



2002

## Law's Constitution: A Relational Critique

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Georgetown Public Law and Legal Theory Research Paper No. 13-036

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17 *Wis. Women's L.J.* 23-56 (2002)

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## LAW'S CONSTITUTION: A RELATIONAL CRITIQUE

Victoria F. Nourse\*

It is a simple fact: we begin from others. Without others we, quite literally, could not live, feel, be born. Every mother, every mother's partner, every father, every child, knows this. But law sees these relations as something lesser, as foreign. Mention the word "relationship" to the average lawyer and she will likely assume that you are talking about sex, dating, or perhaps marriage. She may even wonder what "relationship" has to do with the law at all.<sup>1</sup>

In this paper, I wonder whether it is possible to flip that equation, *to think of the relational as central, rather than peripheral*, to law's most ambitious public projects. My hypothesis is two-fold: first, that the relational question is known by, and important to, feminism; and, second, that the relational is important beyond feminism, indeed that it is important to our ideas of constitution and law itself. If this is right, then focusing on relationships is far from the marginal project that it is often assumed to be. Indeed, it may allow feminism to predict new ways of seeing law. I cannot prove any or all of that here; all I can do is offer examples from my own legal experience<sup>2</sup> – in criminal law and constitutional law – that show what I will call (for lack of a better term) the "relational critique." What I mean by this is two things: (1)

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\* Victoria F. Nourse, Professor of Law, University of Wisconsin Law School. Special thanks to Jane Larson, K.T. Albiston, and Tonya Brito for their comments on this paper and to Mary Becker for her important and inspiring work. Neither this paper, nor this conference, would have been possible without the hard work and enthusiasm of many, but most notably, that of Tonya Brito. Finally, my thanks to the editors of the *Wisconsin Women's Law Journal* for their patience and to Sarah Ivory for her excellent research assistance.

1. Intimacy goes by the legal name of privacy and, if considered governable at all, is left to the purportedly lesser disciplines. Law tends to reproduce this idea in its classifications of legal knowledge, making "family law" seem less important than "constitutional law" for example, even though it is likely that no state could exist without the family. See MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 23-24 (1995) (criticizing the scholarly tendency that tends to treat "those relationships conceptually contained in the private sphere [as] receiving little sustained critical attention except as they relate to the public domain."). It is even complained that these kind of relations (known again as "family law") are relegated to the lesser within feminist theory. *Id.* at 23 ("[T]he family has been only marginally evident in legal theory or jurisprudence, including feminist legal theory.")

2. Because I gather very disparate examples, I unfortunately find myself citing to my own work more than I would like. The arguments I set forth below about constitutional structure and criminal law are unconventional within their own disciplines and, therefore, I feel compelled to point the reader to the other materials for a full sense of the argument in each case.

that many of the concepts that we see in law, that seem mundane, natural or given, stand as proxies for normative relations; (2) that by disaggregating the natural object – by seeing relations in naturalized descriptions – we can see the law creating/generating/constituting. Put another way, this paper is about thinking relationally – I am wondering whether it is possible or wise to substitute the “relational” question for the “sameness” question or the “difference” question – not only in cases of concern to feminists but cases elsewhere in the law.

The examples that follow are ones of public law, but they do not seem, at first, to be that. I study the everyday within the law; indeed, I study ideas that seem so mundane and natural that they don't seem legal at all – ideas like passion and time and blood. Real life, and reading hundreds of cases, have taught me that the natural in the law is quite unnatural, quite “made” in the image of human relations, and that this is not simply a theoretical trope, that this “madness” is quite real and demonstrable. Perhaps more importantly, it has convinced me that no theory of law can be complete without accounting for law's constitutive/creative aspects.<sup>3</sup> It is in this sense that the “relational move” should be understood – as a way of disaggregating the natural and, in the process, showing us law's generativity, its natality.<sup>4</sup> To borrow a phrase, it is an attempt to “uncover the laws of motion of a system” that seems to find inferiority and oppression in nature.<sup>5</sup>

I recognize, of course, that the relational and the constitutive (terms I use throughout this paper) have larger meanings within the law and legal scholarship. Each bears scholarly connotations, some of which I readily accept and others I just as readily reject.<sup>6</sup> Relational concepts are at least as conventional as Madison and Hohfeld and Black,<sup>7</sup> as feminist as West and Becker and MacKinnon,<sup>8</sup> as historical

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3. For a discussion of the meaning of “constitutive,” see *infra* note 10.

4. Feminism cannot accept, in my view, the traditional positivist model of law as command or some less apparently forceful pedigree view of that idea. Instead, it must have a notion of law that it is at least partially constitutive, constitutive in the following sense – that law creates relationships both within legal rules themselves and in the world. Note that I am not arguing for a view of law that is only constitutive, but for one that is at least partly constitutive.

5. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 241 (1989).

6. For example, relational contracting is defined, as I understand it, as a long-term ongoing relationship. My concept of relational does not depend upon temporality or the longevity of the relationship. See Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, AM. SOC. REV. 28 (1963) (studying the ways in which long-term relationships affect our understanding of real life contracting); see also Elizabeth Mertz, *An Afterword: Tapping the Promise of Relational Contract Theory – ‘Real’ Legal Language and a New Legal Realism*, 94 NW. U. L. REV. 909 (2000).

7. THE FEDERALIST NOS. 47-51 (James Madison) (assuming and describing the political relations at stake in constructing a government); Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) (disaggregating rights into an elaborate set of relations of opposites and correlatives); CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969) (using the relational to describe the structural features of our constitution).

and social as Hurst and Gordon and Macaulay.<sup>9</sup> The constitutive finds homes in disciplines as widely disparate as philosophy, feminist theory, critical legal studies, social theory and legal history.<sup>10</sup> But this, to me, is the beauty of the project, as well as its risk. The risk is of course that I will be taken to mean something other than what I am saying;

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8. Mary Becker, *Patriarchy and Feminism: Toward a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21 (relying on the patriarchal relation of men to each other as a springboard for a substantive theory of feminism); MACKINNON, *supra* note 5, at 100 ("Power is a social relation."); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 4 (1988) ("But the gap between legal theory's descriptions of human nature and women's true nature also presents a *conceptual* obstacle to the development of feminist jurisprudence: jurisprudence must be about the relationship of human beings to law . . .") (emphasis in original).

9. JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM: IN THE NINETEENTH-CENTURY UNITED STATES* (1956) (opening this set of lectures with the "mutual assistance" arrangement entered into by Wisconsin settlers as a reflection of working principles of the everyday legal order and considering, at various points, the nature and closeness of mutual relations in assessing the law's impact); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 103 (1984) ("[I]n practice, it is just about impossible to describe any set of 'basic' social practices without describing the legal relations among the people involved. . ."); Macaulay, *supra* note 6.

10. The idea of the "constitutive" arises in the philosophical literature, JOHN R. SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* 33 (1969) ("constitutive rules do not merely regulate, they create or define new forms of behavior"), and more recently in social theory, see ANTHONY GIDDENS, *THE CONSTITUTION OF SOCIETY: OUTLINE OF THE THEORY OF STRUCTURATION* 18 (1984) ("[r]ules relate on the one hand to the constitution of meaning, and on the other to the sanctioning of modes of social conduct"). Within legal circles, there appear many meanings. For example, there is an ongoing debate within jurisprudence about the meaning of constitutive rules. See JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 108-111 (1990) (disputing Searle's notion that constitutive rules are really distinct from regulative rules). At the same time, the constitutive has been an important part of critical movements, such as critical legal studies, feminism and, more generally, the law and society movement. Gordon, *supra* note 9, at 106 ("Understanding the constitutive role of law in social relationships is often crucial not only in characterizing societies but in accounting for major social change."); ARTHUR McEVoy, *THE FISHERMAN'S PROBLEM: ECOLOGY AND LAW IN THE CALIFORNIA FISHERIES, 1850-1980* 13-14 (1986) ("People not only exist as part of their natural environment but also comprehend that environment in socially and historically contingent ways. In turn, by acting on the basis of that comprehension in a responsive environment, they help create the world in their own image."); see also Austin Sarat & Thomas R. Kearns, *Editorial Introduction*, in *LAW IN EVERYDAY LIFE* 10-11 (Austin Sarat & Thomas R. Kearns eds., 1993) (contrasting and seeking to reconcile "instrumentalist" and "constitutive" views of law in everyday life); John Brigham, *The Constitution of Interests, Institutionalism, CLS, and New Approaches to Sociological Studies*, 10 YALE J.L. & HUMAN. 421 (1998). Meanwhile, conventional constitutional scholars regularly write of the document as "constitutive." See Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1235 (1995). Perhaps some of this is now converging: recently, Julie Nice has provided an important addition to this scholarship by urging a co-constitutive approach toward equal protection law, a stance that brings law and society scholarship to bear on a traditional constitutional topic. See, e.g., Julie A. Nice, *Equal Protection's Antinomies and the Promise of a Co-Constitutive Approach*, 85 CORNELL L. REV. 1392, 1393 (2000) (arguing that a "co-constitutive approach transcends equal protection's antinomic discourse").

that I will be assigned to a camp from which I do not hail (I devote Part III to some potential misunderstandings). But the beauty is that the relational may well offer connections between different viewpoints in ways that are potentially fruitful or interesting.<sup>11</sup>

I do not aim to locate the relational in a given tradition (other than one that is broadly realist).<sup>12</sup> Instead, I am trying to take a concept feminism has revealed to me, indeed, that is necessary to my feminism and see whether it might reach beyond feminism's traditional borders. I hope it has something to say about how pain and suffering and oppression are thought, how good men and women can live in a world where hate and oppression are part of the natural order of things. What follows has profited enormously from the work of my colleagues (Wisconsinites present and past);<sup>13</sup> however, any mistakes or pretensions are my own. This is but my mosaic, based on my experience. It is an investigation in the mechanics of law's creation – in how time, blood and passion can, when found in the law, come to be so very unnatural.

In the first part of this paper, I set forth the context in which the relational has emerged in feminism and how I understand the more general notion of the "relational" in this paper. In the second part, I examine three different issues that reveal a similar dynamic – one dealing with self-defense law, the other with the law of honor de-

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11. For example, my subject matter – the study of doctrine – is quite conventional and yet I am using tools and ideas borrowed from various unconventional places. I take the rules seriously, if you will, but with an altered angle of vision. For those who find contradiction in this, let me just say that a theory of law is not a theory of law application and that it is possible to believe quite consistently that there are rules but that they are not self-applying. That the law is not fully autonomous does not mean that law does not, as a practice, have its own conventions and vocabularies, its own practice. Indeed, we have spilled too much ink debating this as an either/or proposition; in this sense, realism and positivism have always needed each other. The important point is not that they do, but how they do.

12. Realism connotes many different legal positions. See Victoria F. Nourse, *Making Constitutional Doctrine in a Realist Age*, 145 U. PA. L. REV. 1401, 1403 n.6 (1997) [hereinafter Nourse, *Constitutional*]. I confess a certain partiality to the empirical philosophy of John Dewey and the history of Willard Hurst and a certain distaste for modern summaries of the realist project. What follows focuses on what I call the relational strain of realism, not one that has been emphasized much in conventional accounts, even by those who both admire realism and emphasize relations. See MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990) (emphasizing realism and noting some of its relational components but giving a rather broad, modern, account of realism). See e.g., Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 827 (1935) (quoting with approval a discussion of the "neo-realistic" approach which departs "entirely from the subject-predicate form of logic, and employ[s] a logic of relations. . . . Instead of treating a legal concept as a substance which in its nature necessarily contains certain inherent properties").

13. I make reference here, in particular, to the work of Stewart Macaulay, Jane Larson, Beth Mertz, Art McEvoy, Bob Gordon and, of course, Willard Hurst. I am particularly thankful to Jane Larson for providing helpful assistance on the question of the constitutive in the law and society movement.

fenses, and finally, an ancient controversy about the sterilization of habitual criminals. In each case, I seek to demonstrate that the standard arguments turn on ideas of the “natural” – whether time, passion or blood – and that these arguments take on new meaning if we come to see the “natural” as a proxy for normative relations. Only then can we begin to see how the law “constitutes” itself, how it may change even while appearing to stay the same. In the final part, I suggest some avenues of inquiry should my hypothesis prove accurate in other venues.

### I. IDENTITY AND RELATION IN FEMINISM: THE CONTEXT

Feminism has, for much of the past twenty years, struggled with questions of identity. Who are we? Who should we be? Are we different? Are we the same? Or, so, goes the refrain. The debates about sameness and difference, subordination and caring, have exacted a toll. Internecine warfare has left theory lurching toward the incomprehensible and the practice and politics (real life politics that is) all but completely neglected. The inevitable recourse to identity has always seemed to me to be something of a diversion; by this, I do not mean that identity is not important as an intellectual matter. Our understanding of ourselves as agents in the world, as something other than what people have defined us as, is essential to imagining justice and political action on behalf of women.<sup>14</sup>

And, yet, by focusing on concepts of identity, the argument has a tendency to spiral inward, to invite crude caricatures, to focus us on our attributes rather than our actions, ourselves rather than our relations with others (men, women or children).<sup>15</sup> Indeed, the identity debates have seemed to occlude the rather straightforward possibility that we are both “the same” and “different;” and, more importantly, that this “sameness-and-difference” depends upon the relations in which we stand. We are mothers and workers, we are students and teachers, we are both inferior and equal, oppressed and emancipated, in different ways at different times, dynamically and secretly and so openly that no one cares.<sup>16</sup> In my view – and this indeed is the point

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14. This should not be taken as a claim that individuality is unimportant. It is simply that I believe, as Hannah Arendt once said, that there is a difference between the “who” of identity and the “what” of identity. The “what” of identity finds identity residing in qualities and thus invites both reduction and oppression. The “who” arrives in the midst of life’s conditions, which are the conditions of activities with other people, and, in my view, anticipates the possibility of emancipation (the ability to “begin anew” as Arendt would put it). HANNAH ARENDT, *THE HUMAN CONDITION* 179, 181 (1958); on this topic, see JULIA KRISTEVA, *HANNAH ARENDT* 171-74 (2001).

15. There is always the danger that our primary aim in focusing on ourselves, willed or unconscious, is simply to reproduce our own particular likeness. This is what I take to be the core of the essentialism critique.

16. This kind of insight is hardly new. It appears in a broad variety of work. See, e.g., LINDA K. KERBER, *NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP* 310 (1998) (“[I]n [the] Anglo-American legal tradition,

of the paper – the descriptive question of identity (whether our labels correspond with reality) is less important than the relational question (how law and life generate and transform relations).<sup>17</sup>

To shift the inquiry toward the relational is, of course, to invoke a term that has a history and various connotations within feminism. Mary Becker has recently given us a new and important version of “relational feminism,” one which begins from the provocative stance that gender is constructed by men’s relation to other men (not women) and concludes that, to counter patriarchy, feminism must emphasize a contrary set of values or relations.<sup>18</sup> Becker’s work, along with that of Robin West (on whom Becker relies) has, to my mind, done us a great service by elevating relations to a point where they can be considered, not dismissed as lesser and unimportant. I agree that relations cannot be assumed as invariably ones of domination and that feminism must see the relational as quite complex.<sup>19</sup> And, yet, my own understandings<sup>20</sup> proceed from a different place. I do not proceed from a theory of gender or sex or patriarchy. I have no big theo-

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equality has always meant simultaneously common law and equity, sameness and difference shaped to authentic equality in the world which living people inhabit.”); CHANTAL MOUFFE, *Feminism, Citizenship and Radical Democratic Politics*, in FEMINISTS THEORIZE THE POLITICAL 369, 372 (J. Butler & J. Scott eds. 1992) (“A single individual can be . . . dominant in one relation while subordinated in another.”); see also BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW COMMON SENSE 408-09 (“there are therefore, capacitating and incapacitating differences, as there are capacitating and incapacitating equalities”).

17. The classic feminist emphasis on rights, which generated some of the early sameness/difference debate, is a good example of how an abstract concept defined by reference to an implicit object metaphor may perpetuate that metaphor. At least since Hohfeld, there have been compelling arguments that a right is not a singular object, but a relation. To use a more modern, feminist source, see IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 25 (1990) (“Rights are not fruitfully conceived as possessions. Rights are relationships, not things; they are institutionally defined rules specifying what people can do in relation to one another. Rights refer to doing more than having, to social relationships that enable or constrain action.”); see also Jennifer Nedelsky, *The Practical Possibilities of Feminist Theory*, 87 Nw. U. L. REV. 1286, 1289 (1993) (“Rights define and structure relationships of power, of responsibility, and of trust.”)

18. Becker, *supra* note 8, at 21 (urging a “relational feminism” as a variation on cultural feminism); see *id.* at 23-25 (relying on arguments that “male distrust and fear of other men” is “patriarchy’s core motivating force.”).

19. See ROBIN WEST, CARING FOR JUSTICE 35-36 (1997) (arguing, for example, that caregiving is moral, not simply emotional, work, and that it should not be seen as opposed to but constitutive of justice).

20. Let me hasten to add that I have been influenced in my thinking on this question by a variety of work that reflects quite different views on questions of gender. See, e.g., MINOW, *supra* note 12 (proposing a social relations approach to questions of difference); West, *supra* note 8 (explaining legal theory’s embedded claims of separation); Nedelsky, *supra* note 17 (emphasizing the relational structure of autonomy claims); MACKINNON, *supra* note 5 (unearthing forced relations and domination in legal theory and jurisprudence); Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996) (elaborating a history of transformation and sustenance of status relations).

ries of women or men or their optimal identities; instead, I have some working principles about law, principles that come from a place where bottom-up meets top-down, where experience meets theory about the relation between law and life.

My claim here is not about identity, then, but about intellectual habits and structures — about the way that we think about the mundane, the everyday, the natural in law. My argument is not a claim about relational or cultural feminism in the sense that many have interpreted it — I am not arguing about women's essence.<sup>21</sup> Nor am I arguing for an "ethic of care." It is precisely because I want to consider the relational "in a different key," that I have chosen a broader, more abstract definition, one which does not look at relations as invariably enriching or oppressive. My view of the relational then — the "relational critique" — is an intellectual action (a way to disaggregate the social from the natural in the law). Thus, any real life relation will do — it need not be the relation between men and women or women and children, it need not be a sexual or an intimate relation, but may be the relation between contracting parties, between the members of a board of directors and the company's officers, or between voters and their public agents. Nor need the relation be obviously healthy or dangerous; it may be a relation of nurturance or oppression, dependence or autonomy, agency or embeddedness. The point of the relational is not to describe the world so much as to think the world.<sup>22</sup>

If the relational concept that I use is, in this sense jurisprudential,<sup>23</sup> it is far from the predominant jurisprudential view within the academy.<sup>24</sup> The conventional view of legal reasoning, one still held by the average lawyer and law professor is derived from the old Austinian "command of the sovereign" idea of law — law as the command of the gun, of the strong against the weak, of the many against the few.<sup>25</sup>

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21. Indeed, one of the reasons that I favor the relational notion is that it may be applied to a variety of naturalized phenomena. For example, it helps to illuminate the ways in which color (whiteness and blackness and brownness), like other apparently natural concepts (time, blood, force), is a "made" relation as well. What I mean by this, of course, is that color appears as if it inheres in nature but in fact creates complex rules of inferiority and superiority, allegiance and even citizenship. See GRACE ELIZABETH HALE, *MAKING WHITENESS* (1998) (tracing the creation of a white racial identity in relation to others).

22. As Catharine MacKinnon has put it: "In life, 'woman' and 'man' are widely experienced as features of being, not constructs of perception, cultural interventions, or forced identities. Gender, in other words, is lived as ontology, not as epistemology. Law actively participates in this transformation of perspective into being." MACKINNON, *supra* note 5, at 237. My aim here is to try to shift the ontological to the epistemological, at least momentarily.

23. See *id.* ("A jurisprudence is a theory of the relation between life and law.").

24. Let me hasten to add, however, that I am far from the only person to think this way, within feminism or without. For a variety of examples from other scholars, see *infra* Part III, notes 105-11 and accompanying text.

25. Pedigrees may help us distinguish official norms from social ones but this does not account for adjudication at all (law application), and that is where all the



This kind of force-as-positivism (strong or weak, conventional or critical, instrumental or gap-filling) makes several important assumptions I think feminism should reject, the most important of which is that we should think about law application by searching for the factual analogues of textual/pedigreed descriptions.<sup>26</sup> If realism taught us anything it should have been that this view was insufficient. For some realists, the positivist view was insufficient because it eliminated the human factor "behind" the law (society's input into law, if you will). But, for other realists, the theory was seen as insufficient because it failed to grasp the generative powers of law (law's output both within law and society).<sup>27</sup> Willard Hurst, I believe, gave life to this in his monumental studies of our legal history: Hurst gave us the "release of energy,"<sup>28</sup> and with it, the notion that law was not simply command, but release, was power-as-relation as much as power-as-violence.

My proposed "working principle" amendment to this realist critique is simply this: law's generativity can be seen in shifting relations. In the examples that follow, law gives birth to relations that did not exist before. Let me hasten to add that this generativity may be beneficial but may also be destructive. Law's relations may prize the few over the many; they may keep the law standing still even when it is moving forward and moving forward when it appears to be standing still. They may, as I will try to show, *create* discrimination (both within and without the law), as well as *expose* it. The important point, for me, is to describe the mechanics of legal transformation/constitution in the very places that seem so terribly illegal – in the everyday ideas of the natural – in time, passion, and blood.

## II. THE RELATIONAL CRITIQUE AND PUBLIC LAW: EXAMPLES

I begin with my favorite example of why a relational view matters. It does not come from the family or dating or sex; it does not concern

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action is (no realist pun intended) in this analysis. The realist critique is not that all law is the same as social or customary norms but that law is not completely explained without room for the influence of social or customary norms.

26. Positivism is a theory of law's authority, and a theory by which law may be distinguished from social or customary norms. It implies, however, a theory of law application which focuses on identifiable public texts.

27. The output/input opposition is too stark; these processes interact, but it is useful here simply as a way of explaining the relevant issues. On this kind of distinction as too sharp, see Sarat & Kearns, *supra* note 10.

28. See, e.g., HURST, *supra* note 9, at 6-7. I have recently been struck with the degree to which Hurst's "release" corresponds to concepts used by John Dewey who, in his empirical philosophy, conceived of language and human association in precisely these terms: "Language is . . . not a mere agency for economizing energy in the interaction of human beings. It is a release and amplification of energies that enter into it, conferring upon them the added quality of meaning." JOHN DEWEY, EXPERIENCE AND NATURE 144 (1925); see also *id.* at 145 ("There is, again, nothing new or unprecedented in the fact that assemblage of things confers upon the assembly and its constituents, new properties by means of unlocking energies hitherto pent in.").

women or children or feminism. Instead, it comes from the most obviously constitutive and public law I know: the United States Constitution. The standard view of the Constitution – held today by most conventional constitutional law scholars, I would add – is a weak, or qualified, version of the old positivist position. The idea is that the Constitution is a law (albeit a higher one); that law is command, and that command is to be found in the text. Indeed, the dominant approach toward constitutional interpretation today is known as textualism — a view so dominant that it has become standard even among those who purport to find it far too constraining.<sup>29</sup>

Now let us consider what this view does to the most basic of constitutional principles — its structure. The standard constitutional law approach is to view structure as a set of legal commands drawn from the text – particular texts known as the vesting clauses.<sup>30</sup> The vesting clauses describe our government using three of the Constitution's most prominent yet opaque terms: the “executive,” “legislative,” and “judicial” powers. These words are thought, in turn, to be the beginning and the end of the matter; because power is naturalized as force, these texts are thought to be about as “natural” as the Constitution gets. They are so natural, they appear incapable of definition and at the same time self-executing. To paraphrase Justice Scalia: executive power is executive power is executive power.<sup>31</sup>

Now, perform with me an intellectual experiment.<sup>32</sup> Take these words – the words that seem so naturally descriptive of our Constitution's structure (the terms “executive,” “judicial,” and “legislative” power). Now, cut them out of the Constitution, wipe them out, eliminate them. Throw away the vesting clauses if you will. You may strike all these terms and not much will happen. The Congress will still meet, the people will still vote, the Supreme Court will still decide cases, and the federal government will still be supreme.<sup>33</sup> In short, we

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29. Even if one does not believe in textualism as a final end, it is thought that one must begin there. See, e.g., PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982) (providing a typology of constitutional argument).

30. By “vesting clauses,” I mean the specific language in the first sentences of the provisions of Articles I, II and III, as follows: U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives.”); *id.* art. II, § 1 (“The executive Power shall be vested in a President of the United States of America.”); *id.* art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

31. I am referring to Justice Scalia's now famous, and newly admired, dissent in the independent counsel case, *Morrison v. Olson*, 487 U.S. 654, 705 (1988) (“To repeat, Article II, sec. 1, cl. 1 of the Constitution provides: ‘The executive Power shall be vested in a President of the United States.’ . . . [T]his does not mean *some of the executive power*, but *all of the executive power*.”) (Scalia, J., dissenting).

32. The full experiment and a full explication of this theory appears in Victoria F. Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749 (1999).

33. Since this often comes as a shock to some, I will provide a rather long list of specific constitutional references: In Article I, § 4, cl. 2, the Constitution specifies that

will still have a government. These descriptive words, assumed to be the most important and naturalized text in our Constitution,<sup>34</sup> do nothing in and of themselves. They govern no one.

Our political order depends not upon the vesting clauses but upon the lived political relations inspired by the document's constitution of representation. I refer here to provisions so anonymous they have no special "clause" names, provisions that, at least until recently, were largely invisible from a standard textualist's gaze – the electoral procedures of Articles I and II.<sup>35</sup> Strike these provisions from the Constitution and quite literally, there is no more representation, no more President, no more Senate or House. The representational "texts," as they are lived, are essential to a republican political order.<sup>36</sup> Every time we give the representative relation voice – every time we vote for a member of the House or the Senate, every time we refrain from storming the Capitol in anger, every time we defer to a President who is not our preference, we reconstitute and reordain the representative nature of our constitution and thus, daily recreate, the possibility, however constrained, of self-government.<sup>37</sup>

All of this should be more obvious: the point, after all, of a constitution is to *constitute* a government in law and in real life. If the point

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"[t]he Congress shall assemble at least once in every Year." *See also id.* amend. XX. The electoral provisions constituting the Congress, and assuming the vote, appear in art. I, §§ 2-3 & amend. XVII. The Supreme Court's appointment, tenure, and jurisdiction is provided for outside the initial sentence of that article which "vests" power in the courts. *See id.* art. III, § 2 (detailing the extent of the judicial power); *id.* art III, cl. 1 (providing for the appointment of judges for good behavior); *id.* art II, § 2, cl. 2 (providing for the nomination of Supreme Court justices). The supremacy clause appears in art. VI, cl. 2. None of these provisions would be affected by striking the vesting clauses in their entirety, where the vesting clauses are defined as I have above.

34. The reason that I call these terms part of a "naturalized" text, is not only because most lawyers use these terms as if they described the world but, also, because they are grounded in a naturalized view of political power as physical force. A view of our polity in which force is so analogized is, in my mind, quite problematic, given our republican (read representative) ideal. My view of power is one based on the relation of persons to each other and should be distinguished from a view of power as violence. On the distinction between violence and political power, see HANNAH ARENDT, ON VIOLENCE 35-46, 56 (1969) ("Power and violence are opposites; where the one rules absolutely, the other is absent.").

35. The invisible, nameless, provisions I am referring to are: U.S. CONST. art. I, §§ 2-3 & amend. XVII (providing for the election of members of the House and Senate); and *id.* art. II, § 1, cls 2-4 & amend. XII (providing for the election of the President).

36. Don't confuse the term republican with republicanism. Representation is the essence of a republic as a form of government distinct from aristocracy and direct democracy.

37. I do not mean by this to valorize the particular representational scheme implied by our constitution. I find it very interesting, for example, that Mary Becker has recently called feminists' attention to the notion of representation, and its transformation, as essential to changing politics to benefit women. *See Becker, supra*, note 8, at 60-81 (urging major changes in forms of representation as the kind of "systemic change" necessary to move toward a less patriarchal culture).

is obvious, it is also powerfully illustrative of “the relational critique.” The Constitution’s *descriptions* of naturalized power – the terms executive, judicial, legislative – do very little in the world; it is constitutional *relations* (political relations between citizens and their government and between different parts of the government) that do all the work, both in law and in life. My point is both obvious and worth restating: relationships are central to our most public law; indeed they are central to the notion of constitutional power in a democracy.<sup>38</sup>

If this is right, then the average lawyer’s understanding of a relationship as sex or dating or marriage is far from complete. The relational cannot be relegated to the private and ungovernable; law’s relations are not only about the family or intimacy or even contracts. Relations inhere, and indeed constitute, self-government. Put in other words, to the extent feminism is concerned with relations, it is not concerned with something marginal, other, something to be dismissed-as-sex, but something extraordinarily important to the most public of laws. I have demonstrated this, however, not by simply asserting, as we have known for some time, the intersection of the public and the private, but by disaggregating the natural into the relational. This is the intellectual move I repeat below.

#### A. *The Relational Critique and Feminism*

Feminism, laced with a bit of John Dewey’s realism, taught me this intellectual move. But to see that, let me now shift venues and talk about issues that are again a matter of public law, but this time closer to traditional feminist concerns. The examples will be drawn from traditional materials (doctrine), but from an untraditional perspective. When I study doctrine, I do not study it to see what the cases hold, but to find doctrine’s patterned irrationalities,<sup>39</sup> irrationalities that reveal something about the rules’ commitments to real life (rules-in-reverse). To do that, I study concepts that do not appear to be about law at all (for example, time, blood, and passion). I begin with two examples from criminal law that resonate with standard feminist subjects – one that concerns the idea of “time” and the law of self-defense and the other the idea of “passion” and the law of provocation. I close with a brief history of the constitutional status of blood, to show how this kind of “relation-think,” might be of use in other, more standard, constitutional controversies.

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38. See ARENDT, *supra* note 34, at 44 (“[W]hen we say of somebody that he is ‘in power’ we actually refer to his being empowered by a certain number of people to act in their name.”).

39. Although I emphasize particular cases below, my research in the criminal law is typically based on patterns of caselaw; the claims made below with respect to “imminence” depend upon a study involving hundreds of cases, as does the comparative assessment of the law of “passion.”

### 1. Time

There seems no more "natural" concept used by the law than time. Few lawyers however would stop to consider "time" a legal concept. And, yet, if one thinks about it for more than a moment, time does play quite a common role in the law.<sup>40</sup> And, in my field, the criminal law, time has come, quite literally, to construct the debate about women and the law of self-defense.<sup>41</sup>

The self-defense debate goes something like this. Battered woman cases are typically thought not to satisfy the "objective" rules of self-defense. They are thought to fail the rules because of time: the battered woman's case is imagined as a case in which the victim kills her husband during a lull in the fight or when he is asleep. Therefore, the argument goes, battered woman cases tend to fail what is known as the "imminence" rule: that a defender must respond to an imminent threat. Imminence is, in turn, defined by reference to the clock: violence must be now, not too soon or too late, immediate. Time, then, becomes the basis on which traditional scholars rely to argue that battered women are generally asking for special favors, a subjective standard, or a special defense.<sup>42</sup>

There are a number of problems with the conventional argument, not the least of which is that it appears to be based on a false factual claim – it may be that most battered woman self-defense cases, are not, in fact, cases that involve a significant time lag.<sup>43</sup> But what I am concerned with here is to show how the meaning of time operates within this argument. If one actually looks at appellate cases that use the term "imminent," one finds that the law's idea of time is far from the objective, clock-like certainty upon which the conventional argument depends. First of all, one finds that "imminence" appears as a legal term as often in cases where there is no actual time lag as in cases where there is a proverbial "lull in the action." And, not surprisingly, given these facts, one finds that time takes on other meaning. It

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40. Rules of "imminence," for example appear in a variety of legal contexts. For one example, see *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (requiring, in standing law, that plaintiff have suffered an invasion of a legally-protected interest which is . . . "actual or imminent."). An important recent exception to the idea that time is typically ignored is Jed Rubenfeld's book on the constitution. See JED RUBENFELD, *FREEDOM AND TIME* (2001).

41. What follows is a summary of a fuller argument that appears in Victoria F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235 (2001) [hereinafter Nourse, *Subjectivity*].

42. To see the standard argument on imminence, see George P. Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 553, 561 (1996) ("[I]mminence, necessity, and proportionality – speak to the objective characteristics of self-defense claims").

43. See Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 388-401 (1991); see also Nourse, *Subjectivity*, *supra* note 41, at 1246-48 (challenging the view that imminence as a concept only arises in non-confrontational cases).

turns out that imminence means many things in the law of self-defense; it is a placeholder – it may borrow from associated norms within the law of self-defense as well as social norms relevant to the particular parties in the case.<sup>44</sup>

Let us look at a single case that makes the point rather clearly: Mrs. Watson was down on the ground, fighting for her life.<sup>45</sup> The state's own witnesses said so.<sup>46</sup> They said that, when she shot, her attacker had her around the neck; the witnesses said that she was struggling when the gun fired.<sup>47</sup> All of the elements of self-defense appeared to be met: there was an unlawful threat, the threat was grave, and it was imminent. The trial judge had a different idea; he denied Mrs. Watson's claim of self-defense. Why? This woman was not asking for a special favor, a subjective standard, or Lenore Walker to take the stand. This was real self-defense, by the book. But the trial judge found that the threat was not "imminent," that there was too much time.<sup>48</sup>

Now, even the most untutored student of the law of self-defense must ask how any trial judge can come to the conclusion that a woman who is down on the ground struggling has no claim of self-defense.<sup>49</sup> To speak of imminence in the context of such a case is the equivalent of legal irrationality. Imminence could not have been an issue in Mrs. Watson's case – the hands were around her neck; there was no time to call the police or to run away.<sup>50</sup> The actual threat was "now"; it was "immediate." Well, the sad, but true answer to this quandary is that the threat was not imminent, according to the trial judge, because "of the parties' relationship involving 'a long course of physical abuse.'"<sup>51</sup>

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44. See Nourse, *Subjectivity*, *supra* note 41, at 1246-48, 1252-56.

45. *Commonwealth v. Watson*, 431 A.2d 949, 951 (Pa. 1981) (relating eyewitness testimony that the victim had the defendant "around" the neck or was on top of her when she shot; trial court finds no imminent threat, a finding reversed on appeal).

46. *Id.*

47. The appellate court reported the testimony of the defendant and a friend who was walking thirty to forty feet behind the defendant and the victim. The friend, testifying for the state, reported that the victim, Mr. Black, "hit [Watson], knocked her down and jumped on top of her before the shooting." The friend stated: "I know one time he got her around the neck some kind of way or another. And that's when I heard the shots, when he got her around the neck." *Id.*

48. The appellate court emphasized the centrality of imminence to the trial court's reasoning and to the case: "The central issue in this case stems from the trial court's finding that appellant's belief – that she was in imminent danger of death or great bodily harm at the time of the shooting – was unreasonable." *Id.* (emphasis added).

49. Ultimately Mrs. Watson's conviction was overturned on appeal. *Id.*

50. *Id.* (Eyewitnesses testified that the victim had the defendant "around" the neck or was on top of her when she shot.).

51. *Id.* The appellate court made clear that it rejected the trial court's logic, stating that "A woman whose husband has repeatedly subjected her to physical abuse does not, by choosing to maintain her family relationship with that husband and their children, consent to or assume the risk of further abuse." *Id.* This, of course, implies

Put another way, the threat was not imminent because Mrs. Watson was a battered woman.

The important point is not to dismiss this case as an oddity, ultimately reversed on appeal, but to consider its irrationality.<sup>52</sup> If time was not a real issue, then imminence had to have another meaning for this trial judge, and it did: it meant something about Watson's prior relationship with her husband. Notice what happens: time, an apparently brute fact about the world, takes on meaning – a meaning borrowed not from the law but from social life (her prior relationship). Time is no longer about the clock, but about social and legal norms about Mrs. Watson's relation to her husband – that she should have left. In this transformation, law (imminence) is quite literally constituted, it is made in the image of a particular kind of relational norm (she should have left) even though it purports to be about the clock.

Criminal law scholars are likely to find this quite odd, since (as I have explained elsewhere) the idea that imminence has a meaning challenges many of the assumptions on which the debate about self-defense is constructed.<sup>53</sup> But it will come as no surprise to law and society scholars, and others, that even the most apparently objective of rules – in this case, time – may absorb social norms (nor that this happens in many self-defense cases, not simply ones affecting battered women).<sup>54</sup> Long ago, realism taught us that legal concepts are not autonomous, created out of nowhere, and that law absorbs social norms and vice-versa. We also know that, by masking these norms, within a purportedly objective, natural guise, the guise of "time," the law tends to legitimate the existing order. We know that from critical legal studies. But what we don't know, or if we know we have not paid sufficient attention to, is *the mechanics of law's constitution* (the "how" it happens as opposed to "that" it happens). The kind of thing we have failed to note are the ways in which relations constitute the natural and, in turn, naturalize relations.

It is one thing for members of society to tacitly share a social norm that women should leave violent relationships. But transformed

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quite strongly that the appellate court interpreted the trial court's remarks in just the way I have, as a statement that she should have left before the confrontation.

52. My study shows that this kind of "patterned irrationality" is not limited to Watson's case. Her case is unusual in a number of respects but not in the sense in which imminence tends to take on meaning, act as a placeholder, in a vast number of cases, cases that involve both male and female defendants. See Nourse, *Subjectivity*, *supra* note 41, at 1255-56.

53. See, e.g., Fletcher, *supra* note 42, at 556 ("[t]he requirement of imminence means that the time for defense is *now*. The defender cannot wait *any longer*."); WAYNE R. LAFAYE, CRIMINAL LAW § 5.7(d) at 495 (reporting that force is imminent if it will occur "almost immediately"); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 206 (2d. ed. 1995) (imminent violence must be "upon the instant" or "at once.").

54. My survey was not limited to battered woman's cases but, instead, encompassed all self-defense cases in which imminence appeared as a term of relevance during a set period of time.

into law, and in particular into self-defense law, the institution changes the legal relations implicit in the norm. The neighbor who says over the fence "she really should leave him," is not the judge or jury who appropriates that norm within the institution we know as law. When we move from time as brute fact to institutional norm, we move from a natural context to an institutional context, a context that is quite complex, subject to its own internal norms and bound by a set of self-regarding institutional imperatives.<sup>55</sup> Once a judge takes that leaving-norm and places it within the legal institution, the norm gains hard edges; it becomes a category of up or down, in or out; it gains power – it takes on the characteristics of the institution in which it is placed. A perceived social obligation imposed on a defendant becomes a measure of legal right and wrong, it becomes a measure of hard and fast exclusion. It thus becomes the way in which a battered woman can be refused a defense because she was battered, but more importantly, it becomes a way to *naturalize discrimination*, to give it the legitimacy of law.<sup>56</sup>

It takes the relational to see precisely how a social leaving-norm comes to be embedded in the natural. Imagine a different relation than the one presented in Watson's case: between male strangers, for example, who frequent a bar in which violent fights erupt every Saturday night. There is no rule in the law of self-defense that these persons must avoid that bar (that they should leave even before the fight) – even though they know that another fight will inevitably happen. Imagine that the *Watson* case takes place between a woman who kills a well-armed stranger who she sees from across the room. There is no rule that she has to leave because he walks toward her. When, in either case, the defendants end up struggling with their attackers, the judge will not say "you, defendant should have left the scene." Indeed, the law of self-defense has always provided breathing room for free action even when the defendant knows of a high likelihood of potential violence. It is not the law, then, but the rules of intimate relation that create the legal rules that govern Mrs. Watson's case.

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55. Institutions tend to "think" in terms that replicate basic questions about their identities. See MARY DOUGLAS, *HOW INSTITUTIONS THINK* 112 (1986) ("Any institution that is going to keep its shape needs to gain legitimacy by distinctive grounding in nature and in reason: then it affords to its members a set of analogies with which to explore the world and with which to justify the naturalness and reasonableness of the instituted rules . . . It provides the categories of their thought, sets the terms for self-knowledge, and fixes identities.").

56. This rule of time is, in effect, a rule of pre-retreat – it is a rule that says that you must leave before the knife is above your head. (On the difference between a pre-retreat and a retreat rule, see Nourse, *Subjectivity*, *supra* note 41, at 1284-85). To apply a pre-retreat rule is not only to impose on the battered woman the responsibility to avoid battering (by leaving) before the confrontation, but also to create a new relation within the world. Time (X) is to count for a pre-retreat rule (Y). Here, the pre-retreat rule constitutes a relation between men and women in which the battered woman is at a distinct disadvantage – for she must retreat where and when others may not be required to do so.



The embedded social norm (you should leave) once applied to Mrs. Watson in a legal context becomes a rule that enforces not only a particular relation toward her husband but also enforces a particular relation of Watson and other self-defense claimants to the state.<sup>57</sup> The law of self-defense simply does not, and never has, required defendants, male or female, to leave *before* the fight starts.<sup>58</sup>

Now, I suspect that the trial judge in *Watson* did not see himself as a bad man or a man who discriminated against women. But that is what he did. Perhaps he thought leaving was the proper social norm (as many do) or perhaps he truly believed that imminence was the proper legal category.<sup>59</sup> But all of this failed to consider that transferring social relations into legal relations is a creative, dynamic act that may destabilize existing assumptions by conflicting with other rules, indeed may even reverse assumptions depending upon where, in the law (crime or defense, exclusion or inclusion), the norm is incorporated. Notice that, in *Watson*, this transformation has reversed nature, time and law. What is supposed to be a hard and fast legal category based on brute objective fact becomes a contingent social norm. What is supposed to be a prediction about the future (is he going to kill her?) becomes a statement about the past (she should have left!). What is supposed to be a rule of equality and freedom becomes one of disadvantage and forced relations.

To see this, of course, requires a willingness to take time from the natural and see it transformed from brute fact to institutional context. It also requires one to give up the notion that discrimination is built on the categories of man and woman, sameness and difference. The notion of an imminent harm does not tell us anything about the identity of women, it does not stereotype women or, at least on the surface, disadvantage women; it does not even seem like a "difference" or a "sameness" issue because the rule is not about gender at all (but, instead, time). Neither the rule of imminence, nor the norms it absorbs, seem motivated by hostility to women nor are they conventionally understood as irrational – that she "should have left" is considered the proper legal policy by many. The discrimination here is neither malicious nor overt nor even directed necessarily against all women. It is a

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57. Time, even at common law, served as a proxy for deference to the state – it meant no time to go to the king's courts, no time to get help. The trial judge in *Watson* thus adopts a temporal rule in the name of an obligation of deference to the State, as the monopolist of force. Mrs. Watson had to leave to defer to the state, to do the right thing, to let the police sort it out. *Watson*, 431 A.2d at 951.

58. To be sure, a minority of jurisdictions require retreat, but retreat is not pre-retreat; it requires leaving *during* the confrontation, not months and years before. American law has typically prized freedom of action, limiting the rule of retreat to the actual confrontation. See Nourse, *Subjectivity*, *supra* note 41, at 1284.

59. Now, let me hasten to add that this is not "the law" of self-defense; indeed the "law" of self-defense – through the introduction of syndrome evidence – tries mightily, in psychological guise, to refuse to apply a rule that "she must leave" before the fight begins.

discrimination of relation, a rule that reenacts a relation of inferiority and invisibility. It is a rule that cannot see Mrs. Watson or the hands around her neck because all it sees is her-in-relation.<sup>60</sup>

Finally, and perhaps most importantly, notice how the logic that brings us here is precisely the logic of my argument about the Constitution – there I said that if we eliminated the descriptive elements that form the positivists' view of constitutional structure, nothing much would happen in the real world. The relationships created by the Constitution (voting, appointment, etc.) are far more important than the proxy-descriptions on which constitutionalists focus (the words "executive," "legislative," "judicial"). So, too, here. The relationships embedded in the idea of time (she-should-have-left) are far more important to the law's application than the proxy descriptions of states of affairs (imminence as describing time-as-the-clock). After all, the clock was simply not the issue (there was no time lag in many of these cases). Time as description may be crossed-out from the law of self-defense (as some of the most respected of criminal law scholars have suggested).<sup>61</sup> I suspect that very little would happen either to the law or the social relations embedded within the law. The same social relations will be replayed and other elements – like necessity – will take on the role mediating legal relations that imminence now plays.

Of course, if one is committed to a view of law as solely positivistic, then one cannot possibly begin to see any of this. If one believes that law is to be applied by looking for natural facts in the world, then it is impossible to see that law may transform fact into norm – that time may become a norm of departure. What I have tried to show here is that even the most objective, the most natural, ideas can take on meaning within the law. One can only see that this changes the relation of woman to man, however, if one acknowledges law's generativity both within and without the law.<sup>62</sup> For the problem, of course, is

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60. It has become popular to talk as if battered women claiming self-defense are seeking a special advantage. But if time carries meanings and those meanings impose a pre-retreat rule (or even in some cases a retreat rule in a non-retreat jurisdiction), then it can hardly be said that women are seeking a special advantage rather than relief from a social and legal norm that says they are responsible for their own battering.

61. Stephen J. Schulhofer, *The Gender Question in Criminal Law*, 7 SOC. PHIL. & POL. 105, 127 (Spring 1990) (arguing that "the traditional insistence on a literally 'imminent' infliction of great bodily harm must be abandoned outright" because the correct inquiry is the necessity of the battered woman's action rather than "imminence per se"); see also PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 131(b)(3) at 76-77 (1984) (stating that "proper application of the necessity requirement would seem adequate to prevent potential abuse of a justification defense in cases where the force is not imminent.").

62. As this example makes clear, the movement from the natural to the institutional is the kind of constitutive act I am trying to elaborate. It differs from the most obvious of constitutive acts (creating law from nothing, like creating a chess game, or a constitution) but there is a similar structure: one starts with something that appears not to be relational or normative (in this case time, a brute natural fact) and then

not primarily that one trial judge somewhere does this, or that there is a pattern of such reasoning throughout self-defense law (a pattern of giving meaning to time), but that the legal relations enforced will be ones which people come to see and understand and act upon in the world. If people believe that these cases are all about time-as-the-clock, then that will be what the cases *are* about and how they are debated. The problem is that this vision happens not only in the law but life, as well, with life and law reinforcing each other, cycling in a process that keeps the law standing still even as it appears to be moving forward.

## 2. Passion

If the idea of time allows us to see this dynamic “in action,” the idea of passion reinforces the main themes. Passionate killings are the stuff of Grisham, late night TV, and the law. We are all familiar, before we enter law school, with the idea that one who kills in passion is less culpable than one who kills in “cold” blood. Leaving aside the analytic difficulties of that position,<sup>63</sup> we accept this principle in real life and reconstitute it in our novels, our newspapers, and our understandings of daily life. Passion killings are “normally abnormal” killings. We carefully, or not so carefully, distinguish between passion killings and other more serious acts. Honor killings, for example, are the stuff of repressive regimes and veiled women, of patriarchal societies foreign to our own; they happen in Jordan and Bangladesh and Pakistan and Turkey,<sup>64</sup> not here. In America, one would think, an honor killing would be odd, strange, unlikely to be condoned.

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finds this transformed, within the social world, into something with relational meaning. I borrow here some of Searle's vocabulary such as “brute fact.” See generally, SEARLE, *supra* note 10.

63. Conventional theories of punishment do not really explain why provoked homicide should in fact be treated less severely. The classic claim is that passionate killers are relatively undeterrable (a claim that relies upon a contestable view of deterrence); the classic counterclaim is that a rule of punishing provoked homicide would in fact deter (the move from a specific utilitarian calculation to a rule utilitarian position). See Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1373-74 (1997) [hereinafter Nourse, *Passion's Progress*].

64. It is a stereotyped vision to believe that these honor killings are limited to Muslim countries. According to the United Nations, honor crimes are increasing in nations as disparate as Brazil, Italy, Uganda and Britain. It is also a stereotyped vision to believe that only women suffer; the men, often boys, enlisted to do these crimes suffer enormously. Molly Moore, *In Turkey, 'Honor Killing' Follows Families to Cities; Women Are Victims of Village Tradition*, WASH. POST, Aug. 8, 2001, at A1 (discussing pain of boy who was forced to kill his sister). Honor killings in other countries are often associated with killings by any male family member, even the woman's own family, or strangers; this is indeed rare in the United States. Moreover, the term seems to extend in the literature along a wide spectrum of conduct. Many honor crimes are similar to the standard American crime of a husband killing a wife or girlfriend because of infidelity but customs differ widely. For example, there are cases in which “male family members gather to vote on the death of women.” *Id.* (Notably, however, the law's partial protections are often invoked; after the death vote, the person who is to do the

But, of course, American law lives with the vestiges of our own peculiarly American version of honor killings and even, to this day, has a partial honor defense. The law of the United States, in most jurisdictions, permits a lesser penalty for “provoked” killings of women who have affairs or leave.<sup>65</sup> A few years ago, the implications of the law erupted into consciousness with a newsworthy case in Maryland.<sup>66</sup> When Kenneth Peacock found his wife in bed with another man, he got his shotgun and scared his rival off; several hours and a gallon of wine later, Peacock shot and killed his wife.<sup>67</sup> To the judge assigned to this case, there was no question that Peacock suffered an adequate provocation resulting in “uncontrollable rage.” He sentenced Peacock to eighteen months to be served on work release, and within two weeks, Peacock was out of jail.<sup>68</sup> Whether or not this kind of a sentence happens often, and it may not, the key here is the judge’s openly sympathetic reaction, one which verged on suggesting that the judge would have done the same himself since the reason for this killing, the provocation, was enough to propel *any man* to “corporal” punishment.<sup>69</sup>

All of this, of course, brings us back to the question of honor killings. What is the difference, one must ask, between the woman in Egypt or Brazil killed because she was thought to be unfaithful and a similar case in the United States? There are, in some cases, significant differences in perpetrators and rituals; I am not trying to diminish the cultural differences.<sup>70</sup> But the reasons for many of these killings – both at home and abroad – are strikingly similar. In the United States, provocation claims may be grounded on infidelity, fears of infidelity, leaving, divorce, or even lesser marital disputes.<sup>71</sup> Of course, Ameri-

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killing is picked, “usually someone under the age of 18 who will be treated more leniently under the law.”).

65. See Nourse, *Passion's Progress*, *supra* note 63, at 1345-47 (detailing cases).

66. Karl Vick, *Md. Judge Taking Heat in Cuckolded Killer Case*, WASH. POST, Oct. 30, 1994, at A1.

67. *Id.*

68. *Id.*; see Ann G. Sjoerdsma, *Justice: 18 Months for a Wife's Life*, CHI. TRIB., Nov. 14, 1994, at 21; see also Lynn Hecht Schafran, *There's No Accounting for Judges*, 58 ALB. L. REV. 1063, 1063-64 (1995) (discussing Judge Cahill's sentence in the *Peacock* case).

69. According to an article quoting the transcript of proceedings, the trial judge, in sentencing Peacock, stated that “the most difficult thing that a judge is called upon to do . . . is sentencing non-criminals as criminals . . . I seriously wonder how many married men, married five years or four years would have the strength to walk away, but without inflicting some corporal punishment.” Schafran, *supra* note 68, at 1063-64.

70. My claim is not that the cultures are the same; it is that “our” American view is conditioned on foreignness (unnaturalness, if you will), rather than the similarity of the conduct. Customs differ from country to country, culture to culture, even province to province. See *Honor Killings (Karo Kari) Claims 129 Lives in Sindh During Last Six Months*, PAKISTAN NEWSWIRE, July 24, 2001; Moore, *supra* note 64, at A1.

71. See Nourse, *Passion's Progress*, *supra*, note 63, at 1342-66 (showing how the American law covers not only imagined or real infidelities, but also simple departures, breaches of dating etiquette, and even attempts to leave prompted by violence or

can law does not fully condone these killings but neither does the law of many foreign jurisdictions condone honor killing. There, as here, the law simply offers partial support – passionate killings are generally not murders, they are manslaughter; they are not “real” murders, but something lesser.<sup>72</sup>

Again, we are confronted with what appears a legal irrationality which does not appear irrational because it is embedded in the natural. Standard criminal law scholarship posits passion “naturally” within a lost sexual or emotional relationship; as H.L.A. Hart put it, the provocation defense deals with losses of self-control grounded in human “nature.”<sup>73</sup> Located within a naturalized discourse of mind and psychology, relational patterns become quickly obscured. Traditional criminal law scholarship cannot “see” the relations because it focuses on a lack of self-control. Law reform has actually exacerbated the law’s tendency to occlude the relational: the model penal code provisions make the defendant’s mental state control – if he is extremely emotionally disturbed, the crime is manslaughter not murder.<sup>74</sup> This has undermined the classic limits on the passion defense, such as an ac-

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divorce). Cf. *No Honor in Violence Against Women*, WASH. TIMES., Aug. 22, 2001, at A14 (decriing an honor killing in the United States of an Egyptian woman: “[t]his scenario is common in a number of countries where the mere perception of an illicit relationship . . . a decision to divorce an abusive husband . . . is said to bring ‘dishonor’ to a man or family.”) (“If a woman leaves home for any reason, it doesn’t matter whether she actually does anything. Once the men, her father, husband or brother, can’t sit with their heads held high in the coffee houses, she has to go.”); James Dorsey, *Men’s Honour Keeps Murder in the Family*, SCOT. ON SUNDAY, Aug. 12, 2001, at 19; *This Mother Has Vanished*, LONDON OBSERVER, July 22, 2001 (defining an honor killing involving the “shame” brought on by “having an affair or . . . simply wishing to divorce her husband”).

72. See Moore, *supra* note 64 (“In Turkey, the killing of a family member draws the most stern penalty allowable: death or life in prison. But if a judge rules there was provocation for the killing – such as a question of honor – the penalty can be reduced.” So, in the end, “perpetrators of [honor] crimes are legally permitted shorter prison terms than those who commit similar crimes for other reasons.”). The Turkish ‘honor crime’ statute, last amended in 1953, mitigates both murder and battery charges: “As regards perpetrators who commit [homicide or battery], against wife, husband, sister or offspring, at the time the victim is caught while in the act of adultery or illegal sexual intercourse, or while the victim was about to commit adultery or about to engage in illegal sexual intercourse, or while the victim was in a situation showing, free from any doubt, that he or she has just completed the act of adultery or illegal sexual intercourse; or against another person caught participating in such acts with one of the aforesaid relatives, or against both, the punishment prescribed for the offense shall be commuted to imprisonment. In lieu of heavy life imprisonment, imprisonment for four to eight years, and in lieu of death, imprisonment for five to ten years shall be imposed.” THE TURKISH CRIMINAL CODE, § 462 (Sweet & Maxwell Ltd. 1964).

73. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 33 (1968) (relying on “common sense generalizations” about “human nature” for conclusion that men are “capable of self-control when confronted with an open till but not when confronted with a wife in adultery.”).

74. See MODEL PENAL CODE § 210.3.

tual as opposed to an imagined affair, a real relationship as opposed to an imagined one, a continued relationship as opposed to one ended in divorce.<sup>75</sup> Of course, even under the model penal code, the emotional disturbance must be reasonable, but from where does a reasonable passion come? It comes from the same transaction we have seen above – social norm translated into passion. It comes from the parties' relations.

Imagine one co-worker who kills another or a neighbor who kills another. Do these killings suggest "natural" passion? Unlikely. We do not say that the co-worker or the neighbor is likely to have acted in "reasonable" passion based simply on the relation of neighboring houses or a joint employer.<sup>76</sup> What then generates "reasonable" passion in the cases I have described? It is the parties' intimate relation. The idea of passion, like time, appears to measure brute fact – in this case, quickened pulses and heartbeats and disturbed minds. But passion, like time, is a reflection of our social relations. And these norms of relation are more powerful than the law's descriptions of mind. Strike the word passion from the passion defense and little, I suspect would change. This is precisely what the model penal code attempted to do, and did, by transferring all the normative rules about the defense into a question of "extreme emotional disturbance."<sup>77</sup> The normative questions raised by the defense haven't gone away; they have simply gone underground.

If relations are essential to understanding the idea of passion, then it is also important to see how the transformation from social to legal norm, from purported fact to institutional relation, generates new relations. Like time, passion becomes generative. Consider the case of the woman who leaves and gets a divorce – does as the law suggests in other circumstances – and finds that her ex-husband follows her, sees her dating, and kills. She has cut off the relation, but it continues to follow her. The law before this transaction assumed male and female equality, it assumed her liberty to choose partners. But, in the guise of passion, we see this norm silently challenged. She has cut off the relation, but the law of passion may demand that the relation follow her. To maintain a legal defense of reasonable passion in these circumstances, the criminal law supports, even if only in a partial way, the killer's sense of entitlement to maintain a connection she has severed. What has passion become but an odd yet resilient version of an older regime of marital unity? What was once a relation of equality becomes one of inequality and oppression.<sup>78</sup>

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75. See Nourse, *Passion's Progress*, *supra* note 63, at 1342-66.

76. In some jurisdictions, defendants in such positions can and do raise provocation defenses but they rarely succeed.

77. MODEL PENAL CODE § 210.3.

78. The relational view also shows how apparent progress in the law may yield real regression. The reformed provocation law of the Model Penal Code looked forward to a world of psychological reality – of minds that had lost self-control. But, in

The point that women have been defined, much to their detriment, in their "relation" to others is not a new one. But what I would like to emphasize here is a reason why the law cannot "see" or "know" this as discrimination. It is not only that the relational issues cannot be seen because, once pointed out, these cases do often appall even those who see them as nondiscriminatory. The essential intellectual problem is this: the inequalities cannot be seen because of the idea of law upon which they depend. The inequalities cannot be seen because they are seen as outside the law – in the realm of the private and non-justiciable (these are cases of sex and privacy and love triangles). The inequalities cannot be seen because people think that the passion defense applies equally – to both men and women; she, too, can argue that when he leaves, she killed in a passion. The only problem is that this formal equality fails to reveal the relational inequality at stake. The problem is not that the passion defense is either motivated by animus toward women or instantiates formal inequality or creates disparate treatment. The problem is that the passion defense creates a set of relations that are intolerably inconsistent with basic norms of liberty for women. The discrimination here is not against sex, but discrimination embedded in forced relations, coerced fidelity, punishment for sex and leaving and divorce, and male demands of relational unity. We have no problem seeing that in some cases – in cases of honor killings. But that is because the image of these killings, transposed to a foreign place, is deprived of its naturalness; it is deprived of the sense that a killing in the heat of passion is a normally abnormal event.

### 3. Blood

The relational critique does not require a topic within feminism or a relation between men and women. One can see how this kind of argument works in other naturalized places, in public as well as apparently private disputes. This is where feminism may well move beyond itself. Here, I turn to a question of standard constitutional law and the idea of blood.

Once upon a time in the United States, we decided to eradicate crime by cleansing American blood of its criminalistic tendencies. In the first decades of the last century, laws prescribing the sterilization of habitual criminals were on the books throughout the country. Thousands of men, and more women, were sterilized under analogous laws applied to the so-called "feeble-minded" (then a technical term denoting certain kinds of insanity which we would today call immorality). In the late twenties, the Supreme Court upheld these laws,

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this move "forward," it reenacted the past by failing to address the relational ideas implicit in the original defense. Status and relation appeared to be rejected but, instead, lived on within naturalized ideas of passion and mind. What is reformed appears on the surface, what is ancient is the law's real world relational residue, which is sustained even as it is apparently transformed. *See generally* Siegel, *supra* note 20.

noting infamously that “three generations of imbeciles” were enough.<sup>79</sup> But in a decision now known for other reasons, *Skinner v. Oklahoma*, the Supreme Court reversed itself, concluding that the sterilization of habitual criminals was a violation of the equal protection clause.<sup>80</sup> So ended the first reign, at least, of blood in American criminal law.<sup>81</sup>

Today, *Skinner's* result is barely questioned but its reasoning remains deeply controversial. No one, I think, believes *Skinner* should be reversed and, yet, many question whether it is a deeply dangerous decision. Indeed, the case has been constructed as something of a referendum on constitutional positivism – the importance of the very writtenness of the constitution. The standard understanding of *Skinner* is that it helps to create a right of procreation and deems it “fundamental.” This prompts strict constructionists to ask: from where does this right hail in the constitution and why is it fundamental?<sup>82</sup> This is, of course, a loaded question, a question loaded with the present – it is the abortion decisions, not *Skinner*, that presumably are the questioner's concern. But it is not simply textualism that is at issue – it is also *Skinner's* reliance on the equal protection clause. Even those who praise *Skinner* for its influence on later law, those who find no problem with its purported embrace of fundamental rights, question its equality rationale. How could Justice Douglas have possibly relied on the equal protection clause, they ask, if that clause simply requires equality in the positive law? If that were true, then a law that sterilized “equally” should be constitutional.<sup>83</sup>

My own view is that these deeply positivist questions are largely irrelevant to an understanding of *Skinner*.<sup>84</sup> The question raised by *Skinner* is far more important than a question about courts and writtenness – it is about the very nature of our political order. Indeed,

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79. *Buck v. Bell*, 274 U.S. 200, 207 (1927).

80. 316 U.S. 535, 538 (1942).

81. This issue has not disappeared: as late as the 1960's, state legislatures, particularly in the south, endeavored to pass laws reflecting a policy aimed to sterilize poor, African American women. These laws were overwhelmingly written to affect welfare mothers' fertility. During the same period, Puerto Rican and Native-American women were systematically sterilized. DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 89-98 (1999).

82. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 63-64 (1990) (“*Skinner* revived and remade the equal protection clause” in ways that “cannot avoid legislating” by permitting courts to decide which classifications should be treated like race.)

83. Justice Stone raised this concern in his concurring opinion. *Skinner*, 316 U.S. at 543 (“If Oklahoma may resort generally to the sterilization of criminals . . . I seriously doubt that the equal protection clause requires it to apply the measure to all criminals in the first instance, or to none.”) (Stone, J., concurring).

84. The contemporary view of *Skinner*, like so much else in constitutional law today, reflects a kind of judicial narcissism – a tendency among judges and law professors to see the constitution as constitutional *law and law alone* and thus to place law and courts at the center of the constitutional universe.



*Skinner* is not about the absence of text or even the creation of fundamental rights; it is about blood and racism and, more fundamentally, about blood as political theory. But, to see that, one must know much more about the history of the case. One must situate blood, not in patterns of cases, but patterns of history, to understand how it imbibes relations of racism and inferiority. Indeed, one can see quite clearly how *Skinner*, in the end, had to be decided the way it was – why *it is* an equal protection case – and why there is relational reason in its apparent doctrinal irrationalities.<sup>85</sup>

To the state of Oklahoma, Jack T. Skinner was a petty chicken thief and robber, a man likely to become a public charge, and therefore a man who should not be able to pass his “criminalistic” genes to his children. In *Skinner*’s day, this argument was hardly novel; the idea that crime was inherited was supported by more than half a century of scholarly work and broad public opinion. By the mid-1930s, sterilization laws were on the books in at least half of the states; thousands of Americans had been sterilized under these policies; and, according to the Gallup organization, the vast majority of Americans approved.<sup>86</sup> Today, we call the idea “eugenics,” and hold our breath. Then, eugenics was thought to be a science grounded in sound genetics and promising reform. Some of the most famous men and women in the United States were strong advocates of eugenic science – David Starr Jordan (the progressive president of Stanford University), Teddy Roosevelt (former outspoken President), and Margaret Sanger (birth control advocate) among them.<sup>87</sup> If eugenics was still reputable science in the early 1930s, it was more than a science, it aspired to be-

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85. Some part of this argument appears in Nourse, *Constitutional*, *supra* note 12, at 1437-42; much of it is in my ongoing book project, *SKINNER’S TRIAL*.

86. See DANIEL J. KEVLES, *IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY* 112 (1995) (stating that “[b]y the mid-thirties, some twenty thousand sterilizations had been legally performed in the United States.”); *id.* at 111 (stating that “[b]y the end of the nineteen-twenties, sterilization laws were on the books of twenty-four states”); see also *Oklahoma Puts Sterilization Law Into Effect*, *LITERARY DIGEST*, vol. 117, no. 19, at 17 (May 12, 1934) (reporting that “[s]terilization, as a means to eliminate criminality and imbecility, is now legal in twenty-seven states” and that “[r]ecent reports show that thousands of people have undergone the operation by legal order. In California, alone, 10,000 men and women have been sterilized.”). On the approval of Americans, see American Institute of Public Opinion, *GALLUP POLL REPORTS 1935-1968* at 78 (The Gallup Poll 1969) (reporting that “84% of nation favor sterilization of habitual criminals and hopelessly insane.”) (May 23, 1937).

87. “Aided and abetted by the Depression, sterilization drew diverse support in the United States and Britain which went far beyond eugenicists. Its advocates ranged from college professors to elementary school principals, from clubwomen to mental-health workers, from the British Conservative Women’s Reform Association to the New Jersey League of Women Voters, from private congresses to the 1930 White House Conference on Children and Health, . . . from Lord Horder, physician of King George VI and the Prince of Wales, to H.L. Mencken, who suggested that the federal government pay a thousand dollars to every “adult American” who volunteered to be sterilized.” KEVLES, *supra* note 86, at 115. On Teddy Roosevelt and Margaret Sanger, see *id.* at 94; on David Starr Jordan, see *id.* at 64.

come a political and emotional faith.<sup>88</sup> Since at least Teddy Roosevelt, the public had been listening to claims that attributed America's success to its "Anglo-Saxon blood."<sup>89</sup> Persistent efforts had been made, during the first two decades of the century, to keep that blood pure by closing America's doors to what were perceived to be lesser and dangerous immigrants.<sup>90</sup> The dilution of American blood was not only a concern of individuals; the blood of the nation appeared to be at stake as well.

If the eugenic movement thrived on this common sense of blood, it also nurtured a particularly malevolent notion of blood and national health. If there was "good blood" to be nurtured, there was "bad blood" to be isolated, segregated or sterilized. There was, to use the term of the day, "the menace of the unfit." For at least fifty years before Skinner's case was tried, a diverse group of eugenicists, criminologists, sociologists, and biologists (and even welfare reformers) had inveighed against the "unfit," a group variously defined to include the feebleminded, the poor, the criminalistic, the epileptic, the deaf and even the poor. Study after study produced by social scientists and geneticists during this period appeared to support the notion that the unfit were propagating at an unusually high rate relative to the rest of the population; and thus diluting good blood with bad.<sup>91</sup> As Lothrop Stoddard, a popularizer of eugenics, put it in the twenties, the unfit are "cancerous growths . . . infecting the blood of whole communities. . . ."<sup>92</sup>

What you ask does this have to do with *Skinner*? With the "relational critique?" Well, everything. Today, lawyers have formed *Skinner's* popular history in the image of a piece of text that never even appears in the decision – "fundamental rights" or a "fundamental

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88. In Oklahoma, as elsewhere, the sterilization laws were the product of a variety of political interests, including new dealers, reformers, and those who saw themselves on a crusade to rid the next generation of disease. Some hoped that science might remake society in its image and that tainted blood, like disease, might be eradicated in men's lifetime. For the latter point, see VICTORIA NOURSE, *SKINNER'S TRIAL* (forthcoming).

89. DIANE B. PAUL, *CONTROLLING HUMAN HEREDITY, 1865 TO THE PRESENT* 102 (1995).

90. The influence of eugenics on the immigration debates of the 1920s is reflected in the passage of the National Origins Act of 1924, which limited the number of immigrants allowed citizenship in the United States according to their race. The prominent eugenicist Charles Davenport encouraged citizens to see the danger of increasing the numbers of non-Nordic immigrants to the United States. KEVLES, *supra* note 86, at 46-51. Congressman Albert Johnson, who chaired the Committee on Immigration and Naturalization, appointed Harry Laughlin, Charles Davenport's protégé, as Expert Eugenics Agent to the Committee on Immigration and Naturalization. PAUL, *supra* note 89, at 105.

91. See generally MARK HALLER, *EUGENICS: HEREDITARIAN ATTITUDES IN AMERICAN THOUGHT* (1963); KEVLES, *supra* note 86, at ch. 5.

92. LOTHROP STODDARD, *THE REVOLT AGAINST CIVILIZATION: THE MENACE OF THE UNDERMAN* 94 (1922).

right to procreate."<sup>93</sup> Then, the driving force behind Douglas's opinion was precisely what he refused to say openly: the risks of eugenics. Blood, the basis of the Oklahoma statute, purported to be natural; it appeared to carry the authority of science. But, in fact, it reflected a contingent and and controversial social relation – eugenics was a science of bad blood, where bad blood meant social inferiority. By 1942, this had become quite clear. At the time Douglas wrote the opinion, everyone knew that the sterilization movement, of which Oklahoma's statute was a small part, was based on the idea that society could cleanse itself of the "unfit." Scientists who, in the early thirties, had supported the program had by then repudiated eugenics. More importantly, life had made clear the political dangers of these policies in the wrong hands: Hitler's sterilization program, widely publicized in America as early as late 1933, had been transformed into something far more disturbing.<sup>94</sup>

Today, this knowledge goes some way toward making sense of the apparent irrationalities of Justice Douglas's rather tortured opinion. Indeed, one can reconceive of the opinion as an experiment in the relational. Today, the opinion seems virtually incomprehensible for those looking for its famous phrases – most of the opinion is devoted to arcane distinctions in the criminal law. Why did Douglas labor so hard over the criminal law? He wanted to make the criminal statute *say* what its relations were. He wanted it to wear its relations of inferiority on its surface. Justice Douglas found what he was looking for: a clause that exempted embezzlers from sterilization. He spent page after page coming to the conclusion that the statute discriminated between embezzlers and chicken thieves.<sup>95</sup> It was as if he had written: "if we changed the relation of the defendant to the state – if we assumed he was a high class character, an embezzler, a white collar criminal – would the state be sterilizing the poor man?"

All of this might have been made a good deal more clear and withstood future scrutiny better had Justice Douglas stated what he knew about the case, instead of simply adverting to it obliquely. He

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93. Contrary to popular understanding, the opinion never uses these terms. It says that procreation is fundamental to the "race." It does refer to human rights in the opening of the opinion and it does claim that the legislation "involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." *Skinner*, 316 U.S. at 541. As to marriage, as a legal form, this is surely an overstatement; as to procreation, it is a truism.

94. Publicity concerning the German sterilization movement first hit the presses in late 1933, as Hitler's planned "eugenic" courts were to go into operation in January of the next year. See Julia McCarthy, *Sterilization—How It Works*, N.Y. DAILY NEWS, Dec. 22, 1933 at 1. On events in Germany, see LUCY S. DAWIDOWICZ, *THE WAR AGAINST THE JEWS 1933-1945*, 136-39 (Bantam Trade ed. 1986). Of course, there was nothing inherent in the sterilization movement itself that demanded a move from sterilization to the final solution; in Denmark and Finland and elsewhere, sterilization continued unabated, for some time, after WWII.

95. *Skinner*, 316 U.S. at 541 ("Embezzlers are forever free. Those who steal or take in other ways are not."). *Id.* at 542.

acknowledged that the “embezzler exception” was but one of the inequalities of the statute.<sup>96</sup> And, indeed, there were other reasons that betrayed the statute as riddled with the potential for racism and caste. The statute sterilized those who had committed “crimes of moral turpitude.” In the real world, that meant “white trash and blacks and other undesirables” (i.e. “the unfit”).<sup>97</sup> No one who had been on the Supreme Court in the 1930s could have failed to mistake the term as code for race, for it played just that role, and was so quoted by the court in one of the most public and controversial criminal law cases of the twentieth century – the Scottsboro trials. In *Norris v. Alabama*, the Court noted that this was the way that southerners were keeping blacks out of jury boxes (and voting booths). The Court’s opinion specifically reported that the jury commissioner, in that case, had testified: “I never met a ‘negro’ who had not committed a ‘crime of moral turpitude.’”<sup>98</sup>

But the relation between blood and race would have been clearer still if Justice Douglas had simply published his draft of the opinion, a draft that openly likened the Oklahoma statute with Hitler’s program to eradicate all but the Nordic races.<sup>99</sup> Perhaps Douglas thought these points too obvious, too pointed or painful, to bear repeating. Perhaps he believed that everyone knew that the case wasn’t simply about science or blood or crime. In April of 1942, when Justice Douglas drafted the opinion, the world was at war to save itself from a dictator who had plunged them into world conflict precisely because he sought a perverse racial purity. Hitler’s racism had been known as early as 1933 when he touted one of his first new initiatives as Chancellor, the Nazi sterilization law. By the summer of 1942, when the Supreme Court issued the *Skinner* opinion, the public was at war to stem the tide of Naziism.<sup>100</sup> No one at the time could have read the

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96. “We do not stop to point out all of the inequalities in this Act.” *Id.* at 538.

97. *Skinner* was reported by newspapers to be a “cripple.” He was not African-American, to the extent that this can be understood from “silence” on his race.

98. *Norris v. Alabama*, 294 U.S. 587, 598-99 (1935). Decades later, the Supreme Court came to the same conclusion in *Hunter v. Underwood*, 471 U.S. 222 (1985), holding that Alabama had cloaked blatant efforts to establish “white supremacy” by disenfranchising blacks through a state constitutional provision that barred voting by persons who had committed a “crime involving moral turpitude.” *Id.* at 228-32.

99. For example, Justice Douglas originally wrote as follows: “The classification hardly has firmer constitutional basis than if in dealing with particular offenses it drew a line between rich and poor or between Nordic and other racial types.” See William O. Douglas, Draft of Opinion in *Skinner* (unpublished draft, on file with Manuscript Division, Library of Congress).

100. The depth of Douglas’s knowledge on the Jewish question is unclear but it is quite clear that he knew the situation was serious. After the *Skinner* opinion was issued, Douglas wrote a draft of a speech in which he called attention to the decade-long “systematic torture” of the Jews by Hitler. William O. Douglas, Radio Address from Madison Square Garden (Mar. 1, 1943) (draft on file with Manuscript Division, Library of Congress). When Douglas ultimately gave the speech, one of his first telegrams of congratulation was from the NAACP. Letter from Walter White, Secretary,

opinion's reference to "evil and reckless hands"<sup>101</sup> as a reference to anyone but Hitler.

As we have seen before, the relations here – the social relations of inferiority – were more powerful than the legal descriptions. This is why, in the end, the statute should (and would have been) struck down with or without the "embezzler" exception or the criminal law distinctions on which Justice Douglas relied. Today, readers consider *Skinner* a case of fundamental rights because they are uncomfortable with a rationale that seems to make the case come out the other way if the statute had simply "sterilized all criminals equally." But even if the "embezzler" exception were not in the statute, and even if the statutory term "crime of moral turpitude" were not code for race and caste, the result would have been the same. Even without these terms, sterilization meant the eradication of the unfit and that meant a relation of state-sponsored genetic inferiority.

What makes *Skinner* so remarkable, to me, is how clearly the opinion seems to recognize the power of law to reconstitute social relations. What would happen, how would relations be different, Justice Douglas asked, if we allowed states to have such laws, if this power of genetic determination were lodged in the hands of politics? Douglas, in the end, made it quite clear: "The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear." Douglas knew that sterilization, however benignly administered, created grave political risks – that it could be used by those in power to eradicate their enemies and thus perpetuate themselves (in life and in power). This is precisely the reason we may strike the key descriptive term here – fundamentality – and the case is quite likely to have come out the same way.<sup>102</sup> Fundamentality is but a description of a relation of inviolability, a conclusion, not an argument. *Skinner* does not create new constitutional text; it relies upon the equal protection clause in its most basic meaning. In a democracy, there can be no basis for a self-perpetuating aristocracy, genetic or otherwise.<sup>103</sup>

*Skinner*, and the sterilization of criminals, stood at the crossroads of two worlds that once met in war: a world that grounded its governments in the idea that some were naturally superior and a world in which that belief had become something to be feared and detested.

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NAACP, to William O. Douglas (Mar. 5, 1943) (on file with Manuscript Division, Library of Congress). Justice Douglas had apparently departed from his prepared text to talk specifically about America's own racial shame.

101. *Skinner*, 316 U.S. at 541.

102. It is worth noting, as well, that Douglas's reference to strict scrutiny seems ambiguous at best. Throughout the opinion, he insists that he is deferring to the state, that the court is not substituting its own judgment – declarations manifestly inconsistent with heightened scrutiny.

103. Lest this be misinterpreted, I make no claim here about the nature or existence of other fundamental rights.

Ask a lawyer about *Skinner* today and, if schooled, he will tell you none of this (he will use the jargon of scrutinies and rights and fundamentality).<sup>104</sup> *Skinner's* quotable phrases are far less important, in my view, than the links between blood and racism and constitution that history exposes. In *Skinner*, the court recognized the ways in which a rule of natural superiority, once transformed from social norm to legal rule, not only changes the relations of persons to each other, but can change our very *form* of government. Eugenics was more than a science; it implied a political theory of how it is that some come to exercise legitimate power over others. The constitutional life of the case thus makes quite clear what the constitutional law may not: there is no specific text in our constitution today that says "our government shall not be one of aristocracy," where some rule over others because they are "naturally" better. And, yet, if there is one thing that we can be certain about, it is that our constitution's spirit and founding condemns aristocracy, biological or otherwise.

### III. THEORY AND QUESTIONS

Examples will only get one so far. The ultimate question I want to ask (a question that I don't even attempt to answer here) is whether it is possible to consider law-application based on relation rather than on interest or text or even policy. What would such legal reasoning look like? Would it be more just? Or simply different? Would it be more friendly to women? Or simply more illuminating of gender dilemmas? Would it place equality at the center of the law? Or would it risk dissolving individual into community? These are some of the questions raised by my examples; they are large ones, to which I have no immediate answers. Let me simply try to conclude by putting the "relational critique" in some context and suggesting a few further implications.

*Nature; relation; constitution; life.* The intellectual progression that I have sketched above begins with nature. Most lawyers, let us face it, do not study concepts/ideas such as time or passion or blood. To most lawyers, these do not seem like law at all. If my examples are worth anything, at a minimum, they should suggest that scholarship, feminist and otherwise, might do well to focus more closely on questions of the "natural." Feminists, I think, know just how important the idea of the "natural" may be. The idea of the female body has held an extraordinary power over our fates for decades and indeed centuries. Given our history, it should not be surprising to learn that law's "nature" – whether it be in the form of time or passion, force or hostility – has been invested with ideas about woman's relation to man. If law

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104. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.27, at 797 (5th ed. 1995) (describing the holding in *Skinner* as follows: "this classification violated the equal protection clause because it could not withstand the scrutiny to which the fundamental nature of the right involved demanded it be subjected.").

is to free itself of anti-feminism, law's relations must be revealed, disaggregated, and disembodied. And, in so doing, it must be made clear that anti-feminism may be embedded in places that do not even seem like they are about women or about gender or even about law (such as time, passion and blood).

*From the natural to the relational.* I have argued that various natural concepts may serve as proxies for relations. This idea is a feminist idea to the extent that it helps us see the ways in which the law naturalizes that which should be seen as unnatural, discriminatory, and even perverse. Indeed, I think that there is a vast array of feminist scholarship that effectively unpacks that which is "natural" in relations. In some cases, this is obvious: Martha Fineman's re-imagining of the family as a mother/child dyad rather than a sexual relation;<sup>105</sup> Jane Larson and Linda Hirshman's construction of sexuality in terms of a bargaining relationship;<sup>106</sup> Mary Becker's unpacking of the naturalness of heterosexuality as facilitating a relation of dominance by men of women.<sup>107</sup> One need not focus on sex, however. This happens elsewhere, in discrimination law and labor relations, in questions about race and disability and even jurisdiction. Vicki Shultz transformed a woman's choice of jobs from a natural to a constructed relation;<sup>108</sup> Kimberle Crenshaw and Patricia Williams have reconstructed relations of race as sex and sex as race;<sup>109</sup> Joan Williams has re-imagined the natural in work as an image of an ideal worker's relation to the workplace;<sup>110</sup> and Judith Resnik has shown that even legal questions such as "jurisdiction" although appearing "naturally" as genderless may in fact reflect gender relations.<sup>111</sup> Perhaps then, what I have said is so obvious that it need not have been said; perhaps I am naïve to think that there is value in bringing these otherwise disparate views together. Or perhaps this is a small place, and it is small, where sameness and difference, caring and domination, may meet.<sup>112</sup>

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105. FINEMAN, *supra* note 1.

106. JANE E. LARSON & LINDA R. HIRSHMAN, *HARD BARGAINS: THE POLITICS OF SEX* (1998).

107. Becker, *supra* note 8.

108. Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations Of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1816 (1990).

109. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991).

110. JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000).

111. Judith Resnik, "Naturally" *Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682 (1991).

112. There will be those who will say, I suspect, that I have diminished feminism by this, that feminism to be effective must stand alone, it must be radical, and other. If this is true, it pretty much eliminates the possibility of political action. My aim is not so much to eliminate questions of sex and power as to supplement them, to disaggregate them into the relations that they both represent.

At the same time, I do not want to diminish the degree to which the idea of the relational is not owned by feminism but is grounded in a variety of other traditions. My own ideas of the relational come from a place where the bottom-up (my research on crime and constitution) meets top-down, the theory and practice of realism. The notion that the natural yields and constitutes important social relations is a much broader phenomenon than simply the natural as it relates to women. To borrow an example from John Searle,<sup>113</sup> consider the pieces of paper that we use as money. Yes, money is made of paper, paper no different in brute reality from the piece of paper on which I now write. In real life, however, important distinctions and actions are made based on how we think about the pieces of paper we call money. There is money that is a gift, money that is extortion, money that pays a tax bill. One reason we make such distinctions, I believe (and here I amend Searle with Dewey, grounding all of this in lived experience), is that in each of these cases money acts – it creates different lived relations. In each case, we can disaggregate the natural and find that different relations are created, relations of citizenship and obligation (tax), relations of love and respect (gift), relations of hostility and violence (extortion). At least as far as life is concerned, the relations are far more important than the piece of paper (money), but the piece of paper enacts the relation, it helps to constitute it, in ways that create a fabulously complex and rich economic order.<sup>114</sup>

*From nature to relation to constitution.* The relational critique is not complete without thinking about the ways in which law is generative. The question here is not simply a matter of disaggregating the natural but seeing how law re-aggregates it within a new institutional context. Once we see the natural as relation, the question becomes how the law absorbs these relations. Here, my argument has been that law transforms the relations – it regenerates them in its own image. A social norm (“you should leave”) means one thing when uttered over the backyard fence, quite another when it becomes a silent rule of self-defense. What was gossip becomes force, what was softly condemnatory becomes hard-edged. What was a question about life becomes a question about law’s institutions. We can see this in the way that immi-

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113. SEARLE, *supra* note 10.

114. Some, of course, will object to this as too simple. They will remind us that there is no logical difference really between the description of a thing and a relation. Yes, it is true that relations may be reified, hypostatized. But my point here is not a logical one; it is a question of describing our experience as our experience. It is a question of attempting, at least temporarily, to unify the subjective and objective, through the action of thinking. DEWEY, *supra* note 28, at 19 (arguing that inquiry must be constantly reminded to repair to real experience so as to replace reified “reflective products”); *see also id.* at 11 (noting that the purpose of empirical method is to “note how and why the whole is distinguished into subject and object, nature and mental operations.”); *id.* at 5 (“the very meaning and purport of empirical method is that things are to be studied on their own account, so as to find out what is revealed when they are experienced.”).



nence takes on the meaning of necessity in the criminal law;<sup>115</sup> we can see this in the way that blood takes on the very meaning of a written constitution.<sup>116</sup> If we are to cut through this self-reflexive habit, this endless repetition of the same questions that positivism invites us to ask (questions about courts themselves), then it seems important to resist the natural with the constitutive.

*Law-as-Relation.* There is a conventional view of law that begins from the geography of the individual and the command of the sovereign. Law's job is to both command and protect; it commands by positive law and it protects by arming the individual with a protected forum or space, an island of personal sovereignty from which he may, if he chooses, hurl insults against an oppressive state. The constitutional law of the twentieth century began and ended with such a notion. At the beginning, it was the zone of an individual's liberty that was thought to make labor unions so strange and terrible and corporate regulation dangerous. At the end of the century, it was the individual's rights over their body and their mind that were thought to form the most fundamental zone of privacy. The political views have changed, but the basic conceptual commitments have not. The right and left simply view the potential for state oppression differently – property, not civil rights, economic freedom, not social equality. The general middle-of-the-road discourse about law today – and that is what influences lawyers and judges – is still a discourse in which law is seen as command of the state to the individual who must protect himself against the state by carving out a protected sphere.

I have no quarrel with the idea that we must protect individuals from a potentially oppressive state. But I have doubts about whether this is a complete image of law or one that feminism can accept. Our existence as individuals depends upon our relations to each other. Whether we view ourselves as victims or heroes of those relations, they are relations nonetheless. Whether they are relations between individuals or relations between the individual and the state, they are still relations. And those relations are what give meaning and life to law; quite literally, it is these relations that constitute the law. They are the lens through which we make sense of "reasonable" actions and emotions and judgments, of passion and time and causation and force and sex.

Traditional positivism takes for its principal question the idea of law's authority, its pedigree; it looks for law's author (whether that be

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115. What I mean by this is that the imminence (time) question turns out to be a proxy for the most important and apparently unresolved question in self-defense – the question of necessity. Nourse, *Subjectivity*, *supra* note 41, at 1266-76 (discussing the meaning of necessity as the fundamental question that has never been resolved in self-defense cases and which haunts the debate about battered woman cases).

116. Blood, which was at stake in *Skinner*, has been transformed in law into a question about whether there are fundamental rights, a question that becomes, for many, a question of writtleness of the constitution.

the ancient sovereign who commanded or the democratic legislature that now provides a pedigree). Feminism must imagine that there is a world in which we are all law's author, in theory if not in practice. Law is not only a top-down affair. It comes from the bottom-up, from social meanings and relations, cycling through legislative language, only to then return back to the world. The willed or author theory of law is and must be foreign to feminism, if for no other reason than that it is based on hierarchy and force.<sup>117</sup> The important question cannot be one of authorship but of the relations that law creates and how these relational structures "canalize action."<sup>118</sup> Law does not only bind with force (there is not enough force to bind us all); the law binds, in part, by allowing creative power, by providing the hope and opportunity of giving birth to new relations and new ideas.<sup>119</sup> Public opinion, knowledge, and the relations it creates are extraordinarily powerful (just look at the flags outside your window, as you read this). It is public opinion that constitutes the state, which poses all sorts of problems in a far-flung democracy such as ours, but problems that are at the very least embodied and real, rather than transcendental and textual. No text ever stopped a tank or a lynch mob, but the beliefs and actions of many in just relations to each other have. Power, in real life, is not simply violence. There is power to persuade, to love, to generate, to govern oneself in relation to others.

Feminism knows this because it knows the law's creative and destructive powers. It knows the law's ability to transform nature into bondage but, also, to release some of bondage's most obvious badges. I tell my students that the Constitution has made me possible even though it never imagined I could exist; it could only do that, if there was the possibility, so faint it seems at times, of regeneration, of birth. Our constitution must hold out the possibility of change if it is to be a

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117. As Dewey put it (when he rejected the command theory of law): "The 'command' theory of common and statute law is in reality a dialectical consequence of the theories. . . which define the state in terms of an antecedent causation, specifically of that theory which takes 'will' to be the causal force which generates the state. If a will is the origin of the state, then state-action expresses itself in injunctions and prohibitions imposed by its will upon the wills of subjects. . . The logical conclusion is that the ground of obedience lies ultimately in superior force. . . . In fact the idea of authority is abolished and that of force substituted." JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 53 (1927). Dewey goes on to argue that this does not change when one substitutes an overruling "general will." *Id.* at 54.

118. Dewey argued against the author theory of law because he believed that the important problem in a democracy was how the public would organize and recognize itself as a public.

119. This seems to me to be essential to democracy. It is only because we acquiesce when we lose in politics (as opposed to engaging in armed revolt) that we have a government at all. Acquiescence requires the anticipation that "one day" things will change, that one will be in the majority, that one will act as sovereign. This hope, then, in law's creativity, seems written into the public psychology, if nothing else, of democracy. Stephen Holmes, *Tocqueville and Democracy*, in *THE IDEA OF DEMOCRACY* (David Copp et al. eds. 1993).

constitution at all (where constitution means constitution of a political order). So, while there is very much to do, and the majority of examples I have given are of ways in which the law occludes and still enforces ancient ideas of women's inferiority, I continue to hold out the possibility of hope that we might see passion and time fall the way of blood (as it did in *Skinner*), that somewhere someday, relational understandings might illuminate rather than occlude.

There is always the danger, of course, that this is but a phantom, created within a world of patriarchy to support that world. Perhaps it is simply naive to imagine that one could have a feminist idea of law that wasn't somehow tainted or dismissed. But denial has its virtues, even if it also has its risks. That is something I suspect that most of us practice in life as well as law. My form of denial is simply to say to those who ask (and to believe that they will take me seriously) that anti-feminism is anti-democratic. I tell them that feminism, for all its apparent radicalism to the public ear, is quite conventional. It is simply one of the latest of our national struggles to realize the great structural promises of our constitution. For, to tout and benefit from the superiority of some to others, is to flout the hopes of that constitution – that we would form a society founded not upon blood, but upon an idea.<sup>120</sup> Linda Kerber has explained that idea quite well: “[I]n the Anglo-American legal tradition, equality has always meant simultaneously common law and equity, sameness and difference shaped to authentic equality in the world which living people inhabit. [This] has shifted over time as social relations between men and women have shifted. The principles remain steady and inviolate, but the work of maintaining them in our lives will have no end.”<sup>121</sup>

Yes, the relational is quite constitutional, I think, in life as well as law.

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120. Abraham Lincoln, *Speech at Republican Banquet in Chicago, Illinois (Dec. 10, 1856)*, in LINCOLN: SELECTED SPEECHES AND WRITINGS 115-16 (Gore Vidal ed., 1992) (“The ‘central idea’ in our political public opinion, at the beginning was, and until recently has continued to be, ‘the equality of men.’”).

121. KERBER, *supra* note 16, at 310.