both President Bush and Defense Secretary Gates quickly responded that they would in no way change U.S. foreign policy toward Iran. *Iran ‘May Have Restarted’ Nuclear Program*, ABC NEWS, Dec. 8, 2007, <http://www.abc.net.au/news/stories/2007/12/08/2113548.htm?section=justin>; see also THE IRAQ STUDY GROUP, U.S. INST. OF PEACE, THE IRAQ STUDY GROUP REPORT (2006), available at [http://www.usip.org/isg/iraq\\_study\\_group\\_report/report/1206/iraq\\_study\\_group\\_report.pdf](http://www.usip.org/isg/iraq_study_group_report/report/1206/iraq_study_group_report.pdf).

61. STANLEY MILGRAM, OBEDIENCE TO AUTHORITY 3–5 (1974).

62. PHILIP ZIMBARDO, THE LUCIFER EFFECT 18–23 (2007).

tional memories.<sup>63</sup> Brain studies by Chris Frith, professor of neuropsychology at University College, London, show “a ‘bottom up’ decision making process, in which the ventral palladium is part of a circuit that first weighs the reward and decides, then interacts with the higher-level conscious regions later, if at all.”<sup>64</sup> “Free will,” a premise about human nature on which many conventional liberal prescriptions depend, appears in these findings as a relatively weak cognitive force, a kind of veto power that people only occasionally call upon to alter a decision made first in the subconscious.<sup>65</sup>

## 5. Human Plasticity

From observing the immense diversity of cultural practices evident in the world, Vico concluded that the human mind has a remarkable capacity for “modification.”<sup>66</sup> Cognitive Behavioral Therapy, the psychological techniques developed independently by Albert Ellis and Aaron Beck, confirm this plasticity of the human mind. These techniques, known colloquially as “the talking cure,” have now become standard psychological treatment for most non-psychotic mental dysfunctions. A human brain is plastic and adaptive because, according to Daniel Levitin, by the calculations of combinatoric mathematics, “The number of combinations [of neurons] possible—and hence the number of possible different thoughts or brain states each of us can have—exceeds the number of known particles in the entire known universe.”<sup>67</sup> Cognitive Behavioral Therapy succeeds by teaching people how, for example, to replace particular neural patterns associated with discouragement and depression by more positive alternative pathways.<sup>68</sup>

63. See Damasio’s appropriately titled ANTONIO DAMASIO, *DESCARTES’ ERROR: EMOTION, REASON, AND THE HUMAN BRAIN* (Penguin Books 2005) (1994); see also ANTONIO R. DAMASIO, *THE FEELING OF WHAT HAPPENS* 59–71 (1999).

64. Benedict Carey, *Who’s Minding the Mind?*, N.Y. TIMES, July 31, 2007, at F1, F6 (paraphrasing Dr. Chris Frith); see also CHRIS FRITH, *MAKING UP THE MIND* 186–88 (2007); DREW WESTEN, *THE POLITICAL BRAIN* 35–44 (2007); John B. Judis, *Death Grip: How Political Psychology Explains Bush’s Ghastly Success*, NEW REPUBLIC, Aug. 27, 2007, at 17 (summarizing the “terror management theory” of psychologists Sheldon Solomon, Jeff Greenberg, and Tom Pyszczynski).

65. Overbye, *supra* note 45, at F4.

66. VERENE, *supra* note 4, at 135.

67. DANIEL J. LEVITIN, *THIS IS YOUR BRAIN ON MUSIC* 86 (2006).

68. More specifically, Cognitive Behavioral Therapy succeeds by teaching people how, for example, to replace certain behaviors associated with discouragement and depression with more positive behaviors. This in turn has been shown to change neural patterns leading to new pathways and connections. (Like learning to ride a bicycle, which also leads to forming a new neural pathway.) This dynamic explains how people learn—from the behavior of playing—to short circuit the brutality cycle. ALBERT ELLIS & ROBERT A. HARPER, *A NEW GUIDE TO RATIONAL LIVING* (1975); see also AARON T. BECK ET AL., *COGNITIVE THERAPY OF DEPRESSION* (1979); SUSAN C. VAUGHAN, *THE TALKING CURE: THE SCIENCE BEHIND PSYCHOTHERAPY* (1997).



In theory, the death of moral foundations, i.e., the robust confirmation of Vico's critique of Descartes for our time, should be "good news" for the cause of peacemaking. If humans realized that the world contains no demonstrable truths to be righteous about—if they realized that no specific religion, political ideology, or scientific methodology can demonstrate a truth's universal correctness—they might more effectively short circuit the brutality cycle described in Part II. Alas, by its own terms, no method can prove that this philosophical conclusion is itself correct either. And as Vico saw, such analytical abstractions do not determine "normally intemperate" human behavior.<sup>69</sup>

## II. THE RIGHTEOUSNESS-HUMILIATION-BRUTALITY CYCLE

We are worshippers of Allah and we carry out our duties. Our duty is to call on all nations to join the light. Our first duty is being people of this religion and to fight for this religion. . . . It is our duty to lead people to light.

—Osama bin Laden<sup>70</sup>

God told me to strike at al Qaida and I struck them; then he instructed me to strike at Saddam, which I did; and now I am determined to solve the problem in the Middle East.

—George W. Bush<sup>71</sup>

Pride goes before destruction, and a haughty spirit before a fall.

—Proverbs<sup>72</sup>

69. Hence Richard Rorty's title in RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* (1989). This essay's analysis merely suggests that Rorty might have strengthened his analysis by substituting "play" for "solidarity."

70. Interview by John Miller, ABC News, with Osama Bin Laden (May 1998), *transcript available at* [http://www.robert-fisk.com/usama\\_interview\\_john\\_millerabc.htm](http://www.robert-fisk.com/usama_interview_john_millerabc.htm).

71. Sidney Blumenthal, *Bush and Blair—The Betrayal*, THE GUARDIAN (London), Nov. 14, 2003, at 28, *available at* <http://www.guardian.co.uk/politics/2003/nov/14/iraq.iraq>.

72. *Proverbs* 16:18 (World English).

The Devil is the absence of doubt. He's what pushes people into suicide bombing, into setting up extermination camps. Doubt may give your dinner a funny taste, but it's faith that goes out and kills.

—John Updike<sup>73</sup>

Part II proposes a behavioral model that explains human brutality across time and cultures. This model incorporates and builds on the empirical conclusions about human cognition and behavior summarized in Part I. Part III will show why, and how, competitive games, including the adversarial game of law, alter cognitive networks and behavioral patterns so as to short circuit the brutality cycle at many points. Daily news reports, particularly from the Middle East, vividly illustrate the cycle, but less current, and hence less emotionally raw, examples may help us comprehend the cycle's dynamics with a clearer head. Here are two.

(1) On July 10, 1941, the bulk of the white male Catholic population of the small and provincial town of Jedwabne in northeast Poland rounded up 1600 men, women, and children, all Jewish, and slaughtered them. In this small town the butchers and their victims were, of course, neighbors. They cut out the tongue and eyes of a living man. The killers used a woman's severed head as a football. Several Jewish mothers drowned their babies and then committed suicide. Those whom the aggressors did not club or stab to death were rounded up and put in a barn, which was then burned to the ground.<sup>74</sup>

(2) The following short item appeared in the September 12, 2001, issue of the *Christian Century*:

Found guilty of blasphemy by a Pakistani criminal court, Dr. Younus Shaikh has been sentenced to death by hanging. Dr. Shaikh, a medical school lecturer, had stated that until Muhammad received revelations from Allah at age 40, the prophet was not a Muslim, and that Muhammad and his family did not pursue Muslim practices prior to his founding of Islam. How stating such obvious facts could constitute blasphemy was not entirely clear. Shaikh, who says he is a devout Muslim, is appealing his sentence.<sup>75</sup>

73. JOHN UPDIKE, *ROGER'S VERSION* 81 (1986).

74. JAN T. GROSS, *NEIGHBORS: THE DESTRUCTION OF THE JEWISH COMMUNITY IN JEDWABNE, POLAND* 90–104 (2001).

75. *No Comment Department*, *CHRISTIAN CENTURY*, Sept. 12–19, 2001, at 7. Nicholas Kristof investigated the story and wrote in the *New York Times* of his encounter with well-educated Pakistanis who supported the execution of blasphemers. One defender insisted to Kristof that Americans also execute blasphemers. President Clinton had after all, ordered that the heretic David Koresh and his followers in Waco, Texas, be burned alive in their compound. Nicholas D. Kristof, Op-Ed., *Watch What You Say*, *N.Y. TIMES*, June 21, 2002, at A21. In November, 2007, Ms. Gillian Gibbons, a British teacher working with children at the Unity High School in Khartoum, Sudan, was jailed on charges of "insulting Islam's Prophet" after she encouraged her students to choose the name of a teddy bear and

Dr. Shaikh was quietly released from prison in Rawalpindi in the winter of 2004 after significant international protest. Note that his captors did not spare him because they discovered “true principles of justice.” A moment of political competition, a peaceful international protest, freed him. What explains such horror stories?<sup>76</sup>

The *Book of Genesis* poetically describes profound elements of the human condition, including the ubiquitous dynamics of the brutality cycle. Adam and Eve eat the forbidden fruit. They defy God’s authority. God, angered by this affront, expels them from the Garden in punishment. Indeed, affronted gods in most religions get very angry and do brutal things, hence various religious injunctions against blasphemy.<sup>77</sup>

Cain’s slaughter of Abel provides an even stronger clue to the explanation. In the Revised Standard Version translation, Genesis 4:2–8 reports:

the students by vote chose the name Muhammad. “Fellow teachers . . . feared for Ms Gibbons’ safety after receiving reports that men had started gathering outside the police station where she was being held.” Her school closed for fear of reprisals. ‘Muhammad’ *Teddy Teacher Arrested*, BBC NEWS, Nov. 26, 2007, <http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/7112929.stm>. On November 29, she was sentenced to a fifteen-day jail term followed by deportation but, after international protest, was pardoned, and she immediately left the country. Robert Booth et al., *Teddy Row Teacher on Her Way Home*, GUARDIAN UNLIMITED, Dec. 3, 2007, <http://www.guardian.co.uk/sudan/story/0,,2221020,00.html?gusrc=rss&feed=networkfront>.

76. A more complete, but far from exhaustive, list of atrocities that fit the righteousness-humiliation-brutality cycle described here would include:

- |  |   |
|--|---|
| —The Crusades  | —The slaughters of the Aztecs and the Incas   |
| —The genocides of North American Indians                                 | —The Inquisitions   |
| —The Holocaust   | —The slaughter of the Parisian Huguenots  |
| —The genocide of the Armenians   | —The Khmer Rouge genocide   |
| —“The Troubles” in Northern Ireland                                      | —Israel/Palestine   |
| —The Balkans   | —Stalin’s “cleansings”  |
| —Chechnya  | —Rwanda   |
| —East Timor  | —The Rape of Nanking  |
| —The Sepoy Mutiny  | —The Columbine High School massacre   |
| —The Red Brigades in Italy   | —The Shining Path in Peru   |
| —The Taliban’s overthrow of the Soviet Occupation of Afghanistan         | —Waco and the subsequent Oklahoma City bombing  |
| —Al Qaeda’s 9/11/01 attack on the World Trade Center                     | —The slaughters of Muslims and Hindus over the temple site in Ayodhya                               |
| —Christian/Muslim battles in Nigeria, Somalia, Sudan/Darfur, etc.        | —The U.S. occupation of Iraq, the resistance to this occupation, and the sectarian conflict in Iraq |
| —“The Lord’s Resistance Army” in Uganda                                  | —The American lynching of “uppity Negroes”  |
| —The stoning to death of sexually transgressive women in the Middle East | —The Baader-Meinhof Gang/Red Army Faction in Germany  |

77. On the innate tendency of human males to engage in atrocities, see RICHARD WRANGHAM & DALE PETERSON, *DEMONIC MALES: APES AND THE ORIGINS OF HUMAN VIOLENCE* (1996). See also EVAN WRIGHT, *GENERATION KILL: DEVIL DOGS, ICEMAN, CAPTAIN AMERICA AND THE NEW FACE OF AMERICAN WAR* (Berkley Caliber 2005) (2004).

Now Abel was a keeper of sheep, and Cain a tiller of the ground. In the course of time Cain brought to the LORD an offering of the fruit of the ground, and Abel brought of the firstlings of his flock, their fat portions. And the LORD had regard for Abel and his offering, but for Cain and his offering he had no regard. So Cain was very angry, and his countenance fell. The LORD said to Cain, "Why are you angry, and why has your countenance fallen? If you do well, will you not be accepted? And if you do not do well, sin is lurking at the door; its desire is for you, but you must master it." Cain said to his brother Abel, "Let us go out to the field." And when they were in the field, Cain rose up against his brother Abel, and killed him.

Humiliation triggered Cain's murderous anger. God favored Cain's younger brother. God denied Cain his senior pride of place. God, in a remarkably perceptive (if hypocritical, since the insult to God's pride of place led to the expulsion from the garden) psychotherapeutic moment, urges Cain simply to keep on doing his best and to ward off the sin of blaming others for his failures in life. In short, God urges Cain to follow a principle, take personal responsibility and be, in effect, his brother's keeper. Cain pays no attention to the principle.<sup>78</sup>

Fratricides like Cain's, genocides, suicide bombings of innocent bus riders and pedestrians, the indiscriminate napalming of villages in Vietnam, and the entirely predictable resistance to the U.S. occupation of Iraq beginning in 2003 follow a common pattern. No doubt other dynamics—a rumor spread, or drunkenness, and of course opportunistic (and at times socio-pathological) political leadership, for example—play a specific role in particular events. Still, a three-part pattern holds across human cultures and historical eras.

First, a group identifies itself as rightfully entitled to something. In some, but not all, cases, someone senses that his superior status in the dominance hierarchy—God's status as, well, God; Cain's status as older brother; presumed Hutu superiority over Tutsi; the inerrancy of the Holy Bible; or the unquestionable authority of Islam—privileges him over his

78. Genesis continues with the familiar story of the flood, wrought by God's anger at man's once again not playing by His rules. Then follows, Genesis 9:20–28, the fascinating story of Noah's humiliation. Having planted a vineyard and made wine, Noah proceeded to get drunk. When his sons came upon him passed out naked in his tent, they covered him up, but Noah was so humiliated that his sons had seen him in that state that he condemned his grandson Canaan, who had nothing to do with the incident, to eternal slavery. The same pattern of righteous anger also appears in the textual setting of the ubiquitously recognized chorus from Handel's *Messiah*, where the people shout "Hallelujah!" at the smashing of the opponents of the Lord into pieces: "The kings of the earth rise up, and the rulers take counsel together, against the Lord and against His anointed. . . . He that dwelleth in heaven shall laugh them to scorn: the Lord shall have them in derision. Thou shalt break them with a rod of iron; Thou shalt dash them in pieces like a potter's vessel. Hallelujah!"

inferiors.<sup>79</sup> Often those who perceive themselves as superior also perceive themselves as “purer” and “cleaner” than their inferiors. For some, divine authority ordains their entitlements. For others, it is simply “the homeland.” In all such cases, something like pride goes before the fall into brutality.

Second, the fall into brutality begins when members of the superior group feel dishonored, humiliated, and, in that pithy American street-slang expression, “dissed.” Often encouraged and incited by opportunistic leaders, people label as “evil” those who challenge and threaten their privileges and entitlements, perhaps to their women (the Trojan War), their turf (the taking of Palestinian land for a Jewish state), or their symbols (the conflict over the Dome of the Rock or “blasphemous” publication of cartoon images of Muhammad). Political rhetoric routinely amplifies the anger by claiming that “the other” has defied the group’s moral superiority and its purity. Osama bin Laden’s defense of the purity of sacred Saudi soil and George W. Bush’s commitment to “freedom and democracy” make such claims.

Third, the superior group brutally overreacts and punishes the disrespectful other out of all proportion to the threat. The earth must be cleansed of the impure other in the name of right, honor, and purity. It is a remarkably robust pattern. Impersonal natural disasters—plagues, droughts, and famines—trigger the killing of witches, Jews, or whatever scapegoat best serves in the moment. Some brutal acts seem consistent with economic models of rational choice. The push to kill aboriginal Americans if they did not convert to Christianity served as a convenient pretext for Europeans bent on taking their gold and land. The United States destroyed the Japanese cities of Hiroshima and Nagasaki with nuclear bombs both to end the war quickly and to demonstrate to the Soviets, who by then knew the U.S. possessed nuclear weapons, its will to use them. Perhaps the regime in China crushed students in Tiananmen Square merely to protect its hold on power. However, neither extreme poverty nor extreme inequalities of wealth systematically trigger human brutality as often or as intensely as do humiliating challenges to claims of righteousness.<sup>80</sup>

79. Predominant use of male gender signifiers herein is intentional, since males do the vast majority of brutal acts as this essay conceives them.

80. The divide between Sunni and Shia, which arose from a disagreement over the right to succeed Muhammad’s rule of Islam and the subsequent centuries of mutual assassinations, may incorporate all the causes of brutality. Recent books confirming the centrality of religious and ideological righteousness as setups for the humiliation that in turn triggers brutality include JUAN COLE, *SACRED SPACE AND HOLY WAR* (I.B. Tauris 2005) (2002); JOHN L. ESPOSITO, *UNHOLY WAR: TERROR IN THE NAME OF ISLAM* (2002); MARK JUERGENSMEYER, *TERROR IN THE MIND OF GOD* (2000); LUCIANO PELLICANI, *REVOLUTIONARY APOCALYPSE* (2003); LOUISE RICHARDSON, *WHAT TERRORISTS WANT* (2006); JESSICA STERN, *TERROR IN THE NAME OF GOD* (2003).

Across cultures, humans become brutal when these conditions exist. Drivers experience road rage. The benches suddenly empty when a baseball pitcher deliberately throws at a batter's head. When Zidane head-butted Materazzi in the 2006 World Cup finals, viewers intuitively knew that something like Materazzi's sexual insult to Zidane's family must have provoked him. Legal systems permit jurors to acquit via jury nullification (or reduce the punishment for) those who kill their adulterous spouses in the "heat of passion." Many legal systems permit people to kill intruders in their homes even when those intruders pose no visible threat to safety or property.

Threats and insults to identities and the symbols and traditions that construct identities—bombing the golden-domed al-Askari mosque in Samarra and destroying the World Trade Center monument to capitalism in New York City—explain the bulk of human atrocities better than do factors like poverty, resource inequality, and greed. If an "untouchable," and in too many cultures simply a woman, defines herself as inferior because that is the proper order of things, she will not think of herself as entitled to anything that can be threatened or humiliated. Untouchables depicted in Bollywood films occasionally become disoriented and confused when their superiors treat them as valued equals.<sup>81</sup> American slaves sought to escape far more frequently than they mounted bloody uprisings, and most slaves did neither. But those who do brutalize others, e.g., the torturers at Abu Ghraib, do not typically act for conventional economic motives. They act, as Shaw's Caesar knew, in the name of right and honor and peace.

At least four sets of conditions seem to correlate with brutality: challenges and insults to status in a dominance hierarchy; challenges and insults to turf; challenges and insults to group and ethnic sexual, physical, and moral purity; and challenges and insults to a sense of justice. Experimental social psychologists Sheldon Solomon, Jeff Greenberg, and Tom Pyszczynski suggest that the uniquely human consciousness of individual mortality underlies the cycle.<sup>82</sup> To ward off the anxiety caused by their knowledge of their inevitable death, people construct religious, political, or moral value systems that reinforce the individual's self-worth in the face of death's certainty. People cannot empirically validate their defense systems, the belief in an everlasting life in heaven after death, or in the righteousness of the Marxist vision of the social order, for example. Their efficacy in

81. See particularly, *LAGAAN: ONCE UPON A TIME IN INDIA* (Aamir Kahn Productions May 8, 2002). The film also describes how British colonials and rural Indian farmers avoided a potentially bloody war by playing a cricket match to resolve their dispute. Compare C.L.R. JAMES, *BEYOND A BOUNDARY* (1963) (documenting the history of cricket in the West Indies).

82. Indeed, the description in Genesis of The Fall itself suggests this explanation of human sin.

warding off the fear of death instead impels people to join social groups—sects, tribes, parties, or teams, for example—that reinforce the truth and righteousness of this psychological buffer. In a warped version of the impulse to kill in self defense, people who perceive threats to these symbolic support systems may see no alternative but to kill those who threaten the systems, for it is these very systems on which the individual's escape from the fear of death depends.<sup>83</sup>

### A. *The Dominance Hierarchy*

Individual brutality predictably occurs when an inferior challenges a superior in the dominance hierarchy. Police officers and prison guards, the official embodiment of the state or the crown and thus the embodiment of official state superiority, seem to have, in the absence of proper instruction that they are “peace officers” first and enforcers only secondarily, a particular propensity to fall into the brutality cycle. New York City police officer Justin Volpe nearly killed immigrant Abner Louima by reaming his anus with a broomstick after Volpe believed (in fact mistakenly) that Louima, a gay black man, had insulted him.<sup>84</sup> The officer “rightfully” dominates because he embodies the dominant righteousness of the state.<sup>85</sup>

### B. *Turf and Similar Things Held Dear*

People and groups get particularly brutal when they perceive that the land they “own” has been defiled or attacked. When in 2000 Ariel Sharon paid a surprise visit to the Temple Mount in Jerusalem, Palestinians soon began throwing rocks at Israeli troops, who returned fire with rubber bullets and tear gas. Conflicts over this economically insignificant piece of turf, because it contains both the Jewish sacred Wailing Wall and the third most sacred mosque in Islam, coupled with displaced Palestinians' insistence on their right to return to their lost turf inside Israel, remain the major obstacles to negotiating the boundaries of an independent Palestinian

83. See Sheldon Solomon, Jeff Greenberg & Tom Pyszczynski, *A Terror Management Theory of Social Behavior: The Psychological Functions of Self-Esteem and Cultural Worldviews*, 24 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 93, 93–105 (Mark P. Zanna ed. 1991). George W. Bush said in 2005, “We will take the fight to the enemy. . . . There is only one course of action against them, to defeat them abroad before they attack us at home.” Address to the Nation on the War on Terror from Fort Bragg, North Carolina, 41 *WEEKLY COMP. PRES. DOC.* 1079 (July 4, 2005).

84. The *New York Times* has the full chronology of this case. N.Y. Times, Abner Louima Archive Highlights, [http://topics.nytimes.com/top/reference/timestopics/people/l/abner\\_louima/index.html](http://topics.nytimes.com/top/reference/timestopics/people/l/abner_louima/index.html) (last visited Mar. 26, 2008).

85. See Errol Morris's film *The Thin Blue Line*, documenting the failure of an entire legal system in Texas, offended by the murder of one of its police officers, to practice the rudimentary elements of legal due process. *THE THIN BLUE LINE* (Miramax Films Aug. 25, 1988).

state.<sup>86</sup> Humans are indiscriminately territorial. The violent defense of one's physical land may have begun as rational economic self-protection, but turf can take on potent non-economic symbolic meanings that people defend just as aggressively as they defend productive soil, e.g., the Saudi soil so sacred to Osama bin Laden and the turf marked off by street gangs in inner cities.<sup>87</sup>

The frequent association between political secession and violence further underscores the role of turf in the brutality cycle. Efforts both to change the legal status of land ownership and to abandon land and "move on" frequently trigger violent responses. In the U.S. Civil War, the Chechnyan separatist movement, the recent push to create the separate state of East Timor in Indonesia, or the Tamil separatist movement in Sri Lanka, a group seeks not to threaten the land of the other but to change its legal and political status. Changing the legal and political labels put on land that people already occupy and use does not alter the land's productivity, yet such changes seem to provoke the "home" group to violence. The early Mormon leader Joseph Smith understandably enraged many Americans when he claimed that God had really given him, not its legal owners, land in Ohio and then in Missouri. Conventional Christian Americans eventually lynched him. Yet Americans also persecuted Mormons after they had wisely abandoned Smith's course and moved on to settle virgin territory in Utah.<sup>88</sup> These patterns closely parallel Jane Goodall's description of the "war" between two factions of her Gombe chimpanzees. In the 1970s, a self-sufficient group of chimps split from their primary tribe and moved to the southern part of the Gombe range. They staked out the areas as their

86. See *Israeli Troops, Palestinians Clash After Sharon Visits Jerusalem Sacred Site*, CNN.COM, Sept. 28, 2000, <http://www.cnn.com/2000/WORLD/meast/09/28/jerusalem.violence.02/>.

87. Bin Laden first became outraged when U.S. troops encamped on, and thus defiled, sacred Saudi soil. In 1996 he issued his fatwa, "Declaration of War Against the Americans Occupying the Land of the Two Holy Places." In contemporary Iraq, the Sunni minority rankles at its loss of its prior dominance over Iraqi turf. The Shia majority, rankling at the injustices done to them in the past, seeks to right those wrongs. Throughout history, holy wars over sacred spaces and holy lands, from the Crusades to Hitler's warped view of the sanctity of the German homeland, have proved to be among the planet's most brutal wars. See Osama bin Laden, *Declaration of War Against the Americans Occupying the Land of the Two Holy Places*, AL QUDS AL ARABI, Aug. 1996, reprinted in ONLINE NEWSHOUR, [http://www.pbs.org/newshour/terrorism/international/fatwa\\_1996.html](http://www.pbs.org/newshour/terrorism/international/fatwa_1996.html) (translation).

88. For the succinct history of the early Mormon persecution, whose fans were flamed in no small part by Joseph Smith's rabid religious fundamentalism, see THOMAS BULLOCK, *THE PIONEER CAMP OF THE SAINTS: THE 1846 AND 1847 MORMON TRAIL JOURNALS OF THOMAS BULLOCK* (Will Bagley ed., 1997) (recounting and analyzing the trail journals of Thomas Bullock, a Mormon Pioneer); WILLIAM G. HARTLEY, *MY BEST FOR THE KINGDOM* (1993) (documenting Mormon history and the life of John Lowe Butler); STEPHEN C. LESUEUR, *THE 1838 MORMON WAR IN MISSOURI* (paperback ed. 1990). For the consequences of residual animosity toward the Church of Jesus Christ of Latter Day Saints on the failed campaign of Mitt Romney for the Republican presidential nomination in 2008, see *Morning Edition: Mormons Confront Negative Ideas About Their Faith* (NPR radio broadcast Feb. 15, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=18905399>.



own, stayed put, and didn't threaten the food or shelter of the original group. But over the next four years, the males who stayed in the original group proceeded to kill all the renegade males, females, and children. These males formed raiding parties. They isolated individual "rebels" and murdered them, sometimes deliberately ripping off their testicles. The younger males shrieked with pleasure as they did so, according to Goodall's account.<sup>89</sup>

The perception of treason, that "one of us has betrayed us," also gets the blood up. In the 2003 Major League baseball playoffs, Steve Bartman, a Chicago Cub fan reflexively trying to catch a foul fly ball from his front row seat, inadvertently interfered with a Cub outfielder's attempt to catch the ball. The Cubs, leading and near victory at the time, went on to lose the game and the chance to move to the World Series. The offending fan's life was suddenly in danger. Within hours Bartman had disconnected his phone and gone into hiding. He required police protection for months.<sup>90</sup>

### C. Purity

Fundamentalism includes not only religious righteousness (e.g., Islamic and Christian fundamentalists) and secular ideological righteousness (e.g., Leninist/Stalinist or Maoist Communism), it includes beliefs in the physical and biological superiority of one's "race": Hitler's Aryan supremacy, which generated the Holocaust, for example, or the racism of many white Americans, which generated so much lynching. A belief in the absolute correctness of group belief systems and ways of life, including identification with the cultural and linguistic patterns associated with "race" and ethnicity, necessarily entails a belief in physical purity, which is an objectified form of righteousness. "Others" are, by definition, impure. Tribal, cultural, and ethnic differences do not, in and of themselves, automatically trigger inter-group violence.<sup>91</sup> Fundamentalists who believe those differ-

89. JANE GOODALL WITH PHILLIP BERMAN, REASON FOR HOPE 97-136 (1999). See the Merle Haggard lines:

If you don't love it, leave it.  
Let this song that I'm singin' be a warning.  
When you're runnin' down our country, man,  
You're walkin' on the fightin' side of me.

MERLE HAGGARD, *The Fightin' Side of Me*, on THE FIGHTIN' SIDE OF ME (Capital Records 1970).

90. "A Good Kid" Gets in the Way, ESPN.COM, Oct. 16, 2003, <http://sports.espn.go.com/mlb/playoffs2003/news/story?id=1638663> ("Last seen, as the Marlins rallied, security guards were escorting Bartman out of the park. He threw a jacket over his face for protection, but not before other fans hurled beers at him. 'You cost us the World Series!' one fan yelled at him. Some chanted 'Kill him!'").

91. James D. Fearon & David D. Laitin, *Explaining Interethnic Cooperation*, 90 AM. POL. SCI. REV. 715 (1996).

ences indicate supremacy, however, behave like Soviet dictators, Hitler, or al Qaeda. American exceptionalists who believe that the United States is “the promised land” may not be far behind.<sup>92</sup>

Barrington Moore tersely describes instances in which the belief in “our” group’s purity had brutal consequences. His retelling of the August 24, 1572, St. Bartholomew Massacre of the Parisian Huguenots describes how the mutual invective on both sides dehumanized the other by employing metaphors of impurity such as “vermin,” “poison,” and “lepers.”<sup>93</sup> The witch trials in Europe between 1450 and 1700, tortured into confessing, burned, and hanged about 100,000 people, the vast majority of them women, in some instances by pulling the accused’s arms from their sockets, or forcing her to sit in a heated metal “witch’s chair.” Among the many elements of this phenomenon, which was deliberately coordinated and endorsed by the moral and intellectual leaders of the time, fifteenth century law required that conviction for witchcraft include proof that the accused had been rendered impure by having physical sexual intercourse with a demon.<sup>94</sup>

Socio-biologists call Moore’s observation “pseudo-speciation” or “despeciation.” Humans “despeciate” the other, i.e., define human victims as not of the species *homo sapiens*, before slaughtering them. In the Rwandan genocide of 1994, Hutus called their Tutsi victims “cockroaches.” Nazis and Stalinists regularly referred to Jews and Kulaks as “vermin.” Ordinary American members of the U.S. armed forces made Iraqi prisoners at the Abu Ghraib prison act like dogs. Conversely, psychologists have

92. See George W. Bush’s statement at the National Cathedral on September 14, 2001, that his “responsibility to history” was to “rid the world of evil.” Press Release, Presidential Office of the Press Sec’y, President’s Remarks at National Day of Prayer and Remembrance (Sept. 14, 2001), <http://www.whitehouse.gov/news/releases/2001/09/20010914-2.html>. Also see the comments of Lt. General William Boykin, a Christian evangelical who, while in uniform, gave a number of speeches at religious functions early in the Iraq war. According to the *New York Times*, “In one speech, the general recalled a Muslim fighter in Somalia who said American forces would never get him because Allah would give him protection. ‘Well, you know what I knew—that my God was bigger than his,’ General Boykin told his audience. ‘I knew that my God was a real God, and his was an idol.’” *Rumsfeld Praises Army General Who Ridicules Islam as ‘Satan’*, N.Y. TIMES, Oct. 17, 2003, at A7.

93. BARRINGTON MOORE, JR., *MORAL PURITY AND PERSECUTION IN HISTORY* 48–55 (2000); see also BARRINGTON MOORE, JR., *INJUSTICE: THE SOCIAL BASES OF OBEDIENCE AND REVOLT*, at xiii–xiv (1978) [hereinafter MOORE, *INJUSTICE*] (exploring why some victims acquiesce to, and others revolt against, their aggressors).

94. See RICHARD KIECKHEFER, *EUROPEAN WITCH TRIALS* (1976); BRIAN P. LEVACK, *THE WITCH-HUNT IN EARLY MODERN EUROPE* (2d ed. 1995) (1987); see also WALTER STEPHENS, *DEMON LOVERS: WITCHCRAFT, SEX, AND THE CRISIS OF BELIEF* 58–86 (2002). Stephens concludes that theologians tried to overcome their growing doubts about the physical existence of God and of the spirit by showing that because women had sex with carnate demons, the world of demons, and therefore the world of God, must physically exist. Women were executed for witchcraft not so much because they were themselves thought impure, but because their execution could maintain the purity of the theologians’ belief in a tangible and objective spiritual world.

found that when people give a pet animal, even a cockroach or a flea, a human name, they have a difficult time seeing the animal die or putting it down. Hence, Moore also speculates, those groups that give God a name and imagine God as a human-like figure whom they should obey, as primates should obey a silverback leader, in a dominance hierarchy, thereby show a greater historical incidence of group violence than do polytheistic or non-theist cultures. These traditions often tell stories of encounters—that of Saul of Tarsus—with God that are “blinding.” We might say that people are blinded by righteousness.<sup>95</sup>

Thus the Crusades may have been inevitable. If “my God” has a name and a story that gives a life its meaning, all the psychological factors—disputed sacred turf, belief in one’s own purity, the affection for things we name, and ultimately the fear of death—point toward despoiling and killing those who threaten to tear that world apart.<sup>96</sup> Moore does not claim that religious or ideological fundamentalist beliefs cause brutality in any simple linear way. Most fundamentalists behave peacefully most of the time. But fundamentalist beliefs do seem to act as “purity boosters,” enablers of moralistic group violence that make brutality against the other seem “right.”<sup>97</sup>

#### D. *The Trouble with Justice*

“Justice” cannot have any objectively correct substantive content in a socially constructed world. As Kahneman, noted above, and other psychologists have found, people on all sides of a conflict believe they are “right.” When justice takes on substantive meaning, that meaning tends inevitably toward the absolutist and righteous; justice itself becomes a trigger of brutality. In the context of competitive play, “justice” and “rights” merely describe the prizes political and legal contestants strive to win.<sup>98</sup> In psychodynamic terms, justice often describes a rationalization of the ex-

95. See DAVID BROCK, *BLINDED BY THE RIGHT* (2002); MOORE, *INJUSTICE*, *supra* note 93.

96. See *supra* note 78 and accompanying text.

97. It bears emphasizing that this essay’s description of the connection between fundamentalism and violence does not entail a critique of religion *per se*. Vico would surely agree with Erich Fromm:

There is no one without a religious need, a need to have a frame of orientation and an object of devotion; but this statement does not tell us anything about a specific context in which this religious need is manifest. Man may worship animals, trees, idols of gold or stone, an invisible god, a saintly man or diabolic leaders; . . . his religion may be conducive to the development of destructiveness or love, of domination or of brotherliness; . . .

ERICH FROMM, *PSYCHOANALYSIS AND RELIGION* 25–26 (1950).

98. Richard Rorty concluded that “justice” makes conceptual sense only as a description of instances where people expand the boundaries of the group to which they feel loyal and thus responsible for helping rather than injuring. Richard Rorty, *Justice as a Larger Loyalty*, in *JUSTICE AND DEMOCRACY* 9 (Ron Bontekoe & Marietta Stepanians eds., 1997).

perience of injustice, i.e., of outrage triggered by insults to power, turf, and purity. Perceived violations of the expectation of fairness and of equal treatment of equals often trigger anger and potential violence.<sup>99</sup>

Frans de Waal has demonstrated that non-human primates similarly react to perceived unfairness and inequality. After discovering experimentally that capuchin monkeys would angrily reject food, in this case a piece of cucumber, that they had once accepted after seeing their partners getting more valued food (a grape), de Waal concluded:

The fairness issue is closely related to the interests of economists, who have classically assumed that human beings are rational optimizers of the costs and benefits of their choices. Some economists, however, believe that we are guided by emotions and passions that sometimes lead to irrational behaviors, at least in the short run, such as in the case of a monkey refusing food. . . . Some economists have become interested in such irrational human actions and have developed very interesting evolutionary explanations for it. The results of this study are aligned with that thinking, in the sense that monkeys behave in a similar manner, rejecting acceptable food when the rational strategy would be always to exchange. They exhibit emotions similar to humans, becoming very unhappy when someone else receives a better deal than they.<sup>100</sup>

De Waal has termed this primate pattern “moralistic aggression,” and the term aptly describes the common human brutality syndrome. Timothy McVeigh bombed the Oklahoma City Federal Building on the anniversary of the deaths of the Branch Davidians at Waco because the injustice of the government’s murder of innocent believers in Waco outraged him.

### III. HOW VICHIAN PLAY SHORT CIRCUITS THE BRUTALITY CYCLE

And I call to mankind, Be not curious about God,  
For I who am curious about each am not curious about God.

—Walt Whitman<sup>101</sup>

There is a national identity to the Iraqis. . . . And nowhere did you see that better than after the soccer victory in the Asian Cup. And everyone was out on the street—Sunni, Shia, Kurd. And in fact Sunni, Shia, Kurd contributed to that victory on the field as well, so it was a wonderful metaphor, in fact, for what Iraq is trying to do.

—General David Petraeus<sup>102</sup>

99. See, e.g., Peter Whoriskey, *Thousands Protest Blacks’ Treatment*, WASH. POST, Sept. 21, 2007, at A1, (explaining the Louisiana case of the “Jena Six”).

100. Frans B.M. de Waal, *Evolutionary Ethics, Aggression, and Violence: Lessons from Primate Research*, 32 J.L. MED. & ETHICS 18, 23 (2004).

101. WALT WHITMAN, *Leaves of Grass*, in LEAVES OF GRASS: FIRST AND “DEATH BED” EDITIONS 29, 88 (Karen Karbiener ed., Barnes & Noble 2004) (1855).

To summarize the argument so far, a Vichian system of peaceful conflict resolution and wholesome civil life must necessarily build on the common sensory experiences of ordinarily passionate and non-rational people. Vico's *sensus communis* is, as Verene puts it, "not a proto-scientific form of knowledge, but . . . a common way of feeling, speaking, and symbolizing meaning in the world."<sup>103</sup> "The natural law of the gentes is not an abstract principle but is present as the actual life of any society. It is true not as a rational ideal but as the actual basis of social practice."<sup>104</sup> In Vico's comprehensive vision, people will socially construct this system without regard to any particular substantive principles of law or morals. They will not "design" such a system by following principles of justice or "good government." They will develop it without consciously knowing that they do so, and it will succeed to the extent it appeals to their elemental (child-like) love of the fabulous and the mythical, their attraction to heroes, and their poetic engagement with the world.<sup>105</sup> In Vico's non-Cartesian world, and in our own, rules themselves do not command, they merely provide one of many elements that frame conflict and debate.<sup>106</sup>

In civil life, Vico's humans learn to live well by learning to compete in the rhetorical game of law. Modern common-law adversarial systems follow the structure of competitive sports and games more explicitly than did the legal institutions of Vico's day. Contemporary liberal constitutional democracy, with its electoral campaigns, winners and losers, and, in concept if not always in practice, an impartial system of refereeing the political contest, also aspires to conform to the structure of competitive play. This is, after all, the core of Madison's argument for countervailing political powers in *The Federalist* #10.<sup>107</sup> In competitive games, humans engage the world through heroes, fables, and passion, and thereby make "a natural law for all of humanity."<sup>108</sup> Humans will fully replace the brutality cycle only

102. *The Charlie Rose Show* (PBS television broadcast Sept. 17, 2007), transcript available at 2007 WLNR 18192646.

103. VERENE, *supra* note 4, at 53.

104. *Id.* at 63. It is one thing for the Declaration of Independence to declare that all men are created equal and quite another for people to practice equality as the "actual basis" of their social lives.

105. Vico uses the word *fantasia* to describe this engagement. Verene marvels at Vico's ability to make "a science . . . whose *chiave maestra*, whose master key, is *fantasia*." *Id.* at 128.

106. See BURNS, *supra* note 12, at 170 ("It is not just, as Kant reminds us, that there are no rules for the correct application of rules (in this case empirical generalizations); it's that there are no rules at all.").

107. See also, e.g., SCOTT GORDON, *CONTROLLING THE STATE: CONSTITUTIONALISM FROM ANCIENT ATHENS TO TODAY* 358–61 (1999) (concluding that all effective constitutional governments have succeeded by creating countervailing powers and competitive checks and balances).

108. VERENE, *supra* note 4, at 60.

through luck, or as Vico put it, by “providence.”<sup>109</sup> Still, to find that Vico’s elemental human nature, confirmed in our time, has within it the capacity to become Shaw’s “race that can understand” must count, at least metaphorically, as a providential and “divine” development.

#### A. *The Elements of Good Games*

This section describes the structural elements of good competitive games. If the world is as Vico described it, then the only “proof” of what follows—indeed the only proof of every element in this essay—will depend on whether readers have sensed and experienced these elements in their lives as players in and observers of organized sports and other venues of competitive play. In other words, the argument necessarily claims that the following elements of good games already help construct a *sensus communis*.<sup>110</sup> Most readers will probably associate these elements of good games with the commercial sports they see on television. But these elements apply in purer form to noncommercial sports, e.g., Little League baseball and youth soccer leagues. Readers may compare the following characteristics of good sports and games—both specific contests and the flow of competition within an organized sport over a season—against their own memories of good contests, close races, and so on.<sup>111</sup>

The features of good games apply equally accurately, with exceptions at the margins, to all instances of structured competition, including legal definitions of due process, institutional structures for fair elections, and economic principles of fair market competition. In all these areas, competition most importantly short circuits the brutality cycle because it legitimizes losing. By decoupling honor from defeating an enemy, games avoid the fundamentalist trap wherein righteousness demands winning at all costs. Games also decouple personal and tribal identity from turf—either as in, say, football, where the teams change the side they defend partway

109. *Id.* at 149.

We [pragmatists] think that the utopian world community envisaged by the Charter of the United Nations and the Helsinki Declaration of Human Rights is no more the *destiny* of humanity than is an atomic holocaust or the replacement of democratic governments by feuding warlords. If either of the latter is what the future holds, our species will have been unlucky, but it will not have been irrational. It will not have failed to live up to its moral obligations. It will simply have missed a chance to be happy.

RORTY, *supra* note 8, at xxxii.

110. See VERENE, *supra* note 4, at 53.

111. For this writer, the U.S.–China 1999 Women’s World Cup Football final, a thriller that went scoreless through two overtimes and ended with dueling free kicks, fully illustrates this section’s analysis. Most recently as of this writing, the competition in *Super Bowl XLII* (FOX television broadcast Feb. 3, 2008) also illustrates this section’s themes. Those who recall the game clearly, or who watch a full replay of the game, will note the virtually flawless refereeing throughout the match.

through the game, or where the turf belongs to the contestants equally, as in the ring in a boxing match, the turf of a golf course, or a horse racing track. Litigants compete on the common ground of the courtroom. Environmentalists who work to save the planet implicitly urge us to experience the earth as land that all humans hold in common.

No sports competitor seems bothered by the absence of any moral or philosophical essence behind the rules of their games. "Three strikes and you're out" is a purely amoral social construction. Game talk differs from morality talk and fundamentalist talk, from ideological talk that commands faith in the correctness of the principles of Marxist-Leninist communism or the inerrancy of the Bible and the Qur'an. Game talk differs from Israeli and Palestinian talk about their absolute and true possession of the Temple Mount. When the Red Sox beat the Yankees in Yankee Stadium or the Yankees win at Fenway, no one's God or sacred space gets defiled.

### 1. Uncertainty, Contingency, and the Acceptance of Losing

Players, coaches, and fans know that their side may lose. Although some sports rules permit ties and sometimes circumstances force the termination of play when the score is tied, players and spectators come to the game believing and accepting the fact that one side will, at its end, have lost. Indeed, in a typical tournament or foot, car, boat, or horse race, most of the contestants lose. Just as the certainty of death is the price we pay for the privilege of living, so losing is the price paid for the satisfaction of playing a game. The closer and more cliff-hanging a particular game—the *more* likely that "my team can lose"—the more memorable the game. Losers, winners, and spectators alike will all describe such closely-fought games as "great."

Religious or ideological fundamentalists, however, cannot conceive that losing embraces goodness in any form. Losing for them is a form of evil. Losing for them requires an endless escalation of effort, perhaps ending in the madness of suicide bombing, to reestablish the good. Players, on the other hand, know that "winning at all costs" is not play at all. Playing well, not winning, is the player's highest goal.<sup>112</sup> Winning teams *never* believe that their "moral purity" entitles them to win. Wise competitors do not talk of their side's righteousness. Losing cannot humiliate; it comes with the territory. If the game is fair, losing players, litigants, and candi-

112. See TORRE, *supra* note 16, at 7; see also SCOTT BARCLAY, AN APPEALING ACT: WHY PEOPLE APPEAL IN CIVIL CASES (1999); TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990). Both books conclude that losing litigants at trial and on appeal accept their losses if they participated in it and believed they had a fair chance to win.

dates in elections will say, “We gave it our best shot.” Players of good games often play for very high stakes—power, prestige, and personal wealth—but they do not play for righteousness and moral purity. The spoils of victory only last until the next game or season.

## 2. Equality

To give each side a plausible chance to win, good games must insure that the players have relatively equal resources and abilities.<sup>113</sup> Games between unequal teams are rarely close games, hence rarely good ones. It is easier to swallow losing today when your side could have won today and can win tomorrow. Competitive games maintain their excitement when team owners, rules committees, amateur and professional league associations, and so on, pay continuous attention to equalizing the resources necessary to give opposing competitors a chance to win. Game organizers pay no attention to the morality of equality—equality merely optimizes their gate and television revenues—yet sports leagues initiate player draft policies that benefit the least successful teams. They worry about gate and television revenue differentials that would, unchecked, empower the most profitable teams to hire the best talent and dominate the league. School and amateur leagues structure themselves to pit comparables against comparables.<sup>114</sup> Southern football coaches, in order to recruit the best possible talent, and hence without regard to race, got confederate flags and the tune “Dixie” removed from southern football stadiums. In women’s tennis, at least, Billy Jean King’s and Martina Navratilova’s lesbianism raised hardly a stir. No professional male athlete has revealed a homosexual orientation during his playing career, but six—the NBA’s John Amaechi most recently in 2007—have come out since retiring from play. Perhaps the intimacy of the shower room encourages the “don’t ask, don’t tell” custom in male sports. Still, none of these six has been the victim of a hate crime, and some, after coming out, are public celebrities.<sup>115</sup>

113. The word “equal” derives from the Latin *aequalis*, meaning “level” as in a level playing field, not from any word signifying an algebraic identity. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 766 (1986).

114. One is tempted to imagine cigar-smoking politically conservative professional team owners railing against “the liberal social agenda” over their third drinks on the night before an owners’ meeting, yet voting the next morning, oblivious to the contradiction, to adopt, for the benefit of the game and for their wallets, “affirmative action”-like programs far more liberal than those practiced in most American social institutions.

115. Regarding Amaechi’s case, and the complex dynamics of homosexuality in male sports, see Chris Sheridan, *Amaechi Becomes First NBA Player to Come Out*, ESPN.COM, Feb. 9, 2007, <http://sports.espn.go.com/nba/news/story?id=2757105>.



### 3. Precision of Rules

Rules in games place high value on precision, for example, the rule concerning the required bounciness of a baseball:

The [coefficient of restitution] is measured by firing balls from an air cannon at a velocity of 85 feet per second directly at a slab of wood 8 feet away. Major league baseball requires a rebound rate of 54.6 percent of the original velocity, with a permitted deviation of no more than plus or minus 3.2 percent.<sup>116</sup>

### 4. The Unquestioned Authority of Referees

Precision is not, however, games' highest jurisprudential value. Words rarely speak clearly beyond specific cases and contests.<sup>117</sup> What matters most is unquestioned obedience to the calls of umpires, both in cases where a rule may be ambiguous and where external observation shows an umpire missed a call. Hence the adage in cricket, "The man in white is always right."<sup>118</sup> More than a momentary questioning of a call gets the disputative player, coach, or manager penalized and/or ejected from the game. Sports rules explicitly articulate the superiority of the umpire.<sup>119</sup>

### 5. Referee Independence, Impartiality, and the Perception of Fairness

When game officials make dubious or evidently wrong calls, players and spectators must see and believe that bad calls do not favor one player or team. Impartial officials do not so much "get it right," a dubious concept in a socially constructed world, as distribute their errors randomly and "sell the call."<sup>120</sup> Sports rules, like rules of law, have their own indeterminacy.

116. GEORGE F. WILL, *MEN AT WORK: THE CRAFT OF BASEBALL* 47 (1990).

117. LIEF H. CARTER & THOMAS F. BURKE, *REASON IN LAW* 23–24 (updated 7th ed. 2007). As fans of the planet Pluto recently learned, no single objectively correct way exists by which to define what is and is not a "planet."

118. DAVID FRASER, *CRICKET AND THE LAW: THE MAN IN WHITE IS ALWAYS RIGHT* (2005); see also ALLAN C. HUTCHINSON, *IT'S ALL IN THE GAME* (2000) (comparing law and the process of adjudication to the process of playing games).

119. See, e.g., INTERNATIONAL RUGBY FOOTBALL BOARD, *THE LAWS OF THE GAME OF RUGBY FOOTBALL*, at Law 6.A.(5) (1996), available at [http://www.uidaho.edu/clubs/womens\\_rugby/RugbyRoot/rugby/Rules/LawBook/law06.html](http://www.uidaho.edu/clubs/womens_rugby/RugbyRoot/rugby/Rules/LawBook/law06.html) ("During a match, the referee is the sole judge of fact and of law."). Vico recognized that legal truth comes not from natural law principles but from human will expressed by authorities. VERENE, *supra* note 4, at 59.

120. Cliff Collins, *Michael Gillette: Order on the Court*, OR. ST. B. BULL., July 2001, available at <http://www.osbar.org/publications/bulletin/01july/profile.htm> ("Basketball officials call it 'selling the call.' 'To sell the call is to make the call in a way that shows the world that you know what you're doing,' explains Oregon Supreme Court Justice W. Michael Gillette. Gillette knows a thing or two about the subject: He has served as both a judge and a high school referee simultaneously since 1977. That was the year then-Gov. Bob Straub appointed him to the Oregon Court of Appeals, fulfilling his longtime ambition to become an appellate judge. The job also left his evenings free, unlike when he was a practicing lawyer.").

Fouls in basketball and soccer are often subjective “judgment calls.” Baseball has no single objective strike zone. But if the home plate umpire sets “his” strike zone for a game, players and fans can see that no fix is in when they see that the judges’ errors, their variance around some point that may vary from game to game, are randomly distributed.<sup>121</sup>

## 6. Game Transparency

Games take place in clearly framed spaces and in bounded times. This framing process makes information flow to players and spectators manageable. Although the sheer speed of the game’s action may momentarily confuse players and spectators, a good game is, nearly all of the time, transparent to players and observers alike. Bill Bradley wrote of basketball’s transparency:

As a form of human endeavor it is understandable and pure. The performance demands maximum effort, as one sees clearly at courtside. Unencumbered by masks, pads, or hats, the players reveal their bodies as well as their skills. People come and see and know that what they see is real.<sup>122</sup>

Sports rules do not condemn athletes who enhance their performances through surgical repair of torn knees and shoulders. These procedures are transparently reported in the press. But they do condemn concealed doping.<sup>123</sup> The drive to ensure that players and fans unquestionably experience games as they “really are” led to the lifetime exclusion of Pete Rose from baseball for gambling on games in spite of the fact that he was not accused of deliberately altering the outcomes of games in which he participated.<sup>124</sup> The very existence of the wager prevents people from knowing, as Bradley put it, “that what they see is real.”

## 7. Deception

Competitive games are amoral in all respects. “Anything goes” unless a rule prohibits it *and* a player gets caught violating it. Games capitalize on the human tendency to better oneself by deceiving others. Games permit all things not prohibited by rule. Clock-stopping instances of faked injuries by

121. The televised wrestling exhibitions of the World Wrestling Federation are theater, but they are not competitive games, in part because, being scripted, no impartial judge determines the outcome.

122. BILL BRADLEY, *LIFE ON THE RUN* 111 (1976).

123. See generally GEORGE J. MITCHELL, REPORT TO THE COMMISSIONER OF BASEBALL OF AN INDEPENDENT INVESTIGATION INTO THE ILLEGAL USE OF STEROIDS AND OTHER PERFORMANCE ENHANCING SUBSTANCES BY PLAYERS IN MAJOR LEAGUE BASEBALL (2007), available at <http://files.mlb.com/mitchrpt.pdf>.

124. See, e.g., Mike Attiyeh, *Pete Rose: Still Battling a Losing Cause*, BASEBALLLIBRARY.COM, May 28, 1999, [http://www.baseballlibrary.com/baseballlibrary/submit/Attiyeh\\_Mike1.stm](http://www.baseballlibrary.com/baseballlibrary/submit/Attiyeh_Mike1.stm).

players on teams playing from behind in the last stages of close college football games and the art of “diving” in international football, for example, are presumed permissible. Squads of basketball referees routinely decide how physically they will permit the teams to play, and they communicate their expectations, how closely or loosely they will call fouls, to the coaches and players prior to the game. Illegal deceptions on the field are, moments after the fact, transparently evident to players and spectators. If referees do not catch them, suddenly-angry coaches and the aggrieved crowd will let the errant referees know soon enough.

#### 8. Minimization of Chance

Good sports and games minimize the effects of purely random accidents on outcomes.<sup>125</sup> The chance elements that remain are either highly transparent, such as starting a game with a coin flip; randomly distributed, like a crazy bounce of the ball; or impact both teams equally, as does a sudden rainstorm.

#### 9. Curiosity and Institutionalized Error Correction

The transparency of games, the precision of their framing in time and space, the minimization of chance elements, and the desire to win provide players with every incentive to perceive mistakes in their play and to correct them. Because players and teams define themselves as “skilled,” but never “just” or “entitled to win,” they constantly seek to discard habits and strategies that do not work. To avoid overconfidence, coaches regularly exhort their players to take the worth and merit of their opponents, even apparently weak ones, seriously. In competitive gaming, teams and players imagine that when they lose, they can improve, play again, and hope to win another day. The game context thus overcomes the human impulse to keep their fears of death at bay by believing in their own righteousness. Like the scientific method, competition teaches the benefits of perpetual curiosity. Through games people come to know the satisfactions that flow from embracing life’s endlessly surprising novelty.

Good games need not incorporate every one of these nine elements. What counts as binding rules and the methods for enforcing them differs from sport to sport. Golf expects players to call rule infractions on themselves, as Bobby Jones famously did when no one but Jones saw his ball rotate as he addressed it in the rough. Jones called a two stroke penalty on himself and lost the 1925 U.S. Open by one stroke. Jones reportedly dis-

125. CAILLOIS, *supra* note 16, at 17–19.

missed praise for his selfless devotion to the game: "You might as well praise a man for not robbing a bank."<sup>126</sup> Under the rules of cricket, a captain whose team has benefited from a call that the captain thinks was erroneous may ask the umpire to reverse the call. Japanese players and coaches never dispute umpires' calls. Japanese custom discourages players and coaches from winning by such a large margin that the opponent loses face.

### B. *The Psychology of Games*

Good games neutralize turf and, by legitimizing losing, reduce or eliminate the irrational and often self-defeating effects of Kahneman's loss aversion, specifically the urge to double down and send good money after bad.<sup>127</sup> Like legal education and legal practice, and like Vico's rhetorical debating games, competitive games over time construct for players and fans a continuing civic education. The desire to win a competition motivates players to become keenly curious about the rules of the game, the conditions on the field of play, the skills of the opponent, and so on. In games people return to and practice the "thought of sense."<sup>128</sup> In games, players must base their calculations on what is real, not on what they imagine or hope for. Games thus rewire the remarkably plastic human brain in the direction of the classical rationality of "economic man" like no other social context. People come to belie Franklin's belief that men only use reason to justify everything they have a mind to do. Through the behavior of playing, people reconfigure their brains to be more conventionally rational. In play people create the sense that Faulkner thought they lacked.<sup>129</sup>

Curiosity necessarily humanizes opponents instead of "despeciating" them, as so often happens in the brutality cycle.<sup>130</sup> Kahneman observes that each opponent in a conventional conflict believes that the other side acts out of malice and hostile motives,<sup>131</sup> but just the opposite happens in games. Competitors merge identities. Each knows that the other experiences the same world, "thinks the way I think," "wants what I want," and "needs to know me as much as I need to know her." Opponents do not

126. Bobby Jones Quotes, Brainyquote.com, [http://www.brainyquote.com/quotes/authors/b/bobby\\_jones.html](http://www.brainyquote.com/quotes/authors/b/bobby_jones.html) (last visited Mar. 12, 2008). The young and evolving game of Ultimate Frisbee also operates very informally.

127. *Weekend Edition Sunday*, *supra* note 58.

128. VERENE, *supra* note 4, at 86.

129. *Supra* notes 23–24 and accompanying text.

130. The announcers of the annual Major League All Star Game miss the mark when they praise baseball players removed from the game for staying in the dugout to watch to the end. These players do not linger to honor other great players or admire the beauty of their play. They linger to study every move of everyone on the field because they hope to compete against them in future games "that count."

131. Kahneman & Renshon, *supra* note 59, at 36–37.

“take it personally.”<sup>132</sup> Competitive games, without any help from post-modern philosophers, convert believers into pragmatists. In games people delight in the particulars of concrete situations. Good play helps realize Whitman’s wise urging to turn from curiosity about God to curiosity about each other.<sup>133</sup> The curiosity that players must develop to play well displaces ethnocentrism, xenophobia, moral superiority, and the other brutalizing tendencies of the human mind described by Hood, Milgram, Zimbardo, Pinker, Damasio, and Frith, and noted in Part I. Curiosity overcomes, or very much reduces, the impulse to hate.<sup>134</sup> Good play has the same effect on players as does the naming of a doll or an animal. It creates a kind of love.

### C. *Applications to Law and Politics*

Progressive legal, political, and economic institutions are competitive games. The Anglo-American common law adversarial system is, in these terms, a game in every respect. Procedural rules for trial and appellate litigation and for election campaigns frame these games just as the International Football Association Board frames international football.<sup>135</sup> These games have their winners and losers: George W. Bush versus Al Gore in 2000 (on both the political and legal playing fields), the congressional elections of 2006, the Netscape versus Microsoft browser wars and Google versus Yahoo competition for search engine dominance, and Yankees versus Red Sox. They all operate within regulatory rules judged before spectators by umpires and referees. Good games thus enable rational collective action more effectively than any other social structures that humans have so far constructed. Whether a polity’s legal, political, and economic games are “good,” of course, depends on the extent to which they embody the elements of good games listed above.

*Losing:* Litigating attorneys often encounter clients who insist that “I’m right, so I must win!” The lawyer’s routine response is, “Think of the trial as a game with rules and plays. You won’t know who will win until it’s over. You may well lose.” She might add that “O.J. Simpson has won

132. See Peter Aronson describing the meeting in a Tallahassee café on December 8, 2000 between contending Bush and Gore attorneys Barry Richard and David Boies as “deep in discussion—about their respective twin sons.” Peter Aronson, *Lawyers of the Year: Teams Bush & Gore*, NAT’L L.J., Dec. 25, 2000–Jan. 1, 2001, at A7.

133. *Supra* note 101 and accompanying text.

134. See VAMIK D. VOLKAN, *THE NEED TO HAVE ENEMIES AND ALLIES* (Master work ed. 1994) (using psychoanalytical principles to analyze international relationships).

135. INT’L FOOTBALL ASS’N BD., *LAWS OF THE GAME 2007/2008* (2007), available at [http://www.fifa.com/mm/document/affederation/federation/laws\\_of\\_the\\_game\\_0708\\_10565.pdf](http://www.fifa.com/mm/document/affederation/federation/laws_of_the_game_0708_10565.pdf).

some and lost some.”<sup>136</sup> James Madison’s model of the best possible government as that in which political factions constantly compete indirectly explains why the U.S. Bill of Rights lists first the separation of church and state. The Founders knew the history of religious wars and persecutions in Europe and how easily their impulses flared up again in Colonial America. They designed a system to control “the effects of factions” by replacing the tendency toward human righteousness with a game played by separate institutions and jurisdictions, each of which will win some and lose some and thereby check each other’s power. Political fundamentalists, e.g., Tom DeLay, who often claimed in public that the Almighty was using him to promote a “Biblical worldview” in American politics,<sup>137</sup> relentlessly (and at times illegally, as in the Abramoff scandal) undermined a sense of comity and fair play in Congress for the sake of their righteous visions.

*Equality:* American, and indeed Western, culture has in varying degrees acknowledged the value of leveling the political playing field since the founding, as the steady expansion of the voting franchise shows. American criminal procedure, through such requirements as the guarantee of the right to counsel, a jury of peers, and the presumption of innocence, attempts to equalize the power of the accused and the state. With the help of public defenders and public interest lawyers, poor, inexperienced and politically unpopular litigants presumably have a better chance of winning their causes in the United States than did Clarence Earl Gideon, whose victory in the U.S. Supreme Court Anthony Lewis described in his iconic book.<sup>138</sup> The U.S. Supreme Court’s famous statement of the conditions warranting judicial intervention in the political choices of other branches in the fourth footnote in *United States v. Carolene Products Co.*<sup>139</sup> rests almost exclusively on the game model of law and politics. The footnote’s first and second parts endorse possible judicial intervention when a court detects that the system is not playing by its own rules, as in the voter discrimination and reapportionment cases. Part three governs instances in which a person or group is so disadvantaged by political and social preju-

136. For a dramatic instance of a deliberate corruption of a legal game for the sake of playing a larger geopolitical game, see Bruce Berenson’s dramatization of a true story from the Boer War, “BREAKER” MORANT (South Australian Film Corp. May 16, 1980).

137. NOW: Bill Moyers on Election 2002 (PBS television broadcast Nov. 8, 2002), transcript available at <http://www.pbs.org/now/commentary/moyers15.html>.

138. ANTHONY LEWIS, GIDEON’S TRUMPET (Vintage ed. 1989) (1964). Lewis describes a rules committee confronting a weakness in the rules of the criminal prosecution game and, under the equality principle, correcting it by requiring the appointment of counsel for indigents accused of felonies. For a description of how the modern role of an attorney is analogous to the position of the “second” in dueling, see Douglas H. Yarn, *The Attorney as Duelist’s Friend: Lessons from the Code Duello*, 51 CASE W. RES. L. REV. 69, 102 (2000).

139. 304 U.S. 144, 152 n.4 (1938).

dice that it lacks the resources and, particularly, status and legitimacy, to compete effectively in the electoral political game, as in the various complaints by accused felons that their convictions fell short of due process, and by African-American victims of Southern *de jure* segregation.

Extensive research confirms the conclusion that the “haves” tend to “come out ahead” in litigation, and game dynamics explain the finding. The “haves” are “repeat players,” players who have through experience developed the skills to play “the system”—the legislative and regulatory rules committees as well as the courts—effectively.<sup>140</sup> Of course financially superior groups buy superior players in both professional sports and in law and politics. Financial inequality in the United States undercuts the goodness of its political and legal games at many levels, e.g., some groups have the financial resources to make non-transparent campaign contributions to influence the choices of political representatives that their competitors lack. Many people lack the resources to mount their best position in civil litigation, particularly so in the case of employee plaintiffs who claim to have suffered workplace-related violations.

If the United States approached domestic politics the way sports league commissioners, team owners, and rules committees work to equalize competition, Americans would, for the same self-interested motives, seek to level the political and social playing fields. They would insure that less-advantaged children received the same quality of education and health care as do otherwise more-advantaged children. They would no more perpetuate the tax policies and social programs that profoundly skew wealth distribution toward the rich than sports leagues would allow winning teams to face only weak opponents on their schedules.<sup>141</sup> A society that aspired to nothing more than good competitive legal and political games among its people would not question the propriety of taxing large wealth transfers by those whose wealth greatly exceeds the average.<sup>142</sup> In international trade, wealthy nations, for their own self-interest, would treat developing nations

140. IN LITIGATION: DO THE “HAVES” STILL COME OUT AHEAD? (Herbert M. Kritzer & Susan Silbey eds., 2003); Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974).

141. See Anna Bernasek, *Income Inequality, and Its Costs*, N.Y. TIMES, June 25, 2006, §3, at 4; David Cay Johnston, *Tax Cuts Increased Income, but Hardly Equally*, N.Y. TIMES, Oct. 12, 2007, at C2. For a politician’s recent criticism of the greater inequalities in the receipt of health care in the United States relative to other industrialized countries, see TOM DASCHLE WITH SCOTT S. GREENBERGER & JEANNE M. LAMBREW, *CRITICAL: WHAT WE CAN DO ABOUT THE HEALTH-CARE CRISIS* (2008).

142. Given the aspiration to human equality in American political thought, federal and state gift and estate taxes, which are of course wealth transfer taxes, not “death taxes,” are arguably the most “American” of all sources of revenue. See *Buffett Says No Estate Tax Would Be a Gift to the Rich*, N.Y. TIMES, Nov. 15, 2007, at C8.

as the Marshall Plan sought to bring the economies of Europe, devastated after World War II, effectively into the competitive economic game.<sup>143</sup> A community that sought no more than to promote good economic competition among producing nations would not at the same time prevent developing countries from competing to sell their agricultural products at lower costs in world markets by wastefully subsidizing the more costly production of the same commodities at home.

*Precision of rules and unquestioned authority of judges:* Substantive legal rules can seem notoriously ambiguous when compared to the codified rules of organized sports, but this is misleading.<sup>144</sup> By the principle that “you can’t play the game without agreeing on the rules,” *Roberts’ Rules of Order* and the sometimes arcane accumulation of rules of procedure in legislative chambers precisely structure legislative tactics and debate just as *The Bluebook: A Uniform System of Citation* structures formal written legal advocacy and the rules of evidence and procedure govern formal litigation. More significantly, political and social play, like organized sports, requires regulatory and judicial independence from the “democratic game” itself. Fareed Zakaria recently reviewed for a general audience the horror stories—the election of Hitler, for example—produced by popular democracy and suggests that other dynamics, and particularly “the rule of law,” contribute more to progressive government than does popular democracy itself.<sup>145</sup> Just as umpires, referees, and rules committees act outside competitive play, so a good political game depends on popular trust in the impartiality of judicial and regulatory decision making. The Federal Reserve Board, the independent regulatory commissions, and ideally the judiciary itself, play the critical role of political and economic rules committees effectively only if they do *not* operate democratically but rather off the playing field altogether. Indeed, given the indeterminacy of substantive principles of morality and justice, rules committees—a category that in-

143. GREG BEHRMAN, *THE MOST NOBLE ADVENTURE* (2007). The more general thesis, suggested by the aftermath of World War II, is that unambiguous victories by one side over the other are more likely to produce lasting peace between the parties than are negotiated settlements. Cf. Roy Licklider, *What Have We Learned and Where Do We Go from Here?*, in *STOPPING THE KILLING: HOW CIVIL WARS END* 303, 310 (Roy Licklider ed., 1993) (analyzing a number of case studies and concluding that one of the five factors that influences lasting peace after a civil war is that both sides have a shared expectation of the outcome if fighting were to resume).

144. For a particularly clever political use of legal rules for potential political gain, consider the effort of California Republicans to “game” the constitutional rules governing the State’s power to determine its electoral vote counting process so as to give electoral votes to the winner in each Congressional district, not state-wide, where Democrats hold a majority. *NPR Morning Edition: California Initiative Could Split Electoral Votes* (NPR radio broadcast, Nov. 26, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=16612724>.

145. FAREED ZAKARIA, *THE FUTURE OF FREEDOM* 60–61 (2003).



cludes courts of law in common law legal systems—can only be said to act sensibly when they rule (using the good-game criteria noted above) so as to make the game a better game, and not by “seeking justice.”

Good political games, hence, require something like the wrongly maligned practice of “judicial activism,” where judges, like calls of umpires and referees, make the rules of the game clear in the moment of play. South Dakotan voters presumably sensed the importance of independent judicial authority when they rejected, by a ratio of nearly nine to one, the proposal on their 2006 ballots to allow a person to sue judges for rendering decisions that he or she didn’t like.<sup>146</sup> When the United States Supreme Court issued its deeply flawed result in *Bush v. Gore*,<sup>147</sup> the loser, Gore, and most Americans, accepted the result and moved on.<sup>148</sup> The Bush administration’s attempt to justify a “unitary executive” power to operate independent of legal checks from the other political branches is the equivalent of a batter insisting that he, having the power to define the strike zone and disagreeing with the umpire’s called third strike on a 3–2 count, trots to first base. The administration’s unitary executive claim, and its patterned disregard of legality more generally, ignores an unbroken line of precedents balancing Article I’s legislative powers with those of the executive in Article II going back to 1804.<sup>149</sup>

*Independence and impartiality of judges:* In 2007, Pakistan’s Pervez Musharraf ousted Pakistani Supreme Court Chief Justice Iftikhar Muhammad Chaudhry because he opposed Musharraf’s unconstitutional attempt to retain his position both as president and supreme military commander. Musharraf subsequently suspended the entire constitution and declared martial law across Pakistan. The public outcry against this violation of the principle of judicial independence forced Musharraf to resign his military command.<sup>150</sup> Musharraf erred by ignoring the proven peacemaking tech-

146. Briefs, *Voters Reject Judicial Ballot Initiatives*, 90 JUDICATURE 139 (2006).

147. 531 U.S. 98 (2000).

148. Compare to Tom DeLays’s statement “[J]udges need to be intimidated, . . . we’re going to go after them in a big way.” Joan Biskupic, *Hill Republicans Target “Judicial Activism”*, WASH. POST, Sept. 14, 1997, at A1.

149. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804). Compare comments by Yale Law School Dean Harold Koh: “If the president has the commander-in-chief power to commit torture, he has the power to commit genocide, to sanction slavery, to promote apartheid, [and] to license summary execution.” Adam Liptak, *Legal Scholars Criticize Memos on Torture*, N.Y. TIMES INT’L, June 25, 2004, at A14. See also JACK GOLDSMITH, *THE TERROR PRESIDENCY* (2007); Barton Gellman & Jo Becker, *The Unseen Path to Cruelty*, WASH. POST, June 25, 2007, at A1; Scott Horton, *Vote Machine: How Republicans Hacked the Justice Department*, HARPER’S MAG., Mar. 2008, at 37; *Frontline: Cheney’s Law* (PBS television broadcast Oct. 16, 2007), transcript available at <http://www.pbs.org/wgbh/pages/frontline/cheney/etc/script.html>.

150. On January 30, 2008, Justice Chaudhry published an “open letter” to various western officials decrying Musharraf’s dismantling of Pakistan’s independent judiciary, protesting that the government

nique known as “triadic dispute resolution.” People routinely turn to trusted and independent third parties—mediators, arbitrators, and judges—to resolve disputes. The dynamic keeps the peace, but only if the third party in the triad avoids appearing to favor one side. “To the extent that the triadic figure appears to intervene in favour of one of the two disputants and against the other, the perception of the situation will shift from the fairest to the most unfair of configurations: two against one.”<sup>151</sup> Again, the incoherence of criticisms of “judicial activism” becomes clear when viewed in terms of games. Faced with ambiguous law, the judge should ask, “What ruling will make the game better?” There is ample evidence from the autobiographies of umpires that they routinely think of their rulings in just this way.<sup>152</sup> Most developed legal systems train their judges. Indeed, sports umpires and referees compete with each other to rise in their fields through training and experience.<sup>153</sup> It makes no more sense to elect judges, as many U.S. jurisdictions do, than it would to have leagues and teams vote on the kind of game officials they want. In American football, imagine the “Passing Party” putting up its slate of referees to run against the candidates slated by “Running Party.”

had kept him and members of his family under house arrest, and noting that the Pakistan Supreme Court had not in fact ruled on whether Musharraf was constitutionally eligible to run for re-election. Salman Masood, *Breaking Silence, Ex-Pakistani Justice Assails Musharraf*, N.Y. TIMES INT’L, Jan. 31, 2008, at A3. In Kenya, when it appeared that the ruling party had corrupted the December 27, 2007 parliamentary election results in order to maintain power, protests escalated into vengeance-driven killings throughout the country. On February 1, 2008, Ofeibea Quist-Arcton reported for NPR:

Kenyans are now fighting each other. Tribes against rival tribes, those who support the president against those who support the opposition leader, and it has left hundreds of thousands of people displaced—women, children, the elderly—driven from their homes, some burned in their homes, between 800 and 900 dead because of an election issue. . . . At the beginning it seemed to be President Kibaki’s Kikuyu tribe who came under the gun, or rather under bows and arrows, clubs, machetes, being chased out of their homes and their homes being burnt behind them. But now we are seeing more and more revenge raids by the opposition leader Raila Odinga’s Luo tribe, allied Kalenjin tribes, people saying exactly the same thing, “This is our land. You set your foot here and we will kill you.”

*NPR Morning Edition: Kenyan Talks Resume After Second Killing* (NPR radio broadcast Feb. 1, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=18599122>; see also Michela Wrong, *Tribal Paranoia*, NEW STATESMAN, Jan. 14, 2008, at 24. The *Journal of Democracy* tracks all election events across the world. *Journal of Democracy*, <http://www.journalofdemocracy.org/>.

151. MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS, AND JUDICIALIZATION 211 (2002). The votes of the five-justice majority in *Bush v. Gore* are particularly hard to reconcile with the impartiality principle. Lawyers can dispute whether the five Justices in the majority adequately justified the outcome, but these same five had, in earlier cases, announced a constitutional “strike zone” that protected state autonomy from federal intrusion, the very heart of the position that Florida presented, reinforced by the language of Article II, Sec. 1, clause 2, in its losing argument.

152. See Lief H. Carter, *The Good Look: How College Football Referees Construct and Achieve Judicial Impartiality* 9 (2005), [http://www.coloradocollege.edu/dept/PS/Reconstructing Impartiality.doc](http://www.coloradocollege.edu/dept/PS/Reconstructing%20Impartiality.doc) (reporting interviews with and observations of supervising NCAA football referees).

153. *Id.* at 16.

*Transparency:* For the sake of transparency, only public funds would, ideally, fuel electoral campaigns. In the alternative, campaign websites would list all sources and amounts of funds received; to eliminate money laundering, all interest groups, including corporations that either contribute to campaigns or advocate policy issues publicly, would post contributions to their websites. For the same reason they banished Pete Rose from organized professional baseball and condemned racing biker Floyd Landis and slugger Barry Bonds for doping, adherents of the good game model would automatically reject the Bush Administration's move to subvert the Freedom of Information Act by keeping secret the records of the Cheney "Energy Task Force" and forcing a lawsuit by Congress's General Accounting Office to seek compliance.<sup>154</sup> People must trust that what they see in politics is real; otherwise politics becomes the World Wrestling Federation.

*Deception:* The preceding analysis has suggested that a variety of the moves of George W. Bush's administration in the political game clearly violate its rules. Yet the amoral game model expects political players to act just this way, i.e., to test the limits of enforcement mechanisms.<sup>155</sup> From this perspective the Bush administration played, at least until its congressional losses in 2006, a particularly effective game of "hardball." The expectation that politicians "be honest" is as naïve as the expectation that corporate management will not behave like Enron executives by using "creative accounting methods" to report phantom profits on their earnings statements. The question in all competitive play boils down to whether its judges, umpires, and regulators have the resources to observe deceptions on its field and the will to blow their whistles and use their power to eject players from the game.<sup>156</sup> Enron did collapse. Jack Abramoff and Congressmen Jefferson, DeLay, Ney, and Cunningham did get caught. Gonzales was forced from office. Still, without the intrinsic commitment to the value of the game model itself, there is no guarantee that a political system will provide funding of enforcement sufficient to maintain basic trust that the system is "clean." A vigilant Federal Reserve Board and Securities

154. See AL GORE, *THE ASSAULT ON REASON* 120–21 (2007); Michael Abramowitz & Steven Mufson, *Papers Detail Industry's Role in Cheney's Energy Report*, WASH. POST, July 18, 2007, at A1. Constitutional protections of free speech and press, when seen within the game frame, are less protections of an individual right than protections of the collective good of transparency.

155. Judged in terms of the game model, workers who seek higher wages by entering the United States illegally are players who, like the Bush administration itself, simply see what they can get away with.

156. The litigation generated by the many allegations of illegalities in the holding of terrorist "suspects" by the United States military at its Guantanamo base in Cuba tests these principles vividly. See *Rasul v. Bush*, 542 U.S. 466 (2004); *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 127 S.Ct. 3078 (2007).

Exchange Commission could easily have promulgated rules prohibiting the issuance of sub-prime mortgage loans and the packaging and selling—based on evidently inaccurate ratings of the safety of these securities by private ratings companies such as Moody’s—of these instruments. However, these agencies, lacking an appreciation of the crucial umpiring role they play in keeping the economic game transparent, lacked the resources and motivation to do so. Their failure caused major shocks to global financial systems in 2007 and beyond.

*Curiosity: Minimizing chance and improving personal skill:* In the Hundred Years War the French insisted that they follow their traditional and righteous battle array. Their defeat by England’s archers, of course, altered European history. History will probably describe the 2003 invasion of Iraq in similar terms. An administration keenly curious about Saddam Hussein would have been warily skeptical of its ability to determine whether he posed a current threat to the United States and its interests. It might well have recognized that Saddam had ample reason to pretend to possess weapons of mass destruction that he did not in fact have. In such a state of wariness, and keen curiosity about the political culture of the Middle East, an administration seeking to maximize its chances of winning would probably have postponed an invasion until the stakes and payoffs were clearer, as they were when Saddam previously invaded Kuwait. Motivated as it was by the righteousness of its cause, the Bush administration made no attempt to anticipate chance elements or question its own competence to win. Effective players understand, with Machiavelli, that successful play depends on a habitual ability to adapt to constantly changing conditions on the field. They never “stand on principles,”<sup>157</sup> unlike in politics, where “good faith” seems an acceptable justification for incompetent decisions. Tony Blair, for example, said upon leaving office, “Hand on heart, I did what I thought was right. I may have been wrong. That’s your call. But believe one thing if nothing else. I did what I thought was right for

157. Compare George W. Bush’s own description of his principle-driven decision process:

I do know—y’know, how do you decide, how do you learn to decide things? When you make up your mind, and you stick by it—I don’t know that there’s a moment, Robert. I really—You either know how to do it or you don’t. I think part of this is it: I ran for reasons. Principled reasons. There were principles by which I will stand on. And when I leave this office I’ll stand on them. And therefore you can’t get driven by polls. Polls aren’t driven by principles. They’re driven by the moment. By the nanosecond.

ROBERT DRAPER, *DEAD CERTAIN: THE PRESIDENCY OF GEORGE W. BUSH*, at xii (2007). See generally FRED KAPLAN, *DAYDREAM BELIEVERS: HOW A FEW GRAND IDEAS WRECKED AMERICAN POWER* (2008); THOMAS E. RICKS, *FIASCO: THE AMERICAN MILITARY ADVENTURE IN IRAQ* (2006); BOB WOODWARD, *STATE OF DENIAL* (2006). Also see Charles Ferguson’s documentary film, *NO END IN SIGHT* (Magnolia Pictures July 27, 2007), for criticisms of Bush’s policy and the Iraq war. Ironically, American fighters won the Revolutionary War because, in part, the British failed to adapt to proto-guerrilla warfare.

our country.”<sup>158</sup> A comparable self-defense would never save the job of a consistently-losing baseball-pitcher, or protect from prosecution an Enron executive involved in the falsification of Enron’s books.

#### IV. TRIANGULATIONS AND CONCLUSIONS

[T]he man who is learned but destitute of prudence, deduces the lowest truths from the highest; the sage, instead, derives the highest truths from the unimportant ones. . . . The learned but imprudent individual, traveling in a straight line from general truths to particular ones, bulls his way through the tortuous paths of life. But the sage who, through all the obliquities and uncertainties of human actions and events, keeps his eye steadily focused on eternal truth, manages to follow a roundabout way whenever he cannot travel in a straight line, and makes decisions, in the field of action, which, in the course of time, prove to be as profitable as the nature of things permits.

—Giambattista Vico<sup>159</sup>

[M]an is made God’s plaything, and that is the best part of him. Therefore every man and woman should live life accordingly, and play the noblest games, and be of another mind from what they are at present. For they deem war a serious thing, though in war there is neither play nor culture worthy the name . . . . What, then, is the right way of living? Life must be lived as play, playing certain games, making sacrifices, singing and dancing, and then man will be able to propitiate the gods, and defend himself against his enemies, and win in the contest.

—Plato<sup>160</sup>

Inspired by Vico’s model of thinking grandly—and by conclusions that three hundred years of additional knowledge and experience strongly confirm—this essay has proposed its own universal theory: if political institutions seek, above all other goals, to reduce human brutality, then the structure of competitive play provides the best framework humans have yet invented for doing so. Because it claims universality, this argument, like the various measurements of the circumference of Australia, could generate

158. Anne Applebaum, *The Riddle That Is Blair*, WASH. POST, May 15, 2007, at A15.

159. GIAMBATTISTA VICO, *ON THE STUDY METHODS OF OUR TIME* 34–35 (Elio Gianturco trans., Cornell Univ. Press 1990) (1709).

160. Plato’s *Laws*, as translated in HUIZINGA, *supra* note 16, at 211–12. The anonymous translator(s) of this volume worked both from Huizinga’s late-life English translation and from Huizinga’s original German edition. See *Translator’s Note*, *id.* at vii. Thus it is unclear whether the translator(s) used only Huizinga’s translation of Plato as it appeared in Huizinga’s English translation, or translated Huizinga’s original translation from Greek to German, or a combination of the two. For a presumably more literal English translation from the Greek, see, for example, PLATO, *THE LAWS OF PLATO* 193 (Thomas L. Pangle trans., Basic Books 1980).

an infinite regress of documentation, elaboration, and debate.<sup>161</sup> But exhaustively documenting and elaborating the argument would convert this project into the sort of Cartesian academic exercise that Vico abhorred—an exercise that “bulls [its] way through the torturous paths of life.”<sup>162</sup> As Vico understood, successful arguments don’t succeed because they prove themselves objectively correct; they succeed by persuading readers and listeners—“indirectly,” as Vico believed—that they, too, experience the same things. In that spirit, here are three possible paths that readers can, but hardly need to, follow in support of the proposition that good competitive play is, in contrast to fundamentalism, a peacemaking cultural practice that nearly all humans can see under their noses.

### A. History<sup>163</sup>

The articulation of the elements of good games, outlined in Part III, emerged in nineteenth century Great Britain. Rugby owes its name to the school whose boys reportedly first played it in 1823. Students at the Harrow School invented squash in 1830. In 1867 the Marques of Queensberry rules for boxing replaced the Broughton rules of 1743. It is no coincidence that these games developed in the same cultural moment when, inspired in no small part by Dickens’s devastating imagery of the British legal system, common law reform, and social reform more generally, took hold in Great Britain.

Pre-modern thinkers have acknowledged the social benefits of competitive play. The Babylonian Talmud endorses intellectual competition. “Jealousy among scholars increases wisdom.”<sup>164</sup> In the eighth century the revered Islamic jurist Imam Abu Hanifa wrote, “Difference of opinion in the Community is a token of Divine mercy.”<sup>165</sup> Having institutionalized competitive games in the common law model, the British Empire sought to

161. Indeed, in the non-foundational world it occupies, this argument can be nothing more than a position in a debate, a position fully open to counterarguments from other quarters. For example, a number of readers of preliminary versions of this essay have insisted that people only kill one another when the stakes are truly high, and that the stakes in games are never objectively very high. To this I have responded that, no, the stakes, both monetary and emotional, are usually very high, and particularly in such games as presidential races, Super Bowls, trials in capital crime prosecutions, and so on, yet people nevertheless conduct themselves peacefully. But I could just as easily argue, and perhaps would be wiser to argue, the reverse: Yes, people only kill when the stakes are truly high, but only the need to believe in the unchallengeable truthfulness of such fundamental things as God, or Marxist-Leninist or Nazi ideology, psychologically generates the belief that the stakes are truly high.

162. VICO, *supra* note 159, at 35.

163. For a deft and succinct history of human sports, see Frank Deford, *Let the Games Begin*, NAT’L GEOGRAPHIC, July 1996, at 42–50.

164. Babylonian Talmud, *Bava Basra* 21a.

165. CYRIL GLASSÉ, THE CONCISE ENCYCLOPEDIA OF ISLAM 126 (1989).

reap the benefits of these forms of play in political life. Virtually all the sports we know today—tennis, soccer, rugby, cricket, and so on—became codified during the colonial period. J.A. Mangan has collected a number of essays that together describe how the British deliberately employed sports and games to extend their colonial hegemony. This Victorian and then Edwardian construction of sport, according to Mangan, “lay close to the heart of Britain imperial culture.”<sup>166</sup> Far from an “intellectually insignificant recreational pleasure,” sports were “arguably . . . far more meaningful at home and abroad than literature, music, art or religion.”<sup>167</sup>

Sports did not simply help occupying colonials bond among themselves to ward off loneliness or cope with stress. Teaching sports to the natives became the pedagogical device of choice whereby the British believed they spread the habits of civil society. Thus one poem of the time, by Norman Gale, included the lines:

There will be a perfect planet  
 Only when the Game shall enter  
 Every country, teaching millions  
 How to ask for Leg or Centre.<sup>168</sup>

Memoirs of the times recount how sports build civic character. Sir Theodore Cook, for example, wrote:

English cricketers are playing against Parsees and Mohammedans at Karachi while a team of Maoris are testing the best of our Rugby footballers at home. By such threads are the best bonds of union woven. For the constitution of the British Empire, unexpressed and inexpressible, does not depend on force and cannot by the sword alone be guarded. It is the visible, intangible impersonation of spiritual sympathies and associations.<sup>169</sup>

Mangan’s collection of essays leaves no doubt that the British sought “in purposive fashion to engineer the conformity of subordinate groups through sport,” but he notes that the widespread adoption of sports in subordinate cultures may have simultaneously served native purposes; in some cases, it empowered native solidarity and resistance.<sup>170</sup> Thus, history records a period in which people shared a political language of peace-making and civility that explicitly embraced the language and practice of games.

166. J.A. Mangan, *Prologue* to THE CULTURAL BOND: SPORT, EMPIRE, SOCIETY 1 (J.A. Mangan ed., 1992).

167. *Id.* at 6 (quotations omitted).

168. *Id.*

169. THEODORE COOK, CHARACTER AND SPORTSMANSHIP 321 (1927).

170. Mangan, *supra* note 166, at 7 (quotations and citations omitted); see also JAMES, *supra* note 81.

The subsequent development of international football shows that games, structured as the British originally did, have universal appeal.

Humans have not deliberately designed games in order to create a peaceful alternative to righteousness and brutality. They have merely sensed the elemental joy of play and then tinkered over time with ways to make them more joyful. Since games can tip over into brawling when “good game” conditions break down, e.g., when rabid football fans revert to the more primitive group psychology of tribal righteousness, games may merely mark one step along a path of social adaptation. Vico, however, would say the reverse: in play humans recover their elemental, i.e., better, nature. Either way, games may shift the human impulse behind the title of Chris Hedges’s book, *War is a Force that Gives Us Meaning*,<sup>171</sup> just one or two degrees away from righteousness. Those degrees, however, cross a line that separates mindless group-think from personal and group agency and from recognizing that, because people (not gods) make their world, people must take responsibility for it.

### B. *Popular Culture*<sup>172</sup>

Books by coaches and retired athletes describe games and their valuable social consequences much as has this essay. *Joe Torre’s Ground Rules for Winners*, which speaks to an audience of business people, not sports fans, takes pains in its opening pages to distinguish winning in life from winning every game:

You can’t win every day, but you can succeed in fulfilling your potential as an individual and a team member.

That’s why baseball is such a perfect metaphor for life. . . . In baseball you’re considered a wild success if you lose fewer than 60 games in one season.

. . . .

Why should you distinguish between success and winning? First, you don’t want to hang your whole identity on the hook of winning. If you do, you could totally sabotage yourself.<sup>173</sup>

171. CHRIS HEDGES, *WAR IS A FORCE THAT GIVES US MEANING* (2002).

172. William P. MacNeil’s book, *Lex Populi*, carries the subtitle “The Jurisprudence of Popular Culture.” WILLIAM P. MACNEIL, *LEX POPULI: THE JURISPRUDENCE OF POPULAR CULTURE* (2007). His “law in literature” approach deconstructs the jurisprudential elements of such popular works as J.K. Rowling’s Harry Potter series and Buffy the Vampire Slayer. In contrast to MacNeil, this section suggests that “the jurisprudence of popular culture” (“lex populi”) resides primarily in what ordinary people do in the course of playing and observing competitive games, not in what some fraction of them may read as constructed by writers of fiction. Thus 97.4 million people, according to Nielsen, watched Super Bowl XLII. Irene Lew, *Nielsen Offers Analysis of Super Bowl XLII*, [WORLDSCREEN.COM](http://www.worldscreen.com/newscurrent.php?filename=nielsen020808.htm), Feb. 8, 2008, <http://www.worldscreen.com/newscurrent.php?filename=nielsen020808.htm>. See *supra* notes 20, 111.



Compare Torre's language to the language of a fundamentalist who shouts, "I would rather die a martyr than . . ." In the popular arts, the premise of the award-winning film *Schindler's List* rests on the distinction between politics as play and politics as brutal war. The opening scene of the film shows Schindler preparing for a night of playing in a cabaret with some German officers. The visceral thrill of risk in play gives his life its meaning, and he continues to play with the Germans until the moment when, on horseback from a hillside, he looks down on the German destruction of the ghetto and realizes the Germans are not playing. Yet Schindler does not become a moralistic freedom fighter. He continues to play, but deceptively and subversively, to achieve his ends.<sup>174</sup>

### C. *The Political Game in the United States*

Drew Westen's *The Political Brain*<sup>175</sup> describes why those who approach political competition as a rational debate about the relative merits of competing public policy proposals lose. To win, politicians must play politics as a game of images and emotions. However, the structure of the electoral game in the United States makes it particularly dysfunctional. U.S. elections, organized by single-member "winner take all" voting districts, produce not a contest among political ideas and records of governing competence but a beauty contest over the strength, physical appearance, and moral virtue of individual candidates. Vico understood the elemental appeal of these beauty contests, with their emphasis on bodily presence, physical beauty, and heroic character, but a contest over personal appearance and character produces policy choices far different from those produced by a contest over party platforms and ideas, as strong parliamentary democracies do.<sup>176</sup>

173. TORRE WITH DREHER, *supra* note 16, at 8–9. Just as books by sports participants can better penetrate the Vichian world than can most academic analysis, so do insider reports on political campaigns best describe competitive play in politics. For a detailed analysis of the 1988 presidential campaign as a competitive contest, see RICHARD BEN CRAMER, *WHAT IT TAKES: THE WAY TO THE WHITE HOUSE* (1992).

174. *SCHINDLER'S LIST* (Amblin Entertainment Dec. 15, 1993).

175. WESTEN, *supra*, note 64, at 35–44.

176. Scott Simon's NPR commentary, November 17, 2007, bemoaned the failure of the 2007 presidential party debates to discuss facts. Candidate responses "had been slowed by facts. What a snooze!" *Weekend Edition Saturday: Trivia on the Campaign Trail* (NPR radio broadcast Nov. 17, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=16389589>. Compare to *French Rivals Dispute TV Honours*, BBC NEWS, May 3, 2007, <http://www.newsvote.bbc.co.uk/go/pr/fr/-2/hi/europe/6618721.stm> (highlighting a vigorous debate over public sector reform and unemployment during the 2007 French presidential elections). For a thorough review of the structural weaknesses of the U.S. constitutional framework, see LEVINSON, *supra* note 17. According to the measurements developed by Nathaniel Heller, the integrity of current electoral practices in the United States ranks 10th in the world, behind such countries as Latvia, Bosnia-Herzegovina, and Peru. GLOBAL INTEGRITY

George W. Bush has played the American game effectively by projecting and preserving his personal strength and virtue. He admitted no mistakes and “stayed the course.” The electoral structure that governs his play required him to stand by his base, even when he had to take policy stands that were senseless by their own terms.<sup>177</sup> President Bush, to maintain his base, appointed amateur agency administrators whose main mission was to discredit religiously unpopular notions of natural selection, global warming, and the “big bang.”<sup>178</sup> Little wonder that many potential U.S. voters choose not to play in the election game. In place of a contest that debates concrete policy choices that affect most voters—for example, health care reform, taxation rates necessary to balance public budgets, and responses to global warming—the structure of the American political system compels a competition among easily manipulated and intangible images of the virtues of political candidates.<sup>179</sup>

Vico wrote that people “become sociable [by] returning to the primitive simplicity of the first world of peoples.”<sup>180</sup> Vico hoped for a “conception of a natural law for all humanity” that is rooted in human historical

INDEX: 2007, GLOBAL INTEGRITY REPORT (2007), <http://report.globalintegrity.org/>; see also *Bob Edwards Weekend: Tom Daschle, Nathaniel Heller, Earl “The Pearl” Monroe* (XM satellite radio broadcast Mar. 15, 2008), available at <http://www.bobedwards.info/ftopic714.html>.

177. Claiming that it would be immoral to spend taxpayers’ money on something morally questionable (a moral twofer for the President’s virtue score), he exercised the first presidential veto of his administration by overturning congressional allocation of federal tax monies for embryonic stem cell research, even though poll results showed that a substantial majority of the very taxpayers whose moral interests Bush claimed to protect supported just such federal research funding. *All Things Considered: Public Opinion on Stem Cell Issue* (NPR radio broadcast Aug. 9, 2004), available at <http://www.npr.org/templates/story/story.php?storyId=3841757>.

178. See MARK BOWEN, CENSORING SCIENCE (2008); GORE, *supra* note 154, at 122–23.

179. It is worth speculating whether, if the United States structured its political game better, its media would report political news more extensively and deeply than it now does. Consider the following three database searches conducted on September 28, 2007, by Colorado College research librarian Robin Satterwhite using the Lexis-Nexis service’s “Newspaper Abstracts” database from 1989 forward, which included approximately eight million articles from fifty national and regional U.S. newspapers. Searching both titles and abstracts for the keyword “sports” generated 253,426 responses and for the keyword “politics,” 137,207. Second, searching the “Newspaper Source” database, which includes article texts for approximately 300 U.S. newspapers plus full-text transcripts for all major radio and television news programming, for the keyword “sports” produced 1,109,512 responses and for the keyword “politics,” 117,139. Finally, a keyword search only of the *New York Times* database (the *New York Times* is normally considered a primary source of political news) limited to the month up to and including September 28, 2007, generated 502 responses for “politics” and 1,386 responses for “sports.” However, the highly competitive and unpredictable 2008 presidential primaries have generated voter turnout rates that are, at least for Democrats, “off the charts,” according to Rhodes Cook, political analyst at the Center for Politics, University of Virginia. *Weekend Edition Saturday: Will Voter Turnout Continue to Swell?* (NPR radio broadcast Feb. 23, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=19304241>; see also Rhodes Cook, *Super Tuesday: A Vast and Varied Test*, CRYSTAL BALL, Jan. 31, 2008, <http://www.centerforpolitics.org/crystalball/article.php?id=FRC2008013101>. Voter turnout rates may be tracked over time at such sites as <http://pollster.com/>.

180. VICO, LA SCIENZA NUOVA SECONDA, *supra* note 4, ¶ 1106; VERENE, *supra* note 4, at 194.

practice.<sup>181</sup> In societies that keep the peace, we see that “the natural law of the gentes”—the “actual basis” of their civil social practices in law, politics, and commerce—incorporates the elements of good competitive play. Their cultures formally endorse the values of a level social playing field, transparency, impartial triadic refereeing, and so on. These social games replicate the elemental natural world that Vico urged us to recover and inhabit. Games have their gods and heroes. Henry Aaron, Joe DiMaggio, and Martina Navratilova, George Washington, Abraham Lincoln, and Eleanor Roosevelt, John Marshall, Louis Brandeis, and Sandra Day O’Connor, Andrew Carnegie and Warren Buffet, become, over time, “creative acts of memory.” These athletic, political, and economic games all embody the eloquent, the mystical, and the fabulous. Each legendary athletic, political, legal, and commercial fable is “true speech.” These games draw the soul to love by means of bodily images in motion, creating things and doing things. Through the experience of games, morality can thrive even as God and religion move away from the center of the political stage.<sup>182</sup> Through games men become sociable.

A story, recently retold by Stanley Weintraub, tells of the World War I “Christmas truce.” At Christmas in 1914, some German and Allied troops, in violation of their commanders’ orders, put down their arms and began sharing food, drink, newspapers, and cigarettes with each other. Eventually they started up little games of football; they sang together at night. When Christmas ended, the commanders had to remove many of the forces from the field because, having played together, the men refused to fight each other further.<sup>183</sup> Whether humans have consciously discovered some peaceful essence of good games or have only stumbled accidentally onto ways of resolving conflict peacefully does not matter. We merely need to see, under our noses, that it is so. We merely need to see that when the Taliban claimed that its Afghanistan was the one true Islamic state, the Taliban also strung up and disemboweled those it caught dancing or kicking a soccer ball. It requires no elaborately Cartesian analysis to see that scientists, who report their research findings in replicable, and hence non-falsifiable ways, because the rules of the science game require it, do not murder each other when they dispute each others’ findings. Good things happen in science,

181. VERENE, *supra* note 4, at 60.

182. “The serious question is whether the morality of human rights can survive the death—or deconstruction—of God.” MICHAEL J. PERRY, *TOWARD A THEORY OF HUMAN RIGHTS* 29 (2007). This essay answers that serious question with an emphatic and obvious “yes.”

183. STANLEY WEINTRAUB, *SILENT NIGHT: THE STORY OF THE WORLD WAR I CHRISTMAS TRUCE* (2001).

just as they do in elections and legal trials, when inquiry meets the criteria that describe good games.

In Vico's framework, games and religions arise from the same source, the same *fantasia*-driven "method" by which people know their world. Becoming "more civilized" means moving away from the righteousness-humiliation-brutality syndrome. This move requires privatizing and personalizing religion—framing religion, as the first two clauses in the Constitution's First Amendment do, as separate from politics. Indeed, the move from righteousness to play might boost appreciation for faiths that, like Buddhism, provide private personal charts for navigating, and ideally transcending, the ultimately aleatory and unknowable dynamics of life.<sup>184</sup> Thinkers from Socrates to Machiavelli to Rorty have written that righteousness does great harm. But science is equally useless, and potentially harmful, when it claims to dictate the personal and private frameworks that each of us needs to "triumph over death." Spiritual perspectives, many with venerable religious traditions, will abide; they give Vichian poetic access to the world. But this poetic perspective differs radically from the Platonic satisfaction of "playing certain games." Enjoying a bottle of wine differs radically from driving a car or piloting an airplane. Both activities can be very satisfying, and occasionally people try to do both at once. But experience shows that they act unwisely when they do, and it is not that difficult to keep the two activities separate.

Since humans are not rational, academic demonstrations (including this essay's argument) of the value of good games will not, by reason, convince Vico's human race to adopt the "rule of law" game, the "fair market competition" game, the "free and open election" game, or any of the other games that lie at the heart of the liberal impulse. If these desirable practices spread, they will spread by something closer to divine fortune, that is, by luck.<sup>185</sup> Middle Eastern men play football as avidly as anyone, but they have not yet gotten lucky. Their experience of football does not find parallels in parliamentary government and constitutional democracy in their countries. The best academics can do is point out, with Vico and Ruskin, what they see, point out in this essay's case that a large majority of men in virtually every culture play or follow international football and experience the conditions that make these games good.

184. For an analysis that equates deep religious engagement and the most intense forms of play, see ROBERT E. NEALE, *IN PRAISE OF PLAY* (1969).

185. See NICCOLÒ MACHIAVELLI, *THE PRINCE* 22 (Christian E. Detmold trans., Lester G. Crocker ed., Washington Square Press 1963) (1515) (bemoaning the difficulties inherent in deliberately attempting to initiate "a new order of things").

Yet imagine, if the human race got lucky, how the world would operate. Once an international legal order ratified the 1967 boundary of the state of Israel (or more recently the Lebanon-Israel boundary), Palestinians, Hezbollah members, and Israelis would unquestionably accept those boundaries. If they don't and they get caught, someone with the authority to eject them from the game blows the whistle. If the Israelis want more land, let them make the Palestinians a money offer and see if another bidder comes forward to compete with them.<sup>186</sup> Such a notion may seem idealistic, but we already practice such wisdom in competitive play. Of course, applying this wisdom requires robust global government, a government with whistle blowers and sanctions, but many urgently seek just this authority today to manage the horrors in Darfur. The International Monetary Fund, the World Bank, and various international courts and trade regulation institutions move in this direction. Given the stakes the species plays for, and particularly the mounting evidence that global warming urgently requires a coordinated global response,<sup>187</sup> moving from the brutality-triggering concept of righteous "sovereignty" to the institutions of global government looks like a smart investment. By making such a move, we may hope to become Shaw's "race that can understand" because people across cultures already know and practice the common language of good competitive games that resolves hard-fought contests peacefully.

<sup>186</sup> Early Zionist settlers began purchasing land in Palestine in the late nineteenth century.

<sup>187</sup> See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT (2007), [http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4\\_syr\\_spm.pdf](http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf). No amount of moral preaching will persuade Brazilian farmers to cease cutting down their rain forests, but a competitive game of carbon trading, enforced by an international rules committee that imposes and enforces a carbon pricing system and referees the carbon-trading game, could do so. See Michael Specter, *Big Foot: In Measuring Carbon Emissions, It's Easy to Confuse Morality and Science*, THE NEW YORKER, Feb. 25, 2008, at 44, 52 (quoting John O. Niles, chief science and policy officer of Carbon Conservation: "It's a no-brainer. People are paying money to go in and destroy those forests. We just have to pay more to prevent that from happening. If you save your forest and we can independently audit and verify it, we will calculate the emissions you have saved and pay you for that.").