Dalhousie Law Journal

Volume 12 | Issue 2 Article 4

10-1-1989

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Richard F. Devlin*

Nomos and Thanatos (Part A). The Killing Fields: Modern Law and Legal Theory[1]

I. *Introduction*

II. *A Celtic Triptych*

1) Reviewing the Jurisprudential Point of View
2) Panel One: A View from the Bottom
3) Panel Two: An Arrest and Interrogation
4) Panel three: Law and Death

III. *Jurisprudential Occlusion: Rediscovering the Essentialism of Mainstream Jurisprudence*

1) The Assumption
2) Tracking the Assumption
3) Destabilizing the Assumption: The Potential of Modernist Jurisprudence

IV. *The Violence of Contemporary Legal Systems*

1) From Reification to Interactionalism
2) Legal Constitutivism
   (i) Ideological Role of Law
   (ii) Facilitative Role of Law
   (iii) Violent Role of Law
   (iv) Genius of Law

V. *A Synopsis*

I. *Introduction*

> *"love cut off from power or justice is psuedo-love, power isolated from love and justice is inauthentic power of dominance, and justice is a meaningless facade of legalism split off from love and real power of being."*
>
> *Mary Daly*[2]

> *"I have come to realize the importance of the experiential because without human experience we will never achieve a true form of equality. In order to understand equality, people must understand caring."*
>
> *Patricia Monture*[3]

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1. Many friends and colleagues in Ireland, Canada and the United States have contributed, directly and indirectly, to this project. I want to particularly acknowledge Mary Joe Frug, Allan C. Hutchinson, Martha Minow, Mary Jane Mossman and Leon Trakman, all of whom cared enough to give me the courage to write this article. Special thanks to Marilee Matheson, Lynn Richards and Bernadette Romanowsky. My greatest debt, however, is to Alexandra Dobrowolsky, for it is she who made feminism an issue for me both personally and politically, and she has been involved at every level, intellectual, emotional, practical. I should add that some of those whom I criticize are also those from whom I have learned the most.

2. *Beyond God the Father* (1973), at 217.

3. "Kin-Nin-Geh-Heh-Gah-E-Sa-Nonh-Yah-Gah" (1986), 2 C.J.W.L. 159.

Law, is so far as it sanctions the coercive power of the state, enables people to do frightening — even deadly — things to each other. Contemporary jurisprudence, the explanatory and justificatory voice of legal practice, fails to interrogate law's interconnection with violence and death and therefore, by a sin of omission, legitimizes humankind's mutual inhumanity. The end result is jurisprudential tolerance of, and acquiescence in, societies underpinned by violence. By identifying the nexus between community (nomos) and death (thanatos), this, admittedly speculative,[4] essay attempts to raise the possibility of a discourse, practice and society that can encourage, reflect and concretize opportunities for human interaction that go beyond violence. What follows, I hope, is an exercise in consciousness-raising.[5]

The essay is to be published in two parts. Part A, "The Killing Fields...", is a critical inquiry into the way in which the "disciplines" of law and legal theory rationalize violence. I begin my discussion with a Celtic triptych — a series of three narratives — that is designed to provide the reader with some background information in order that he or she may acquire a sense of the perspective and experiential context from which this essay emerges.

Next, I briefly outline the central role which violence has played in structuring our received tradition of jurisprudential inquiry. I will argue that, without exception, jurists of the western tradition have adopted the fatalistic premise that violence is inevitable, even necessary, in human interaction. Such essentialism constrains in a fundamental way the remainder of their work and, more often that not, imprisons their jurisprudential efforts in attempts to legitimize the violence of one interest group over all others. In short, traditional jurisprudence does not challenge violence, it spiritualizes it.

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4. Speculative thought has been a vital element of literary herstory; *see, e.g.*, Dorothy Bryant, *The Kin of Ata are Waiting for You* (1971); Charolette Gilman, *Herland* (1979); Marge Piercy, *Woman On the Edge of Time* (1981). Moreover, much feminist jurisprudence has been deliberately speculative in nature, *see, e.g.*, Ruth Colker, "Consciousness and Love: Towards a Feminist Theological Dialogue" (1988) (unpublished manuscript); C. MacKinnon, "Feminism, Marxism, Method and the State: Towards a Feminist Jurisprudence" (1984), 8 Signs 635 [hereinafter cited as "Feminist Jurisprudence"]; J. Rifkin, "Toward a Theory of Law and Patriarchy" (1980), 3 Harvard W.L.J. 83; D. Polan, "Towards a Theory of Law and Patriarchy" in D. Kairys, *The Politics of Law* 294 (1983); Ann Scales, "Toward a Feminist Jurisprudence" (1981), 56 Ind. L. J. 375; Fran Olsen, "The Family and The Market: A Study of Ideology and Legal Reform" (1983), 96 Harvard L. Rev. 1497, 1560-78; Christine Littleton, "Reconstructing Sexual Equality" (1987), 75 Cal. L. R. 1279 [hereinafter cited as "Reconstructing"].

5. On the centrality consciousness-raising as both methodology and praxis for feminism, see Catharine MacKinnon, "Feminism, Marxism, Method and the State: An Agenda for Theory" (1982), 7 Signs 515 [hereinafter cited as "Agenda"].

Next, I outline the fundamental connection between violence and the legal systems of contemporary western liberal democratic society. The purpose of this section is not to belittle the significant accomplishments that have been achieved by liberalism, but rather to demonstrate that we still have a great deal further to go. Our faith in the Rule of Law should not blind us to the inscription of violence within that very idea itself, at least as it is currently understood, or obscure from us the fact that ours may be a social "order ... made with knives",[6] a society of "organized lovelessness".[7] A brief conclusion summarizes the impasse in which modern law and theory find themselves.

Part B of the essay (to be published in the next issue of this Journal), subtitled, "Feminism as Jurisgenerative Transformation, or, Resistance Through Partial Incorporation?"[8] is a cautious constructive sequal to the critique of "The Killing Fields". After a short introduction, I outline the possibility for a legal system that might provide an opportunity to escape the deadening weight of acquiescence, and encourage greater consciousness of violence, and perhaps even its de-centering. I shall argue that traces of this counter-vision can be identified within feminism, and will suggest that one critical difference of a feminist jurisprudence is that it provides a unique opportunity to displace the thanatical impulse that underpins traditional "male-stream"[9] legal theory. Insofar as feminism aspires "to question everything",[10] it focuses our attention on the relationship between law, violence and love, thereby providing what is, perhaps, a unique opportunity to create "a new jurisprudence, a new relation between life and law".[11]

In Part III of the sequel, through a discussion of pornography, I attempt to balance the theoretical potential of an emancipatory feminist jurisprudence against the practical everyday reality of violence against women. In Part IV, by relating theory to practice, I will suggest that law, as presently understood and practiced, while being a necessary part of the solution is also part of the problem.

The final section of the paper will suggest that the tension between theory and practice, though depressing, need not be paralysing.

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6. Margaret Atwood, *Surfacing* (1972) at 215.
7. Aldous Huxley, *The Perenial Philosophy* 93 (1944), cited in Ann Scales, "The Emergence of Feminist Jurisprudence" (1986), 95 Yale L. J. 1373, 1391.
8. Forthcoming (1989), 12 Dal. L. J. .
9. Mary O'Brien, *The Politics of Reproduction* (1981) coins this phrase.
10. A. Rich, "Forward: On History, Illiteracy, Passivity, Violence and Women's Culture" in *On Lies, Secrets and Silence: Selected Prose (1966-1978)*, at 13 (1979) (hereinafter cited as "Lies"). See also Wishik, "To Question Everything" (1986), Berkeley Women's L. J. 64, who proposes that "... (n)othing about existing law should constrain the construction of our visions" at 77.
11. Catharine MacKinnon, "Feminist Jurisprudence", *supra* note 4 at 658.

Unidimensional solutions would obscure more than they reveal. I will suggest that the feminist resort to legal remedies must be extremely context-sensitive, necessitating a careful balancing of the realities and the potentials — both progressive and reactionary — but always inspired by the desire to transform law, not simply to rework it. The dilemma into which feminist practice leads us is, itself, an acute awareness of the difficulty of speaking against the rationalization of violence.[12]

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12. At the outset, I must admit that I have had strong reservations about even articulating the concerns raised in this paper. The reason for this reluctance is, what I understand to be, the integral connection between speech and power. Speech is more than simply voicing an opinion. Speaking is an exercise in power. But not everyone who speaks commands the same amount of power. More importantly, when some people speak, that act is so powerladen that it drowns out other voices. Speech can be the silencing of others.

As of the time of writing, I am a white, male law professor at a relatively prestigious Canadian law school. This role, which continually threatens to annihilate the person, has been given (or has taken upon itself) a hierarchical social significance. Therefore, when I speak, people sometimes listen. My status reinforces my power. More significantly, my act of speaking and others' act of listening has a direct impact upon other persons. By monopolizing the channels of discourse and reception, my speech prevents others from speaking. Or, even if they do speak, they may not be heard because their speech does not carry the same authority as mine. My voice may be respected, their's may be devalued. If I say nothing, perhaps I will not clog the already limited paths of communication; and perhaps someone else will say something more important than what follows.

Yet, at the same time, I feel that silence can be frighteningly loud ... and dangerous. Communication is an essential aspect of our social condition, a prerequisite for the advanced level of our society and for our mutual interdependence (Jurgen Habermas, *Communication and the Evolution of Society* (1979)). Thus, while the dangers of despotic discourse are very real, communication is also an act of community, an act of civic responsibility. More specifically, when a person communicates there is a real possibility that she or he can consider the other person as a full person, someone worthy of respect whose viewpoint is legitimate to the extent that it does merit both listening to and response. Communication, as both listening and response, validates the integrity of the other. Indeed, feminist literary theorist, Julia Kristeva, suggests that communication is motivated by a desire to love and be loved. See *Revolutions in Poetic Language* (1974) (trans. Margaret Waller, 1984). Perhaps a communicative ethics will help lay the foundation of a feminist inspired ethics.

Moreover, when people go public by communicating with one another, they reveal, either implicitly or explicitly, their own deepest secret fears and aspirations. The communicator then becomes vulnerable, an important first step towards solidarity ... and perhaps equality. Understood in this admittedly benign light, communication avoids the insidious dynamic of clandestine sabotage by publicly articulating fears, concerns and hopes.

I have said that my intention is to participate in a discourse, but of course this begs the very question of whether males and females share sufficient common experiences and common language to make *real* communication possible. If language is "man-made" (Dale Spender, *Man Made Language* (2nd ed.) (1980)), if males monopolize the "socio-cultural means of interpretation and communication" (Nancy Fraser, "Toward a Discourse Ethic of Solidarity" (1986), 5 Praxis International 425), then it may well be that feminists and males cannot share a dialogic discourse for there is a lack of sufficient common ground, or women, as yet, have not had the opportunity to create the words. (See Mary Daly, *The Wickedary* (1988)).

For discourse to be possible there must exist an "interpretive" (S. Fish, *Is There a Text in This Class: The Authority of Interpretive Communities* (1980). In using Fish's term here it is

Footnote 12 continued on page 347

II. *A Celtic Triptych*

> *"To understand society deeply is always to see the settled from the angle of the unsettled."*
>
> *Roberto Mangabeira Unger*[13]

1. *Reviewing the Jurisprudential Point of View*

As I will argue in the next section of this essay, traditionally, jurisprudence has been written from the perspective of those who are situated in a position of privilege. Even the most cursory reflection on the leading figures of our jurisprudential heritage — Plato, Aquinas, Hobbes, Locke, Kant, Austin, Kelsen, Rawls and Dworkin[14] — suggests two important facts: first, that they are all men; and second, that despite their important differences, a biographical profile indicates a commonality of privileged social status. My purpose in raising these two issues is not to suggest some transhistorical conspiracy — for that would be indefensible — but rather to remind us of the Marxist aphorism that "social being determines consciousness", that our social status has an irrespressible impact upon our understanding of the world.

In recent years, feminism has been the movement that has pursued the thesis of perspectivism most explicitly and relentlessly. As we shall see in Part II of this essay, a key theme of feminist analysis has been the ontological, epistemological and political significance of gender difference. Not only have feminists identified the inequality and power-laden nature of relationships between men and women (patriarchy), they have also argued that the exclusion of women's perspectives from all aspects of social life has led to an impoverished and unidimensional interpretive structure (androcentrism). The cummulative impact of patriarchy and androcentrism on law has been what Martha Minow, in a related context, has described as "partial justice", that is, a conception of justice that is both incomplete and partisan.[15] Law and legal theory, incorporate, reflect and concretize particularized and existentially located viewpoints on the world, not *the* truth.

Feminist political theorist, Nancy Hartsock, has also identified the interpretive signficance of socio-cultural location and, more importantly, has highlighted the progressive dynamic engendered by an awareness and mobilization of the power of "otherness".

> (1) Material life (class position in Marxist theory) not only structures but sets limits on the understanding of social relations. (2) If material life is structured in fundamentally opposing ways for two different groups, one

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13. Roberto Mangabeira Unger, *Social Theory* (1987) at 65.
14. See *infra* at Part III.
15. "Partial Justice: Law and Minorities" (1988, unpublished manuscript).

> can expect both that the vision of each will represent an inversion of the other and the vision of the ruling class will be partial and perverse. (3) The vision of the ruling class structures the material relations in which all parties are forced to participate, and therefore cannot be dismissed as simply false. (4) In consequence, the vision available to the oppressed group must be struggled for and represents an achievement that requires both science to see beneath the surface of the social relations in which all are forced to participate, and the education that can only grow from political struggle. (5) Because the understanding of the oppressed is an engaged vision, the adoption of a standpoint exposes the real relations among human beings as inhuman, points beyond the present, and carries a historical and liberatory role.[16]

For Hartsock and Minow, a view from the bottom, an interpretation from those who are disempowered, is a vital viewpoint for it identifies the nexus between knowledge and power and, even more importantly, the existence of subjugated knowledges that, resurrected, could help us make social interaction otherwise.

This feminist espousal of otherness, difference and partiality, is of fundamental political and jurisprudential significance. It indicates, in a profound way, the centrality of factors — in this case, gender — which, within mainstream theory, were considered either as irrelevant and irrational or, even more repressively, as "non-questions".[17] By destabilizing male-stream coherence and universality, by disinterring a perspective that has been buried by centuries of male-stream intellectual hegemony, feminism has dramatically opened up the parameters and potential of the jurisprudential conversation. In so doing, it has also unpacked a plethora of hitherto unforeseen problems.

Moreover, in the last few years, feminists have become conscious that there are real dangers in what some describe as "dualistic thought".[18] By structuring their analysis around the dichotomies of women/men, feminism/masculinism, there is the risk of "false universalism"; that is, of buying into an assumption all women (or men) regardless of race, class, age, or national origins share a commonality that exists in contradistinction to men (or women). For some feminists, such a dichotomized universalism is totalistic, repressive and acontextual, ultimately no more than an inversion and reproduction of male-stream analysis. For these (postmodern) feminists, though gender is important, so also are many other factors to one's experience, interpretation and existence in the

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16. *Money, Sex and Power: Towards a Feminist Historical Materialism* (1983) at 118.
17. See Jill McCalla Vickers, "Memoirs of an Ontological Exile" in *Feminism in Canada, supra* note 12 at 28.
18. See generally, Sondra Farganis, *The Social Reconstruction of the Feminine Character* (1986), Chapter 8 and 9.

world.[19] This polyvocal or multiplicitous feminist approach recognizes the importance of gender, but refuses to prioritize it as *the* explanatory factor of social interaction, for that would only be to reinforce the subordination of otherness. Feminism, in this view, seeks to create interpretive space so that a variety of different voices — those that relate to issues of class, race, sexual orientation, religion, handicap, ethnicity and national origins, as well as gender — can actively participate in the jurisprudential conversation.

Over the last couple of years I have learned a great deal from feminism, methodologically, critically and substantively. Given the importance which feminism attaches to located experience, as well as its emphasis upon the constitutive relationship between the personal, the political and the juridical, I want to offer an/other contribution to the now expanded jurisprudential conversation, a perspective that emerges from my own experiental context. This interpretation is different from most of the male-stream and feminist analyses of law and is certainly partial . . . but, as will become clear, that alone does not make it any less valid. It is simply a different reality.

However, an awareness of different realities should not be misunderstood as an acceptance of relativism. A recognition of difference is not indifferent to domination. A central purpose of this essay is to challenge at its core the dominant (male-stream) interpretation of the reality of law — that law is "an unqualified human good"[20] — and, in so doing, to posit the need for a reconstitution of modern law. The essay is also a plea to those who are enthusiastic about using law to solve (patriarchal) social practices to try to "apprehend the reality of the other",[21] to consider those who will be on the receiving end of such strategies. It is a petition to remember that contemporary law is about the enforcement of domination, that it creates its own subordination, and it requests, if possible, care about those others while caring for their own needs. From my perspective, modern law does not deviate from domination, it merely distances us from its victims.

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19. *See eg,* Chris Weedon, *Feminist Practice Post Structuralist Theory* (1987); Jane Flax, "Postmodernism and Gender Relations in Feminist Theory" (1987), 12 Signs 621; Nancy Fraser, Linda Nicholson, "Social Criticism without Philosophy: An Encounter Between Feminism and Post-modernism", in A. Cohen and M. Descal, (eds) *The Institution of Philosophy. A Discipline in Crisis* (1988); Martha Minow, "Partial Justice: Law and Minorities" (unpublished manuscript); "Justice Engendered" [hereinafter Engendered] (1987), 101 Harvard L. R. 10; Seyla Benhabib, Drucilla Cornell, *Feminism as Critique* (1987).

20. *See eg,* sources as diverse as E.P. Thompson *Whigs and Hunters* (1975) at 266; and Ronald Dworkin, *Law's Empire* (1986).

21. Nel Noddings, *Caring: A Feminine Approach to Ethics* (1984). I will return to this point in Part II, B, 2, b, iii.

In keeping with these themes of contextualism and perspectivism, let me say that I comprehend modern law through the prism of my experiences in British-occupied Northern Ireland.[22] In order to provide an indication of the context from which I emerge, to suggest that this viewpoint from the bottom is not unique, and to de-centre the authoritarianism latent in any act of authorship, in the remainder of this section I want to bring to the reader's attention three "scenes", as related by others, of experiences with, and interpretations of, law. What follows is a far cry from the stuff from which jurisprudence is usually made. However, the triptych does, I hope, exemplify the experiential depth of the critique, portray the authenticity of the perspective, and encourage a recognition of the necessity of juridical reconstruction as part of the programme for any progressive social movement.

2. *Panel One: A View From the Bottom*

No Time For Love

They call it the law: we call it apartheid, internment, conscription, partition and silence.
It's the law that they make to keep you and me where they think we belong.
They hide behind steel and bullet-proof glass, machine guns and spies,
And they tell us who suffer the tear gas and the torture that we're in the wrong.

Chorus

No time for love if they come in the morning,
No time to show tears or for fears in the morning,
No time for goodbye, no time to ask why,
And the sound of the siren's the cry of the morning.

They suffered the torture, they rotted in cells, went crazy, wrote letters and died.
The limits of pain they endured, but the loneliness got them instead
And the courts gave them justice as justice is given by well-mannered thugs.

22. I suspect that many readers will respond that I am generalizing what is an exceptional instance of law into a totalistic analysis. That, however, would be to misunderstand what I have been trying to get at in the last couple of pages of text. The Irish context is helpful in that it does provide an exemplary moment of the nexus between law and domination. However, there are people at the bottom in every society, and I believe parallels can be drawn between their experiences and those that are recounted in the following triptych. The point is that their perspectives do not, usually, make it into the pages of North American law journals because they have been dispossessed ... interpretively, politically and jurisprudentially. Domination and subordination are not just quantative they are also qualitative.

Sometimes they fought for the will to survive, but more times they just wished they were dead.

Chorus

They took away young Francis Hughes and his cousin Tom McIlwee as well.
They came for Patsy O'Hara and Bobby Sands and some of his friends.
In Boston, Chicago, Saigon, Santiago, Warsaw and Belfast
And the places that never make headlines, the list never ends.

Chorus

The boys in blue are only a few of the everyday cops on the beat,
The C.I.C., Branchmen, the Blacks and the Gilmores do their jobs well;
Behind them the men who tap phones, take photos, programme computers and files
And the man who tells them when to come and take you to your cell.

Chorus

Come all you people who give to your sisters and brothers the will to fight on,
They say you can get used to a war, that doesn't mean that the war isn't on.
The fish need the sea to survive just like your people need you
And the death squad can only get through to them if first they can get through to you.

Chorus

Yes the sound of the siren's the cry of the morning,
Oh the sound of the siren's the cry of the morning.

Jack Warshaw[23]

3. *Panel Two: An Arrest and Interrogation*

Rosemary Meenan, Derry. Age: 21 years
Height: 5 ft. Weight: 7 st 8 lbs.
Occupation: Factory worker. Single status.

I, Rosemary Meenan, was arrested on the 28th of July 1976 at 5:30 a.m. from my home in Lisfannon Park. I was arrested by British soldiers accompanied by a Military Police woman and taken to Strand Road Police Barracks, which is also the headquarters of British Military Police. I was photographed and then put into a small room.

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23. *Christy Moore Songbook* (1984), 86-87.

During the time I was there I was subjected to verbal abuse by Army Personnel and at one stage the chair was kicked from under me. I was handed over to the Royal Ulster Constabulary at 8 p.m. I was formally arrested under Section 12 of the Emergency Provisions Act. I was escorted to a cell by a police woman and left there. The cell was dirty; there was urine on the floor and it contained no furniture other than a wooden plank or bench. There was a small window in the top wall. I was left there for some time; I can't say exactly how long, as I did not have a watch, and then I was taken upstairs by a police woman.

I was taken into a small office on the first floor. It contained a desk and a small table and three chairs. Three men in plain clothes came into the room. One sat facing me and two others stood behind me. The police woman sat in a chair in the corner. One of the men asked me if I knew why I was there. I did not answer. They then said that they had signed statements from people in the Bogside, who wanted me off the streets. They also said that .... had been arrested and had signed a statement that he and I had attempted to murder a soldier. They said that we were going to a special court in the morning. I replied that I had nothing to say, and asked to see my solicitor. The two plain clothes men behind, then pulled me by the hair forcing my head back. The man who had been questioning me, got up and spat on my face. I wiped my face and asked again for a solicitor. I requested a solicitor during every period of interrogation for the seven days I was in custody but my request was always refused. I was again questioned about attempted murder and the Provisional Irish Republican Army (PIRA) and I was asked to sign a statement admitting the attempted murder of a soldier. I refused to sign. The two plain clothes men went out, and two others came in. They questioned me about IRA activity in the Bogside and the alleged charge. One of them kicked me off the chair and I fell into the corner. The man who was questioning me got up and put his foot on my stomach. He asked me to sign a statement. I refused. One of the men went out and came back with a statement. They showed me the bottom half and it alleged that I was a member of Cumann na mBan. It was signed by .... I requested to see the entire statement but they said it contained .... address, and that I could not see it.

I was then taken upstairs and down a long corridor into a large room with a window covered by a venetian blind. I was not to see daylight for the entire seven days. The two men, whom I now knew to be Special Branch Officers, were with me, also a police woman. They were joined by a big heavy man whom I had not seen before. He pulled my coat off told me to run around the room as if I had a gun

under my coat. I refused. He pulled me by the hair again and then ran me around the room. Then they told me to stand facing the wall but I refused so they pulled me by the hair and banged by head on the wall. They asked me again to sign an incriminating statement. The men then left the room and the police woman offered me a cup of tea. She said that she would not take that sort of treatment from anyone and advised me to tell them what they wanted to know. The two branch men came back into the room and the interrogation resumed. Their language was vulgar and abusive. I was taken back to my cell and I saw by their watches that it was 2:00 a.m.; seventeen hours since my interrogation had begun. There was no mattress in my cell, so I lay on the board. Although I was exhausted, I was unable to sleep because of the cold air in the cell. About an hour later a Special Branch man came in with a hankie done by .... They said that I would soon be doing these in jail. They went out again but kept coming back and kicking the cell door. I didn't sleep that night.

The next morning at 8:30 a.m. they took me up the corridor and I saw my mother hand a flask to a policeman. I was returned to the cell and the flask and toast were given to me. This was the first food I had eaten since I was arrested. I was not to eat again for two days, as I refused to take the food the police offered me, fearing that it might be tampered with, and they refused to give me the food my mother left for me. I was taken to the same office for interrogation during the next six days, for periods of six to twelve hours. I was finger printed and during this time I was struck on the mouth by a Special Branch Man. The interrogation took the form of question, threat and physical abuse, such as face slapping, hair pulling and standing for long periods with my hands above my head. I was continually thumped under the arm, and on the third day my arm was stiff and very painful. I was given the impression that if I signed the statement all this would stop.

On the third day of my detention I was informed that an interim custody order had been authorised so that I could be detained for a further four days. I was interrogated for periods of two hours both morning and afternoon. Both the tone and manner of the interrogations was menacing and abusive. During this period one of the Branch men left the room and came back carrying a white folded cloth. He spread it out on the floor of the room and told me to sit on it. I refused. The other two branchmen pulled me down by the wrists and held me there whilst the other man put a pen in my hand and told me to write my name on the sheet. When I refused he slapped me about the face and began shouting at me using vulgar language. Later in the day I had my first visitor, a local priest, Father ....,

I told him what was happening, but asked him not to tell my mother. On the fourth day I was interrogated during the morning but left in my cell in the afternoon. This was the first break in daytime interrogation I had had in four days. My mother visited me at 5:00 p.m. and brought me food. The visit lasted five minutes and I asked my mother to get me a solicitor. She told me that my solicitor had been refused entry. After the visit I was taken upstairs for interrogation. My arm was very stiff and painful and my interrogators kept asking me to raise it. I could not do so. They then took me to a room and a man there identified himself as a Police doctor. He asked me if I would be examined but I refused. He wrote down my complaints and asked me to sign the paper. I refused as I was afraid to incriminate myself. I was taken back to my cell at 10:00 p.m. Despite the pain I slept.

On the fifth day I was allowed food left by my mother. I still had no mattress on my bed nor had I been allowed to wash. During this day the interrogation took a different form. I was asked personal and embarrassing questions; Are you a virgin? Do you sleep with the Provos? They then threatened to rape me and dump me in a back lane. One of the Branch men came over to me and ran his hands over my person. He kept breathing heavily in my face. The other men, there were three in all, said dirty things about my family and my mother. At 5:00 a.m. I had a visit from my mother. I told her that I had no mattress in my cell and that my back was sore. A plain clothes man present during the visit denied abusing me. When I was taken back to my cell there was a mattress there but the food my mother had given me was taken from me.

The next morning I was taken upstairs. I had not been given anything to eat but allowed to throw water on my face. This time the interrogation took the form of a persuasion. The Branch Man said that if I signed a statement admitting membership of the PIRA they would drop the attempted murder charge. They said I would only get two years for membership, and that I'd be out in a year. I asked again for my solicitor but was refused. When the two Branch men were bringing me down the stairs one turned off the lights and the other tried to push me down the stairs. I managed to grab the rail. Later on that night my mother visited me for twenty minutes. During the visit I took a pain in my side. I was interrogated after the visit, but this time there was no abuse. At nine o'clock my family doctor, Dr. .... visited me. He diagnosed an infection of my kidney, and muscular swelling to my arm. He asked if the cell was cold. I was taken back to my cell and a uniformed policeman told me that I was being released. A few minutes later two Branch men came in and told

me that I was being re-arrested. I was released thirty minutes later. It was ten thirty p.m.

Rosemary Meenan[24]

4. *Panel Three: Law and Death*

The three principal cases covered by my investigation were as follows. On 11 November 1982 three men were shot dead by members of a special Royal Ulster Constabulary anti-terrorist unit in Tullygalley East Road, just outside Lurgan. The men were Eugene Toman, Sean Burns and Gervaise McKerr. They were all unarmed.

Less than two weeks later, on 24 November 1982, two youths were shot, one being killed and the other seriously wounded, by members of the same anti-terrorist unit, in a hayshed in Ballyneery Road North, also just outside Lurgan. The dead youth was Michael Justin Tighe, who was 17 years old, and his companion was Martin McCauley, who was 19. Three old pre-war rifles were recovered from the hayshed, but no ammunition was found.

Less than three weeks after that, on 12 December 1982, two more men were shot dead, yet again by a member of the same special unit, this time in Mullacreavie Park, in Armagh City. They were Seamus Grew and Roddy Carroll. Neither of them was armed.

All these shootings were investigated by other members of the Royal Ulster Constabulary, and files were sent to the Director of Public Prosecutions for Northern Ireland, Sir Barry Shaw. The first prosecution to come before the courts related to the last of the three incidents, and was that of Constable John Robinson. He appeared before Mr. Justice McDermott on 3 April 1984, and was acquitted of the murder of Seamus Grew. Neither he nor any other police officer has ever been charged with the murder of Roddy Carroll, who was in the same car as Grew when they were shot. During the trial Constable Robinson gave evidence in his own defence, and it emerged publicly for the first time that the two men had been shot not, as claimed, at a random police road check, but following a long surveillance operation that had taken RUC officers into the Republic of Ireland and back again. Robinson, it was disclosed, was not an ordinary policeman as had been said, but a member of a highly trained special police squad,

24. Fr. Denis Faul and Fr. Raymond Murray, *The Castlereugh File: Allegations of RUC Brutality 1976-1977* (Dungannon, 1978) 91-93. I should add that I have attempted to be very careful in selecting this piece of testimony. Many other reports by women place more emphasis on the prevalence of sexual abuse in the interrogation process. However, because of my concern about the reproduction of "pornographic vignettes" (a phrase coined by Carol Smart) I thought it preferable not to report such discussions in this forum. For a feminist critique of pornography, see Part II C of this essay.

and the deaths of Grew and Carroll had come at the end of a planned operation involving that special squad. During the trial Constable Robinson told a story that made international headlines: he told the court that he had been instructed by senior police officers to tell lies on his official statements in order to protect the nature of that special operation. It became clear that investigating CID officers, the Director of Public Prosecutions, and finally the courts themselves, had all been quite deliberately misled in order to protect police procedures and systems. The revelations created a public outcry . . .

Within a few days of my commencing the investigation, the trial of three more policemen on murder charges made for more international headlines. Sergeant Montgomery and Constables Brannigan and Robinson (not the same officer as in the Grew and Carroll shootings) were acquitted of the murder of Eugene Toman at a supposed road block in Tullygally East Road, Lurgan. The trial judge, Lord Justice Gibson, recognized the unusual nature of the case and commented about seriously incorrect evidence given to a court at a preliminary hearing of the charges. He then went on, in acquitting the officers of murder, to praise them for bringing the deceased men, Toman, Burns and McKerr, to 'the final court of justice'. His remarks created unprecedented uproar. They appeared to remove all doubt: there existed, it seemed, a judicially endorsed 'shoot-to-kill' policy in the Province. The judge's reference to the deaths of Burns and McKerr, whom none of the officers had been charged with unlawfully killing, was particularly unfortunate. Uncommitted observers, as well as nationalists, could see no reason why the judge should be so enthusiastic about the deaths of three unarmed men at the hands of the police. Such was the widespread international condemnation of his remarks that he quickly made a prepared (and very unusual) public statement from the Bench in which he clarified his views by emphatically repudiating the idea that he approved for a shoot-to-kill policy on the part of the police. It was too late for that: the damage was done, and no denial was every going to change the general public belief among Catholics and many others in the Province, as well as the mainland and the Republic of Ireland, that some members of the RUC were out of control and had a free rein to kill whomsoever they suspected of involvement in unlawful republicanism. Lord Justice Gibson became a marked man, and he and his wife were killed in a border car bomb explosion in April 1987. . .

Even though the six deaths had occurred over a five-week period in the same relatively small area of Northern Ireland, and involved in each case officers from the same specialist squad, no co-ordinated investigation had ever been attempted. . .

We started with the investigation into the deaths of Toman, Burns and McKerr in Tullygally East Road, Lurgan. The official version of the events had been that a police officer on foot, accompanied by a colleague, had routinely attempted to stop a Ford Escort car by the traditional method of standing in the road and signalling with his torch for it to stop. The driver, it was said, stopped momentarily, then accelerated past the policeman, striking him and causing him to jump out of the way. Other policemen in a patrol car, parked by chance nearby, had witnessed the incident and had moved off to follow the car. The policemen in the car said they believed they were being fired at, and opened return fire. The Ford Escort left the road; the three men in it were all found to have died instananeously from gunshot wounds.

The truth was quite different. We discovered that the three men had been under surveillance for many hours, and that the police plan had been to intercept them at a different place altogether. No serious attempt to attract the attention of the driver was ever made, and no policeman was struck by the car. The three officers in the police car were waiting, and they fired 108 bullets from a Sterling sub-machine gun, Ruger rifles and a handgun during a pursuit that extended over 500 yards. All the men died instantly; none was armed. I was astonished to learn that all the policemen involved had been instructed to leave the scene immediately, with their car and their weapons, and return to their base for a de-briefing by senior Special Branch officers. Detective officers were denied access for many days to them and to forensic examination of their car, clothes, hands and weapons. The same CID officers were, on the night of the killings, provided with incorrect information about where the shootings had commenced, and some forensic examination of the scene was conducted in the wrong place. Many cartridge cases were never found, and some wholly unconvincing explanations were given for their removal. One of these was that a Catholic priest who came unannounced to perform the last rites on the deceased must have swept the cases away, possibly accidentally in the hem of his cassock.

My conclusion in relation to the missing cartridge cases was that as many as twenty were deliberately removed from the scene. I could only presume that this was in order to mislead the forensic scientists and to hide the true nature and extent of the shooting...

In the meantime we worked hard at finding the truth of the shooting death of the unarmed Roddy Carroll and Seamus Grew in Armagh City on 12 December 1982. After that shooting a public statement had been issued by the police saying that the men were shot after breaking through a random police road block and injuring a policeman. None

of this was true. At the trial of Constable Robinson for the murder of Grew he gave evidence, on oath, in his own defence, in which he said that after the shooting he was taken quickly from the scene before the CID could interview him, together with his weapon, uniform and police car. He said he was told to tell lies to protect an informant source. He was instructed to tell a story that made it appear that the entire episode had been the result of a misunderstanding. My team either discovered or confirmed for me that the deaths of Grew and Carroll had, like the other shootings, come at the end of a long surveillance operation that had involved RUC officers making journeys into the Republic of Ireland. Grew and Carroll had been followed for days but had managed to avoid a joint police/Army road block after they drove back over the border into Northern Ireland. In an accidental collision between an undercover Army car and a police car a policeman had hurt his leg. We found that during the resulting confusion the suspects' Allegro car had driven past the accident undetected, followed by an RUC Special Branch Inspector who had been on their trail in the Province and in the Republic of Ireland. He saw the shambles at the side of the road, realized that Grew and Carroll had driven past unseen, and panicked. He picked up an armed RUC officer — Constable Robinson — and pursued the car containing Grew and Carroll. On the outskirts of the staunchly Catholic Mullacreavie Park housing estate in Armagh, the undercover police car pulled ahead of the suspects' car and Constable Robinson got out. He emptied his revolver into Grew and Carroll, reloaded and fired more shots. Both men died instantly. The Special Branch Inspector, who had had the opportunity to see everything and knew the truth, drove off, and his evidence was kept secret from the CID investigating the deaths and from the Director of Public Prosecutions and the courts. Records were altered to hide the use of undercover cars in that part of Northern Ireland...

These were men whom the Special Branch strongly believed to be associates of the much-wanted alleged terrorist murderer Dominic McGlinchey. The complex operation, the surveillance, the unauthorized journeys by police officers into the Irish Republic, and finally the shootings were all part of a plan to detain McGlinchey. He had not, however, been seen by any policemen that day despite the long periods of surveillance, and it was never established — certainly not by me — that Seamus Grew and Roddy Carroll had been in his company...

As the months of 1984 went by I realized the power of the RUC Special Branch... A clear message emerged: that Special Branch

officers planned, directed and effectively controlled the official accounts given in the two incidents we had so far addressed. The Special Branch targeted the suspected terrorist, they briefed the officers, and after the shootings they removed the men, cars and guns for a private de-briefing before the CID officers were allowed any access to these crucial matters. They provided the cover stories, and they decided at what point the CID were to be allowed to commence the official investigation of what had occurred. The Special Branch interpreted the information and decided what was, or was not, evidence; they attached the labels — whether a man was 'wanted' for an offence, for instance, or whether he was an 'on-the run terrorist'...

The dead men were regarded as nothing but determined and ruthless terrorists who would have killed them had they not been killed first: men who were born to die violently in one way or another...

[The third incident related to the death of] Michael Justin Tighe, at the Hayshed in November 1982. The Hayshed was a ramshackle, breeze-block and corrugated iron building owned by Kitty Kearns, the elderly widow of an old-time Republican who had died some years before. She had been away from home staying with friends at the time of the shooting. The farmhouse and barn lie close to a housing estate on the outskirts of Lurgan occupied by people of resolutely nationalist inclinations. The security forces knew that the barn had been the storage point for explosives used to kill three policemen six weeks earlier, and that the explosives had been removed undetected while the barn was supposedly under police surveillance...

The search for information showed us that Tighe had no security record or criminal convictions. He was a fresh-faced young seventeen-year-old, and his death had been a bewildering tragedy for his parents. We had spoken to them at length. They told us that Michael had never shown the slightest interest in political or terrorist activity. He lived at home quietly and was a good and considerate son who had a number of friends of the same age, including Martin McCauley, who was then nineteen. McCauley's name had been mentioned by an informant in connection with the Kinnego explosion. Tighe, on the other hand, had no record whatsoever. Tighe was a lad of simple needs who was happy and contented to remain in and around his home. Mr. and Mrs. Tighe could not accept that their son had been shot dead for any valid reason. They will always believe that he strayed innocently into an ambush intended for anyone who entered that staked-out barn, and that he was not given the opportunity to come out before being shot...

Until the trial was over it was not possible for me to answer [all the] questions, but I did know that the only reference to Tighe I saw in official records was dated after his death, and associated him posthumously with IRA activity because he had been shot dead by an anti-terrorist squad. The implication was that there could be no innocent reason for any youth to be in that barn on Ballyneery Road North: its association with a Republican sympathizer owner, its recent use for explosive storage and its proximity to a Catholic housing estate seemed to confirm beyond question that Tighe must have been there in the capacity of an IRA member...

McCauley [the other youth] appeared before Mr. Justice Kelly charged with possessing the three old rifles that were found in the barn, without ammunition, after he and Tighe had been shot. The account first given by the police officers stated that they had been on routine patrol when one of them had seen a man with a gun move from near the cottage into the Hayshed. The police officer ran to the Hayshed and from outside heard the cocking sound of a rifle mechanism and muffled voices. A sergeant shouted 'Police! Throw out your weapons!' There was silence. He repeated the warning using the same words, but there was still no reply. Through a space in the makeshift door he saw McCauley pointing a rifle at a constable. The sergeant opened fire with an initial 14-round burst at McCauley and the constable fired a further three rounds. Within a few seconds the constable saw Tighe, also pointing a rifle, and he and another constable opened fire on him. Tighe dropped out of sight behind the bales of hay. A further volley of shots was then fired at McCauley, who had reappeared, still with the rifle, and then again at Tighe, who had also reappeared. McCauley was dragged out barely alive.

[The author then outlines at length his understanding of the events and continued...]

As an individual, I also passionately believe that if a police force of the United Kingdom could, in cold blood, kill a seventeen-year-old youth with no terrorist or criminal convictions, and then plot to hide the evidence from a senior policeman deputed to investigate it, then the shame belonged to us all. This is the act of a Central American assassination squad — truly of a police force out of control. The cover stories, the lies, the obstruction were insignificant when placed alongside possible State murder...

I reflected on the nature of the deaths I was investigating. They had a common feature: each left a strong suspicion that a type of pre-planned police ambush had occurred, and that someone had led these men to their deaths...

...I wished that a letter be put on his file stating that after the most careful re-investigation I believed I could present a great deal of extra evidence,

including independent forensic findings, that would indicate that the five men shot dead in their cars were unlawfully killed by members of the Royal Ulster Constabulary...

It cannot be disputed that in a five-week period in the mid-winter of 1982 six men were shot dead by a specialist squad of police officers in Northern Ireland. The circumstances of those shootings pointed to a police inclination, if not a policy, to shoot suspects dead without warning rather than to arrest them...

I was no doubt seen [by the local police] as a mainland careerist who did not comprehend their world, and an important part of the RUC set out to make me understand that in Northern Ireland the survival and strength of the police is paramount. If the police fail, then government fails. There was nothing in their attitude towards me or my team that was personal; I doubt if it would have mattered who we were. It was a demonstration to us that life in the Province will — indeed, must — go on in its time-honoured way...

John Stalker
Former Deputy Constable of the Greater Manchester Police[25]

III. *Jurisprudential Occlusion: Rediscovering the Essentialism of Mainstream Jurisprudence*

"...only a conception of law which is concerned with social reality and human experience can have philosophical meaning."

C.J. Friedrich[26]

"So long as we traffic in the ruling dogmas of society our doubts are kept to a minimum."

Roberto Mangabeira Unger[27]

1. *The Assumption Stated*

Jurisprudence, like history, is written by the victors; it is structured by a view from the top down, rather than from the bottom up.[28] Not surprisingly, the critiques emerging from, or inspired by, traditional jurisprudence have been partial rather than fundamental, reformist rather than transgressive, conceptual rather than experiential.

For example, traditionally, analyses of the history of mainstream legal thought have been organized around the tensions between naturalism and positivism, reason and will, utilitarianism and deontology. Current jurisprudential debates manifest similarly unsituated and decontextual-

25. *Stalker* (1988) at 12-13, 38-41, 43, 52-53, 56, 59, 61-63, 67, 72, 92, 253, 262.
26. *Philosophy of Law in Historical Perspective* 149 (1963).
27. *False Necessity* 19 (1987).
28. For a brief overview of the social status of the leading lights of our received jurisprudential tradition, see Clarence Morris, *Great Legal Philosophers* (1959). For an important discussion of the value of the viewpoint of the "other" *see e.g.* Mari Matsuda, "Looking to the Bottom, Critical Legal Studies and Reparations" (1987), 22 Har. C.L.C.R.L.R. 323.

ized preoccupations. Law and economics strives to provide efficient accounts of the operation of law, both descriptively and normatively; deontological liberals advocate that the good society prioritizes the right over the good; civic republicans prioritize their visions of communal good over individual rights; interpretivists, regardless of their political stripes, pursue normative rationalization through hermeneutic analogies; and critical theorists argue that all of the foregoing are misconceived because, philosophically, such understandings are anachronistic for the post-modern condition.

However, despite these differences, differences which are clearly important, all of the above share a common viewpoint, their perspective is from the top of the pyramid, not the bottom. What I want to suggest is that if we start at the other end — at the bottom — then one's experiences and presuppositions, always interconnected, may be otherwise, with the consequence that the issues of concern will be very different. Put another way, because these academic's experience of law is subjective, it is partial, excluding the experience of others, particularly those who are at the receiving end of law, those who are, as I claim, "the victims of law". Their viewpoint may well encompass concerns not usually considered by the dominant traditions.

The claim that I want to defend in this part of the paper is that underlying all their differences, our jurisprudential forefathers shared a common assumption: that violence is real law's determinative and distinguishing characteristic. Where they differ is in their relative explicitness with regard to the assumption, or in the justification of it. None have ever challenged the assumption itself.

2. *Tracking The Assumption*

In this section I want to briefly etch a pattern, one that provides an outline of the reluctance, or willingness, of jurists to recognize the interconnection between law and power, with particular emphasis on the clarity of their acknowledgement of the violence in law. My aim is to highlight how all of the jurists who, collectively, comprise our received tradition of jurisprudence implicitly or explicitly recognize that law is vital to bolster domination and to reinforce subordination. This is what I mean by a view from the bottom.

We can begin our inquiry with the Ancient Greeks. Plato has long been recognized to be one of the founding fathers not only of jurisprudence, but also of philosophy and social and political theory.[29]

29. One commentator rapturizes thus: "In the philosophy of Plato, Greek thought reached its culmination. He stands as the aristocrat among the philosophers of ancient days, an elect spirit of surpassing greatness." F. Berolzheimer, *The World's Legal Philosophers* 60 (1929).

His reflections on law can, roughly, be separated into two relatively distinct phases, the idealist and the practical, a dichotomy that, I would suggest, reflects his maturing political pragmatism. In the *Republic* and the *Statesman,* Plato indulged, at length, in his celebrated conception of law as the pronouncements of a philosopher king who could access justice through reflection, although admittedly, it would be impossible for him to communicate his reasons to lesser mortals. This has been the predominant focus of jurists who have reflected on Plato.

However, an older Plato, chastened by the contemporary adventures of his city state, recognized the futility of such a vision of the ideal city, and advocated in its place a more practical polity, with a correspondingly more immediate conception of law. In *The Laws,* the later Plato argues that law must play a pivotal role in the structuring of the polity. For him, law is functional, its purpose is to make citizens virtuous, and this, in turn, will be for the common good of the whole community.

At first blush, such a virtuous desideratum for law seems commendable. When, however, we proceed to unpack Plato's conception of the "virtuous society" the attractiveness of the aspiration begins to falter. As R.F. Stalley carefully argues, within *The Laws* there is a sleight of hand that merges the "virtuous society" with a predisposition for "conformity with social norms".[30] This conflation of "virtue" with "conformity", raises critical concerns about Platonic conservatism, and asks why should these particular norms be preserved, and to whose benefit do they gravitate?

More directly relevant for my purposes, however, is the role that law is to play in the virtuous polity. Although Plato makes much of the connection between law and reason,[31] his principal concern in *The Laws* is to provide a detailed legal code that will provide the contours for the virtuous society. In this sense, Plato's law is intended to be educative,[32] and supreme. But his educative conception of law takes on a very particular approach. Although, rhetorically, he recognizes that law can operate through either persuasion or violence,[33] and he eulogizes the pedagogical virtues of pursuasive preambles, at bottom, he distinguishes between "preambles" and "laws proper" on the basis of penalities, with their in-built force and threatening capacity.[34] Moreover, he portrays noncompliance with law as a "disease" that must be "cured" for the benefit of both the individual and the community as a whole. Unpacked

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30. *An Introduction to Plato's Laws* 39 (1983).
31. See generally *The Republic* and *The Laws,* 713e-714a.
32. E.g. *Laws* 63lb-632d.
33. *Laws* 722c.
34. See e.g., *ibid.* 721e, 784c, 853b-c.

further, "cure" turns out to be "punishment" and the proposed Platonic "remedies" are wide-reaching, including the extensive use of capital punishment, the expansion of corporal punishment, the innovative idea of "imprisonment", and monetary penalities.[35]

That "education" and "cure" should take on such a repressive nature suggests that these propositions are a rationalization of the coercive enforcement of a preferred political agenda, the corraling of law as a legitimization of the violent imposition of a particular social order. Moreover, such an interpretation is supported by even a cursory review of his reflections on slavery. Not only does Plato fail to challenge slavery in *The Laws,* he reinforces that institution by imposing even greater punishment on slaves than "free men" for similar crimes "because only through *fear* can the slave population be kept in *subordination*".[36]

What we have in Platonic legal theory, then, is a vision of law as an extensive regulator of all aspects of the community and individual life.[37] More specifically, however, it is a conception of regulation shot through with the repressive apparatus of the polity, designed to impose by force a conception of social relations that aspires to be virtuous, but only on the back of violence. Similar themes emerge when we shift from pagan to Christian jurisprudence.

The central legitimizing tenet of Christianity has been its aspiration "to love thy neighbour", a desideratum that one might think would be antithetical to violence. For example, St. Augustine sought to replace the "community of law" with "the community of charity or love",[38] an aspiration that sits uncomfortably with his extensive vindications of "the just war" theory, and his correlative ambivalence towards the fate of innocent non-combatants.[39] However, it is St. Thomas Aquinas who, evaluated by the criteria of sophistication, coherence, longevity and influence, represents the zenith of Christian jurisprudence, and against whom we can measure the Christian commitment to love.

Aquinas' *Summa Theologica* has been both widely celebrated and hotly disputed for its ability to synthesize his suggested four categories of law, *lex aeterna, lex divina, lex naturalis* and *lex humana.* However, when we move beyond his certainly impressive enterprise, we encounter

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35. See *Laws,* Book IX and Stalley *supra* note 30 at ch. 13.
36. Stalley, *supra* note 30 at 149 (emphasis added); see also G.R. Morrow, "Plato and Greek Slavery" (1939), 48 Mind 186-201.
37. See, e.g, H. Cairns, *Legal Philosophy from Plato to Hegel* 48 (1967).
38. C.J. Friedrich, *supra* note 26 at 37.
39. R.S. Hartigan, "St. Augustine on War and Killing; The Problem of the Innocent" (1966), 27 Journal of the History of Ideas 195; see generally, F.H. Russell, *The Just War in the Middle Ages* (1975).

a definition of law as "an ordinance of reason for the common good made by him who has care of the community and promulgated".[40] Aquinas spends a great deal of time discussing the importance of reason, the common good and promulgation, and the factor of care appears to dovetail with Christianity's broader ambitions. However, as against "care" there is the idea of law being an ordinance, a coercive command. When we get down to it, within the Thomist system,

> law, to be effective in promoting right living must have such *compelling force;* . . . But the power of *compulsion* belongs either to the community as a whole, or to its official representative whose duty it is to *inflict penalties* . . . He alone, therefore, has the right to make law.[41]

And the justification is as follows:

> From the foregoing it is clear that there is in man a natural aptitude to virtuous action. But men can achieve the perfection of such virtue only by the practice of a "certain discipline". — And men who are capable of such discipline without the aid of others are rare indeed. — So we must help one another to achieve that discipline which leads to a virtuous life. There are, indeed, some young men, readily inclined to a life of virtue through a good natural disposition or upbringing, or particularly because divine help; and for such, paternal guidance and advice are sufficient. But there are others, of evil disposition and prone to vice, who are not easily moved by words. These it is necessary to restrain from wrongdoing by *force* and by *fear.* When they are thus prevented from doing evil, a quiet life is assured to the rest of the community; and they are themselves drawn eventually, by force of habit, to do voluntarily what once they did only out of *fear,* and so to practise virtue. *Such discipline which compels under fear of penalty is the discipline of law.* Thus, the enactment of laws was necessary to the peaceful and virtuous life of men.[42]

So, care, a cognate of love, is subordinated to the educative-disciplinary virtues of force and fear, for the good of both the community and the individual, a princely paternalism that cloaks the violence of the will. John Finnis, Aquinas' modern day interlocutor, glosses Aquinas' rationalization on the basis that "there is a need for compulsion, to force selfish people to act reasonably".[43] It is only selfish people upon whom legal compulsion is brought to bear? One queries whether in St. Thomas' era, or our own, there is a unified "commonality" and a single "common good" that could support such a justification for princely power? How does this rationalization of violence on the basis of education fit with the Thomist defence of slavery? And, what is the connection between these

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40. *Summa Theologica* Qu. 90, art 4 [hereinafter cited as *S.T.*].
41. *Ibid.* Qu. 90, art 3 um (emphasis added).
42. *Ibid.* Qu. 95, art. 1 (emphasis added).
43. J. Finnis, *Natural Law, Natural Rights* 28 (1980).

recalcitrant "selfish people" and the Thomist vindication of private property?[44] These are questions from the bottom.

Moreover, even if *lex humana* does conflict with a higher law, Aquinas argues that *lex humana* may still be binding "in order to avoid scandal or disturbance",[45] for priority must be given to the public peace, the public order. Once again education and virtue are invoked to provide the justification for coercion, but when we dig just a little deeper a more significant factor surfaces, what I later call "the imperative for the preservation of order". This factor is important in that it draws attention to the agents involved in the legal process, the perpetrators, benefactors and victims of state sanctioned violence. And, once we identify the element of human agency, we begin to wonder who, in reality, is on the side of the angels? Or, more cynically, do we simply give up the idea of angels completely? Enter Hobbes.

Despite the important differences between the theologism of Thomist jurisprudence and the secularism of John Hobbes' *Leviathan,* at least one element remains constant, the embeddedness of violence in law. Compared to what has come before, and much of what is to follow, Hobbes is almost refreshingly candid about the violent constitution of law. It may be that the vulgarity of his explicitness is the reason why so many of Hobbes' jurisprudential successors have sought to distance themselves from him, and yet, as we shall see, they remain indebted to him. Furthermore, it is suggested that Hobbes' openness may be due, in part, to the fact that he was never trained as a lawyer, he did not have to reconcile himself to the fact that his chosen profession is imbricated with pain and death.

The whole of Hobbes' social contract thesis is an attempt to provide a justification for the absolutist state, as a remedy against the dangers of civil war.[46] The antisocial state of nature where life is "solitary, poor, nasty, brutish and short"[47] is deliberately constructed[48] to provide philosophical justification as to why people should submit unconditionally and "consent generically"[49] to a sovereign who is omnipotent, answerable only to God. For Hobbes, civil laws are decisions of the sovereign will, obedience to those laws is essential to preservation of the contract, and any breach will be sanctioned, because there must be the *"terror* of some power to cause them to be observed".[50] Thus, in a sense,

44. McLaren, *Private Property and the Natural Law* (1948); Finnis, *ibid.,* at 169-173.
45. *S.T.* Qu. 96 art 4.
46. Leo Strauss, *Natural Right and History* 166-202 (1953).
47. *Leviathan,* Pt. 1, Chap. 13.
48. John Plamenatz, *Man and Society* (1963), Vol. 1 at 163-164.
49. Friedrich, *supra* note 26 at 88.
50. *Leviathan,* ch. xvii (emphasis added). See also ch. xxvi.

Hobbes is an important precursor of the positivists, in that he posits that, *"law properly* is the word of him that by right hath command over others" and to be effective, there must be:

> some *coercive* power to compel men equally to the performance of their covenants by *terror* of some *punishment* greater than the benefit they expect from the breach of their covenant.[51]

Hobbes thoughts on law are, therefore, frank and unreserved. For him law is about power, the power of the sovereign to determine and enforce his vision of the good society, and enforcement is based upon punishment and a calculus of terror. At least the political constituencies are apparent in Hobbes' jurisprudence.

Locke was deeply concerned by the authoritarian and absolutist tendencies of Hobbes' justifications, and sought a less restrictive state, one more tolerant of religious diversity,[52] one more open to the newly emerging classes of English society.[53] Although he had a much more benign conception of the human personality and the state of nature than Hobbes, he also adopted the idea of a social contract through which individuals would come together and gain the protection of the state, with the built-in proviso that this was a fiduciary trust.[54]

Although Locke recognized limits to that trust and provided a justification of a right to revolution if the sovereign breached that trust,[55] within those limits he too advocated a conception of politico-legal power which involved,

> the right of making laws with *Penalties of Death* and consequently *all less penalties,* for the regulating and preserving of Property employing the *force* of the community in the execution of such laws and in the defence of the commonwealth from foreign injury and all this only for the public good.[56]

The rub is, of course, whose property is to be regulated and preserved, who makes up the "commonwealth", who qualifies as "the public" for whom the "good" is exercised, and from whom is it to be protected? The "imperative for the preservation of the social order" is, once again, cast very broad, an apology for the coercive enforcement of a peculiar and particular political preference. Thus, although most of the subsequent philosophical and jurisprudential inquiries have concentrated on Locke's discussion of the state of nature, the significance of the trust, his liberalism

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51. *Ibid.* ch. xv (emphasis added).
52. *A Letter on Toleration* ed. R. Klinbansky, trans. J.W. Gough (1968).
53. C.B. MacPherson, *The Political Theory of Possessive Individualism* (1962).
54. J.W. Gough, *John Locke's Political Philosophy: Eight Studies* (1950).
55. *Two Treatises of Government* ed. P. Laslett (1967).
56. Cited in Paton, *Jurisprudence* (1972), at 108 (emphasis added).

and his individualism, such emphases gloss over an important element of consistency with his predecessors: that law is a variation on violence, not its transcendence. Differences, important as they may be, arise on the basis of this consensus.

For anyone who is critically concerned about the pervasiveness of violence in law and society, the work of Immanuel Kant suggests itself as a possible starting point for two reasons. First, as Kant himself says, his ambition is to develop a critical philosophy, one that challenges all previous philosophies on the basis of either their skepticism or their dogmatism.[57] One might be tempted to think that such an ambition might challenge the one orthodoxy of all his predecessors, their ultimate indentification of "law proper" with violence.

Second, and even more encouraging, is the potential of what is, perhaps, Kant's most significant contribution to philosophy, his *a priori* first principle: the categorical imperative. Kant takes as his pivotal starting point the centrality of the freedom of the individual and, on this foundation, constructs a moral theory on the basis of Right.[58] Particularly significant is his emphasis on the importance of treating people as ends in themselves and not as a means to an end:

> Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.[59]

At first blush, such a strongly stated proposition in defence of human dignity *per se* would appear to rule out the infliction of violence on another person. And again, his statement of the "Universal Law" would also tend to reinforce this optimistic reading of justice as a respect for the "other": "Act only on the maxim through which you can at the same time will that it should become a universal law."[60] Implicit in such a proposition is the assumption that the actor would also be subject to the universal law, and, I think, it is fair to say that none of us would want to be the victims of violence. Thus, it would appear that Kant with his transcendental normative order, with its prioritization of the dignity of the person, has taken us a long way from the instrumentalist, even thanatical, Hobbesian view of social and legal interaction.

Such a sanguine interpretation can only be maintained, however, at the cost of excluding Kant's *Metaphysical Elements of Justice* (1797),[61] a

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57. See *Critique of Pure Reason* (1781) trans. Norman Kemp Smith (1933).
58. See generally, *Groundwork of the Metaphysics of Morals* (1785), trans. H.J. Paton (1964) [hereinafter cited as *Morals*].
59. *Ibid.* at no. 66-67, p. 96.
60. *Ibid.* at no 52, p. 88.
61. Ladd trans. (1965) [hereinafter cited as *Justice*].

tract published when he was seventy-three, seven years before his death. In this work, he provides an extensive — indeed he claims it to be a "comprehensive" and "complete"[62] — theory of justice and law. Of particular relevance to this inquiry is Kant's discussion of the "coercion" component of law, and its problematic relation to his much celebrated categorical imperative.

It is at this point that the idealist elements of his transcendentalism manifest themselves most clearly, and his orthodoxy with the mainstream tradition becomes most explicit. In communion with all his predecessors he takes the crucial step of bifurcating law between what he variously describes as "private" and "public", "natural" and "civil", "ethical" and "juridical" law. The homology with the "natural law/positive law" dichotomy becomes explicit through his discussion of the criterion of differentiation, the actor's motives for complying with his or her duty. Kant's basic proposition is that morality is based upon internal incentives, while legality is based upon external coercion.

> "Ethics teaches only that, if the incentive that juridical legislation combines with that duty, namely *external coercion*, were absent, the Idea of duty alone would still be sufficient as an incentive."[63]

As he says, "right" and the "authorization to use *coercion*", "means the same thing".[64] Once more we have the connection, although the explanation is different, between real law and coercion. "... [C]ompulsion is essential to law and a right is characterized by the power to compel".[65] And it is on this foundation — a bifurcation of Ethics into

62. *The Philosophy of Law* 4 (1887), Hastie trans.

63. *Justice* at 20. He develops this point more generally, although less explicitly, as follows,

> ... all legislation can nevertheless be differentiated with regard to the incentives. If legislation makes an action a duty and at the same time makes this duty the incentive, it is *ethical*. If it does not include the latter condition in the law and therefore admits an incentive other than the Idea of duty itself, it is *juridical*. As regards juridical legislation, it is easily seen that the incentive here, being different from the Idea of duty, must be derived from *pathological* grounds determining will, that is, from inclinations and disinclinations and, among these, specifically from disinclinations, since it is supposed to be the kind of legislation that constrains, not an allurement that invites.
>
> The mere agreement or disagreement of an action with law, without regard to the incentive of the action, is called *legality;* but, when the Idea of duty arising from the law is at the same time the incentive of the action, then the agreement is called the *morality* of the action.
>
> Duties in accordance with juridical legislation can be only external duties because such legislation does not require that the Idea of this duty, which is internal, be of itself the ground determining the will of the agent. Because such legislation still requires a suitable incentive for the law, it can combine only external incentives with the law.

Ibid. at 19 (emphasis added).

64. *Ibid.* at 237 (emphasis added).

65. W. Friedmann, *Legal Theory* 5th ed. (1967), at 159-160.

morality and law — that he can proceed to discuss the enforcement of contracts, property rights and his conception of penal law as justified on the basis of retribution. It is also worth noting that Kant also advocated the monopolization of violence — "to *punish, destory* or exile" — in so far as he invoked an absolute duty to obey existing legislative power, while decrying as an abomination any proposition in favour of a right to revolution.[66] Viewed in this light, Kant has given a new twist to the Rousseauean proposition that, ". . .the strong is never strong enough to be always the strongest, unless he transfers strength into right and obedience into duty".[67]

Of course, Kant recognizes the tension between his categorical imperative, premised as it is on freedom, and the legalization of violence. His justification is, at bottom, that state coercion ultimately is an enhancement of, rather than a limitation upon, our natural, innate, moral freedom, or more pithily, "justice is united with the authorization to use coercion".[68] Nor should we forget that this is not a description of the law as is, it is Kant's vision of how the law ought to be.

Moreover, the supporting argument for such a claim is particularly revealing, given his much touted transcendentalism. Like Hobbes and Locke, Kant also invokes the ideas of a "state of nature" and a "social contract" to "explain" political authority, although there are some variations in their respective accounts. Most importantly, he shares with Hobbes the fictional claim that the state of nature is pathological, malign, embattled and insecure, and that the only way to avoid this is to "consent" (that notoriously indeterminate idea) to enter civil society and establish the authority of a compulsive "rule of law":

> "Although experience teaches us that men live in violence and are prone to fight one another before the advent of external *compulsive* legislation . . ."[69]

Where Kant differs from Hobbes is that he claims that "men" are bound by justice to "quit the state of nature" and "subject[ ] himself to a public

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66. *Ibid.* at 84-89 (emphasis added).
67. *The Social Contract and Discourses* 6 (1966).
68. *Justice* at 35. He continues

> Coercion, however, is a hindrance or opposition to [lawless] freedom. Consequently, if a certain use of freedom is itself a hindrance to [lawful] freedom according to universal laws (that is, is unjust), then the use of coercion to counteract it, inasmuch as it is the prevention of a hindrance to freedom, is consistent with freedom according to universal laws; in other words, this use of coercion is just.

See also 80-81.
69. *Ibid.* at 76 (emphasis added).

lawful external *coercion* . . . civil society",[70] whereas Hobbes merely thought such a move prudential.

Within the Kantian scheme of things, coercion is legitimate and the Rule of Law is distinguished from violence because citizens have consented to it and, as a totality, they benefit from it. It is fair to ask whether this analysis accurately portrays the experience of his "passive citizens", those who have not acquired political rights, such as women, children, day labourers and house servants?[71] Despite Kantian aspirations to prioritize the dignity of the person, despite the virtues of his deontological liberalism, and despite his republicanism the question is: whose freedom and at what price? When it comes to law, the essentialist premise goes unchallenged, and the jurisprudential enterprise becomes one of the "rationalization of coercion", a strategy that is based upon derivation, dichotomies, fictions and generalities. *Plus ça change, plus c'est la mème chose.*

The historical overview indicates that the normativists — Plato, Aquinas, Locke and Kant — recognize the violence of law, but consider it unproblematic. It is unquestioned, a given that is rapidly glossed over in their haste to discuss the virtues and justifications of their preferred polity. But its "assumedness", its "taken for grantedness" and its submergence, obscures the vital way in which the violence of law impacts upon their vision and the extent to which domination and subordination are embedded in the heart of their conceptions of Justice, in so far as their Rule of Law acquiesces in its own violence. Consequently, those who contemplate justice at length are also those who do the least to acknowledge the violence constitutive of their own agendas. This is what I mean by a view from the top.

By an ironic twist of fate, it is the anti-normativists, the positivists, those who seek a scientific, non-ideological, apolitical[72] understanding of

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70. *Ibid.* at 76 (emphasis added). To be fair to Kant, though, he is "realistic" enough to posit that

> "from the very nature of uncivilized man it can be inferred that this [original submission] was achieved through the use of violence".

Ibid. at 111.

Such a claim, however, casts doubt on how, exactly, Kant understood the social contract, as an "idea of reason" or as "an historical fact". In view of his rationalism and his critique of Hobbes, the former is the preferred understanding, but statements like the above suggest the historical interpretation. Perhaps the lack of clarity indicates Kant's discomfort with the very idea of the social contract, suggesting in turn, the lengths he had to go to in order to rationalize his defense of the "compulsive" civil society as against his stronger predisposition for freedom. Moreover, the forgoing quotation betrays an essentialist conception of "man's" nature, a point I shall return to in Part II of this essay.

71. *Ibid.* at 79.

72. See Hans Kelsen, rejecting "politics masquerading a jurisprudence" cited in Paton, *Jurisprudence* (3rd) (1972) at 17.

law, who go the furthest in their recognition of the violence inherent in law. In one sense they can "afford" to admit this, in that their agenda is "descriptive" not "normative".

Despite its widely recognized weaknesses, John Austin's command theory is explicit about the connection between domination and subordination, law and power.

> "A law . . . may be said to be a rule laid down for the guidance of an intelligent being by an intelligent being having *power over* him."[73]

These rules are best understood as command. That is:

> "Every positive law is set by a given sovereign to a person or persons in a state of *subjection* to its author"[74]

> "A command is distinguished from other significations of desire not by the style in which the desire is signified, but by the *power* and purpose of the party commanding to *inflict* an *evil* or *pain* in case the desire be disregarded."[75]

The intertwining nature of law and violence within mainstream legal thought can be encapsulated in the less than holy trinity of "command, duty, sanction".[76] Where Austin differs from his predecessors is that he stops at this point, while they attempted to provide a justification for this constitutionalization of violence. Austin's "virtue" is that at least he puts the connection centre stage, whereas many others, while they admit the interplay, submerge it in rationalizations, mythical, religious or secular. None challenge the identification with, and reduction of, one to the other.

Hans Kelsen was also an advocate and practitioner of the "science not the politics" of law. His "pure theory of law", with its emphasis on a hierarchical structure of norms, is expressly designed to demonstrate that the "decisive" difference between law and other normative structures is the "complusive" nature of law. His aim is to inquire into the measures of compulsion exercised by society against those who fail to conform. For Kelsen, sanctions are the final and pivotal stage in hierarchies of norms, and law, which he identifies as the state concretized, is "a *coercive* order of human behaviour".[77] Like Hobbes and Austin he is clear about the purpose of a legal order, it is to:

> *"inflict* [. . .] on the responsible individual an *evil* — such as deprivation of life, health, liberty, or economic values . . . even against his will by the employment of *physical force."*[78]

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73. *The Province of Jurisprudence Determined* (ed). Hart (1954), at 10 (emphasis added).
74. *Ibid.* at 201 (emphasis added).
75. Austin, *Jurisprudence* 5 (2nd ed. 1970) (emphasis added).
76. *Ibid.* at 9.
77. *Pure Theory of Law* 33 (1967).
78. *Ibid.*, at 33 (emphasis added).

Thus, it is

> "(a)s a *coercive* order . . . (that) law is distinguished from other social orders. The decisive criterion is the element of *force* . . ."[79]

Curiously, then, it is the scientists of the law, the would be non-ideologues, who have identified most explicitly the most political fact about law, that it is the imposition of violence. They have taken that to be the end of their inquiry when, I would suggest, it should only be the starting point. The more important question is why should violence be the distinguishing essence of law? Is it possible to conceive of, and put into practice, a system of social relations that avoids violence, and yet still merits the accolade "legal"? Positivism's "results", though hardly novel, open up the possibility for such a speculative inquiry.

However, as T.S. Eliot reminds us, "humankind cannot bear too much reality"[80] and the candour of positivism is disconcertingly revealing. Its open recognition of, and its scientific honesty about, the integral connection between law and violence cuts too close to the liberal sensibilities of mainstream jurists. Consequently, in the last couple of decades, we have experienced a retreat from positivism, and the re-emergence of a jurisprudential discourse that, consciously or unconsciously, obfuscates the violence of law.

Take for example, the scholarship of John Rawls. His classic tractate, *A Theory of Justice* (1971) is a splendidly impressive neo-Kantian rationalization of the liberal democratic welfare state. The work is a classic example of jurisprudence from the top down, in that it attempts to discover and argue for determining principles that can provide evaluative benchmarks against which the basic structure of a society can be measured. The community from which Rawls project emerges, and to which it is directed, is a community of academics seeking a coherent vision of justice, a community that, perhaps, knows a lot about the purpose of law, but little or nothing about its impact.

This is not to say that Rawls completely ignores questions pertaining to the enforcement of law, rather it is to identify the relative weight which he assigns to this concern. Although he admits that "the law defines the basic structure within which the pursuit of all other activities takes place",[81] he does not manage to deal with the issue of the "Rule of Law" until he is well over a third of the way into his treatise. Such structural decentralization reveals the priority which Rawls attaches to such

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79. *Ibid.*, at 34 (emphasis added).
80. Eliot, *Murder in the Cathedral* 27 (1976).
81. *A Theory of Justice* 236 (1971) [hereinafter cited as *T.J.*].

concerns. Moreover, his definition of a legal system is analytical, detached, functional and unemotional:

> "a *coercive* order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social co-operation."[82]

But why should "social co-operation" and "regulation" only become feasible on the basis of a "coercive order"? Rawls' answer is telling in that despite his deontological predelictions, on this point he expressly takes us back to the leviathan. Following Hobbes, he posits that because "men" cannot trust each other to fulfil their mutual obligations, there is a danger of "instability" and so ". . . for this reason alone, a coercive sovereign is presumably always necessary . . ."[83] Once again, not only do we have a hasty retreat to necessitarianism, we also have an explanation that is so vague, unspecific and decontextualized as to be virtually worthless. Thus "coercion" (always a more palatable word than "violence") is smuggled into the Rawlsian scheme on the basis of inevitability, but once inside it can be expanded to support any and all of the preferences espoused by the nearly just society, dependent as it is on the "rule of law".[84]

And that is as much as we get. In a six hundred page inquiry into justice and the nature of a good society, Rawls can manage only a couple of pages that all too quickly assume the connection of law and violence. Given Rawls' progressive stature, one could be forgiven for expecting at least a little more.

Perhaps Rawls' myopia can be understood, but not necessarily accepted, given that he is a philosopher, not a jurist. The same, however, cannot be said of Ronald Dworkin, the reigning, and imperalist[85] king of the jurisprudential castle.[86] Dworkin begins his latest contribution, *Law's Empire*, with the basic question, "What is Law?" However, unlike the positivists, he does not attempt to provide us with a practical understanding. On the contrary, he directs our attention, again and again, to "dauntingly abstract" philosophical questions about "theoretical disagreement in law"[87] and "the argumentative character of our legal

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82. *Ibid.* at 235 (emphasis added).
83. *Ibid.* at 240.
84. As an aside, although Rawls does not deal with the issue of law's ambition to monopolize violence, it is worth noting that although he provides an attractive justification for civil disobedience, his definition of civil disobedience has a built in pre-requisite of non-violence. *T.J.* at 364 and 366.
85. *Law's Empire* (1986) [hereinafter cited as *Empire*].
86. Allan C. Hutchinson, "Of Kings and Dirty Rascals: The Struggle for Democracy" (1985), 10 Queen's L.J. 273.
87. See e.g. *Empire*, 5, 6, 11.

practice".[88] Moreover, as if to shift our attention from positivism's candour about the repressive power of law, he reclassifies and reinterprets positivism to fit the "interpretative turn"[89] of recent jurisprudence so that it becomes a "semantic theory of law".[90] Again, one is reminded of T.S. Eliot's concern that we are continually "distracted from distraction by distraction". And off rides Dworkin on his new-fangled interpretive hobby horse, with its lengthy discussions of "semantic stings", "chain novels", "integrity", a literarily adept "Hercules atop Olympus", and "Law's Dreams".

To be fair to Dworkin, he does in fact pay some attention to law's connection with domination, but it is a discussion that is so brief, apologetic and superficial that it can only serve as a further indictment of his already tarnished image.

Like Rawls, Dworkin considers that the connection between law and violence merits no more than a passing consideration, and he only manages to address it about one quarter of the way through his treatise, under the euphemistic title, "Grounds and Force of Law".[91] The most explicit reference is when he happily joins the long tradition of those for whom:

> "legal argument takes place on a plateau of rough consensus that if law exists it provides a justification for the collective use of *power* against individual citizens or groups."[92]

Or as he says a little later, legal philosophers,

> "share a general, unspecified opinion about the *force* of law . . . the law should be obeyed and *enforced*."[93]

The correlative is obvious, the force of law is a non-issue, a "non question", for jurists. This is like saying that because the test for determining rape has always been measured from the viewpoint of men,[94] then that viewpoint should be accepted, that there is consensus, that it does not merit jurisprudential inquiry. Or again, that because all the founding fathers practiced slavery, that slavery is not a worthy topic of politico-constitutional inquiry. But domination is just that, domination. The mere fact that there is consensus amongst the members of a particular elite enclave is no justification for the marginalization of issues

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88. *Empire* at 14.
89. See Part II B, 2, b, i, a of this essay, "Trespassers on the Lawns of Patriarchy".
90. *Empire* at 33-35.
91. *Ibid.* at 108-113.
92. *Ibid.* at 108-109 (emphasis added).
93. *Ibid.* at 111 (emphasis added).
94. C. MacKinnon, "Feminist Jurisprudence", *supra* note 4.

of subordination. On the contrary, that very consensus, that ominous silence, should suggest to the critical jurist that something is amiss.

Perhaps because he is a little uncomfortable with such a facile confession, Dworkin attempts to bolster his cavalier attitude through a rather strained strategy of avoidance. He claims that:

> Academic tradition enforces a certain divison of labor in thinking about law. Political philosophers consider problems about the force of law, and academic lawyers and specialists in jurisprudence study issues about its grounds. Philosophies of law are in consequence usually unbalanced theories of law: they are mainly about the grounds and almost silent about the force of law. They abstract from the problem of force, that is, in order to study the problem of grounds more carefully.

I think two, interconnected, points are relevant here. Feminists suggest that many scholars tend to point to structures as justification for their own personal failures to deal with certain issues. This is variously described as "reification", or the "denial of agency".[95] Viewed from this perspective, and temporarily assuming that Dworkin is accurate, "academic tradition" does not "enforce"; rather, legal philosophers have chosen not to deal with the question of the interconnection between law and violence. In this essay I have attempted to indicate why they have made such a choice.

Secondly, Dworkin's claim that there is a division of labour between "political philosophers" and "academic lawyers" is misleading and unsustainable. As I have indicated, jurists as diverse as Plato, Aquinas, Austin, Kelsen and one of Dworkin's own heroes, Kant, have devoted significant aspects of their work to a discussion of the "force" of law, as well as to its "grounds". What this suggests is that Dworkin does not want to deal with the issue of domination through law. Rather, his preference is to simply take it for granted, to use it as a foundation upon which to construct his own legal empire. The impact of domination does not change, but the rhetorical rationalizations do!

Thankfully, the last few years, there have been indications that, again, the tide may be beginning to turn, that the self-imposed myopia of mainstream jurists may be weakening, and that a greater consciousness of the practical impact of all our theorizing is on the increase. Of particular interest here is the work of the late Robert Cover. After almost two decades of pondering the convergence of law and literature,[96] in the last few years of his life, Cover began to realize the integral and constitutive

95. *See e.g.* Jill McCalla Vickers, "Memoirs of An Ontalogical Exile" in *Feminism in Canada, supra* note 12.
96. "The Bonds of Constitutional Interpretation" (1986), 20 Georgia L.R. 815 [hereinafter cited as "Bonds"].

connection between law and violence. He began to recognize what hitherto had been so obvious as to be unworthy of mention,[97] that legal interpretation takes place on a field of fear, pain and death.[98] Indeed, broadening his inquiry, he argued that the legal system — through its hierarchicalized division of labour and its role structures of judge, police, jailer and other enforcers — is a "pyramid of violence".[99] It operated to create encompassing *"conditions of effective domination",*[100] where suffering is routinized through an almost trouble-free "transmission of the engine of justice".[101] The result is not that law eliminates violence, rather it is that law normalizes, sanitizes and domesticates violence,[102] and attempts to monopolize it.

These insights of Cover are fundamental. They challenge, at its core, our tendency to deify the Rule of Law and our propensities self-indulgently bask in the sunshine of liberal pluralism, to bullshit on the beaches of jurisprudential reflection, while others experience law in action, even to the point of death. Cover's ruminations draw our attention to "the how of law", to the existential experiences of how jurisprudential rationalization shakes down in practice.

On one level, I agree with Cover that violence is a fundamental reality of law in modern society. Where we differ, however, is in our respective responses to this consciousness of the pervasiveness of legal violence. Not only does Cover acquiesce in the belief that violence is inevitable,[103] he actually goes so far as to think it is a good thing. Cover's fatalism becomes clear when he posits:

> If it seems a nasty thought that death and pain are at the centre of legal interpretation, so be it. . . . As long as pain and death are part of our political world, it is essential that they be at the centre of law. The alternative is truly unacceptable — that they be in our polity but outside the discipline of the *collective* decision rules and the individual efforts to achieve outcomes through those rules.[104]

The problem with this viewpoint is that, as I will suggest below, law is not the project of *collective* decisions, it is the project of certain elements. Law is more than a discipline, it is also viciously disciplinary. Moreover,

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97. "Violence and the Word" (1986), 95 Yale L.J. 1601, 1610, fn. 22 [hereinafter cited as "Word"].
98. *Ibid.* at 1629.
99. *Ibid.* at 1609.
100. *Ibid.* at 1616 (emphasis in original).
101. *Ibid.* at 1619.
102. Martha Minow, "Interpretating Rights: An Essay for Robert Cover" (1987), 96 Yale L.J. 1860, 1900 [hereinafter cited as "Rights"]. Professor Minow has suggested that my ensuing critique of cover is too harsh.
103. "The unseverable connection between legal interpretation and violence" Word at 1610.
104. Word at 1628 (emphasis in original).

Cover may have an unduly narrow vision of the role of the law in our polity for he cannot contemplate the possibility of de-centering the violence of law which, in turn, just might help to reduce the violence of the polity itself. Law, as I will suggest, is constitutive as well as reflective of the relations of social interaction.

The problem with Cover's position also runs deeper, premised, I think, on his vision of social interaction. He concludes his reflections as follows:

> In law to be an interpreter is to be a force, an actor who creates effects even through or in the face of violence. To stop short of suffering or imposing violence is to give law up to those who are willing to so act. The state is organized to overcome scruple and fear. Its officials will so act. All others are merely petitioners if they will not fight back."[105]

What we have in Cover's work is a late twentieth century rearticulation of the Hobbesian vision of the world. We remain in a state of nature. Law with its magisterial hierarchicalized violence, is the great leveller, and to have one's interests protected, one's vision developed, enforcement through the violence of law is the only way to achieve one's aspirations.

Still more disconcerting, is Cover's response to our present situation. Despite his acute awareness of the pervasiveness of violence both within the law, and beyond, he is disturbingly uncritical. Not only does he believe that "such a well-coordinated form of violence is an achievement"[106] he rejects the abolition of the death penalty,[107] and his consciousness of violence does little to help him empathize with those who are subject to this horrifying power:

> "If I have exhibited some sense of sympathy for the victims of this violence, it is misleading. Very often the balance of terror in this regard is just as I would want it."[108]

One wonders what black people, indigenous North Americans, other minority groups would say about this particular balance?[109] His analytical reason, it seems, refuses to tolerate either passion for, or empathy with, the humanity of his fellow human beings. Furthermore, for Cover, by and large, things are fine; to preserve what we have achieved, we have to continue as we have always done . . . the sacrificing must continue. If, as

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105. Bonds at 833.
106. Word at 1624.
107. Bonds at 831.
108. Word at 1608.
109. Consider, for example, the vastly disproportionate numbers of natives who make up the Canadian prison population. See Michael Jackson, *Locking up Natives* (1988). Or again, how about the documented racial discrimination in the application of the death penalty in the United States, "Supreme Court: Leading Cases" (1987), 101 Har. L. Rev. 149-159, and more generally, the racism of the American criminal process (1988), 101 Har. L. Rev. 1475-1671.

he suggests, "law is the projection of an imagined future upon reality"[110] the Coverian future is bleak: the continuation of a polity in which lives will continue to be "torn apart by these 'organized, social practices of violence' "[111] where "bodies [remain] on the line",[112] and where "death [is] at the heart of the Constitution".[113] The Coverian nomos is thanatical, our societal psychosis is to continue and the addiction to violence is to remain uncurtailed.

3. *Destabilizing The Assumption: The Potential of a Modernist Jurisprudence*

> "For the master's tools will never dismantle the master's house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change."
>
> Audrey Lorde[114]

The foregoing overview demonstrates that the belief in the inevitability of violence is a "taken for granted", an unquestioned and unquestionable assumption in the history of legal philosophy.[115] Such an essentialist premise has pervasive, systemic and deleterious ramifications. It structures jurisprudential inquiry so as to avoid the fundamental question of "why violence", and instead redirects the discourse towards the provision of justifications or legitimations for the continued existence of violence.

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110. *Word* at 1604.
111. *Ibid.* at 1601.
112. *Ibid.* at 1605.
113. Bonds at 827.

Martha Minow is not as pessimistic about Cover's work as I am. She suggests that "Cover's work changes the terms of discussion; we cannot go on the way we were going after we hear his words." (Rights, at 1863.) I suppose the discourse might change, although I doubt it, but on my reading, Cover had little intention of changing the polity. Insight is different than vision: his nomos is the continuation of "violent domination". (Word at 1604 and 1608.)

Minow also accepts that violence will be inevitable. She correctly points out that private bodies and persons frequently use violence, and that very often the only choice is between "private violence and public violence". (Rights at 1402.) Although it would be foolish to deny that there is ever a time when violence is always prohibited, I want to resist the potentially limiting connotations of Minow's position. I think she comes dangerously close to seeing power as having as its only variant, violence, whereas I want to suggest, below, that power can manifest itself in a variety of ways. Progressive scholars and activists should be careful not to be outflanked by an understanding of the world that deradicalizes their fundamental insights and potentials. Is the only possibility for dealing with oppression and domination, further domination?

114. *Sister Outsider* 111 (1984).
115. The critique also applies to left analyses of modern law. See in particular, my "On the Road to Radical Reform: A Critical Review of Unger's *Politics*" (1989), 28 Osgoode Hall L.J. (forthcoming).

I do not want the reader to misunderstand the purpose of this historical revision. It is not an argument that traditional jurists are nothing more than vulgar apologists for certain interests, although that may be the case in certain instances. Nor is it an argument that seeks to devalue the importance of their contributions to the question of "justice" and "authority". Emphatically, it is not an attempt to tar them all with the same brush, to ignore the vitally important differences between them. All of these differences, and more, are important and legitimate jurisprudential concerns.

But jurisprudence can neither expect nor demand closure. Contemporary wisdom cannot, and should not, delimit the contours of contemporary or future inquiry. Indeed, on the contrary, it is the responsibility of jurisprudence to critique and reflect upon conventionalism, for knowledge itself is power. Therefore, although all of our jurisprudential forefathers make explicit reference to the violence of law, in the main, it has been glossed over and peripheralized, rendered almost invisible by its assumedness. The result is jurisprudential complacency in, and worse, a reinforcement of, the banal nature of legal violence. It would, of course, be foolish to deny the reality of violence, but must jurisprudence take the further step and accept that it is an *inevitable* reality? Legal theory, as a critical discursive practice, can and should ask the prior question of whether legal violence is inescapable and ponder the possibility of whether we, as a community, could do better.

In raising this question of whether the connection between law and violence is necessary, I draw inspiration from what, roughly, may be described as modernism.[116] The opportunity provided by modernism is,

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116. Modernism, as a phenomenon, emerges from the interface between the aesthetic and the political. To attempt to provide a determinative definition of modernism would be impossible, indeed, anti-thetical to its significance, but one commentator suggests that some of its key themes include, but are not limited by,

> "an intense concern with the mediation of "content" by form; use of synchronous montage as an alternative to merely linear additive time; techniques of "de-familiarizing" the object-world; cultivation of paradox and ambiguity as opposed to monolithic notions of a single objective reality; and exploration of the fragmented and alienated experience of individuals in modern urban and industrial societies..."

Eugene Lunn, *Marxism and Modernism* 2 (1982). *See also* Marshall Berman, *All That Solid Melts Into Air* (1982); S. Spender, *The Struggle of the Modern* (1963); Jo Anna Isaac, *The Ruin of Representation and Modern Art and Texts* (1986). For discussions and examples of its impact on contemporary jurisprudence, *see e.g.* David Luban, "Legal Modernism" (1986), 84 Michigan L.Rev. and Roberto Mangabeira Unger, *Knowledge and Politics* (1975); *Passion: An Essay on Human Personality* (1984); *Politics* (1987); D. Cornell, "Towards a Modern/Postmodern Reconstruction of Ethics" (1985), 133 U.Pa.L.Rev. 295. For a further critical discussion of modernism, see my review essay of Unger's *Politics*, "On the Road to Radical Reform" 28 Osgoode Hall L.J. (forthcoming), and my "Towards An/other Legal Education" (1989), 12 U.N.B. L.J. (forthcoming).

as yet, unrealized, unimagined, unimaginable. One of the central themes of modernism is contingency, the awareness that essentialism is a fraud, with the therapeutic and emancipatory correlative consciousness that things could be different. It provides us with a unique opportunity to question the unquestioned assumptions that underpin social interaction and knowledge. As such, modernism helps to subvert what is, at bottom, a repressive " 'regime' of truth",[117] the disempowering discourse and ideology of necessitarianism.[118] By drawing on modernism's consciousness of contingency we can legitimately ask the fundamental question of whether violence is inevitable for social interaction. More specifically, a modernist jurisprudence queries whether law should be shackled in the dungeons of violence, or whether it can be re-imagined and transformed so as to challenge violence, to be an instrument of soccour rather than a mechanism of communal torture.

Furthermore, modernism allows us to de-reify law, to see it is an artifact, constructed by social actors and therefore capable of reconstruction by social actors.[119] It also allows us to inquire who these social actors are, why they understand law the way they do, and to problematize why their vision should be universalized as the essence of law. Modernism's critique of essentialism opens up new horizons for social interaction.

IV. *The Violence of Contemporary Legal Systems*

> *"Beware, my friend, of the signifier that would take you back to the authority of a signified!"*
>
> *Hélène Cixous*[120]

> *"The real political task in a society such as ours is to criticize the workings of institutions which appear to be both neutral and independent; to criticize and attack them in such a manner that the political violence which has always exercised itself obsurely through them will be unmasked, so that one can fight against them."*
>
> *Noam Chomsky & Michel Foucault*[121]

In this section, I shift the focus of attention from historical overview to contemporary analysis in order to demonstrate that, as heirs of this jurisprudential heritage, we too accept as normal and necessary the channelling of violence through law. To this end, two arguments are

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117. Michel Foucault *Power/Knowledge* 133 (1979).
118. Unger, *Politics* (1987).
119. *Ibid.*
120. "The Laugh of the Medusa" (1976), 4 Signs 875, 892.
121. Chomsky and Foucault, "Human Nature: Justice versus Power" in F. Elder, *Reflexive Water* 170 (1974).

developed: the first is an outline of what I describe as "interactional theory of law"; the second is a description of some of "the functions" which law fulfills within contemporary western liberal democratic society, and, more importantly, an analysis of the relationship between these "functions".[122]

1. *From Reification To Interactionalism*

Liberalism and traditional Marxism tend to have a rather technical conception of law, they treat it as an entity, they "either personalize or commodify" it. Liberalism, working on an assumption of consensus, portrays the law as a subject, the neutral arbiter and great leveler above and beyond the mass of social interaction.[123] Traditional Marxism, on the other hand, working on an assumption of conflict portrays law as an object, a malleable instrument in the hands of the ruling class for dominating the working class.[124] Both approaches not only over-simplify and are ideal typical, they also misunderstand and mischaracterize the nature of law. I suggest that we must "flick the switch", that we stop thinking of law as a thing — subject or object — that we recognize law as relational.

To better comprehend the nature and functions of law in contemporary society we must recognize that it is a complex, double-edged and deeply fissured condensation of social relations. Like society, the economy, state and ideology, law cannot be treated as a static monolith.[125] Law is not a thing, it is relational, part of the ensemble of social relations. It is a material condensation of social relations in so far as it is an aspect of human interaction where competing interpretations, attitudes and visions fuse, conflict, merge, coalesce and mutually modify each other and then reemerge as either rules, or in the guise of legal

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122. This section is a much abbreviated version of a significantly longer article, "Law's Centaur: A Preliminary Theoretical Inquiry into the Nature and Relations of Law, State and Violence" (1989), Osgoode Hall L.J. 220.

123. For a classic example of the assumption of consensus (with its built-in premise of sameness) at work see Dworkin's *Law's Empire* (1986), in which he portrays law as a neutral, if pluralist, subject capable of incorporating and accomodating a wealth of diverse social desires and interests. *See also,* Bruce Ackerman, *Reconstructing American Law* (1985).

For a critique of the assumption of consensus see Michael Mann, "The Social Cohesion of Liberal Democracy" (1970), 35 Am. Soc. Rev. 423.

124. *See e.g., Marx and Engels on Ireland* (1972); K. Marx, *The Civil War in France* (1870); *The German Ideology* (1845); V. Lenin, *The State and Revolution* (1976); F. Pearce, *Crimes of the Powerful* (1970).

125. *See generally* Antonio Gramsci, *Selections from Prison Notebooks* (Q. Hoare, G. Nowell Smith eds. 1971) [hereinafter cited as "S.P.N."]; Nicos Poulantzas, *Political Power and Social Classes* (1971) [hereinafter cited as P.P.S.C.], *State, Power and Socialism* (1979) [hereinafter cited as S.P.S.].

personnel (for example, a judge, police officer or arbitrator), or through an institution such as the courts. Law is one arena in which people choose (or perhaps more commonly are forced to choose) to attempt to fulfill their nature as social beings. An awareness of relationalism, in turn, emphasizes the importance of law's interactional texture.

This is not, however, a pluralist analysis of law which portrays it as a neutral arena which absorbs all relative viewpoints, digests them, evaluates them objectively and spits out a decision or announces a role which its functionaries are to fulfill. Such an approach incorporates a reified view of law. The relationships involved are much more internal than this pluralist vision. The people interacting are sentient persons who are in different social positions; some rich, some poor, some white, some black, some male, some female, some religious, some areligious, some educated some uneducated etc. These people express their interpretations, their desires, their fears and their visions through the law. Law itself must therefore be studied in terms of classes and class fractions, political parties and political cliques, gendered preferences and bureaucratic predelictions, pluriclassite and cultural movements and all their corresponding ideologies. Law is created by the interaction of all these social forces, and in turn helps create the way in which these social forces interact. Law is both created and creator.[126] It is a peculiar and particular response to human and social interraction, the reactive condensation of the fluid motion of human relationships. Moreover, as a powerful form of (ir)rationality in contemporary society, law is an active agency, one which provides frameworks, guidelines and direction for the structuring of human and social relations. Law, in the present politico-historical conjuncture, is a vital arena of social interaction; it is constitutive[127] as much as it is reactive.

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126. It is only by adopting this interactional approach that we can sufficiently comprehend the contradictory reality of law. As Edward Thompson argues: "I found that law did not keep politely to a level but was at every bloody level; it was imbricated within the mode of production and productive relations themselves (as property rights, definitions of agrarian practice) and it was simultaneously present in the philosophy of Locke; it intruded brusquely within alien categories, reappearing bewigged and gowned in the guise of ideology; it danced cotillion with religion, moralizing over the theatre at Tyburn; it was an arm of politics, politics was one of its arms; it was an academic discipline, subjected to the rigor of its own autonomous logic; it contributed to the definition of the self-identity both of rulers and ruled; above all it afforded an arena for class struggle, within which alternative notions of law were fought out." *Whigs and Hunters: The Origins of the Black Act* 288 (1977).

127. The term "constitutive" is simply another way of expressing the idea of an interactional theory of law. The term first emerges in Klare's excellent article, "Law-making as Praxis" (1979), 40 Telos 123, 128 and later in Tushnet's "Marxism as Metaphor" (1983), 68 Cornell L. Rev. 281, 285-87. For a favourable response see Alan Hunt, "The Theory of Critical Legal Studies" (1986), 6 Oxford Journal of Legal Studies, 37-43 where he pithily comments, "... law both constitutes and is constituted" at 38.

An important consequence of interactionalism is that the values inherent in law can no longer be viewed as transcendental, rising above factional partisanship. On the contrary, law becomes another aspect of social relations where partisanship expresses itself; law is not distinct from politics, but integral to politics.[128] Legal rules are an expression of individual's — perhaps mediated and encoded, but still incorrigible — subjective interests not objective, rational standards by which to evaluate society. Legal institutions are composed of human beings who have irrepressible social contexts and thus have individual backgrounds, attitudes, values and aspirations which infiltrate and orient those institutions in certain directions rather than others. Put briefly, modernism's legacy of contingency, indeterminacy, relativism, and subjectivity provides the manifestly unstable foundation for contemporary legal rules and legal institutions. Viewed from the perspective of interactionalism, "legality" is a politico-cultural construct, and the ideal of the Rule of Law must, therefore, be rendered vulnerable to critical appraisal.

2. *Legal Constitutivism*

The point of interactionalism is to demonstrate that modern law reacts to a plethora of competing social forces, although by no means equally, while at the same time structuring and moulding, to a significant degree, the form and substance of contemporary social reality itself. Law fulfills this constitutive role in a variety of ways, what I describe as its "ideological", "facilitative" and "violent" functions.[129]

(i). *Ideological Role of Law*

Law fulfills an ideological function insofar as it acts as a cohesive factor in structuring current social relations. Put differently, law in modern society fulfills a "directive" function in that it attempts to educate, instruct and adapt much of the population to the norms on the vision of those

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128. Joseph Singer, "The Player and the Cards: Nihilism and Legal Theory" (1984), 94 Yale L.J. 1; Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (1986). See also R.F. Devlin "Ventriloquism and the Verbal Icon" (1988), 26 Osgoode Hall L.J. 1.

129. To avoid misunderstanding, I want to make it clear that to use the word "function" does not mean that I accept or employ the methodology, assumptions or preferences of "functionalism", with its tendency to reduce complexity to tidy coherence. Indeed, as my discussion of legal violence will indicate, it is because of law's "disfunctional" propensities that violence is important. "Function" is used descriptively, not as a term of art.

The breakdown, in part, draws upon the work of K. Klare, "Praxis", *supra* note 127 and M. Tushnet, "Perspectives on the Development of American Law" (1977), Wisconsin L.R. 81.

who have power in society. In this regard, law as ideology is formative. Its purpose is to achieve an acceptable level of consensus and to create sufficient stability in order that existing social relations may continue. To adopt the discourse of Antonio Gramsci, law as ideology aspires to generate "spontaneous consent" and "the will to conform", attitudes that indicate that some social group has attained a condition of hegemony.[130]

A great deal of progressive scholarship has developed over the last decade or so emphasizing the ideological role which law fulfills. In particular, despite their differences, this has been the central focus of concern for both critical legal scholars and feminists.[131] By decoding and reinterpreting the ideological significance of post-industrial, patriachal law such scholarship has exorcised the phantasm of legal neutrality, and highlighted the various and ingenious ways in which cohesiveness has been achieved at the price of marginalization, exclusion and inequality. Moreover, the critique has emphasized the "put togetherness" of law, de-reifying it to identify that it is not law that creates society, but just the reverse, that is, it is particular people who create law to regulate their own social relations. The ideological critique reinforces our awareness of law's artifactual quality.

However, while the discovery of the ideological significance of law as a cohesive factor is vital, it is important not to over-emphasize this approach. It is only one of at least three functions which modern law fulfills in the present politico-historical conjuncture. One exclusionary paradigm should not be replaced with another.

(ii) *The Facilitative Role of Law*

A second manner in which law contributes in a vital way to the maintenance and continuation of post-industrial, patriarchal social relations can be characterized as facilitative. In one sense, all law which fulfils a cohesive function can be said to be facilitative in that, by smoothing out contradications, it makes easier the continuation of modern society. Facilitative, in the sense used here, is narrower because it deals with those aspects of legal relations which more directly pertain to the economic side of human interaction, dovetailing with what Lon Fuller used to describe as law's "channelling" function. For example,

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130. Gramsci, *S.P.N., supra* note 125 at 195.

131. See the bibliographies collected by Duncan Kennedy and Karl Klare (1984), 94 Yale L.J. 461, Fran Olsen and Mary Joe Frug, "Bibliography of Feminist Legal Scholarship" (unpublished 3/23/87); Susan Boyd and Elizabeth Sheey, "Bibliography, Canadian Feminist Perspectives on Law" (March 1986).

facilitative laws are those such as property law, company law, trusts, etc.[132]

The facilitative role of law, like the ideological role, is oriented towards the attainment of a hegemonic condition. It can be characterized as:

> "A set of rules which organizes capitalist exchange and provides a real framework of cohesion in which commercial encounters can take place".[133]

But again we must be careful. Facilitative law, while a veritable "ace" in the deck of legal legitimization can also be a "joker" insofar as the state, through law, has adopted an increasingly interventionist role in the structuring of the economy. Inevitably, such involvement operates to the advantage and disadvantage of different social groups, once again indicating the absence of neutrality, and the centrality of power(lessness) in legal relations. Thus facilitative law is itself structurally insecure. While being vitally cohesive, it is also incorrigibly destabilizing, rendering the attainment of hegemony that much more elusive.

(iii) *The Violent Role of Law*

Traditionally, in reference to this function, jurists adopt a usually more amorphous, or perhaps euphemistic, term such as "compulsive",[134] "coercive"[135] or "repressive".[136] I think a more precise, immediate — and perhaps disturbing — analysis can be developed on the basis of the term "violence", which I use in the narrow, direct sense of physical injury or harm.[137] Lest there be confusion about my proposition, I want to be explicit. The connection between law and violence is not simply descriptive of the law in action, it is an endemic feature of modern law, a direct consequence of what I call "the imperative of the preservation of

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132. It is crucial to bear in mind, however, that the categorization is somewhat arbitrary, and that it is possible to consider this facilitative function as a subfunction of the ideological role of law, if ideology is taken to express itself in material forms through social relations, as I have argued elsewhere. See *supra* note 122. The reason for dealing with facilitative law as a distinct category is that its origins lie in, and have greatest impact upon, relations between various factions of the bourgeoisie. Essentially, facilitative law is intraclass, although due to the pervasiveness of law, it also has important effects on interclass relations.
133. Poulantzas, P.P.S.C., *supra* note 125 at 53.
134. See generally Part III. of this essay.
135. *Ibid.*
136. Tushnet and Klare, *supra* note 127.
137. I am fully conscious that "violence" can be defined in a variety of different ways, definitions that usually correlate with particular political preferences. I adopt this very narrow interpretation, because if I am right on the basis of this approach, the wider the definition the more expansive the indictment of modern law. See generally my "Law's Centaur . . .", *supra* note 122 at footnotes 138 and 139 for a lengthy discussion of the ideological significance of competing interpretations of "violence".

stability". Existing society seeks to preserve itself in its established, known form; those groups who benefit from a particular configuration of social relations strive to preserve that situation. The State, as a material condensation of those social relations, also functions to preserve the status quo; specifically, through its cohesive role. But the contradictions are too great, and since modern society is in continual flux, groups desiring social change continually emerge. When their demands become too loud, when they refuse to comply with or acquiesce in, or when they challenge and criticize the status quo, "accommodation" is replaced by coercion. Law is a vital part of these social relations. Through its ideological and facilitative roles, law strives to attain the hegemonic condition. However, "contradictory consciousness", an awareness of exploitation, domination and inequality, continually breaks through and consensus weakens.

There may be widespread respect for the Rule of Law in western liberal democratic society, but at the same time there is also an awareness of inequality, unfairness and injustice, an awareness that often manifests itself as non-compliance with, disregard for, or resistance to the legally enforced order. Such resistance, such insubordination, in and of itself challenges the hierarchy and authority structures of contemporary society and is interpreted as a threat to the social order. Law plays a crucial role in terminating this perceived threat. As Colin Sumner points out, ". . . the legal system is first and foremost a means of exercising political control".[138]

The political control of "deviants" through law operates on two levels. First, their undisciplined conduct is set against a backdrop of threats to law and order, caricatured as the thin edge of the wedge of social disintegration and chaos. The capacity of law to perform this ideological feat of reinterpretation, in turn, represents law as the community's salvation, thereby sanctifying legal violence as the only available, and legitimate, resolution of the problem. Put differently, by shifting the focus from the reasons for non-compliance to a discourse of "respect", "security", "enforcement", "compliance" and "criminality" we indirectly legitimize the violence that is used against those who fail to comply. Enforcement — read violence — is the second level, and, in the main, is not seen as problematic because, filtered through the legal structures, it is no longer violence, it is law. Viewed from the bottom, however, it is both.

This is not instrumentalism. It is not law as a tool in the hands of the bourgeoisie; rather it is law, the people, the principles and the rules as part of the process of human interaction. The people who make and enforce the rules are social beings who have a position in the flux of human

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138. *Reading Ideologies* 277 (1979).

interrelations. They see their society threatened by deviant and disruptive elements: the poor, native people or blacks, the lazy, the spongers, the gays, the AIDS carriers, the anarchists or the commies. Even women. They perceive a cloud of chaos shadowing their lives; they detect alternative possibilities that simply do not fit with their preferences for certainty, stability and normalcy. Contrary to some instrumentalist critiques, their motivations do not arise out of a bad faith, or conscious bias, but rather out of fear. It is not a great conspiracy that leads to the resort to legal violence, rather it is people living their lives in accordance with their ideology, their sense of reality, who see their world menaced.[139] They will fight to preserve that world, that reality. The imperative of the preservation of stability means that violence is as endemic to modern law as either ideology or facilitation.

(iv) *The Genius of Law*

I hope that, by now, I have said enough to refute the counter-positioning of law and violence and to demonstrate both the reality and pervasiveness of legal violence in contemporary western liberal-democratic society. Though useful, my argument does not make sufficient progress on either a theoretical or practical level. I have not said enough about the relationship *between* the various legal functions. Specifically, my argument has a fundamental weakness, it indulges in dichotomization. It works on the premise of the couplet "consent or coercion", an approach which is, I think, inadequate for a project that hopes to re-vision law. The relationship between law as ideology (which also includes the facilitative role of law) and law as violence cannot be grasped simply by their mere conjuction or addition. In brief, an analysis which only goes as far as to argue that law can be either ideological or violent, or ideological and violent does not do enough for an agenda that aspires to be transformative.

Although such an argument is moving in the correct direction, it is problematic. The implicit methodology looks at the quantity (extent) of hegemonic leadership or ideological pre-eminance, and quantity (extent) of coercion or violence. It implies that the greater the violence, the less

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139. Several sociological-psychological studies of police attitudes indicate that they see themselves as the last line of defence against chaos, the thin blue line in a hostile environment. *See, e.g.,* W.A. Westley, *Violence and Police* (1970); J.Q. Wilson, *Varieties of Police Behaviour,* (1968); S. Holdaway, *Inside the British Police,* (1983); P.K. Manning, *Police Work,* (1977). See also C.J. Vick, "Explaining Police Pessimism, R.C. Adam, "The Police Personality", both in D.W. Pope and N.L. Weiner, *Modern Policing,* (1981); and P. Gorman and A. Coleman, "Conservatism, Dogmatism and Authoritarianism in British Police Officers" (1982), 16 Sociology; M. Brogden, *Police, Autonomy and Consent,* (1982).

the spontaneous consent, suggesting, in turn, that the two are variables which mutually adjust in automatic response. It is a zero-sum, hydraulic-piston approach; as one increases, the other automatically decreases. This approach fails, in my opinion, to capture the pathological genius of law.

Law does many things in modern society: it creates a world which obscures the harshness of social relations and legitimates oppression. It diffuses potential dissent and creates an acceptable level of exploitation. It even provides real benefits for most members of society, even though these do not accrue anything like equally. Law, by removing some of the excesses of exploitation, by mediating the disadvantages of current society, contributes, in the long run, to the continuance of the inherent inequality since it smooths out the jagged edges, and encourages acquiescence. Yet its genius lies in none of these. Law's genius lies in its ability to make two acts, which are essentially the same, politically different. Law makes legal violence legitimate, and illegal violence illegitimate; violence which is legal becomes acceptable in the popular psyche, even when used against those who's dissent is peaceful. Ideology is inherently incapable of transcending the factors of disequilibrium in a post-industrial, patriarchal society; instability will surface, and "when in doubt" those who have been threatened by social instability will "lash out". Legal relations are carried out by such people. Law has a very human face with very human instincts. Law is people in action, but more important, it is legal people in action, thus its action appears to be legitimate. The genius of law stems from its capacity for legal and legitimate violence. Legal violence and legal ideology co-exist in a permanent, threatening, mutually reinforcing unity, for "repression never comes unpackaged".[140]

There is another way in which we can understand the nature of the relationship between violence and ideology. Althusser and Poulantzas have drawn an important distinction between that which is dominant and that which is determinative.[141] Dominant can be understood as a quantative concept, while determinative can be understood as a qualitative concept. "Dominance" suggests that certain factors or concepts stand out as being the most significant criteria. When this is applied to law, the most significant (dominant) thing about it, is its claim to legitimacy. Law is, within current social relations, a major arbiter of the limits of acceptability. This is what makes law so effective in liberal democratic society and gives importance to juridico-political ideology.

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140. Miller and Fine, *Policing the Miners Strike* 10 (1986).
141. Althusser, "On Contradiction and Overdetermination" in *For Marx* (1976) and Poulantzas S.P.S. *supra* note 125 at 79.

However, this dominance of the ideologial aspect of law is not immune from social relations; on the contrary, law as ideology is dominant only because of the nature of current social relations. The analysis I have offered of these relations is that they are overdetermined by (they have as their fundamental priority) the imperative to maintain the current social order. I have suggested, however, that such societies are in a rapid state of flux, and that this had fostered dissent, dissatisfaction, non-compliance and protest. The priority for law is to preserve stability and when confronted with difference, discordance and heterodoxy, this imperative can be achieved only through resort to coercion and violence. Violence is the determinative aspect of law.

Legal violence is continually present; it is the foundation upon which social relations are built in a post-industrial, patriarchal social formation. As Poulantzas suggests:

> State monopolized physical violence permanently underlies the techniques of power and mechanisms of consent; it is inscribed in the web of disciplinary and ideological devices; and even when not directly exercised, it shapes the materiality of the social body upon which domination is brought to bear.[142]

Law is that moment, that specific set of social relations which has as its distinctive feature the capacity for supreme, yet legitimate, overt violence. Modern law has failed us as a community because its response to humankind's fundamental dilemma — the antinomies of mutual longing and mutual jeopardy, mutual need and mutual fear[143] — has not been through the transcendence of repression, or the acceptance of "otherness", but rather through the rationalization, institutionalization and constitutionalization of violence. The result is dialectic of hegemony and violence which can be devastating — even deadly — to those who are at the bottom.

V. *A Synopsis*

> "The stabilization of a social world requires the spiritualization of violence."
>
> Roberto Mangabeira Unger[144]

In this first part of "Nomos and Thanatos" I have attempted, by the means of several interpretive techniques, to critically adumbrate the nexus between law and violence. The narratives reported in the "Celtic Triptych" indicate two theses of this essay. First, that there is no single,

142. Poulantzas *ibid* at 81.
143. See Roberto Unger, *Passion: An Essay on Personality* (1984).
144. *False Necessity* 398 (1987).

categorically privileged or true interpretation of the significance, purpose or effect of law. One's context determines one's reality. A second thesis is that, traditionally, the view from the bottom has been excluded from the jurisprudential conversation, silenced by those who are the gatekeepers of discursive hegemony.

With this perspective in mind, I shifted the focus to a jurisprudential archaeological dig that revealed a common link between all of our jurisprudential forefathers: an essentialist belief in the inevitability of law as constituted by violence. This is the third thesis of the essay. A fourth thesis is that despite their significant differences, to a man each of these jurists either submerged the connection between law and violence, or assumed it to be unproblematic. The political significance of this tolerance and legitimation of violence impacts upon us all. Consider for example, the ease with which those of us who have been trained as lawyers use the phrase "no force or effect". Note which word comes first, reflect upon the assumption that we buy into through an uncritical and unquestioning acceptance of such a prioritization. Is it inevitable that the effect of law is dependent upon its force? Phrases such as this, I suggest, are legalized doublespeak, indicating the extent to which we have accepted the discursive normalization of violence, highlighting our complicity in the perpetuation of domination and subordination. This is a fifth thesis.

Having unmasked the tendency of male-stream jurisprudence to desensitize us to the violence of law, I turned to a brief analysis of the nature and functions of contemporary law. The sixth thesis posited that theory and practice — for once — unite, and that modern legal systems do, in reality, have as their determinative criterion their ideological monopoly of violence. Essentialism, it would seem, has won out.

However, the great strength of critique is that if you push it far enough, it will eventually begin to suggest angles for reconstruction. By unpacking the taken for granted assumption that law is premised upon violence, the final section,with its emphasis on the interactional significance of human agency, began to suggest that perhaps the reason for this presupposition is to be located in anxiety and fear. In particular, it hinted that perhaps the reason why we so readily accept the banality of legal violence is because we assume that the relationships we have with each other are basically predatory. I want to suggest that such a perspective upon human relations is itself constructed upon an assumed theory of human nature, one that envisions a sharp demarcation of the "self" and the "other". If, however, we did not automatically accept such a vision of social interaction, if we could conceive of the relationship of self and other as being one of interdependence and interconnection rather than antinomy,

then perhaps our envisaged legal regime — as a regulatory mechanism of social interaction — would not necessarily be constructed on the constitutionalization of violence. These are the concerns addressed in the cautious reconstructive sequal of "Nomos and Thanatos: Feminism as Jurisgenerative Transformation, or Resistance Through Partial Incorporation?".

Footnote 12 continued from page 301

important to point out that I am not working on an assumption of consensus, that we all share the same interpretive community. The community to which this paper is directed is a particular community, a progressive community, and as such is only one of many potential communities which co-exist, although not necessarily in conditions of equality.) or "dialogic" (Allan C. Hutchinson, *Dwelling on the Threshold: Critical Essays in Modern Legal Thinking* (1987)) community. In the last decade or so, feminism has been slowly beginning to articulate a new language, one which gives voice to women's experiences, perspectives and aspirations. This is the voice of "the other", the disempowered, the silenced. It is also a vibrant voice which, although still marginal and constrained, has already begun to demand and describe an alternative conception of social interaction, one based on greater interconnectedness and receptivity. This perspective understands discourse to be oriented towards a mutual understanding of needs and desires. This language does not presuppose *a priori* right answers or essential truths, it is open and polyvocal. (Toril Moi, *Sexual/Textual Politics* 68 (1986)). It is to this dialogic community that this paper is oriented.

Moreover, I have tried very hard to avoid imperial scholarship (Richard Delgado, "The Imperial Scholar: Reflections on a Review of Civil Rights Literature" (1984), 132 U. Pa. L. Rev. 561). Professor Delgado points out the very real dangers of imperial scholarship as "factual ignorance or naivete, ... failure of empathy, and inability to share values, desires and perspectives of the population whose rights are under consideration ... " (at 568) and further proceeds to

> "... compile an *a priori* list of reasons why we might look with concern on a situation in which the scholarship about group A is written by members of group B. First, members of group B may be ineffective advocates of the rights and interests of persons in group A. They may lack information; more important, perhaps, they may lack passion, or that passion may be misdirected. B's scholarship may tend to be sentimental, diffusing passion in useless directions, or wasting time on unproductive breast-beating. Second, while the B's might advocate effectively, they might advocate the wrong things. Their agenda may differ from that of the A's, they may pull their punches with respect to remedies, especially where remedying A's situation entails uncomfortable consequences for B. Despite the best of intentions, B's may have stereotypes embedded deep in their psyches that distort their thinking, causing them to balance interests in ways inimical to A's. Finally, domination by members of group B may paralyze members of group A, causing the A's to forget how to flex their legal muscles for themselves." (p. 567).

Luce Irigaray makes a similar point:

> "I will never be in a man's place, a man will never be in mine. Whatever the possible identifications, one will never exactly occupy the place of the other — they are irreducible the one to the other."

Cited in Martha Minow, "Supreme Court 1986 Term, Forward: Justice Engendered" (1987), 101 Harvard L. Rev. 10, 45 [hereinafter cited as "Justice Engendered"].

I do not intend to speak for women or in the name of women, rather I seek to speak with women. It is unclear to me whether it is ever possible for a biological male to be a feminist, (For discussions *Men in Feminism*, A. Jardine & P. Smith eds. (1987); R.W. Connell, *Gender and Power* (1987), Introduction; K. Lahey, "Until Women Themselves Have Told All That They Have To Tell" (1985), 23 Osgoode Hall L. J. 519, 520. See also A. Miles, M. O'Brien, and P. Hughes in *Feminism in Canada: From Pressure to Politics* 213, 251 and 296 (A. Miles & G. Finn eds. 1982), [hereinafter cited as *Feminism in Canada*] but it is at least my aspiration that males can be pro-feminist in so far as they sincerely believe in and give support to feminist visions and projects for a reconstructed, post-patriarchal world. Thus, perhaps a pro-feminist can participate in discourse. Consequently, my thoughts are not authoritarian accusations of wrong and right; they are an attempt to continue dialogue, to ask appropriate questions, to petition for critical self reflection and, therefore, to sustain the dynamic quest of continually opening up new emancipatory horizons and for actually beginning to transform the nature of social interaction. The paper rejects dogma and pursues engaged and committed discourse.