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On Causation

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ESSAY

ON CAUSATION

*Mari Matsuda**

In this Essay, Professor Matsuda argues that the narrow dyadic focus of tort law perpetuates very real, and remediable, social harms. Using tort causation doctrine as her starting point, Professor Matsuda demonstrates how the tort system sacrifices human bodies to maintain the smooth flow of the economic system. Time after time, tragedies occur: school systems fail, first graders shoot each other, women live in constant fear of rape. Yet each tragedy is met with the same systematic response: those without resources, those least able to correct the harm, are considered the legal cause of the harm. The economic and corporate interests that created the structure in which these tragedies occurred are absolved of legal and moral responsibility. Professor Matsuda proposes two changes to this system: First, when determining legal cause, we must expand tort liability in consideration of the ability of defendants to avoid, prevent, and redress social harm. Second, we must exchange our egocentric notion of responsibility for a communal and connected understanding of social responsibility. For instance, when I walk over a homeless man on my way to law school, I must recognize that it is not just a social failing that caused his plight; it is a personal failing on my part. Professor Matsuda argues that we exist in, and benefit from, a society that makes his position possible, and under current understandings of responsibility, even inevitable.

These words are written in difficult times. We may choose, now, to join in the celebration of what some describe as unprecedented prosperity, a growth curve without a horizon, spurred by technology that responds with friendly efficiency to our mouse clicks. Or, we can spoil the party. We can speak of the unspeakable human pain that goes on outside the banquet halls. As I sat to write this lecture,¹ a sick knot of tension lodged in my stomach. If I were a violent person, I might have felt the urge to hit someone. Instead, I am a gardener, and I did the only thing I know to do with that knot in my gut. I went to shovel manure.

At the stables in Rock Creek Park, people rent stalls for horses and when the stalls are shoveled out, mountains form for hauling away. I

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1. This lecture was delivered as the joint keynote address for the Society for the Study of the Multi-Ethnic Literature of the United States and the Tulane University School of Law Dreyfous Lecture, March 9, 2000.

shoveled and bagged pungent gold for my garden until I was breathing hard. As the knot in my stomach gave way to work, this lecture took shape in my head and I looked up to see a cheery sign on the oversized dumpster at my side: "Pine View Hauling—Manure Removal."

The cheerful pine-tree logo suggested an organizing metaphor for this lecture. We live in a world in which manure removal is a business, in which some people make their livelihood hauling away the by-products of other people's leisure choices, in which the oozing detritus of your privilege is removed for a fee, creating jobs and obviating the necessity for incorporating your horse's manure into your own backyard, where, my tomatoes will tell you, it could do some good. My theme is choices, consequences, and causation—how we understand these things in law and in life, and the costs of our misunderstandings.

I. THAT BOY NEEDS A MEDICINE MAN: WHAT CAUSES DISASTER?

Consider Leslie Marmon Silko's² novel, *Ceremony*.³ Early in that book, Tayo, a shell-shocked World War II veteran, is visited by Ku-oosh, the aging healer. Tayo is bedridden and weak, suffering from flashbacks, hallucination, stomach cramps, wrenching nausea—what the white doctors are calling battle fatigue. Finally, Grandma says to Auntie, "That boy needs a medicine man. Otherwise, he will have to go away. Look at him."⁴ She is worried that her grandson will go off to the veteran's hospital, introducing a central plot tension—will Tayo survive this book, or will we see another crazy Indian dragged away to a life of incarceration? The medicine man comes.

At this reservation, other returned veterans are suffering from alcoholism, fits of violence, and loss of purpose. A prolonged drought is killing crops and animals, and driving families further into poverty. The medicine man speaks slowly, inserting stories to explain the significance of the words and questions he brings. He wants to know if Tayo killed anyone in the war, because under the old ways, a returning warrior must atone through ritual for the death of an enemy. Tayo says he did not kill anyone, but adds, "Maybe you could help me anyway. Do something for me, the way you did for the others who came back. Because what if I didn't know I killed one?"⁵

The medicine man ponders a war in which one can kill without ever seeing the face of the enemy. He is not sure he has medicine that will help. The author continues the scene: "He pulled the blue wool cap

2. Leslie Marmon Silko, an acclaimed writer of fiction and a professor of English at the University of Arizona, Tucson, grew up on the Laguna Pueblo Reservation. See *Voices from the Gaps: Women Writers of Color* (visited April 13, 2000) <<http://voices.cla.umn.edu/authors/LeslieMarmonSilko.html>> (on file with the *Columbia Law Review*) (providing biographical information and a selected bibliography of Silko's works).

3. Leslie Marmon Silko, *Ceremony* (2d ed. 1986).

4. *Id.* at 33.

5. *Id.* at 36.

over his ears. 'I'm afraid of what will happen to all of us if you and the others don't get well,' he said."⁶

At that moment, well in the beginning of the book, before I had fallen in love with the characters or knew the full jeopardy they faced, I began to weep. It was an odd point in the book to be so moved, and I was sitting on a plane at the time, embarrassed by my tears. "Why am I crying?" I thought.

When the medicine man left, leaving no magic cure, Tayo rolled over onto his belly. The author says:

He pressed his face into the pillow and pushed his head hard against the bed frame. He cried, trying to release the great pressure that was swelling inside his chest, but he got no relief from crying any more. The pain was solid⁷

I wept because I know that solid, corporeal pain that Tayo carried, the anxiety that attacks when the body knows the world is not right or safe. I know people I love who see human pain so clearly that they are ill-equipped to function in a heartless world, and I know there is a price for such seeing. I teach law, and know that under our modern legal system, the notion that "something will happen to all of us if you and the others don't get well," is illogical and therefore without power. And I know that a narrow understanding of causation, consequence, and responsibility is killing us.

II. FORTY-ONE SHOTS

Forty-one shots. In the same week that these words formed on paper, I marched with thousands of others, seven times around the Department of Justice,⁸ as Joshua marched around Jericho. Many of the Black men, including my students, who marched with me, held their wallets up in the air. I was there because a young man named Amadou Diallo was shot forty-one times in the vestibule of his own home, because he was Black, and he was reaching for his wallet, in the night, in a city plagued by crime.⁹ That, a jury found, was sufficient reason for the police to fear for their own lives and, in their confusion, shoot an innocent citizen.

6. *Id.* at 38.

7. *Id.*

8. See Lorraine Adams & Petula Dvorak, *N.Y. Police Acquittals Protested; U.S. Vows Review*, *Wash. Post*, Mar. 3, 2000, at B2 ("The demonstration halted lunchtime traffic on Pennsylvania and Constitution avenues between Ninth and Tenth streets"). News reports estimated 1000 protestors. This author observed marchers surrounding all four sides of the Justice Department's building, which occupies a full city block. Marchers filled at least two traffic lanes, and stood 10 to 15 people abreast for the entire perimeter, suggesting many thousands of demonstrators. The sight, according to Justice Department employees I spoke with, made quite an impression on those who were watching from the windows above.

9. See Tom Morganthau, *Cops in the Crossfire*, *Newsweek*, Mar. 6, 2000, at 22. Amadou Diallo was a 22-year-old West African immigrant who came to America in 1997. He was known as "hardworking and quick with a smile." *Id.* Mr. Diallo was shot by four

Forty-one shots. The four police officers who killed Amadou Diallo were tried for homicide, including the lesser charge of criminal negligence, and they were acquitted.¹⁰ The verdict of not guilty felt like an assault to me, for Amadou Diallo could have been any of the Black and brown men in my family circle, and I could have been the mother screaming, “no, no, no” into an endless canyon of pain.

In the same week that we marched on Justice, we mourned the shooting deaths of two top students from the best public high school in Washington, D.C., the one that is supposed to be “good” and “safe.”¹¹ Also that week a six-year-old child shot another six-year-old child in a Michigan first grade classroom,¹² and every parent in America who sends a child off to school each morning had to fend off the chill of knowing, “I cannot keep them safe.”

plain-clothed, white police officers who “didn’t like the way it looked” when they approached him in front of his home. *Id.* at 24. When he reached for his wallet, police fired 41 shots in eight seconds. Mr. Diallo was hit 19 times, with bullets smashing through his spinal cord and severing the main artery to his heart. He was rattled with so many bullets that “he began to spin, like an animal on a spit . . .” *Id.* at 22. At the trial of the four police officers, a pathologist testified that police kept shooting after Mr. Diallo lay crumpled on the ground. *Id.* at 24. Bruce Springsteen memorialized Mr. Diallo with a song tentatively titled “American Skin (41 shots).” Springsteen’s words include these:

Lena gets her son ready for school
She says now on these streets Charles
You got to understand the rules
Promise me if an officer stops you that you’ll always be polite
Never ever run away and promise me you’ll keep your hands in sight

Editorial, “41 Shots,” *Boston Globe*, June 15, 2000, at A23. Springsteen’s song, first performed on June 4, 2000 in Atlanta, prompted immediate criticism from the New York Police Department. See Julian E. Barnes, *Springsteen Song About Diallo Prompts Anger from Police*, *N.Y. Times*, June 13, 2000, at B3.

10. See Morgenthau, *supra* note 9, at 22. In early March 2000, a racially mixed jury in Albany, New York acquitted the four police officers of all charges. Amadou Diallo’s parents are contemplating a civil lawsuit against the four officers and they are also pressuring the Department of Justice to file federal charges against the officers for violating Mr. Diallo’s civil rights. *Id.* at 25.

11. Both Natasha Marsh, an honor student preparing for a summer internship with an accounting firm, and her boyfriend, Andre Wallace, a star basketball player, wanted to go to West Virginia University in the fall. See Arthur Santana & Sylvia Moreno, “Just Totally Senseless’: Two Wilson High Seniors Shot Down After Leaving Game,” *Wash. Post*, Feb. 10, 2000, at A1. They were shot execution style on the sidewalk in front of Natasha’s home after returning from the grocery store. See Jennifer Frey, *Broken Connections*, *Wash. Post*, May 31, 2000, at C1. On February 29, the 1600 students at Wilson High held a memorial service for their slain classmates. See Sylvia Moreno, *Lives of Slain Students Commemorated*, *Wash. Post*, Apr. 3, 2000, at B2.

12. On February 29, 2000, the six-year-old son of Dedric Owens shot Kayla Rolland to death with a .32 semi-automatic handgun. “I don’t like you,” he said as they were walking to class. “So?” she responded, and was met with a single bullet that entered her right arm and traveled through her vital organs. She was pronounced dead less than 30 minutes later. See Maggie Mzumara, *Young Killers on the Loose in US Schools*, *Fin. Gazette*, Mar. 16, 2000, at 1.

This shooting by six-year-old Dedric Owens Jr.¹³ led to a predictable response. Politicians were quick to support calls for childproof locks on guns, and Democrats reaffirmed their current gun control proposals—Milquetoast reforms including waiting periods and limits on purchases to one gun, per person, per month.¹⁴ The NRA-types refrained from using the “guns don’t kill, people do” line, perhaps recognizing the unseemliness of putting the whole rap on a child still in the sandbox. Pro-gun editorialists instead clamored, “Where were the parents?”¹⁵ The parents in this case were, for one, in prison, and for the other, homeless.¹⁶ The six-year-old was, in large part, left to fend for himself in a crack house.¹⁷ The prosecutor grabbed the next available causal agent, the drug addict who kept a gun on his bed for self-protection,¹⁸ and some of us held our morning papers and wept—for a little girl dead, and for a little boy with no bed, making his way through life so alone that no one knew whether he had breakfast or carried a gun to school.

13. The six-year-old boy’s name has not been revealed to the press. This Essay follows the press convention of using the father’s name, Dedric, with “Jr.” appended.

14. The 106th Congress is currently in a stalemate over proposed legislation that includes a waiting period for background checks at gun shows and child safety locks on guns. See Michael Romano, *Gun Control Spurs Angry Debate Among State Delegation*, *Denv. Rocky Mtn. News*, Mar. 19, 2000, at 4A. Both parties refuse to compromise their positions. Republicans favor a 24-hour background check instead of the Democrats’ proposed 72-hour check. See Lorraine Adams, *NRA Official Sticks by His Guns*, *Wash. Post*, Mar. 20, 2000, at A6.

15. NRA leaders blamed “parental neglect,” Mary McGrory, *Last Chance*, *Mr. President*, *Wash. Post*, Mar. 12, 2000, at B1, and said “A precious child’s life has been senselessly taken by another child who was raised in a home surrounded by crack pipes and stolen guns, not responsible adults,” Sarah A. Webster, *Clinton Pushes Gun Safety: 6-Year-Old’s Death Serves as Inspiration for San Jose Speech*, *Det. News*, Mar. 5, 2000, at 1. See also Mark Steyn, *Death of Innocence Did Not Come From a Gun*, *Chi. Sun-Times*, Mar. 17, 2000, at 47 (“The death of 6-year-old Kayla Rolland isn’t a gun story. It’s a family disintegration story.”).

16. See DeNeen L. Brown, *Guns and Children: A Deadly Environment: Six-Year-Old Killer’s World Had No Place for Toys*, *Wash. Post*, Mar. 21, 2000, at A1. Gloria Steinem spoke at the Feminist Expo describing the plight of this mother. She was living out of a suitcase after an eviction from her home. With no housing or minimum income available to her she left her sons with her brother, and continued to work two jobs, visiting her sleeping boys late at night after her second job ended. See Gloria Steinem, *Envisioning the Future*, reprinted in *Off Our Backs*, June 2000, at 8.

17. After Dedric Owens Jr.’s mother was evicted from her rented home, she sent Dedric and his brother to live with their 22-year-old uncle and another young man in a house that police allege was a busy crack house with frequent shootings. See Brown, *supra* note 16, at A1.

18. Genesee County Prosecuting Attorney, Arthur A. Busch, explained that he would “find some justice” by “getting to the adults who made this gun accessible.” *Id.* Two weeks later, 19-year-old Jamelle James was charged with involuntary manslaughter for carelessly storing the gun that Dedric used to kill Kayla Rolland. Lisa Singhania, *Gun Owner Standing Trial in Shooting*, *AP Online*, Apr. 5, 2000, available in *DIALOG*, File No. 258. Dedric Jr. testified that he found “the gun and some quarters in a shoebox in James’ room” and that earlier he had seen James playing with the gun. Joseph Altman Jr., *Boy Says He Didn’t Shoot Classmate*, *AP Online*, Apr. 1, 2000, available in 2000 WL 17835668.

During the past year, in the relatively small city where I live, sixteen school-aged children died in gunfire before school let out for the summer.¹⁹ At the height of a glorious D.C. spring, the mockingbirds trilled giddily to the azaleas, and seven children were shot at the National Zoo.²⁰ As spring 2000 gave way to summer, a million moms marched against guns.²¹ As I joined them, they struck me as uncertain of their politics even as they were certain of their imperative to keep their children alive through a good, long lifetime of springs.

III. OLD AND NEW UNDERSTANDINGS OF CAUSATION

The law on causation is traditionally more certain of its politics, offering the thinnest gauze of logic draped over clear self-interest. The intellectual history of the doctrine of objective causation was described in Morton Horwitz's chapter in *The Politics of Law*, a foundational text of the critical legal studies movement.²²

A spark jumped from a steam locomotive and set a town on fire.²³ The Courts debated whether the railroads were liable for the fire—for the first house, the second house, or the whole town. The New York court held that a railroad that negligently caused a fire was liable only to the owner of the first house because that first house fire was the “proximate” result of the railroad’s negligence;²⁴ the remaining injuries were considered too “remote” for liability.²⁵ Liability would lead to “the destruction of all civilized society,”²⁶ the court declared, because railroads were a primary agent of economic growth at the time. The history of the industrial revolution, pitting robber baron against agrarian populist, is captured in the legal seesawing over the question of causation and railroad spark fires.

19. Nightline: Year's Teen-Age Deaths by Shootings in Washington, D.C. (ABC News television broadcast, Apr. 21, 2000).

20. See Martin Weil & Cheryl W. Thompson, Six Wounded in Gunfire at Zoo, Wash. Post, Apr. 25, 2000 at A1.

21. On Mother's Day, May 14, 2000, hundreds of thousands of people gathered on the National Mall for the Million Mom March, united behind a call for stricter regulation of guns. See Susan Levine, Many Moms' Voices are Heard on Mall: Rally Supporting Stricter Gun Laws Draws Thousands, Wash. Post, May 15, 2000, at A1. The Million Mom March has become an advocacy group. See Million Mom March (visited Aug. 19, 2000) <<http://www.millionmomsmarch.com/index.html>> (on file with the *Columbia Law Review*).

22. See Morton J. Horwitz, The Rise and Early Progressive Critique of Objective Causation, in *The Politics Of Law: A Progressive Critique* 471, 487 (David Kairys ed., 3d ed. 1998) (discussing Francis Wharton's advocacy of a narrow conception of causation in order to protect industrialists' interests) [hereinafter Horwitz, Objective Causation]. Horwitz further explores this argument in *The Transformation Of American Law, 1870-1960*, at 51-63 (1992) [hereinafter Horwitz, Transformation].

23. See *Ryan v. New York Cent. R.R.*, 35 N.Y. 210 (1866).

24. *Id.* at 210.

25. *Id.* at 213.

26. *Id.* at 217.

The law of torts seeks determinations of causation that are predictable, stable, and objective. This gives the law legitimacy and provides a welcoming environment for economic growth. Broadening notions of responsibility, making the railroad pay beyond the first house, is a harm to capital. Horwitz quotes nineteenth century jurist Francis Wharton:

Capital, by this process is either destroyed, or is compelled to shrink from entering into those large operations by which the trade of a nation is built up. We are accustomed to look with apathy at the ruin of great corporations and to say, "well enough, they have no souls, they can bear it without pain, for they have nothing in them by which pain can be felt." But no corporation can be ruined without bringing ruin to some of the noblest and most meritorious classes of the land.²⁷

The way to protect class interests, Wharton realized, was to narrow causation. A pebble cast in the water makes ripples, the classic torts imagery goes, and we limit liability to the rings that are closest in time and space. The fewer causes and effects we identify, the cleaner and more predictable the doctrine. Single causation, linear causation, causation no further than the eye can see.

When Ku-oosh, the medicine man, says, "I fear what will happen to all of us if you and the others don't get well," he is expressing the pre-modern view of causation. It is neither linear, nor singular, nor stuck in the Newtonian world of action/reaction. Indeed, the central image of *Ceremony* is the circle. Human beings past and present are linked; the spirit world and the human world are linked. Actions give rise to effects, but effects also give rise to actions. Healing requires journeys, circles, touching of each direction: north, south, east, west. No person is ever an individual acting without consequence to others. Individual bad deeds and individual spiritual estrangement cause our collective illness, and collective illness is never cured by leaving individuals to their own resources.

This world view of *Ceremony* felt familiar to me, because I was raised in the last century, exposed to wisdom that defied the final triumph of modernism. I heard aunties say with casual certainty, "*bachi ga aru*,"²⁸ when they heard ill-spirited remarks about others, disrespectful comments about death or cemeteries, or gloating at personal success. You invite bad luck if you set yourself above and apart from others, when you act as if you believe you could not be the next one hit by a car or struck by lightning. In Hawaii, where I spent most of my youth, I heard regularly the calm explanations of flash floods or volcanic eruptions. Elders quoted in the newspaper would cite greed, disrespect for the old ways, a hotel developed on sacred land, bones dug up and not consecrated, as the precursors of disaster. They told stories of righteousness repaid, and kindness rebounding as good fortune. There was that time Uncle gave a

27. Horwitz, *Objective Causation*, supra note 22, at 486 (quoting Francis Wharton, *Liability of Railroad Companies for Remote Fires*, 1 S. L. Rev. (n.s.) 729, 730 (1876)).

28. Literally, "a curse is there."

ride to that hitchhiking old woman and the next night the lava turned right and flowed uphill over the rise and into the gully in order to avoid taking out Uncle's house.²⁹ I have heard these stories told in the tone used for reporting the weather. Nothing particularly miraculous, this is just how the world works.

It is a story as old as the plagues of Egypt. Human failing, greed, oppression, and disregard for the presence of a higher power will bring disaster. The good and the right in human behavior are what it takes to stop a curse. This premodern understanding is, of course, completely at odds with the contemporary legal understanding of cause and responsibility.

Under the modern view, causation is a notion best cabined and controlled lest it spin wildly out of control. Not every citizen who is in a position to stop a harm, not every neighbor who helped create the circumstances under which harm occurs, not every mourner who nurses regrets, is held responsible. Broad causation leads to "crushing liability,"³⁰ thus various legal devices apply to limit causation. Foreseeability, closeness in time and space, directness of the sequence of events, the number and kind of intervening causes, privity of contract, degrees of moral blameworthiness, and "no duty" rules are used to limit the range of human actors considered responsible for a given tragedy.³¹ These limiting doctrinal devices are artificial. That is, they do not represent any natural, logical, or inevitable restraint on the finding of casual connection between an act and a consequence. Legal causation, christened "proximate cause" by common law jurists, is recognized as a policy choice.³²

In the law of torts, if a woman is raped, we look to the rapist for recourse. He is subject to the narrow criminal and civil sanctions of the law.³³ Others in a position to predict and prevent rape—such as law en-

29. For collections of similar stories, see Glen Grant, *Obake Files: Ghostly Encounters in Supernatural Hawai'i* (1996).

30. *Strauss v. Belle Realty*, 481 N.E.2d 34 (1985).

31. Any torts casebook or hornbook covers examples of each of these limitations on causation. See, e.g., Prosser & Keeton, *Torts* (5th ed. 1984).

32. *Id.* at 273.

33. Catharine MacKinnon is the most powerful critic of the narrow focus of rape law. See Catharine A. MacKinnon, *Toward a Feminist Theory of the State* 180 (1989).

Rape, like many other crimes, requires that the accused possess a criminal mind (*mens rea*) for his acts to be criminal. The man's mental state refers to what he actually understood at the time or to what a reasonable man should have understood under the circumstances. The problem is that the injury of rape lies in the meaning of the act to its victim, but the standard for its criminality lies in the meaning of the act to the assailant.

Id. The victim-perpetrator dichotomy is noted by progressive authors, particularly in the field of antidiscrimination law. See Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, reprinted in *Critical Race Theory: The Key Writings That Formed the Movement* 29, 30 (Kimberlé Crenshaw et al. eds., 1995) ("Operating along with fault, the causation requirement serves to distinguish those conditions that the law will address from

forcement officers, parole boards, landlords, hotel operators, and security firms—are typically absolved of responsibility.³⁴ The law calls this “no duty.” No duty means that even if there are reasonable things one could do to prevent rape, the law will not require the doing of those things.³⁵ Immunity is also presumed for those who create an ideological system that makes rape possible. Pornographers, advertising executives, purveyors of violent imagery and the active subjects who make women objects in our culture are seen as obviously not responsible for the obvious consequences of their actions.³⁶ Thus, in the typical parking garage rape case, regardless of inadequate security and lighting, absence of available safety measures, and even given a known high rate of rape within the community, the victims of rape will lose in a suit against the garage operator.³⁷

the totality of conditions that a victim perceives to be associated with discrimination.”); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *Stan. L. Rev.* 317, 324–25 (1987) (explaining how the intent requirement in antidiscrimination law restricts notions of causation and discussing the ways in which the individual fault model prevents collective healing from the wounds of racism); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 *Harv. C.R.-C.L. L. Rev.* 323, 374–80 (1987) (explaining how narrow notions of fault and causation are an impediment to public acceptance of reparations for historical injustice); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 *Harv. L. Rev.* 1419, 1447–48 (1991) (arguing that the criminal justice system’s punitive approach to drug use prevents the system from addressing the real causes of drug-addicted newborns). The primarily punitive focus of the perpetrator perspective limits not only what we perceive as causes, but also what we construct as appropriate remedies. See, e.g., Mari J. Matsuda, *Where is Your Body?* 37–45 (1996) [hereinafter *Matsuda, Where is Your Body*] (arguing that the use of punitive criminal sanctions to deter violence against women is a double-edged sword); Martha Minow, *Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice*, 32 *New Eng. L. Rev.* 967, 969 (1998) (discussing “restorative justice,” which focuses on “repairing relationships between offenders and victims and within the community” as an alternative to retribution).

34. See, e.g., Ellen M. Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 *Colum. L. Rev.* 1413, 1416 (1999) (criticizing “no duty” laws and arguing that people should not have to structure their lives around the assumption that others will rape them).

35. *Id.* at 1443. Where third parties are not completely absolved, courts have employed the doctrine of comparative negligence to find the rape victim’s action contributed to her rape. See, e.g., *Wassell v. Adams*, 865 F.2d 849, 854–55 (7th Cir. 1989). In *Wassell*, a woman who let an unknown man into her hotel room was found negligent and “97 percent to blame for the attack,” even though the hotel had not taken adequate security measures to protect its guests. *Id.* at 852, 855. Using a risk-utility analysis, the Seventh Circuit held that the cost to the woman of maintaining vigilance against rapists was less than the cost to the hotel of employing a security guard (\$20,000 per year), and thus the hotel had virtually no duty to take such precautions. *Id.* at 855–56.

36. For a persistent and eloquent voice offering the opposite view, see Catharine A. MacKinnon, *Only Words* 45–68 (1993).

37. *Gillot v. Washington Metro. Area Transit Auth.*, 507 F. Supp. 454, 457 (D.D.C. 1981) (holding that, in the context of parking lot rapes, “[t]he acts of a third person in committing an intentional tort or crime is a superceding cause of harm even though a defendant’s negligence may have created a situation which afforded an opportunity to the third person to commit such a crime”); *Errico v. Southland Corp.*, 509 N.W.2d 585, 588

"Look to the rapist," is the law's mythical remedy offered in response to women's trauma. It is a myth because rapists are rarely apprehended, and when apprehended, are rarely prosecuted effectively.³⁸ When sued,

(Minn. 1993) ("Presumably, Errico [the sexual assault victim] considered cost and convenience when she chose to patronize Southland's store [in a high crime neighborhood]. The risk she accepted in doing so was probably an acceptable risk, considering the time of night and the neighborhood in which she chose to shop."). See Bublick, *supra* note 34, at 1444-46. But cf. Shannon D. Sweeney, Note, "Inherently Dangerous" Premises: *Sharon P. v. Arman, Ltd.* Dictates That Criminal Acts of Third Parties Are Foreseeable in California Commercial Parking Structures, 33 U.S.F. L. Rev. 521, 529-32 (Spring 1999) (discussing California's struggle to come to terms with the problem of crime in parking garages).

38. "Ninety-eight percent of rape victims will never see their attacker apprehended, convicted and incarcerated." Staff of Senate Comm. on the Judiciary, 103d Cong., *The Response to Rape: Detours on the Road to Equal Justice 1* (Comm. Print 1993) [hereinafter *Response to Rape*]. The women's movement has longstanding grievances about weak enforcement of rape laws and the anti-women structure of such laws. It is common knowledge that women who are raped face a long, painful struggle not just against their perpetrator, but also against an unsympathetic and biased justice system. See Susan Estrich, *Real Rape 5* (1987).

[Rape] has been defined so as to require proof of actual physical resistance by the victim, as well as substantial force by the man. Evidentiary rules have been defined to require corroboration of the victim's account, to penalize women who do not complain promptly, and to ensure the relevance of a woman's prior history of unchastity.

Id. See also Catharine A. MacKinnon, *Toward a Feminist Theory of the State 179* (1989) ("From women's point of view, rape is not prohibited; it is regulated Rather than deterring or avenging rape, the state, in many victims' experiences, perpetuates it."). Police have discretion to disbelieve (find "unfounded") a victim's rape complaint. In 1995, forcible rapes were unfounded at a significantly higher rate (8%) than the average unfounding rate for all other violent crimes (2%). See Katherine T. Bartlett & Angela P. Harris, *Gender and Law: Theory, Doctrine, Commentary 832* (2d ed. 1998). Because many rapes are never reported, the Uniform Crime Report, which tallies the number of rapes reported to police, vastly underestimates the occurrence and prevalence of rape in the United States. See Estrich, *supra*, at 10-15 (observing that, for numerous reasons, victims many times choose not to report rape, particularly acquaintance rape, to police); Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. Davis L. Rev. 1013, 1019 n.24 (1991) ("Actual police statistics, for a variety of reasons, are an inadequate reflection of the number of rapes committed."). According to the limited information in the Uniform Crime Report, half of the rapes reported to police in 1998 resulted in arrest (an estimated 31,070 arrests for rape resulted from an estimated 71,040 reports). See Federal Bureau of Investigation, U.S. Dep't of Justice, *Crime in the United States 1998: Uniform Crime Reports 24*, 201 tbl.25, 210 tbl.29 (1999) [hereinafter *Uniform Crime Reports 1998*]. The National Crime Victim Survey, which actually surveys households instead of relying on police reports, found 199,760 incidents of rape victimization (including attempts) in the United States in 1998. See Bureau of Justice Statistics, U.S. Dep't of Justice, *Criminal Victimization in the United States, 1998*, tbl.91 (1999) [hereinafter *1998 NCVS*] (approximately 49,000 households are sampled for three years and are interviewed by U.S. Census Bureau personnel at six-month intervals). Of these incidents, only 29% were reported to police. *Id.* at tbl.91. The National Violence Against Women Survey, the most comprehensive study surveying a nationally representative sample of households, estimates that, in the United States, there are over 876,000 rape incidents against women annually. See Patricia Tjaden & Nancy Thoennes, *Nat'l Inst. of Justice & Ctrs. for Disease Control and Prevention, U.S. Dep't of*

the rapists are typically insolvent and unable to pay damages,³⁹ and when convicted, they rarely receive mental health or other rehabilitative services,⁴⁰ nor do they remain in prison long enough to prevent repeat of

Justice, Prevalence, Incidence, and Consequences of Violence Against Women: Findings From the National Violence Against Women Survey 4 (1998). Conviction rate estimates for rape vary widely. Department of Justice statistics suggest that approximately half of all felony rape arrests in 1990 resulted in convictions. See Lawrence A. Greenfeld, Bureau of Justice Statistics, U.S. Dep't of Justice, Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault 12 (1997) [hereinafter Sex Offenses]. "A rape prosecution is . . . 30 percent more likely to be dismissed than a robbery prosecution." Response to Rape, supra, at 1. Cf. Bureau of Justice Statistics, U.S. Dep't of Justice, Drugs and Crime Facts, 1994, at 18 (June 1995) (visited Aug. 8, 2000) <<http://www.ojp.usdoj.gov/bjs/pub/pdf/dcfacts.pdf>> (on file with the *Columbia Law Review*) [hereinafter Drugs and Crime] (reporting 84% conviction rate for federal drug offenses in 1991). Even with conviction, the sentences imposed vary greatly. "Adding together the convicted rapists sentenced to probation and those sentenced to local jails, almost half of all convicted rapists are sentenced to less than 1 year behind bars." Response to Rape, supra, at 1. Of the estimated 21,655 rapists convicted in 1992, approximately 68% were sent to prison, 19% were sentenced to time served in jail, and 13% received only probation supervision. Greenfeld, supra, at 14. But cf. Drugs and Crime, supra, at 18 (87% of federal drug law violators sentenced to prison in 1991).

39. A rape victim's losses are rarely compensated. Victims can pursue monetary awards through numerous channels. See Barbara E. Smith & Susan W. Hillenbrand, Making Victims Whole Again: Restitution, Victim-Offender Reconciliation Programs, and Compensation, in *Victims of Crime* 245 (Robert C. Davis et al. eds., 1997) (discussing court-ordered restitution, state crime victim-compensation statutes, voluntary agreements, victim/offender reconciliation programs, civil suits, and insurance claims). All of these remedies are wanting. Civil remedies are costly and time-consuming. See id. at 245. Victims, many times, are unaware that they can sue. See The National Center for Victims of Crime, Civil Justice for Crime Victims (visited Aug. 15, 2000) <http://www.ncvc.org/Infolink/Infolink_frames2.htm> (on file with the *Columbia Law Review*) [hereinafter Civil Justice] (outlining the role the civil justice system can play in securing justice for victims of crime). Suits are rarely pursued against the rapist alone because of enforcement problems and because most defendants do not have sufficient assets to support significant damage awards. See id. ("Unfortunately, many defendants do not pay these judgements."). Of the estimated 21,655 felony convictions for rape in 1992, only 12% required some amount of court-ordered restitution to the victim. See Greenfeld, supra note 38, at 14-15; see also Civil Justice, supra, ("[E]ven when restitution is ordered, it is rarely enforced."). State crime victim compensation statutes are "subject to restrictions and limitations that may prevent crime victims from being fully compensated." Civil Justice, supra; see also *United Nat'l Ins. Co. v. Ent. Group, Inc.*, 945 F.2d 210, 214 (7th Cir. 1991) (holding that the theater was not liable for rape, even if negligent, because of policy exclusion); *Northland Ins. Co. v. Briones*, 81 Cal. App. 4th 796, 810 (2000) (insurer not liable to victim for insured rapist's acts because "rape is intentional conduct"); Civil Justice, supra ("[M]ost insurance policies exclude intentional acts from coverage.").

40. Most sex offenders do not get treatment despite evidence that specialized treatment may reduce recidivism rates. See Jonathan Kaden, Therapy for Convicted Sex Offenders: Pursuing Rehabilitation Without Incrimination, 89 J. Crim. L. & Criminology 347, 365 & n.103 (1998) (claiming that the high recidivism rate of untreated sex offenders can be reduced through treatment); Julie A. Allison & Lawrence S. Wrightsman, Rape: The Misunderstood Crime 231 (1993) ("Although new treatment procedures are reducing the recidivism rates of rapists, the vast majority of sex offenders in prison receive little or no treatment.") (citation omitted). Sex offender recidivism is a well-acknowledged problem. "Rapists and sexual assaulters serving time in State prisons . . . were substantially

fenses.⁴¹ The United States Supreme Court, in nullifying the Violence Against Women Act, has further extended the de facto immunity for rapists.⁴² Yet, we persist in telling women to seek redress from rapists, not from a system that creates and condones rape.

more likely to have had a history of convictions for violent sex offenses” Incarcerated “sex offenders, while accounting for about 20% of all violent offenders, accounted for about 66% of all violent offenders with a prior history of sex offenses.” Greenfeld, *supra* note 38, at 23. But see Katherine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 Harv. L. Rev. 563, 582 (1997) (criticizing Rule 413 of the Federal Rules of Evidence because, she argues, statistics do not demonstrate high recidivism probability for rapists). Of the estimated 21,655 felony convictions for rape in 1992, only 10% of the sentences required some form of treatment. See Greenfeld, *supra* note 38, at 15. Fourteen percent of surveyed incarcerated sex offenders reported that specialized treatment was required as a part of their sentences. See *id.* at 23. “[P]roviding treatment for sex offenders clearly makes a difference. In general, . . . most institutional programs have found that approximately 15 to 20 percent of treated offenders will commit a sex offense within three years of their release, while approximately 60 percent of those who have not received treatment will re-offend.” National Institute of Corrections, U.S. Dep’t of Justice, *Questions and Answers on Issues Related to the Incarcerated Male Sex Offender 6* (1988) (visited on Aug. 8, 2000) <<http://www.nicic.org/pubs/pre/007404.pdf>> (on file with the *Columbia Law Review*).

41. Sentencing practices do not reflect the serious harm of rape. Of those 21,655 rapists convicted in 1992, 68% were sentenced to prison for an average of 164 months, 19% were sentenced to jail for an average of eight months, and 13% (approximately 2,800 felons) were sentenced to no incarceration at all, but only probation supervision for an average of just under six years. See *Sex Offenses*, *supra* note 38, at 14. “[P]risoners who had served . . . more than five years in prison, had lower rates of rearrest than other offenders during the followup period.” Allen J. Beck, U.S. Dep’t of Justice, *Recidivism of Prisoners Released in 1983*, at 2 (1989) (visited on Aug. 8, 2000) <<http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr83.pdf>> (on file with the *Columbia Law Review*). The Senate Judiciary Committee has joined in criticizing the lax sentences received by rapists. See *Response to Rape*, *supra* note 38, at 1 (“Nearly one-quarter of convicted rapists are not sentenced to prison but, instead, are released on probation. Nearly one-quarter of convicted rapists receives a sentence to a local jail—for only 11 months.”). These sentences, when coupled with ineffective enforcement and prosecution, send the message to women and men that rape is not a crime we take seriously in this society. This is particularly so given the general trend to punitive, mandatory sentences for drug crimes. This observation does not suggest agreement with the punitive model. Rather, given lax sentencing of rapists in an otherwise punitive criminal justice system, I allege that crimes against women’s bodies are taken less seriously than other crimes. For my criticism of the punitive model see generally Matsuda, *Where is Your Body*, *supra* note 33, at 37 (discussing *Feminism and the Crime Scare*).

42. See *United States v. Morrison*, 120 S. Ct. 1740 (2000). In a 5-4 decision, the Supreme Court struck down the federal civil remedy contained in 42 U.S.C. § 13981(c) of the Violence Against Women Act of 1994 (VAWA). See *id.* at 1759. Chief Justice Rehnquist, writing for the Court, declared that Congress had overstepped its legitimate authority, acting without the blessing of either the Commerce Clause or Section 5 of the 14th Amendment. See *id.* Rehnquist extended the Court’s holding in *United States v. Lopez*, 514 U.S. 549 (1995), and, relying on a restrictive notion of causation remarkably similar to Francis Wharton’s, as discussed in Horwitz, *Objective Causation*, *supra* note 22, at 487 and text accompanying note 27, ruled that violence against women did not substantially affect interstate commerce. See *Morrison*, 120 S. Ct. at 1753 & n.6 (quoting *Lopez*, 514 U.S. 549, and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)). Prior to *Morrison*, it was unclear whether the *Lopez* limitation on the scope of the

Similarly, the families of the several thousand American children killed by guns in a typical year are told to look to the shooter for redress.⁴³ If the shooter is another child, then look to the parents of that

Commerce Clause was attributable to a lack of congressional findings or the Court's desire to rely on a strict, and artificial, division between economic and non-economic behavior. See *Lopez*, 514 U.S. at 563. In *Morrison*, the Court ignores voluminous congressional findings on the impact that violence against women has on interstate commerce. See *Morrison*, 120 S. Ct. at 1764 (Souter, J., dissenting); see also Catharine A. MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 Harv. L. Rev. 135, 177 (2000) ("*Morrison* addressed ground zero for citizenship—physical security—and ground zero for women's human status—sexual inviolability. At stake was nothing less than whether women are full citizens . . ."); Kerrie E. Maloney, *Gender-Motivated Violence and the Commerce Clause: The Civil Rights Provision of the Violence Against Women Act after Lopez*, 96 Colum. L. Rev. 1876, 1921–25 (1996) (explaining that only a devaluation of the problem of violence against women could justify a determination that it does not have a substantial effect on interstate commerce).

43. Common law rules generally insulate gun retailers and manufacturers from liability for the harm caused by their wares. See, e.g., *Hulsman v. Hemmeter Dev. Corp.*, 647 P.2d 713, 721–22 (Haw. 1982):

The record reveals that Miller's conduct in purchasing the rifle would not lead a reasonable seller, exercising ordinary care, to anticipate or foresee that Miller would misuse the rifle. Furthermore, the proximate cause of appellant's injury would not be Thom's alleged negligence, rather, it would be the criminal act perpetrated by Miller which broke any causal connection between Thom's alleged negligence and the injuries sustained by appellant.

Id. See also *Robinson v. Howard Bros.*, 372 So. 2d 1074, 1076 (Miss. 1979):

In sum, the intentional criminal act of Alexander was an independent intervening cause that broke any causal connection between defendants' negligent act and the death of Mrs. Robinson. The criminal act cannot be said to have been within the realm of reasonable foreseeability because the defendants, although negligent per se, could reasonably assume that Alexander would obey the criminal law.

Id. See also *Jantzen v. Edelman*, 614 N.Y.S.2d 744, 745 (N.Y. App. Div. 1994) ("In any event, as a matter of law, there could be no finding of proximate cause under the circumstances of this case. The sale of a shotgun merely furnished the condition for the unfortunate occurrence."); *Fly v. Cannon*, 836 S.W.2d 570, 575 (Tenn. Ct. App. 1992) ("Under the uncontroverted facts in the instant case, defendant's sale of the ammunition to Cannon, at most, created a condition by which the unfortunate incident was made possible. The direct and proximate cause of the incident was the action of Cannon in firing a gun at a supposed intruder."); *Chapman v. Oshman's Sporting Goods, Inc.*, 792 S.W.2d 785, 787 (Tex. App. 1990):

Even assuming, arguendo, that Oshman's was directly or vicariously negligent in the sale of the gun, Buede's criminal conduct was a superceding cause that relieved Oshman's of liability. Once Oshman's presented as summary judgment evidence a certified copy of Buede's guilty plea and judgment of conviction for first degree murder, appellants could defeat Oshman's motion for summary judgment only by presenting evidence that raises a factual issue as to whether Buede's criminal conduct was foreseeable.

Id. See also Timothy A. Bumann, *A Products Liability Response to Gun Control Litigation*, 19 Seton Hall Legis. J. 715, 729 (1995) (reviewing cases decided on strict liability theories and concluding: "Strict liability has been a failure for gun control plaintiffs. Courts simply refuse to apply strict liability to cases involving the criminal misuse of non-defective products. Likewise, the sale of non-defective goods in a lawful manner to buyers legally entitled to own and possess them is not a hazardous activity."); John P. McNicholas &

child. Unfortunately, the law typically does not hold parents responsible for the acts of their children,⁴⁴ and even if it did, it could do little to

Matthew McNicholas, *Ultrahazardous Products Liability: Providing Victims of Well-Made Firearms Ammunition to Fire Back at Gun Manufacturers*, 30 *Loy. L.A. L. Rev.* 1599, 1605–17 (1997) (discussing the failure of California’s progressive products liability regime to recognize fault in cases of harm caused by “well-made” firearms). Some commentators have suggested that a tort law presumption that gun purchasers will only engage in non-criminal uses of their guns is derived from the Second Amendment of the U.S. Constitution. See, e.g., Amanda B. Hill, *Ready, Aim, Sue: The Impact of Recent Texas Legislation on Gun Manufacturer Liability*, 31 *Tex. Tech L. Rev.* 1387, 1432 (2000) (“If gun manufacturers are held liable for injuries caused by gun violence, regardless of whether the theory is products liability or negligence, it would negatively affect one’s right to own a gun, guaranteed by the Second Amendment of the United State Constitution.”); David B. Kopel & Richard E. Gardner, *The Sullivan Principles: Protecting the Second Amendment from Civil Abuse*, 19 *Seton Hall Legis. J.* 737, 773 (1995). (“As *Sullivan* established, for the government, including the judicial branch, to allow common law torts to infringe on Constitutional rights amounts to unlawful state action that is barred by the Fourteenth Amendment. The judiciary has an affirmative obligation to prevent such infringement.”); see also, e.g., *United States v. Emerson*, 46 *F. Supp. 2d* 598, 611 (N.D. Tex. 1999) (striking down a statute forbidding people targeted with domestic violence restraining orders from possessing guns because “the statute has no real safeguards against an arbitrary abridgement of Second Amendment rights. Therefore, by criminalizing protected Second Amendment activity based upon a civil state court order with no particularized findings, the statute is over-broad and in direct violation of an individual’s Second Amendment rights.”). Whether the Second Amendment does, or should, provide an individual right to carry and use firearms is currently a topic of much debate. Compare Joyce Lee Malcolm, *To Keep and Bear Arms* 135–64 (1994) (discussing historical evidence in favor of an individualist understanding), Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 *Geo. L.J.* 309, 359–61 (1991) (arguing that the Second Amendment is particularly important to African-Americans since they cannot reliably count on the state for security), and Sanford Levinson, *The Embarrassing Second Amendment*, 99 *Yale L.J.* 637, 655–59 (1989) (arguing that the normal canons of Constitutional interpretation lead to an individualist understanding of the Second Amendment), with Michael C. Dorf, *What Does the Second Amendment Mean Today?* *Columbia Law School Public Law & Legal Theory Working Paper* (No. 7, Mar. 28, 2000), available at <http://papers.ssrn.com/paper.taf?abstract_id=221450> (on file with the *Columbia Law Review*) (arguing that the normal canons of Constitutional interpretation support a collective approach to the Second Amendment), and Michael Bellesiles, *Arming America: The Origins of a National Gun Culture* 9–13 (2000) (critiquing the quality of the historical analysis used to defend the individual approach to the Second Amendment).

44. See Rhonda Magee Andrews, *From David Cash to Columbine: The Unfinished Business at the Heart of Common Law Duty* 3, 13 (2000) (unpublished manuscript, on file with the *Columbia Law Review*) (arguing for parental liability for the torts of minors). I agree with Professor Andrews’s conclusion that parents should share liability for the violent torts committed by their minor children, because as a practical matter this rule extension will make some compensation available to presently uncompensated or under-compensated victims, particularly in the case where the parent-defendants are either independently wealthy or insured. I do not, however, feel that this doctrinal change achieves justice. It burdens defendant-parents with liability without providing them with any assistance in preventing violent torts by their minor children. Indeed, the parents who have reason to anticipate violence from their child, particularly where mental illness is a cause, have fewer options than in years past. The contraction of social services available to families in distress, the increasing unavailability of civil commitment as an option, and the

change the circumstances of the worst parental neglect. Desperately neglectful parents are not generally in a position to think about the tort law consequences of their actions. That is the least of their many, cascading problems.

At this point, I must insert a note on individual responsibility, because the reader may correctly anticipate that this lecture will close by advocating a broadly collectivist notion of cause and responsibility. Does this mean I am opposed to individual responsibility? No. One of my sins is judgment: I tend to judge my fellow citizens harshly and to feel outraged disappointment at their failures. Parents who neglect children, dealers who sell drugs, rapists, murderers, violent police officers, drunk drivers, and anyone who cannot follow the basic rules of other-regarding behavior should be punished with, of course, humanity and due process of law. I believe in individual responsibility because the human condition calls for it. We need to hold each other to a minimum standard of safe behavior and call transgressions what they are. This is how we define ourselves and how we right wrongs. Accountability is a human need.⁴⁵

proliferation of “managed care” limit coverage for mental-health needs. See E. Fuller Torrey, M.D., *Out of the Shadows: Confronting America’s Mental Illness Crisis* 1–14, 120–26 (1997) (detailing the history of deinstitutionalization and its gradual replacement with a profit-driven managed-care industry that has no incentive to provide care to the chronically ill). From the point of view of victims of violent acts by minors, compensation is essential. From the point of view of parents, it is wealth transference based on the random occurrence of mental illness in a particular family unit.

Holding parents liable for their children’s torts sends the wrong ideological message: When things go terribly wrong, as with the Columbine murders, the parents of the shooters are to blame; they alone should have foreseen and could have prevented the murders. Mental illness touches nearly every family, yet we act as though it is both rare and blameworthy. In fact it is a widespread phenomena, increasingly understood as encompassing both biological and social origins. To the extent that the cause is “nature,” parental liability makes as much sense as suing parents whose children get cancer. To the extent it is “nurture,” parents share responsibility with a broader community that has neglected the needs of children and completely failed to make available affordable community-based mental-health services. Look at the mentally-ill roaming the streets, wearing rags, and eating from trash bins in any American city for testimony on how we have collectively chosen to deal with mental illness. I am, then, a reluctant supporter of parental liability just as I am a reluctant supporter of the tort system generally. It is a stopgap providing some compensation and some deterrence. It is not justice.

45. One thoughtful reader sees in this paragraph a potential “drift to the right.” Conversation with Marc Spindelman, Sept 21, 2000. To the extent that this essay leaves room for retribution as a valid part of the human experience, one may see this either as a drift to the right, or as an attempt on the left to more fully map the landscape of human needs as part of the project of making sure that human needs are taken seriously and of affirming that meeting human needs is a collective responsibility. If I am my sister’s keeper, am I also to aid her when she says, “my ability to live my life in peace requires collective condemnation of harms to my body?” I believe so, and I am also a civil libertarian. That is, I commit to strong limits on the State’s power to act in retribution because of the history and the potential for abuse, particularly in relation to the least advantaged, when retribution is considered a legitimate end of the State. I also believe that substantive equality is the best check on repressive retribution. That is, on the day when all people have equal access to education, livelihood, food, shelter, medical care,

The trouble is that individual responsibility is all we offer under liberal legalism, and it is vastly inadequate to keep us safe and healthy. Criminalizing dangerous gun use has not sufficiently curtailed dangerous gun use.⁴⁶ The individual-accountability model has not kept guns out of the hands of children. People from countries that ban handguns are shocked that we allow thousands of children to die by gunfire each year. They see our choice as a collective one: “Those Americans must be crazy.”⁴⁷ If we, the collective, are in a position to stop the violence, and we allow it to continue, then we are responsible.

Holding one responsible for the act of another recognizes mutual humanity. A version of liberty offered by some on the Right offers as the essence of freedom the right not to ask that question, not to care or know or act when it comes to the lost lives of others.⁴⁸ In our democracy, this version of liberty has always existed in contest with liberty defined in

wealth, and production of speech, I would like us all to sit down and have a serious conversation about the means and the limits of punishment as a collective goal. Pending utopia, I do believe we have an obligation to make tentative conclusions about what is best for our communities and to move toward the best, with caution. With this proviso, I believe I avoid a drift to the right.

46. Tens of thousands of people die every year from gunshot wounds. In 1997, the last year for which final official statistics exist, 32,436 people were killed by firearms. See 47 CDC Nat'l Vital Stat. Rep., No. 19, at 10-11, 68 (June 30, 1999) <http://www.cdc.gov/nchs/data/nvs47_19.pdf> (on file with the *Columbia Law Review*). Preliminary data for 1998 indicates that 29,849 people were killed by firearms. See 17 CDC Nat'l Vital Stat. Rep., No. 22, at 28 (Oct. 5, 1999) <http://www.cdc.gov/nchs/data/nvs47_25.pdf> (on file with the *Columbia Law Review*); see also, e.g., Josh Sugarmann, *Reverse Fire*, *Mother Jones*, Jan.-Feb. 1994, at 36, 38 (stating that guns in America claimed approximately 37,000 lives in 1990). Youth are particularly subject to the dangerous effects of guns—a child in America is shot every 36 minutes. See Carl W. Chamberlin, Johnny Can't Read 'Cause Jane's Got a Gun: The Effects of Guns in Schools, and Options after *Lopez*, 8 *Cornell J.L. & Pub. Pol'y* 281, 282 (1999). Philip Cook and Jens Ludwig have argued that understanding the costs of gun violence in terms of “30,000 deaths and 80,000 serious injuries places the focus on the victims and may lead to an assessment of how they are different from the rest of us.” Instead, they focus on “how gun violence reduces the quality of life for everyone in America,” through changes in behavior and limitations on personal choices required by the presence of gun violence, as well as economic costs estimated at \$100 billion per year. See Philip J. Cook & Jens Ludwig, *Gun Violence: The Real Costs* vii-viii (2000).

47. See, e.g., Barbara Paskin, 'If Someone Broke In, I Would Shoot Them in a Second,' *Times* (London), Apr. 14, 2000, at 34 (“But in Britain, where possession of guns is regulated, [Charlton Heston's] pro-gun stance has also singled him out for attack. It seems inconceivable to us that American schoolchildren as young as six can get hold of guns and go around brandishing them and killing their peers. But Heston insists that “it's not the guns that kill, it's the maladjusted kids.”). It appears that this outlandish quote from Mr. Heston received scant attention in the United States.

48. See, e.g., Richard A. Epstein, *A Theory of Strict Liability*, 2 *J. Legal Stud.* 151, 198 (1973). Epstein writes:

Once one decides that as a matter of statutory or common law duty, an individual is required under some circumstances to act at his own cost for the exclusive benefit of another, then it is very hard to set out in a principled manner the limits of social interference with individual liberty.

Id. at 198.

more humane terms. Those mothers who seek freedom from mourning, the rape survivor who wants to take back the night, the teacher unfolding a damp homework sheet received from a child who says the roof was leaking at the shelter last night, all might offer a different version of what liberty could mean, as has my colleague Robin West in her book *Progressive Constitutionalism*.⁴⁹ Seeing causation beyond the hand on the gun, beyond the gun itself, forces us to ask what human beings really need to live free from fear and violence.

IV. BROADENING CAUSATION

I advocate two changes in our thinking on causation. We could implement the first one today without significant modification of our legal system. The second is more utopian, and therefore more transgressive. What we could do today is this: We could establish a legal principle of causation that says that if the party most proximate⁵⁰ to the harm is less likely to be deterred by imposition of liability than other causal agents less proximate, then the others less proximate shall be considered a proximate cause of the harm. To put it simply, take the harm and figure out who is in the best position to prevent it. The person in the best position to prevent the harm is the logical person to hold accountable for the harm. The presence of another potentially accountable person should not let everyone else who could have prevented the harm off the hook. Every effect has multiple causes, and in a responsible society we should identify as the responsible causes all those that could have made a difference.⁵¹ I regret to tell you that the direction of the law, largely at the urging of manufacturers and insurance companies, is moving in the

49. Robin West, *Progressive Constitutionalism* 119 (1994). Professor West observed: As was the case with gender roles, however, the constraint on liberty occasioned by sexual violence is not a constraint directly worked by state action. Instead, it is a constraint imposed by men. Although the state unarguably aggravates the harm by casual, lax, or nonexistent enforcement of the criminal laws against sexual violence, it is the sexual violence actually perpetrated by men—strangers, acquaintances, dates, lovers, and husbands—rather than irrational or abusive states or state officials that most profoundly limits women's liberty.

Id. (citations omitted).

50. "Proximate" as used here reflects all of the sometimes contradictory and vague meanings of the word under common law, including closeness in time and space, predictability in sequence, predictability in kind/foreseeability, closeness in the chain of events, and moral culpability.

51. Professor Robert Rabin would reach a similar result by focusing on the blameworthiness of "enabling" the torts of others. See Robert L. Rabin, *Enabling Torts*, 49 *DePaul L. Rev.* 435, 450–52 (1999). I focus on deterrence, a broader principle for extending liability, in the belief that deterrence is the most socially useful result of the American tort system. As a system of compensation for injury, it is replete with waste, gaps, inconsistencies, over- and under-compensation. As a system of justice, defined as placing blame in culturally agreed-upon hands, it is plagued by irresolvable conflicts of value and, in my view, is far too narrow to represent a consensus on blameworthiness. What the American law of torts has done, albeit imperfectly, is to focus our attention on making products, activities, premises, and institutional practices safer. It is common knowledge

other direction: toward narrow notions of cause and the reduction of joint responsibility for harmful acts.⁵²

Good citizens are fighting back. In a landmark lawsuit filed in New Orleans, Mayor Marc Morial is attempting to use multiple causation theory against gun manufacturers.⁵³ Manufacturers of cheap handguns know those guns are not used by hunters or competitive target shooters

that disregard of safety leads to lawsuits, and much harm is avoided based on this knowledge.

52. See, e.g., Lucinda M. Finley, *Guarding the Gate to the Courthouse: How Trial Judges Are Using Their Evidentiary Screening Role to Remake Tort Causation Rules*, 49 *DePaul L. Rev.* 335, 341–42 (1999); cf. Henderson & Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 *UCLA L. Rev.* 479, 481 (1990) (discussing pro-defendant trends in tort law).

53. New Orleans was the first city to challenge the gun industry for failing to build weapons with adequate safety features. See Michael Perlstein, *Morial Files Suit Against Gun Makers: City Seeks Compensation for High Cost of Violence*, *New Orleans Times-Picayune*, Oct. 31, 1998, at A1. In an effort to kill the New Orleans suit, the Louisiana state legislature passed a retroactive law banning product-liability lawsuits against gun manufacturers. The law was recently declared unconstitutional and the lawsuit was allowed to go forward. See *New Orleans Lawsuit Against Gun Industry Goes Forward; State Ban Ruled Unconstitutional*, *U.S. Newswire*, Feb. 29, 2000, available in 2000 WL 4141868. Following New Orleans's lead, a number of cities filed similar suits, placing pressure on gunmakers. See *Smith & Wesson Up for Sale: Gun Suits by Cities are Turning Up the Heat*, *New Orleans Times-Picayune*, Jan. 1, 2000, at C1. On June 20, 2000, New York City was the most recent city to file, bringing the total number of cities involved in the litigation to 31. See *The Legal Action Project of the Center to Prevent Handgun Violence* (visited Sept. 17, 2000) <<http://www.handguncontrol.org/lap/index.html>> (on file with the *Columbia Law Review*) (providing links to pleadings from each of the municipal suits). New York State followed, and on June 26, 2000, became the first state to file. See *id.*

Gun litigation has become increasingly complex since the first New Orleans lawsuit was filed, with cases relying on several causes of action: 1) strict liability for abnormally dangerous activity; 2) product liability for design defect; 3) negligent marketing; 4) public nuisance; and 5) deceptive trade practices. See David Kairys, *Legal Claims of Cities Against the Manufacturers of Handguns*, 71 *Temp. L. Rev.* 1, 14–15 (1998) (setting out the arguments upon which some lawsuits are based); Timothy D. Lytton, *Tort Claims Against Gun Manufacturers for Crime-Related Injuries: Defining a Suitable Role for the Tort System in Regulating the Firearms Industry*, 65 *Mo. L. Rev.* 1, 6–50 (2000) (providing an in-depth discussion and criticism of each of the five causes of action); *Developments in the Law—The Paths of Civil Litigation*, 113 *Harv. L. Rev.* 1752, 1759–83 (2000) (discussing the success of each claim in then-ongoing lawsuits). The litigants have also requested an increasingly diverse set of remedies. See, e.g., *Developments in the Law—The Paths of Civil Litigation*, *supra*, at 1773–75 (discussing possible remedies in light of the courts' holdings of proximate cause); Note, *Recovering the Costs of Public Nuisance Abatement: The Public and Private City Sue the Gun Industry*, 113 *Harv. L. Rev.* 1521, 1522, 1531–38 (2000) (explaining how cities can recover for the costs of treating victims of gun violence, including increased police protection, court services, and medical care). The NAACP has also filed suit, requesting injunctive relief against several unreasonable industry practices, including the sale of more than one handgun to the same customer in the same month. See *First Amended Complaint* at 47–48, *NAACP v. A.A. Arms, Inc.*, E.D.N.Y., No. 99-3999 (E.D.N.Y.), available in *Firearms Litigation Clearinghouse* (visited Sept. 17, 2000) <<http://www.firearmslitigation.org/99ny00.pdf>> (on file with the *Columbia Law Review*). Pleadings and orders for all of the cases are available in <<http://www.handguncontrol.org/lap/index.html>> and <<http://www.firearmslitigation.org/decisions.html>>.

or any responsible gun owner who is familiar with the rules and principles of gun safety.⁵⁴ If you know you are manufacturing a product likely to facilitate violent, criminal acts, and if you put that product on the market knowing criminal injury and death will occur as a result, you should be liable for the consequences to innocent victims and to cities like New Orleans, which spend millions of dollars each year for the police, the ambulances, the coroners, the hospitals, the clean up and burial every time a child picks up a gun and shoots a fellow citizen.⁵⁵ Let the product bear the costs of the harm it causes. Those of us who choose not to own guns would rather see our tax dollars go to crime prevention than to the public expenditures required by gunshot wounds. Those who choose to own guns should pay, through higher gun prices, for the costs to society imposed by the proliferation of guns. This is what the New Orleans lawsuit is attempting to do. It is consistent with the law of products liability as anticipated by Justice Traynor, one of the giants in the pantheon of twentieth-century legal thought.⁵⁶

54. See, e.g., *Merrill v. Navegar, Inc.*, 89 Cal. Rptr. 2d 146, 166 (Cal. App. 1999). The evidence suggests that the favored status and frequent criminal use of the TEC-9 and the TEC-DC9 was also the result of Navegar's advertising, which called attention to features of the weapon that would be of interest only to criminals, such as the threaded barrel that accommodated silencers and flash suppressors, and the claim that the surface of the weapon has "excellent resistance to fingerprints."

Id. See also *Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143, 1158 (Md. 1985). The *Kelley* court imposed strict liability on manufacturers of Saturday Night Specials because they are largely unfit for any of the recognized legitimate uses sanctioned by the Maryland gun control legislation. They are too inaccurate, unreliable and poorly made for use by law enforcement personnel, sportsmen, homeowners or businessmen. The chief "value" a Saturday Night Special handgun has is in criminal activity, because of its easy concealability and low price.

Id. at 1158. See also Timothy D. Lytton, *Halberstam v. Daniel* and the Uncertain Future of Negligent Marketing Claims Against Firearms Manufacturers, 64 Brook. L. Rev. 681, 687-88 (1998) (describing the application of negligent entrustment doctrine to the mail-order supplier of the Cobray M-11/9 pistol).

55. One expert estimate of the societal costs of gun violence in the United States is \$100 billion per year. See Cook & Ludwig, *supra* note 46, at vii-viii.

56. See *Greenman v. Yuba Power Products Inc.*, 377 P.2d 897, 901 (Cal. 1963) ("The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."); *Escola v. Coca-Cola Bottling Co.*, 150 P.2d 436, 440-41 (Cal. 1944).

Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public

Thus in addition to the shooter, in the case of gun violence, I would find liable anyone in the chain of distribution who had reason to foresee harm, and who failed to take reasonable steps to prevent harm. Note that this requires neither super-human prescience, nor heroic intervention. It applies longstanding principles of notice (did you know or could you have reasonably known) as well as breach (it is not breach unless you act unreasonably) that are well-developed in the common law. This standard suggests that gun sellers who know that large numbers of their guns are distributed to violent criminals through predictable channels, such as guns shows, have some responsibility to either avoid distribution through those channels or to pressure retailers and regulators to prevent sales to criminals in the secondary markets. Expecting businesses to keep track of this information is reasonable. My marketing friends tell me that corporate sellers keep close tabs on where their products are sold and to whom, because it is business suicide not to have this information. This proposed standard imposes an obligation upon manufacturers to develop and incorporate cost-effective crime prevention and safety devices. Admittedly, expanding causation principles in this way burdens sellers and manufacturers with not only the obligation to make changes in current practices, but also with uncertainty. "No duty" is a much clearer standard than an obligation of reasonableness. Nonetheless, the obligation of reasonable behavior is what the law imposes on ordinary citizens in most of their daily activities, such as driving a car, and it is something with which most of us are able to live. In arguing for expanded causation principles, I seek to extend the rule of reasonableness to reach those actors most able to prevent gun violence.

In the case of little Detric Owens, left to his own resources in what the police are calling a drughouse, we seem to know that the hand on the gun, though closest in time and space to the harm, was not the hand ultimately responsible for the act. The prosecutor moved quickly to the next nearest adult, the gun owner. As I watched the video clip of the hunched over 19-year-old drug addict/gun owner, I could not help thinking that he was nearly as lost as Detric. Responsible, yes, but placing all of the responsibility on his hapless shoulders does little to make us safe. The wave of crime associated with drug addiction has shown us again and again that drug-addicted people are not deterred by the threat of legal punishment.⁵⁷ That is what drug addiction at its nadir is—the desire for

interest to discourage the marketing of products having defects that are a menace to the public.

Id. See also Judge Roger J. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 *Tenn. L. Rev.* 363, 366 (1965) (explaining his theory of strict product liability).

57. Deterrence theory has long assumed a model of human consciousness that is incompatible with drug addiction. See William J. Chambliss, *Types of Deviance and the Effectiveness of Legal Sanctions*, 1967 *Wis. L. Rev.* 703, 707–08 (1967) (documenting the extremely high rates of recidivism for drug addicts). Cocaine addiction, as in Mr. Owens's case, is uniquely incompatible with deterrence assumptions. See A. Morgan Cloud, III,

the drug is lodged in the body replacing the most basic of human instincts: to care for children, to eat, sleep, bathe and care for one's self, to evade punishment. The drug eclipses all of this.

If punishing the drug addict/gun owner, or the homeless mother, or the drug user/drug seller/imprisoned father, himself the son of a drug-selling mother,⁵⁸ gets us little deterrence, where else should responsibility lie?

Dr. Margaret Morgan Lawrence began advocating mental health teams in the schools many, many decades ago. After young Dedric shot his classmate, I was moved to read Dr. Lawrence's book, *The Mental Health Team in the Schools*.⁵⁹ I read with a growing rage. In the book, Dr. Lawrence described how mental health professionals, working with teachers, can identify children in distress at an early age, and intervene in a way that will shore up the strengths of those children and their families.⁶⁰ Find what is good and resilient and support it before chaos and dysfunction define a child's life chances. Dr. Lawrence describes serving as the psychiatrist on the team helping a troubled child return to school after an extended absence.⁶¹ The child has school phobia. She is cradled and loved by the supportive adults in the school mental health team. The child participates in making a plan for her return. She draws pictures of what she will see when she goes back. She talks about what the other children will say and how she will respond. She is listened to and taken seriously until she feels ready to return. A plan is in place that all the adults in the school, the parents, and the child's doctor agree to and support. Dr. Lawrence herself promises to drive the girl to school on the

Cocaine, Demand, and Addiction: A Study of the Possible Convergence of Rational Theory and National Policy, 42 Vand. L. Rev. 725, 767-77 (1989) ("A realistic appraisal of the current situation leads to the conclusion that society cannot expect to reduce demand among addicts by increasing the unit price of cocaine. Lawmakers are unlikely to achieve any greater success by imposing criminal sanctions for possession and use of illegal drugs."). A recent article argues that punitive criminal justice approaches even have an iatrogenic effect on crime in drug afflicted minority communities, replacing relatively effective internal social norms with suspect external criminal norms. See Jeffrey Fagan & Tracey Meares, Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities (Columbia Law School Public Law & Legal Theory Working Paper No. 10, Mar. 25, 2000), available at <http://papers.ssrn.com/paper.taf?abstract_id+223148> (on file with the *Columbia Law Review*) (explaining that over-punitive formal corrective measures frequently trade-off with more effective social norms by revealing the state's ideological bias).

58. Dedric Sr.'s mother reportedly purchased crack for Dedric Sr. to cut into \$20 rocks. Both mother and son pled guilty to felony possession in 1997. Dedric Sr.'s sister, Angela, is also in prison for a drug-related offense. See David Zeman et al., *The Family Portrait: Crack, Crime and Jail*, Detroit Free Press, Mar. 4, 2000, available in DIALOG, File No. 498 (on file with the *Columbia Law Review*).

59. Margaret Morgan Lawrence, *The Mental Health Team in the Schools* (1971).

60. *Id.* at 9.

61. *Id.* at 53-79.

first day, and the child uses this promise as an additional talisman of strength to enable her to return successfully.⁶²

I was enraged. Dedric Owens, Jr. needed this. The adults around him, based on his repeated acting out and earlier expulsion, knew he needed it. He did not get it, because we have no mental health teams in our schools. The models exist. We know how to do it and we have proven over and over again in countless controlled studies that early intervention works.⁶³ We choose not to do it, because providing public mental health services in schools is “social programs” that create “bureaucracies,” as in “socialism” and “wasteful government spending.” There is a pervasive myth that we do not know how to attack the social problems of poverty, drug abuse, child neglect, and shoddy public schools, even though large bodies of expertise and data identify obvious changes we could make to alleviate large portions of all of these problems. We call poverty and homelessness “intractable” as though they fell out of the sky like frogs, rather than as a result of specific policy choices made with our imprimatur.

I believe those forty-one bullets that rained down on Amadou Diallo had New York Mayor Giuliani’s name on them and my name as well, for we are all responsible for what is done in the name of public safety. I, who confess the sin of judgment, was bitterly disappointed that those four police officers were acquitted, but I remind myself that I am a participant in the system that created them, with their honest belief that a Black man in the night is by definition dangerous and subject to execution without trial. I have watched movies and television programs that spread this lethal lie. I have purchased products advertised on those television programs. I have called, even in this lecture, for greater police protection of women, knowing we do not yet have in place civilian control of the police that could prevent abuses of police power.⁶⁴

62. *Id.*

63. The Chicago Longitudinal Study is an example of the value of early intervention. It has consistently demonstrated that its particular approach to early intervention, the Child-Parent Center Program, has significant and lasting benefits on educational achievement, juvenile delinquency, grade advancement, and future earnings. See Weisman Ctr., Chicago Longitudinal Study 6–8, 10–11 (2000) <<http://waisman.wisc.edu/cls/NEWSLETN.PDF>> (on file with the *Columbia Law Review*). For each dollar spent on this program, society gains approximately \$4.71 in value. See *id.* at 14; see also Lawrence J. Schuineheart et al., Significant Benefits: The High Scope Perry Preschool Study Through Age 27, at xv–xix, 17–20 (1993) (longitudinal study, with control group comparison, showing positive effects of preschool intervention).

64. On the subject of civilian control I have said:

Feminists cannot afford reaching for less than the utopian. We should demand, now, community control of police and prosecutors. Feminists, families from the projects, lesbians and gay men, and representatives of all groups with a stake in bringing fairness to police practices should sit on review boards with actual hiring and firing power and they should fill the ranks of law enforcement from top to bottom.

Matsuda, *Where is Your Body*, *supra* note 33, at 44.

What utopian vision of causation do I then advocate? We must see the web of connection and hold our collective selves responsible for any harm to another human being.⁶⁵ We are all the child facing the barrel of the gun, the child holding the gun, and the parent failing the child. In whatever city you live, there are children who go to school every day without a hug and a kiss, who come home each day to a place where no one asks whether they have homework to do, where deadening neglect and abuse occur. If you do not know that this happens in your city, you do not read the local news and you have never talked to a social worker. Wherever you live, you live among fellow citizens who were raised this way, without anyone to tell them they are whole, human, and valued. When we live amongst people raised this way, we live in danger.

We are all the child facing the barrel of a gun. It could happen to you at the bank machine, the gas pump, the parking garage, or any of those places where solid citizen meets the dispossessed and great harm occurs. Add to routine child neglect the widespread availability of guns, multiple video images of violence fed daily to Americans from cradle to grave,⁶⁶ drug use without any adequate drug treatment programs in any major U.S. city, and a growing chasm between rich and poor, and you should not feel safe. There are choices behind each element in this mix,

65. Here I speak of moral responsibility, not necessarily of expanded legal liability, although I do not foreclose the possibility of imposing legal liability on those who fail to act reasonably to prevent harm to children. I disagree with current law to the extent that it absolves state actors from responsibility to intervene when they know children are at risk for child abuse, malnutrition, and the ordinary violence of life in poverty. Liability is a way to make people pay attention, and a means to define who we are and what we will stand for as a nation. I am open, therefore, to expanding legal rules to more closely mirror the moral obligation I argue for here.

66. See American Psychiatric Assoc., *Psychiatric Effects of Media Violence* (visited on Sept. 21, 2000) <http://www.psych.org/psych/htdocs/public_info/media_violence.html> (on file with the *Columbia Law Review*). The average American child watches 28 hours of television each week. By the age of 18 that child will have seen 16,000 simulated murders and 200,000 acts of violence on television. Violence is especially prevalent on commercial television for children, with such shows being 50 to 60 times more violent than adult prime-time television. See Michael Furlong et al., *The Effects of Media Violence on Youth*, 19:2 *Children's Legal Rts. J.* 33, 34 (Summer 1999). Children learn behavior from observation. When children observe violence and other aggressive behaviors through media images, they learn to imitate that behavior, becoming more violent themselves. See Edward L. Palmer & Aimee Dorr, *Children and Faces of Television: Teaching, Violence, Selling* 120–121 (1980). There is strong evidence of a positive correlation between violent media images and later aggressive behavior. See Surgeon General's Report by the Scientific Advisory Committee on Television and Social Behavior: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, 92d Cong. 26 (1972). In fact as far back as 1972, Jesse L. Steinfeld, the U.S. Surgeon General, testified before Congress that "[I]t is clear to me that the causal relationship between televised violence and antisocial behavior is sufficient to warrant appropriate and immediate remedial action." *Id.*

reasons why the General Motors plant pulled out and the drug houses moved in to Dedric Owens's once-thriving neighborhood.⁶⁷

V. WE ARE THE CAUSE, WE ARE THE CURE

My closing pleas are these. First, let no child die without our lamentation. Speak for the child in your city who died this year in a house fire caused by mid-winter utility cutoffs. Speak for the child in your city killed by the hand of an abusing caretaker. Speak for the child in your city killed by gun fire. I do not need to read your local paper to guess that one or more of these things happened, that we lost one of our own whom we should have cradled, and that our souls were diminished by that failure. Our first obligation is to notice and mourn.

In *Ceremony*, the land goes bone-dry, the dust blows, and Tayo grows sicker. He goes to Betonie, another keeper of the old ways, to attempt a ceremony of healing and atonement. We are living in the drought of modern times. Our brothers and sisters have no place to go for healing and their pain plays out on the parched landscape of our collective soul. To not notice pain is the first step in condoning pain. We begin a ceremony of healing by searching broadly for the causes of the pain we choose to see. Every time a child dies in a drive-by shooting, we should point to the gulf between rich and poor that loads the gun as clearly as any human hand does.

Even at its outermost limits, modern tort law stops the chain of causation here. The Courts may soon say that manufacturers of handguns are responsible when weapons designed for killing are marketed in ways that make it probable that they will end up in the hands of murderers. Tort law, even as the magnificently compassionate Justice Traynor envisioned it, is not prepared to go beyond that and ask what we have done to create murderers.

Cause is a web, a circle, the well from which we all drink. No society that chooses to leave a significant portion of its own behind survives the drought of the soul that inevitably follows. Have we lost the power to envision a polity in which all are included? Can we still call it greed when one takes so much more than one needs and another goes to school hungry? The dot-com millionaires rattle around like marbles in a can, the echos of their own unaddressed pain bouncing off the cold, marble floors of their mansions. Across town, young children grow up in neighbor-

67. Mt. Morris Township, Michigan, Dedric Jr.'s hometown, is a dependent suburb of Flint, Michigan. As Michael Moore documented in his classic film, *Roger and Me* (Warner Bros. 1989), the globalization of the automobile industry resulted in massive job reductions and social displacement in the blue collar manufacturing industries that were the lifeblood of Dedric's community. See Julian Borger, *Life of Neglect that Led to School Shooting*, *The Guardian* (London), Mar. 3, 2000, at 16 ("But for many of those made redundant in the 1980s, with no access to retraining, it has not been so easy. 'When you put abject poverty together with easy access to guns, you have a recipe for this kind of violence,' Mr. Moore told a radio talk-show.")

hoods where drug dealers are the only ones with money and respect. These divided kin share a loss of self and purpose. Whether doused with prescription drugs or crack cocaine, the pain persists, unabated.

Meanwhile, back in the faculty lunchroom, a colleague speaks of books one reads over and over in one's mind. "Like what," someone asks? "*Anna Karenina*," someone else offers. "*The Whole Earth Catalog*,"⁶⁸ I say, to no nods of recognition. I tell them of a novella that ran in the margins of the version of the *Whole Earth Catalog* I read as a teenager. The novella encompassed a journey of redemption, with the confused young protagonists finally, at the end, meeting the wise old hippie who tells them the meaning of life: rabbit manure. Three acres and two dozen rabbits equals self-sufficiency fueled by an endless supply of the best-quality, pelletized manure. Feed the rabbits garden scraps and weeds, and they provide a perfectly balanced, non-burning manure. Live off your garden and avoid exploitation of your fellow human beings. It was a dream that affected me deeply at age fourteen, and I have been a composter ever since. After some jokes about how one could remember anything one read even a year ago, much less decades ago, one friend asked, "You didn't understand that as tongue-in-cheek?"

That was the first time, in all these years, that I considered the possibility that the dream of rabbit manure as salvation was a joke. Do you know that there lives among us a hidden tribe who still believes that you should not waste nature's gifts, that you can find personal peace in shoveling your own instead of paying someone else to cart it away; that you should not make your waste someone else's problem, nor should you see wasted children as belonging to someone else? Do you know that Dr. Margaret Morgan Lawrence, my eighty-six-year-old mother-in-law, still believes what she wrote decades ago at the conclusion of her book, that "our respect and concern for children will engender the growth of self-respect, respect for others, and ultimately the capacity for world citizenship,"⁶⁹ and she is available to tell anyone who will listen how to establish an effective mental health team in the schools?

My final plea is that we act to demand action. Every time a son or daughter of ours is shot we should take some action, however small: Stand with your wallet held in the air for Amadou Diallo, call your local radio talk show to ask why there was no mental health team in Dedric Owens's school, ask your local politicians why their children go to private academies while the public schools are begging for computers, bring a lawsuit calling the shortened hours at your local library a First Amendment violation. Do not let this country go down the tubes with your permission. I dream of a world in which every advantage I have, from the tomatoes I am privileged to grow in my backyard to the car I drive to haul manure, is not tied to the disadvantage of someone else. That world will

68. *The Last Whole Earth Catalog: Access To Tools 421-431* (1971).

69. Lawrence, *supra* note 59, at 159.

come only if we stand up against inequality and harm in the world as it is now, knowing every wound upon a human heart or body as both caused by us and happening to us. Our first obligation is to mourn. Our second obligation is to see a web of cause that comes home always. Our last obligation is to act. I fear what will happen to all of us if we do not.