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# Cultural Pluralism, Identity Politics, and the Law

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- "The Sacred Rights of the Weak: Pain, Sympathy, and the Culture of Individual Rights in Antebellum America," *Journal of American History* 82:3 (September 1995): 463-93.
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## The Subject of True Feeling: Pain, Privacy, and Politics

Lauren Berlant

Liberty finds no refuge in a jurisprudence of doubt<sup>1</sup>

### Pain

Ravaged wages and ravaged bodies saturate the global marketplace in which the United States seeks desperately to compete "competitively," as the euphemism goes, signifying a race that will be won by the nations whose labor conditions are most optimal for profit.<sup>2</sup> In the United States the media of the political public sphere regularly register new scandals of the proliferating sweatshop networks "at home" and "abroad," which has to be a good thing, because it produces *feeling* and with it something at least akin to *consciousness* that can lead to *action*.<sup>3</sup>

1. *Planned Parenthood of Southeastern Pennsylvania v. Casey* 112 S.Ct. 2791 (1992), at 2803.

2. See, for example, George DeMartino and Stephen Cullenberg, "Beyond the Competitiveness Debate: An Internationalist Agenda," *Social Text* 41 (1994): 11-39.

3. Take the case of the talk show host Kathie Lee Gifford, whose clothing line at the U.S. low-price megastore Wal-Mart generated for her ten million dollars of profit in its first year. During May and June 1996 Gifford was exposed by Charles Kernaghan, of the National Labor Education Fund in Support of Worker and Human Rights in Central America, for allowing her clothes to be made by tragically underpaid and mistreated young Honduran children, mostly girls. A Lexis/Nexus search under the keywords *Kathie Lee Gifford/Child Labor* nets close to two hundred stories, from all over the world, reporting on this event. A few main plots emerge from these stories: it is cast as a revenge story against privilege from the ranks of the less well-off, which strips from Gifford the protection of her perky, populist, and intimate persona to reveal the entrepreneurial profiteer beneath; it implicates an entire culture of celebrity-centered consumerism (Jaclyn

Yet, even as the image of the traumatized worker proliferates, even as evidence of exploitation is found under every rock or commodity, it competes with a normative/utopian image of the U.S. citizen who remains unmarked, framed, and protected by the private trajectory of his life project, which is sanctified at the juncture where the unconscious meets history: the American Dream.<sup>4</sup> In that story one's identity is not borne of suffering, mental, physical, or economic. If the U.S. worker is lucky enough to live at an economic moment that sustains the Dream, he gets to appear at his *least* national when he is working and at his *most* national at leisure, with his family or in semipublic worlds of other men producing surplus manliness (e.g., via sports). In the American dreamscape his identity is private property, a zone in which structural obstacles and cultural differences fade into an ether of prolonged, deferred, and individuating enjoyment that he has earned and that the nation has helped him to earn. Meanwhile, exploitation only appears as a scandalous nugget in the sieve of memory when it can be condensed into an exotic thing of momentary fascination, a squalor of the bottom too horrible to be read in its own actual banality.

The exposed traumas of workers in ongoing extreme conditions do not generally induce more than mourning on the part of the state and

Smith, A-Mart. The Gap, Spike Lee/Michael Jordan/Nike) that is organized around a "virtuous" role model/sque public figure or label that seems to certify healthy conscientious social membership for consumers; it becomes an exemplum of the banality of sweatshop labor in the United States and around the world; and a call to belated conscience. Through Gifford's apparent intimacy with her devoted audience a "public" outraged by child exploitation seemed instantly to emerge, which led in turn to a kind of state action involving an intensified federal push for voluntary covenants against child labor and subminimum wages (measured by "local," not U.S., standards of remuneration). It also eventuated in the development of a new label, "No Sweat," to be put on any clothes produced by adequately paid workers—a sad substitute for the union labels of years past. This issue has quickly joined child abuse as an ongoing zone of fascination and morally impotent concern in the political public sphere. See, for a relatively unjaded extended example, Sidney Schamberg, "Six Cents an Hour," *Life* (June 1996): 38–48. For a more general view of the political/media exploitation of the exploited child figure, see McKenzie Wark, "Fresh Maimed Babies: The Uses of Innocence," *Transition* 65 (Spring 1995): 30–47.

4. For more exposition on the ways political cultures that value abstract or universal personhood produce privileged bodies and identities that travel unmarked, unremediated and free of structural humiliation, see Lauren Berlant, "National Bodies: National Bodies: Imitation of Life," in *The Phantom Public Sphere*, ed. Bruce Robbins (Minneapolis: University of Minnesota Press, 1993), 173–208; and *The Queen of America* (Washington City: Essays on Sex and Citizenship) (Durham: Duke University Press, 1997); Richard Dyer, "White," *The Matter of Images* (New York: Routledge, 1993), 141–63; and Peggy Phelan, *Unmarked: The Politics of Performance* (New York: Routledge, 1993).

the public culture to whose feeling-based opinions the state is said to respond. Mourning is what happens when a grounding object is lost, is dead, no longer living (to you). Mourning is an experience of irreducible boundedness: I am here, I am living, he is dead, I am mourning. It is a beautiful, not sublime, experience of emancipation: mourning supplies the subject the definitional perfection of a being no longer in flux. It takes place over a distance: even if the object who induces the feeling of loss and helplessness is neither dead nor at any great distance from where you are.<sup>5</sup> In other words, mourning can also be an act of aggression, of social deathmaking: it can perform the evacuation of significance from actually-existing subjects. Even when liberals do it, one might say, "others" are ghosted for a good cause.<sup>6</sup> The sorrow songs of scandal that sing of the exploitation that is always "elsewhere" (even a few blocks away) are in this sense aggressively songs of mourning. Play them backward, and the military march of capitalist triumphalism (*The Trans-Nationale*) can be heard. Its lyric, currently crooned by every organ of record in the United States, is about necessity. It exhorts citizens to understand that the "bottom line"<sup>7</sup> of national life is neither

5. The essay of Sigmund Freud's summarized here is "Mourning and Melancholia," in *General Psychological Theory*, intro. Philip Rieff (New York: Collier Books, 1963), 164–79.

6. The best work on the civilized barbarism of mourning has been done on AIDS discourse in U.S. culture: see Douglas Crimp, "Mourning and Militancy," in *Out There: Marginalization and Contemporary Cultures*, ed. Russell Ferguson, Martha Gever, Trinh T. Minh-ha, and Cornell West (Cambridge: MIT Press, 1990), 233–45; and virtually every essay in Douglas Crimp, ed., *AIDS: Cultural Analysis/Cultural Activism* (Cambridge: MIT Press, 1988). Crimp is especially astute on the necessary articulation of sentimentality and politics: because processes of legitimation cannot do without the production of consent, and empathetic misrecognition is one tactic for creating it. The question is how, and at what cost, different kinds of subjects and contexts of empathy are imagined in the struggle for radical social transformation. See also Jeff Nunokowa, "AIDS and the Age of Mourning," *Yale Journal of Criticism* 4, no. 2 (Spring 1991): 1–12. Judith Butler's work has also been a crucial intertext here, notably its representation of heterosexual melancholia (the disavowed experience of loss heterosexuals endure as a consequence of having to divert ongoing same-sex love/identification/attachments), a condition that expresses itself through gender normativity, heterosexual hegemony, misogyny, homophobia, and other forms of disciplinary order. This opened a space for thinking about the social function of mourning in similar contexts of normative hierarchy in which intimacies appear to have to be constructed, not suppressed. See *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990); and *Bodies That Matter: On the Discursive Limits of Sex* (New York: Routledge, 1993).

7. On the "bottom line" as a site of political articulation and struggle, see Elizabeth Alexander, "'Can You Be BLACK and Look at This?': Reading the Rodney King Video(s)," in *The Black Public Sphere*, ed. Black Public Sphere Collective (Chicago: University of Chicago Press, 1995): 81–98.

utopia nor freedom but survival, which can only be achieved by a citizenry that eats its anger, makes no unreasonable claims on resources or control over value, and uses its most creative energy to cultivate intimate spheres while scrapping a life together flexibly in response to the market world's caprice.<sup>8</sup>

In this particular moment of expanding class unconsciousness that looks like consciousness emerges a peculiar, though not unprecedented, hero: the exploited child. If a worker can be infantilized, pictured as young, as small, as feminine or feminized, as starving, as bleeding and diseased, and as a (virtual) slave, the righteous indignation around procuring his survival resounds everywhere. The child must not be sacrificed to states or to profiteering. His wounded image speaks a truth that subordinates narrative: he has not "freely" chosen his exploitation; the optimism and play that are putatively the right of childhood have been stolen from him. Yet only "voluntary" steps are ever taken to try to control this visible sign of what is ordinary and systemic amid the chaos of capitalism, in order to make its localized nightmares seem uninevitable. Privatize the atrocity, delete the visible sign, make it seem *foreign*. Return the child to the family, replace the children with adults who can look dignified while being paid virtually the same revolting wage. The problem that organizes so much feeling then regains livable proportions, and the uncomfortable pressure of feeling dissipates, like so much gas.

Meanwhile, the pressure of feeling the shock of being uncomfortably political produces a cry for a double therapy—to the victim and the viewer. But before "we" appear too complacently different from the privileged citizens who desire to caption the mute image of exotic suffering with an aversively fascinated mourning (a desire for the image to be *dead*, a ghost), we must note that this feeling culture crosses over into other domains, the domains of what we call identity politics, where the wronged take up voice and agency to produce transformative testimony, which depends on an analogous conviction about the *self-evidence* and therefore the *objectivity* of painful feeling.

8. On the structures and rhetorics of coercive flexibility in transnational times, see David Harvey, *The Condition of Postmodernity* (London: Basil Blackwell, 1989); Roger Rouse, "Thinking through Transnationalism: Notes on the Cultural Politics of Class Relations in the Contemporary United States," *Public Culture* 7 (Winter 1995): 353–402; and Emily Martin, *Flexible Bodies: Tracking Immunity in American Culture—from the Days of Polio to the Age of AIDS* (Boston: Beacon Press, 1994).

The central concern of this essay is to address the place of painful feeling in the making of political worlds. In particular, I mean to challenge a powerful popular belief in the positive workings of something I call national sentimentality, a rhetoric of promise that a nation can be built across fields of social difference through channels of affective identification and empathy. Sentimental politics generally promotes and maintains the hegemony of the national identity form, no mean feat in the face of continued widespread intercultural antagonism and economic cleavage. But national sentimentality is more than a current of feeling that circulates in a political field: the phrase describes a long-standing contest between two models of U.S. citizenship. In one, the classic model, each citizen's value is secured by an equation between abstractness and emancipation: a cell of national identity provides juridically protected personhood for citizens regardless of anything specific about them. In the second model, which was initially organized around labor, feminist, and antiracist struggles of the nineteenth-century United States, another version of the nation is imagined as the index of collective life. This nation is peopled by suffering citizens and noncitizens whose structural exclusion from the utopian-American dreamscape exposes the state's claim of legitimacy and virtue to an acid wash of truth telling that makes hegemonic disavowal virtually impossible, at certain moments of political intensity.

Sentimentality has long been the means by which mass subaltern pain is advanced, in the dominant public sphere, as the true core of national collectivity. It operates when the pain of intimate others burns into the conscience of classically privileged national subjects, such that they feel the pain of flawed or denied citizenship as their pain. Theoretically, to eradicate the pain those with power will do whatever is necessary to return the nation once more to its legitimately utopian odor. Identification with pain, a universal true feeling, then leads to structural social change. In return, subalterns scarred by the pain of failed democracy will reauthorize universalist notions of citizenship in the national utopia, which involves believing in a redemptive notion of law as the guardian of public good. The object of the nation and the law in this light is to eradicate systemic social pain, the absence of which becomes the definition of freedom.

Yet, since these very sources of protection—the state, the law, patriotic ideology—have traditionally buttressed traditional matrices of cultural hierarchy, and since their historic job has been to protect

universal subject/citizens from feeling their cultural and corporeal specificity as a political vulnerability, the imagined capacity of these institutions to assimilate to the affective tactics of subaltern counterpolitics suggests some weaknesses, or misrecognitions, in these tactics. For one thing, it may be that the sharp specificity of the traumatic model of pain implicitly mischaracterizes what a person is as what a person becomes in the experience of social negation; this model also falsely promises a sharp picture of structural violence's source and scope, in turn promoting a dubious optimism that law and other visible sources of inequality, for example, can provide the best remedies for their own taxonomizing harms. It is also possible that counterhegemonic deployments of pain as the measure of structural injustice actually sustain the utopian image of a homogeneous national metaculture, which can look like a healed or healthy body in contrast to the scarred and exhausted ones. Finally, it might be that the tactical use of trauma to describe the effects of social inequality so overidentifies the eradication of pain with the achievement of justice that it enables various confusions: for instance, the equation of pleasure with freedom or the sense that changes in feeling, even on a mass scale, amount to substantial social change. Sentimental politics makes these confusions credible and these violences bearable, as its cultural power confirms the centrality of interpersonal identification and empathy to the vitality and viability of collective life. This gives citizens something to do in response to overwhelming structural violence. Meanwhile, by equating mass society with that thing called "national culture," these important transpersonal linkages and intimacies all too frequently serve as proleptic shields, as ethically uncontestable legitimating devices for sustaining the hegemonic field.<sup>9</sup>

Our first example, the child laborer, a ghost of the nineteenth century, taps into a current vogue to reflect in the premature exposure of children to capitalist publicity and adult depravity the nation's moral

9. One critic who has not underestimated the hegemonic capacities of state deployments of pain is Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* (New York: Oxford University Press, 1985). This book remains a stunning description of the ways control over actual physical and rhetorical pain provides the state and the law with control over what constitutes collective reality, the conjuncture of beliefs and the material world. See especially part 2, on pain and imagining. Like the legal theorists and jurists whose writing this essay engages, Scarry works with a fully state- (or institutionally) saturated concept of the subject, a relation more specific and nonuniversal than it frequently seems to be in her representation of it.

and economic decline, citing it as a scandal of citizenship, something shocking and un-American. Elsewhere I have described the ways the infantile citizen has been exploited, in the United States, to become both the inspiring sign of the painless good life and the evacuating optimistic cipher of contemporary national identity.<sup>10</sup> During the 1980s a desperate search to protect the United States from what seemed to be an imminently powerful alliance of parties on the bottom of so many traditional hierarchies—the poor, people of color, women, gays and lesbians—provoked a counterinsurgent fantasy on behalf of "traditional American values." The nation imagined in this reactive rhetoric is dedicated not to the survival or emancipation of traumatized marginal subjects but, rather, to freedom for the American innocent: the adult without sin, the abducted and neglected child, and, above all, and most effectively, the fetus. Although it had first appeared as a technological miracle of photographic bio-power in the mid-1960s, in the post-Roe era the fetus became consolidated as a political commodity, a supernatural sign of national iconicity. What constituted this national iconicity was an image of an American, perhaps the last living American, not yet bruised by history: not yet caught up in the excitement of mass consumption or ethnic, racial, or sexual mixing, not yet tainted by knowledge, by money, or by war. This fetus was an American to identify with, to aspire to make a world for: it organized a kind of beautiful citizenship politics of good intention and virtuous fantasy that could not be said to be dirty, or whose dirt was attributed to the sexually or politically immoral.

By *citizenship* I refer here both to the legal sense in which persons are juridically subject to the law's privileges and protections by virtue of national identity status but also the experiential, vernacular context in which people customarily understand their relation to state power and social membership. It is to bridge these two axes of political identity and identification that Bernard Nathanson, founder of the National Abortion Rights Action League (NARAL) and now a pro-life activist, makes political films starring the traumatically post-iconic fetal body. His aim is to solicit *aversive identifications* with the fetus, ones that strike deeply the empathetic imaginary of people's best selves while creating

10. See Berlant, *Queen of America*. The following paragraphs revise and repeat some arguments from this book. For an essay specifically on scandalized childhood in the contemporary United States, see Marilyn Ivy, "Recovering the Inner Child in Late Twentieth Century America," *Social Text* 37 (1993): 227–52.

pressure for the erasure of empathy's scene. First, he shows graphic images of abortion, captioned by pornographic descriptions of the procedures by which the total body is visibly turned into hideous fragmented flesh. He then calls on the national conscience to delete what he has created, an "unmistakable trademark of the irrational violence that has pervaded the twentieth century."<sup>11</sup> The trademark to which he refers is abortion. He exhorts the public to abort the fetal trademark so as to save the fetus itself and, by extension, the national identity form and its future history. In this sense the fetus's sanctified national identity is the opposite of any multicultural, sexual, or classed identity: the fetus is a blinding light that, triumphant as the modal citizen form, would white out the marks of hierarchy, taxonomy, and violence that seem now so central to the public struggle over who should possess the material and cultural resources of contemporary national life.

It will be clear by now how the struggle over child labor takes on the same form as fetal rights discourse: revelations of trauma, incitements to rescue, the reprivatization of victims as the ground of hope, and, above all, the notion that the feeling self is the true self, the self that must be protected from pain or from history, that scene of unwelcome changing. The infantile citizen then enfigures the adult's true self, his inner child in all its undistorted or untraumatized possibility. But to say this is to show how the fetal/infantile icon is a fetish of citizenship with a double social function. As an object of fascination and disavowal, it stands in for (while remanding to social obscurity) the traumatized virtuous private citizen around whom history ought to be organized, for whom there is not a good-enough world. (This currently includes the formerly tacit, or "normal," citizen and the sexually and racially subordinated ones.) In addition to its life as a figure for the injured adult, the fetus has another life as a utopian sign of a just and pleasant socius, both in pro-life, pro-family values rhetoric and in advertisements and Hollywood films about the state of white reproductive heterosexuality in the United States during an era of great cultural, economic, and technological upheaval. Its two scenes of citizenship can be spatialized: one takes place in a traumatized public and the other in a pain-free intimate zone. These zones mirror each other perfectly, and so betray the fetish form of sentimental citizenship, the wish it expresses to signify a political world beyond contradiction.<sup>12</sup>

11. Nathanson speaks this line in the film *The Silent Scream* (1984).

12. This intensification of national-popular patriotic familialism has taken place at a time when another kind of privatization—the disinvestment of the state economically

I have elaborated these basic Freudian dicta about mourning, the theory of infantile citizenship, and this account of U.S. political culture to make a context for four claims: that this is an age of sentimental politics in which policy and law and public experiences of personhood in everyday life are conveyed through rhetorics of utopian/traumatized feeling; that national-popular struggle is now expressed in fetishes of utopian/traumatic affect that over-organize and over-organize social antagonism; that utopian/traumatized subjectivity has replaced rational subjectivity as the essential index of value for personhood and thus for society; and that, while on all sides of the political spectrum political rhetoric generates a high degree of cynicism and boredom,<sup>13</sup> those same sides manifest, simultaneously, a sanctifying respect for sentiment. Thus, in the sentimental national contract antagonistic class positions mirror each other in their mutual conviction about the *self-evidence* and *objectivity* of painful feeling, and about the nation's duty to eradicate it. In the conjuncture "utopian/traumatized" I mean to convey a logic of fantasy reparation involved in the therapeutic conversion of the scene of pain and its eradication to the scene of the political itself. Questions of social inequity and social value are now adjudicated in the register not of power but of sincere surplus feeling: worry about whether public figures seem "caring" subordinates analyses of their visions of injustice; subalternized groups attempt to forge alliances on behalf of radical social transformation through testimonial rhetorics of true pain;<sup>14</sup> people believe that they know what they feel when they feel it, can locate its origin, measure its effects.

The traffic in affect of these political struggles finds validity in those seemingly superpolitical moments when a "clear" wrong—say, the spectacle of children violently exploited—produces a "universal"

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and culturally in promoting public life—characterizes almost all the activity of the political public sphere. The economic defederalization of citizenship downsizes the public so drastically that it begins to look like "the private," its nineteenth-century antithesis (only this time mass-mediated and thus publicly sutured in a more classic Habermasian sense). Yet all too frequently the analysis of the institutions of intimacy is kept separate from the considerations of the material conditions of citizenship.

13. On cynicism and citizenship, see Slavoj Žižek, *The Sublime Object of Ideology* (London: Verso, 1989), 11–53.

14. On pain's place in forming the political imagination of subjects during the epoch of U.S. identity politics, see Wendy Brown's powerful essay "Wounded Attachments: Late Modern Oppositional Political Formations," in *The Identity in Question*, ed. John Rajchman (New York: Routledge, 1995), 199–227.



response. Feeling politics takes all kinds: it is a politics of protection, reparation, rescue. It claims a hard-wired truth, a core of common sense. It is beyond ideology, beyond mediation, beyond contestation. It seems to dissolve contradiction and dissent into pools of basic and also higher truth. It seems strong and clear, as opposed to confused or ambivalent (thus: the unconscious has left the ballpark). It seems the inevitable or desperately only core material of community.

What does it mean for the struggle to shape collective life when a politics of true feeling organizes analysis, discussion, fantasy, and policy? When feeling, the most subjective thing, the thing that makes persons public and marks their location, takes the temperature of power; mediates personhood, experience, and history; takes over the space of ethics and truth? When the shock of pain is said only to produce clarity when shock can as powerfully be said to produce panic, misrecognition, the shakiness of perception's ground? Finally, what happens to questions of managing alterity or difference or resources in collective life when feeling *bad* becomes evidence for a structural condition of injustice? What does it mean for the theory and practice of social transformation when feeling *good* becomes evidence of justice's triumph? As many historians and theorists of "rights talk" have shown, the beautiful and simple categories of legitimation in liberal society can bestow on the phenomenal form of proper personhood the status of normative value, which is expressed in feeling terms as "comfort";<sup>15</sup> and, meanwhile, political arguments that challenge the claim of painful feeling's analytical clarity are frequently characterized as causing further violence to already damaged persons and the world of their desires.

This essay will raise uncomfortable questions about what the evidence of trauma is: its desire is to exhort serious critical, but not cynical, attention to the fetish of true feeling in which social antagonism is, frequently, being worked without being worked through. My larger aim to bring into being as an object of critique the all-too-explicit "commonsense" feeling culture of national life, evident in the law, identity politics, and mass society generally: it is about the problem of trying ideologically and culturally to administer society as a space ideally void of

15. On rights talk and normativity, see the volume *Identities, Politics, and Rights*, ed. Martin Sarat and Thomas R. Kearns (Ann Arbor: University of Michigan Press, 1995). See especially Wendy Brown's contribution, an indispensable discussion of the ways "rights" enables the production of traumatized political identities: "Rights and Identity in Modernity: Revisiting the 'Jewish Question'," 85-130.

struggle and ambivalence, a place made on the model of fetal simplicity. I am not trying to posit feeling as the bad opposite of something good called thinking: as we will see, in the cases to follow politicized feeling is a kind of thinking that too often assumes the obviousness of the thought it has, which stymies the production of the thought it might become.

In particular our cases will derive from the field of sexuality, a zone of practice, fantasy, and ideology whose standing in the law constantly partakes of claims about the universality or transparency of feeling, a universality juridically known as "privacy." We begin by addressing the work of feeling in Supreme Court decisions around sexuality and privacy. But the tendency to assume the nonideological, nonmediated, or nonsocial status of feeling is shared by opponents to privacy as well, with consequences that must equally, though differently, give pause: the following section interrogates the antiprivacy revolution legal radicals have wrought via the redefinition of harm and traumatized personhood. The paradoxes revealed therein will not be easily solved by ignoring or condescending to the evidence of injustice provided by the publicized pain of subordinated populations: the essay's coda focuses on a twelve-step book about reproduction, *Peaceful Pregnancy Meditations*, by Lisa Steele George, whose commitment to therapy for pregnant women and whose paranoia about the world of identity politics in the present moment does *not* produce an image of the just world. Its properly paranoid politics of intimacy rejects the mirroring logics of posttraumatic national subjectivity. It promotes, instead, a deeply felt but stubbornly uncongealed form of personhood whose way of inhabiting politics, publicness, personhood, and power suggests how much work it would take, and what kinds of changes it would bring, to induce a break with trauma's seduction of politics in the everyday of U.S. citizenship.<sup>16</sup>

### Privacy

It would not be too strong to say that where regulating sexuality is concerned the law has a special sentimental relation to banality. But to say

16. *Intimate discipline* is Richard Brodhead's term for the coercions of sentimental culture in the nineteenth century United States. See "Sparing the Rod: Discipline and Fiction in Antebellum America," *Cultures of Letters: Scenes of Reading and Writing in Nineteenth-Century America* (Chicago: University of Chicago Press, 1993), 13-47.

this is not to accuse the law of irrelevance or shallowness. In contrast to the primary sense of banality as a condition of reiterated ordinary conventionality, banality can also mark the experience of deeply felt emotion, as in the case of "I love you," "Did you come?" or "O' Say, Can You See?"<sup>17</sup> But for an occasion of banality to be both utopian and sublime its ordinariness must be thrust into a zone of overwhelming disavowal. This act of optimistic forgetting is neither simple nor easy: it takes the legitimating force of institutions—for example, the nation form or heterosexuality—to establish the virtue of forgetting banality's banality. Take a classic instance of this process, an entirely forgettable moment in *The Wizard of Oz* that precedes an unforgettable one. Auntie Em says to Dorothy, who has been interfering with the work on the farm (no child labor there: Dorothy carries books): "Find yourself a place where you won't get into any trouble." Dorothy, in a trance, seems to repeat the phrase but misrepeats it, sighing, "a place where there isn't any trouble," which leads her then to fantasize "somewhere over the Rainbow." Between the phrase's first and second incarnations the agency of the subject disappears and is transferred to the place: the magic of will and intention has been made a property of property.

The unenumerated relation between *the place where you won't get into trouble* and *a place where, definitionally, there is no trouble* expresses the foggy fantasy of happiness pronounced in the constitutional concept of privacy, whose emergence in sexuality law during the 1960s brought heterosexual intimacy explicitly into the antagonistic field of U.S. citizenship. Privacy is the Oz of America. Based on a notion of safe space, a hybrid space of home and law in which people will act legally and lovingly toward one another, free from the determinations of history or the coercions of pain, the constitutional theorization of sexual privacy is drawn from a lexicon of romantic sentiment, a longing for a space where there is no trouble, a place whose constitution in law

17. Jean Baudrillard posits banality as the affective dominant of postmodern life: see *In the Shadow of the Silent Majorities . . . Or the End of the Social and Other Essays*, trans. Paul Foss, Paul Patton, and John Johnston (New York: Semiotexte, 1983); and "From the System to the Destiny of Objects," in *The Ecstasy of Communication*, ed. Sylvère Lotringer (New York: Semiotexte, 1987), 77–96. See also Achille Mbembe, "Prosaics of Servitude and Authoritarian Civilities," *Public Culture* 5 (Fall 1992): 123–48; Achille Mbembe and Janet Roitman, "Figures of the Subject in Times of Crisis," *Public Culture* 7 (Winter 1995): 323–52; and Meaghan Morris, "Banality in Cultural Studies," in *Logics of Television: Essays in Cultural Criticism*, ed. Patricia Mellencamp (Bloomington: Indiana University Press, 1990), 14–43.

would be so powerful that desire would meet moral discipline there, making real the dreamy rule. In this dream the zone of privacy is a paradigmatic national space too, where freedom and desire meet up in their full suprapolitical expression, a site of embodiment that also leaves unchallenged fundamental dicta about the universality or abstractness of the modal citizen.

Much has been written on the general status of privacy doctrine in constitutional history, a "broad and ambiguous concept which can easily be shrunken in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things other than searches and seizures."<sup>18</sup> Privacy was first conceived as a constitutionally mandated but unenumerated right of sexual citizenship in *Griswold v. Connecticut* (381 U.S. 479 [1965]). The case is about the use of birth control in marriage: a nineteenth-century Connecticut law made it illegal for married couples to use contraceptives for birth control (oral arguments suggest that the "rhythm method" was not unconstitutional in that state);<sup>19</sup> they were only allowed prophylaxis to prevent disease. To challenge this law Esther Griswold, director of Planned Parenthood in Connecticut, and Lee Buxton, the chief physician there, were arrested, by arrangement with the district attorney, for giving "information, instruction, and medical advice to married persons as to the means of preventing conception."<sup>20</sup>

The arguments made in *Griswold* stress the Due Process clause of the Fourteenth Amendment, because denying the sale of contraceptives "constitutes a deprivation of right against invasion of privacy."<sup>21</sup> This kind of privacy is allotted only to married couples: Justice Goldberg quotes approvingly a previous opinion of Justice Harlan (*Poe v. Ullman*, 367 U.S. 497, at 533), which states that "adultery, homosexuality, and the like are sexual intimacy which the State forbids . . . but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected."<sup>22</sup>

18. Justice Hugo Black, concurring, *Griswold v. Connecticut* 381 U.S. 479 (1965), at 509.

19. Stephanie Guitton and Peter Irons, eds., *May It Please the Court: Arguments on Abortion* (New York: New Press, 1995), p. 4.

20. Justice William O. Douglas, Opinion of the Court, *Griswold v. Connecticut*, at 480.

21. *Ibid.*, 5.

22. Justice Arthur Goldberg, concurring, *Griswold v. Connecticut*, at 499.



We can see in Harlan's phrasing and Goldberg's citation of it the sentimental complexities of making constitutional law about sexual practice in the modern United States. The logic of equivalence between adultery and homosexuality in the previous passage locates these antithetical sexual acts/practices in an unprotected public space that allows and even compels zoning in the form of continual state discipline (e.g., laws);<sup>23</sup> in contrast, marital privacy is drawn up here in a zone elsewhere to the law and takes its authority from tradition, which means that the law simultaneously protects it and turns away its active disciplinary gaze. At this juncture of space, time, legitimacy, and the law Gayatri Spivak's distinction between *Time* and *timing* will also clarify the stakes of privacy law's optimistic apartheid where sexuality is concerned. Spivak argues that the difference between hegemonic and "colonized" conceptions of imperial legal authority can be tracked by graphing *Time* as that property of transcendental continuity that locates state power to sustain worlds in the capacity to enunciate master concepts such as liberty and legitimacy in a zone of monumental time, a seemingly postpolitical space of abstraction from the everyday. In contrast, *timing* marks the always processual, drowning-in-the-present quality of subaltern survival in the face of the law's scrutiny and subject-making pedagogy.<sup>24</sup> Mapped onto sexuality law here, in privacy's early and most happy conceptualization, we see that nonmarital and therefore nonprivate sex exists in the antagonistic performance of the law's present tense, while the marital is virtually antinomian, *Time* above fallen *timing*. It is not only superior to the juro-political but also, apparently, its boss and taskmaster.

The banality of intimacy's sentimental standing in and above the law is most beautifully and enduringly articulated in the majority opinion in *Griswold*, written by Justice William O. Douglas. Douglas argues that a combination of precedents derived from the First, Fourth, Fifth, Ninth, and Fourteenth Amendments<sup>25</sup> supports his designation of a

23. I borrow this rhetoric of zoning, and specifically its relation to the production of normative sexuality, from Lauren Berlant and Michael Warner, "Sex in Public," *Critical Inquiry* 24 (winter 1998): 547-66.

24. Gayatri Chakravorty Spivak, "Time and Timing: Law and History," in *Chronologies: The Construction of Time*, ed. John Bender and David E. Wellbery (Stanford: Stanford University Press, 1991), 99-117.

25. Douglas writes: "Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The

heretofore unenumerated constitutional right for married persons to inhabit a zone of privacy, a zone free from police access or the "pure [state] power" for which Connecticut was arguing as the doctrinal foundation of its right to discipline immorality in its citizens.<sup>26</sup> The language Douglas uses both to make this space visible and to enunciate the law's relation to it shuttles between the application of *stare decisis* (the rule of common law that binds judicial authority to judicial precedent) and the traditional conventionalities of heteronormative Hallmark-style sentimentality:

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms" [*NAACP v. Alabama*, 377 U.S. 288, at 307]. Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship. We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or

Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.' " *Griswold v. Connecticut*, at 484. Justice Goldberg's concurring opinion, while mainly running a legal clinic on the Founders' relation to unenumerated rights, adds the Due Process clause of the Fourteenth Amendment to this constitutional congeries. *Ibid.*, at 488.

26. Guitton and Irons, eds., *May It Please the Court*, 7.

social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.<sup>27</sup>

Douglas bases his view that sexuality in marriage must be constitutionally protected—being above the law, prior to it, and beyond its proper gaze—on a sense that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”<sup>28</sup> A *penumbra* is generally a “partial shadow between regions of complete shadow and complete illumination,” but I believe the sense in which Douglas uses this dreamy concept is more proper to its application in the science of astronomy: “The partly darkened ridge around a sunspot.” In other words, privacy protections around even marital sexuality are the dark emanations from the sunspot of explicit constitutional enumeration, and the zone of privacy in which marital sexuality thrives is the shadowland of the “noble” institution of marriage, with its sacred obligational emanations of social stability and continuity, intimate noninstrumentality, and superiority to the dividedness that otherwise characterizes the social. To back him up Justices Harlan’s and Goldberg’s opinions invoke the state and the Court’s propriety in pedagogically bolstering the institutions of traditional American morality and values: after all, the theater of marital intimacy is “older than our political parties, older than our schools.”

Justice Hugo Black’s dissent in *Griswold* blasts Justices Douglas, Goldberg, Harlan, and White for the unethical emotionality of what he calls the “natural law due process formula [used] to strike down all state laws which [the justices] think are unwise, dangerous, or irrational.” He feels that it introduces into constitutional jurisprudence justifications for measuring “constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our own notions of civilized standards of conduct. Such an appraisal of the wisdom of legislation is an attribute of the power to make laws, not of the power to interpret them.” He finds precedent in this critique in a Learned Hand essay on the Bill of Rights that reviles judges’ tendency to “wrap up their veto in a protective veil of adjectives such as ‘arbitrary,’ ‘artificial,’ ‘normal,’ ‘reason-

27. Justice William O. Douglas, Opinion of the Court, *Griswold v. Connecticut*, at 485, 486.

28. *Ibid.*, at 484.

able,’ ‘inherent,’ ‘fundamental,’ or ‘essential’ whose office usually, though quite innocently, is to disguise what they are doing and impute to it a derivation far more impressive than their personal preferences, which are all that in fact lie behind the decision.”<sup>29</sup> In this view, whenever judges enter the zone of constitutional penumbra, they manufacture euphemisms that disguise the relation between proper law and personal inclination. Patricia Williams has suggested that this charge (and the countercharge that at the heights of feeling it is no different than reason) is at the heart of the fiction of *stare decisis* that produces post-facto justifications from judicial or social tradition for judges who inevitably impose their will on problems of law but who must, for legitimacy’s sake, disavow admission of the uninevitability of their claim. The virtually genetic image legal judgment has of itself in history veils not only the personal instabilities of judges but also the madness of the law itself, its instability and fictive stability, its articulation at the place where interpretive will and desire mix up to produce someone’s image of a right/just/proper world.<sup>30</sup>

After sexual privacy is donated to the U.S. heterosexual couple in *Griswold* by way of the sentimental reason the Court adopts—through the spatialization of intimacy in a bell jar of frozen history—a judicial and political nightmare over the property of sexual privacy ensued, whose mad struggle between state privilege and private liberty is too long to enumerate here. We can conclude that the romantic banality that sanctions certain forms of intimacy as nationally privileged remains hardwired into the practice of sex privacy law in the United States. Almost twenty years later, however, *Planned Parenthood of Southeastern Pennsylvania v. Casey* (112 S. Ct. 2791 [1992]) recasts the force of its machinery remarkably, replacing the monumentality of sexual privacy that *Roe* had established as a fundamental condition of women’s liberty with the monumentality of *Roe* itself as evidence of the Court’s very authority.

In their majority opinion Justices O’Connor, Souter, and Kennedy recognize the sovereignty of the zone of privacy as a model for freedom or liberty, returning explicitly to the method of penumbral enumeration and *stare decisis* introduced in *Griswold*. But the real originality of *Planned Parenthood v. Casey* is in the extent to which it supplants entirely

29. *Ibid.*, at 517 n.10.

30. Patricia J. Williams, *The Alchemy of Race and Rights* (Cambridge: Harvard University Press, 1991), 7–8, 134–35.

the utopia of heterosexual intimacy on which sexual privacy law was based in the first place, putting *women's pain* in heterosexual culture at the center of the story of privacy and legal protections. In this sense the legitimating force of deep juridical feelings about the sacred pleasures of marital intimacy are here inverted and displaced onto the woman, whose sexual and political trauma is now the index of the meaning and value of her privacy and her citizenship.

Briefly, *Eisenstadt v. Baird*, 405 U.S. 438 (1972) extended *Griswold* to unmarried women through the equal protections clause, transforming sexual privacy from its initial scene—the two-as-one utopia of coupled intimacy—into a property of individual liberty. This muted the concretely spatial aspects of the “zone of privacy,” dismantling the original homology between the marital/sexual bedroom and the citizen’s sense of self-sovereignty. It placed the focus on the space of the woman’s body, which includes her capacities, passions, and intentions. But the shift from reframing contraception to adjudicating abortion required the discovery of more emanations from constitutional penumbra: in *Roe v. Wade* (410 U.S. 113 [1973]) the right of privacy remains the *woman's* right but here one that has internal limits at the juncture where state interest over potential “life” and social self-continuity overtake the woman’s interest in controlling her sexual and reproductive existence. Gone, from that decision, is *Griswold's* rhetoric of the Court’s moral pedagogy or its chivalry toward sexually sacred precincts: indeed, Justice Blackmun writes that, because of the “sensitive and emotional nature of the abortion controversy,” he wants to adhere to “constitutional measurement, free of emotion and predilection.”<sup>31</sup> (There is not a sexuality/privacy case in which such a caveat against emotion is not passionately uttered.) *Roe* attempts to achieve its postemotionalism by deploying knowledge, plumbing the juridical and historical archive on abortion: its emphasis is not on expanding liberty by thinking through the contexts of its practice but, rather, by massaging precedent and tradition.

*Planned Parenthood v. Casey* was widely seen as an opportunity for a new set of justices to overturn *Roe*. The Pennsylvania Abortion Control Act of 1982 (amended in 1988–89) did not abolish abortion in the state but intensified the discursive contexts in which it happened, seeking to create around abortion a state-sanctioned, morally pedagogical zone of publicity. Provisions included a twenty-four-hour waiting

31. Justice Blackmun, Opinion of the Court, *Roe v. Wade* 410 U.S. 113 (1973), at 708.

period, minor notification of parents and wife notification of husbands, and intensified standards of “informed consent” (including a state-authored brochure condemning abortion). The majority opinion has two explicit aims: to affirm the fundamental holdings of *Roe* on behalf of the sovereignty of women’s citizenship, the unity of national culture, and the status of the Court’s authority; and to enumerate what it felt was underenumerated in *Roe*, the conditions of the state’s sovereignty over the contexts of reproduction. In other words, as Justice Scalia’s dissent argues, the Court’s majority opinion seeks to affirm *Roe* while also significantly dismantling it. Its technical mechanism for achieving this impossible feat is the substitution of an “undue burden” rule for a whole set of other protections that *Roe* provides: especially by dismantling the trimester framework that determined the woman’s sovereignty over reproduction in a pregnancy’s first six months and substituting for it a rule that favors the state’s right to place restrictions on the woman’s reproductive practice (restrictions that can then be weighed by courts that will determine whether a given law mounts egregiously burdensome obstacles to the woman’s exercise of her constitutional right to abortion).

Scalia claims that the majority pulls off this impossible feat (in its claim to refuse a “jurisprudence of doubt” while making equivocal legal judgments) by disguising its own muddy impulses in a sentimental and “empty” rhetoric of intimacy:

The best that the Court can do to explain how it is that the word “liberty” *must* be thought to include the right to destroy human fetuses is to rattle off a collection of adjectives that simply decorate a value judgement and conceal a political choice. The right to abort, we are told, inheres in “liberty” because it is among “a person’s most basic decisions,” *ante*, at 2806; it involves a “most intimate and personal choic[e],” *ante*, at 2807; it is “central to personal dignity and autonomy,” *ibid.*; it “originate[s] within the zone of conscience and belief,” *ibid.*; it is “too intimate and personal” for state interference, *ante*, at 2807; it reflects “intimate views” of a “deep, personal character,” *ante*, at 2808; it involves “intimate relationships,” and “notions of personal autonomy and bodily integrity,” *ante*, at 2810.<sup>32</sup>

32. Justice Scalia, dissent, *Planned Parenthood v. Casey* 112 S.Ct.2791 (1992), at 2876–77.

Correctly, Scalia goes on to point out that these very same qualities meant nothing to the Justices when they heard *Bowers v. Hardwick* (478 U.S. 186 [1986]), "because, like abortion, they are forms of conduct that have long been criminalized in American society. Those adjectives might be applied, for example, to homosexual sodomy, polygamy, adult incest, and suicide, all of which are equally 'intimate.'" <sup>33</sup>

But Scalia's critique is trivial, in the sense that the majority opinion does not seek to rethink sexual privacy or intimacy in any serious way. The rhetoric of intimacy in the case is part of its argument from *stare decisis*,<sup>34</sup> but the majority justices' originality is located in their representation of the specificity, what they call the "uniqueness," of the material conditions of citizenship for women in the United States. Because the right to sexual privacy has been individuated by *Roe*, privacy no longer takes place in a concrete zone but, rather, a "zone of conscience"—the place where, as Nietzsche tells us, the law is painfully and portably inscribed in subjects.<sup>35</sup> The justices refer to women's "anxieties," "physical constraints," and "sacrifices [that] have since the beginning of the human race been endured by woman with a pride that ennoble her": they contend that a woman's "suffering is too intimate and personal for the State to insist . . . upon its own vision of the woman's role."<sup>36</sup> Therefore, abortion definitively grounds and sustains women's political legitimacy: their "ability to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."<sup>37</sup>

The justices here concede that femininity in the United States is virtually and generically an undue burden, however ennobling it might be. The de-utopianization of sexual privacy established in *Griswold* and the installation of female citizenship at the juncture of law and suffering is further reinforced by the one part of the Pennsylvania law that

33. *Ibid.* Scalia also blasts Justice Blackmun (n. 2, at 2876) for using the same intimate rhetoric that means nothing, constitutionally, at least to Scalia.

34. A passionate and creative argument about what cases constitute precedent for *Roe* takes place between Justices O'Connor, Kennedy, Souter (*ibid.*, at 2808–16), and Scalia (at 2860–67).

35. Friedrich Nietzsche, *On the Genealogy of Morals*, ed. Walter Kaufmann (New York: Vintage, 1967), 57–96. On the ways Nietzsche reproduces the individuating limits of pain-centered politics, see Wendy Brown, "Wounded Attachments."

36. Justices Sandra Day O'Connor, Anthony M. Kennedy, and David H. Souter, Opinion of the Court, *Planned Parenthood v. Casey*, at 2807.

37. *Ibid.*, at 2809.

the majority finds unconstitutional: the clause that commands women to notify their husbands of their intention to abort. The segment in which this happens exposes women's suffering in the zone of privacy, where, it turns out, men beat their wives. They cite evidence, supported by the American Medical Association, that men are raping their wives, terrorizing them (especially when pregnant), forcing them to inhabit a zone of privacy that keeps secreted men's abuse of women. In short, the "gruesome and torturous" conditions of marital domesticity in battering households requires the Court *not to protect privacy* for the couple but to keep the couple from becoming the unit of modal citizenship where privacy law is concerned.<sup>38</sup>

Catharine MacKinnon deems privacy law a tool of patriarchal supremacy:

Women in everyday life have no privacy in private. In private, women are objects of male subjectivity and male power. The private is that place where men can do whatever they want because women reside there. The consent that supposedly demarcates this private surrounds women and follows us everywhere we go. Men [in contrast], reside in public, where laws against harm exist. . . . As a legal doctrine, privacy has become the affirmative triumph of the state's abdication of women.<sup>39</sup>

MacKinnon's arguments in these essays—which purport to be about "women" and "men" but which to my ear are more profoundly about heterosexuality as a virtual institution and a way of life—derive from Court practice through the late 1980s and do not consider the work that jurists such as O'Connor have done to deprivatize privacy. But it should be no surprise that the citizen imagined by even moderates these days is no longer a complex subject with rights, needs, reciprocal obligations to the state and society, conflicting self-interests, or prospects for happiness in realms beyond the juridical: the citizen now is a trauma effect who requires protection and political reparation,

38. *Ibid.*, at 2827.

39. Catharine A. MacKinnon, "Reflections on Law in the Everyday Life of Women," in *Law in Everyday Life*, ed. Austin Sarat and Thomas R. Kearns (Ann Arbor: University of Michigan Press, 1995), 117–18. See also MacKinnon, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press), 184–94.

whether or not that citizen can be fully described by the terms in which historically subordinated classes circulate in the United States. The Opinion of the Court in *Casey* answers the dissenters' argument—which asserts that so few women are battered in the United States that the husband notification principle stands within constitutional norms—by arguing that “the analysis does not end with the one percent of women upon whom the statute operates: it begins there.”<sup>40</sup> Here their jurisprudence is not so far from Mari Matsuda's when she claims that “looking to the bottom” of social hierarchy and making reparative law from there is the only politically ethical thing to do.<sup>41</sup>

In the twenty years between *Roe* and *Planned Parenthood v. Casey* the general scene of public citizenship in the United States has become suffused with a practice of making pain count politically. The law of sexual privacy has followed this change, registering with symptomatic incoherence a more general struggle to maintain the contradictory rights and privileges of women, heterosexuality, the family, the state, and patriarchalized sexual privilege. The sheer ineloquence of this jumble of categories should say something about the cramped space of analysis and praxis to which the rhetoric and jurisprudence of sexual privacy has brought us—a place where there is much trouble: a utopia of law.

### Politics

In *Griswold*, I have argued, we see codified the assurance of some jurists that the intimate feelings of married sexual partners represent that zone of privacy and personhood beyond the scrutiny of the law whose value is so absolute that the law must protect its sovereignty. Between *Griswold* and *Roe* these intimate feelings and their relation to liberty were still assumed as the sovereign materials of the law of sexual privacy. Now, however, many of the political and juridical contexts have dissolved that once sustained the fantasy of a core national culture, threatening the capacity of sentimental politics to create feeling cultures of consensus that distract from the lived violences and fractures of everyday life in the polis. The class, racial, economic, and sexual fragmenta-

40. *Planned Parenthood v. Casey*, at 2829.

41. Mari J. Matsuda, “Looking to the Bottom: Critical Legal Studies and Reparations,” in *Critical Race Theory: The Key Writings that Formed the Movement*, ed. Kimberlé Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas (New York: The New Press, 1995), 63–80.

tion of U.S. society has emerged into the vision of the law and the public not as an exception to a utopian norm but as a new governing rule of the present. The legal struggles over affirmative action, welfare, abortion, and immigration the courts currently worry are also about whether the utopian or the traumatic story of national life will govern jurisprudence and the world it seeks to confirm. Trauma is winning.

Central to the legal emergence of the politics of trauma against the scene of liberal-patriotic disavowal has been a group of activists from within (mainly academic) legal studies who speak from feminist, gay and lesbian, antiracist, and anticapitalist movements. They take their different but generally painful experiences of social hierarchy in the United States to require a radical rhetorical and conceptual transformation of legal scholarship that embraces “subjectivity of perspective,” asserts the collective nature of subject formation (around stereotypical social identities), and refuses traditional liberal notions that organize the social optimism of law around relatively unimpeded individuality, privacy, property, and conventional values.<sup>42</sup> At stake in this transformation of law is the importance of antinormativity to counterhegemonic critical theory and practice: since liberal law has long recognized a particular and traditionally sanctioned form of universal personhood as that around which society, theory, forms of discipline, and aspirational pedagogies should be organized, antiliberal activism has had strategically to *ground* law in experience (in all senses of the pun) and particular identities.

In this sense critical legal praxis is the opposite of national senti-

42. Critical Legal Studies, critical race theory, radical feminist legal theory, and an emergent body of work in gay and lesbian culture, power, and the law encompasses a huge bibliography. Rather than dump a stupidly big omnibus footnote here, let me metonymically signal the archive via a few recent helpful anthologies or extended works: Mary Becker, Cynthia Grant Bowman, and Morrison Torrey, *Cases and Materials on Feminist Jurisprudence: Taking Women Seriously* (St. Paul, Minn.: West Publishing, 1994); Dan Danielsen and Karen Engle, *After Identity: A Reader in Law and Culture* (New York: Routledge, 1995); Lisa Duggan and Nan D. Hunter, *Sex Wars: Sexual Dissent and Political Culture* (New York: Routledge, 1995); Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado, and Kimberlé Williams Crenshaw, *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Boulder, Colo.: Westview Press, 1993), 1–15; Kimberlé Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas, *Critical Race Theory*; Richard Delgado, *Critical Race Theory: The Cutting Edge* (Philadelphia: Temple University Press, 1995); Patricia Smith, ed., *Feminist Jurisprudence* (New York: Oxford University Press, 1993); Robin West, *Narrative, Authority, and Law* (Ann Arbor: University of Michigan Press, 1993); Patricia J. Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* (Cambridge: Harvard University Press, 1991); and *The Rooster's Egg* (Cambridge: Harvard University Press, 1995).

mentality, which pursues collective cohesion by circulating a universalist currency of distress. At the same time, the structure of reparation central to radical legal politics suggests an unevenness in this general tactic of making legal notions of subjectivity historically and corporeally specific. Subaltern pain is not considered *universal* (the privileged do not experience it, they do not live expecting that at any moment their ordinarily loose selves might be codified into a single humiliated atom of subpersonhood). But subaltern pain is deemed, in this context, universally *intelligible*, constituting objective evidence of trauma reparable by the law and the law's more privileged subjects. In other words, the universal value is here no longer a property of political personhood but, instead, a property of a rhetoric that claims to represent not the universal but the true self. But, if historical contexts are incomparable across fields of simple and complex distinction, how can someone's pain or traumatized identity produce such perfect knowledge? And, if the pedagogies of politics were necessary to reframe a set of experiences, knowledges, and feelings as the kind of pain that exposes injustice, what is "true" about it, exactly?

In this political model of identity trauma stands as truth. We can't use happiness as a guide to the aspirations for social change, because the feeling of it might well be false consciousness; nor boredom, which might be depression, illness, or merely a spreading malaise. Pain, in contrast, is something quick and sharp that simultaneously specifies you and makes you generic: it is something that happens to you before you "know" it, and it is intensely individuating, for surviving its shock lets you know it is your general survival at stake. Yet, if the pain is at the juncture of you and the stereotype that represents you, you know that you are hurt not because of your relation to history but because of *someone else's* relation to it, a type of someone whose privilege or comfort depends on the pain that diminishes you, locks you into identity, covers you with shame, and sentences you to a hell of constant potential exposure to the banality of derision.

Pain thus organizes your specific experience of the world, separating you from others and connecting you with others similarly shocked (but not surprised) by the strategies of violence that constantly regenerate the bottom of the hierarchies of social value you inhabit. In this sense subaltern pain is a public form because its outcome is to make you readable, for others. This is, perhaps, why activists from identity

politics generally assume pain as the only sign readable across hierarchies of social life: the subaltern is the surrogate form of cultural intelligibility generally, and negated identities are pain effects. Know me, know my pain—you caused it: in this context paranoia would seem adaptive and would make understandable a desire for law to be both the origin *and* end of my experience of injustice. It might even make a wish that I have to see even subaltern suffering as something more mediated seem, perhaps, cold or an effect of the leisure of privilege. Who has time, after all, to query violence between shock and the moment it becomes true meaning?

These dicta ground much current countertraditional legal argument. Take, for example, an original and impassioned work such as Robin West's *Narrative, Authority, and Law*,<sup>43</sup> which sees as its task the production of moral criticism and transformation of the law from the point of view of its and a society's victims. West wields narratives powerfully throughout the book that reveal the law's fundamental immorality (and therefore its fundamentally immoralizing effect on the subjects who are educated to its standards) where women's lives are concerned, and her powerful feminist arguments for the need to deprivatize women's structurally induced pain testify to the radical changes in the law and other institutions of intimacy that would have to happen if women are to attain legitimacy as social subjects. But West assumes that women's pain is already available as knowledge. To her it is meaning and the material for radical pedagogy. To think otherwise is to be either misogynist or guilty of shallow and overacademic postmodernism. Empathy is an ethical rule. Not surprisingly, as it happens, one example of pain's pure force that she uses to summarize her argument comes from a child: "We must be able to say, to quote my two-year-old, 'don't do that—you're hurting me,' and we must be able to hear that utterance as an ethical mandate to change course."<sup>44</sup>

43. Robin West, *Narrative, Authority, and Law* (Ann Arbor: University of Michigan Press, 1993).

44. *Ibid.*, 19–20. Much the same kind of respect and critique can be given to Catharine MacKinnon's promotion of juridical reparation on behalf of women's pain under patriarchy: in her work the inner little girl of every woman stands as the true abused self who is denied full citizenship in the United States. For an analysis of antipornography rhetoric's depiction of pain's place in women's citizenship, see Berlant, "Live Sex Acts," *Queen of America*.



Not all radical legal theorists so simplify pain as to make the emblem of true wisdom about injustice and its eradication something as sentimental and fictive (to adults) as a child's consciousness:<sup>45</sup> yet the desire expressed in its seeming extreme clarity signals a lost opportunity for rethinking the relation of critique and culture building at this juncture of identity politics and legal theory. Would the child build a just world from the knowledge he gleans from being hurt? What would the child need to know for that to happen? How could this child learn to think beyond trauma, to make a context for it? It seems hard for this group of legal theorists to imagine the value of such questions, for a few reasons. One may be due to the centrality of "pain and suffering" to tort law, which endorses a construction of the true subject as a feeling subject whose suffering disables a person's ability to live at his full capacities, as he has been doing, and thus requires reparations from the agents who wielded the force. A great deal has been and will be written on this general area, for feminist antipornography and antiracist hate speech litigation borrows much of its legitimation from this hoary jurisprudential domain:<sup>46</sup> their tactic here is to challenge local purveyors of structural violence in order to make racism and misogyny *less profitable*, even symbolically, and meanwhile to use the law to debanalize violence by making illegal that which has been ordinary practice, on the model, say, of sexual harassment law or even more extremely, using the constitutional model of "cruel and unusual punishment" to revoke legitimation from social relations of violence traditionally authorized by the state and the law.

Kendall Thomas has made this latter point, in an essay on privacy

45. Another instance in which a generic child's nonideological relation to justice is held as the proper index of adult aspiration is to be found in Patricia Williams, *Alchemy of Race and Rights*. This brilliant book is fully dedicated to understanding the multiple contexts in which (Williams's) legal subjectivity inherits, inhabits, and reproduces the law's most insidious violences: its commitment to syncretic modes of storytelling about these conjunctures leaves open some questions about the relation between what she represents as the madness of inhabiting legal allegories of the self in everyday life and certain scenes of hyperclarity in which children know the true scale of justice and the true measure of pain (in contrast to adults, with their brains twisted by liberal ideologies of property and contract [12, 27, e.g.]). Perhaps this is because, as she says, "Contract law reduces life to fairy tale" (224).

46. See Lucinda M. Finley, "A Break in the Silence: Including Women's Issues in a Torts Course," *Yale Journal of Law and Feminism* 1 (1989): 41-73. See also Scarry, Matsuda, West, and Williams, and MacKinnon, *op. cit.*

after Bowers.<sup>47</sup> He takes up Elaine Scarry's model of torture as a vehicle for the legitimating fiction of state power and claims that the Cruel and Unusual Punishment clause of the Eighth Amendment should be applied to state discrimination against gays and lesbians. The strength and clarity of his vision and the sense that his suggestion seems to make brings us to the second reason it seems hard for theorists who equate subjectivity in general with legal subjectivity to work beyond the rule of traumatic pain in imagining the conditions for progressive social change. Thomas's model only works if the agent of violence is the state or the law; it works only if the domain of law is deemed interchangeable with the entire field of injury and reparation, and if the subject of law is fully described by the taxonomies that law recognizes. This position would look awkward if it were rephrased: subjects are always citizens. But the fact is that the notion of reparation for identity-based subordination assumes that the law describes what a person is, and that social violence can be located the way physical injury can be tracked. The law's typical practice is to recognize kinds of subjects, acts, and identities: it is to taxonomize. What is the relation between the (seemingly inevitable) authoritarianism of juridical categorization, and the other, looser spaces of social life and personhood that do not congeal in categories of power, cause, and effect the way the law does? Is the "cruel and unusual punishment" tactic merely a reversal in extremis that points to the sublime banality of state cruelty, or is it a policy aspiration seeking a specific reparation for the specific violation/creation of gay and lesbian identities? Would the homeopathy of law against its own toxins in this domain of state cruelty work for women or the poor African Americans, Hispanics, and immigrants who are currently being economically disenfranchised from the resources that state capitalism manages?

Without making a ridiculous argument that the state is merely a mirage or a fetish that represents networks of inchoate forces that control, without constituting, the realm of society, it should be possible to say that radical counterpolitics needs to contend with notions of personhood and power that do not attain the clarity of state and juridical taxonomy, even across fields of practice and stigma. The desire to find

47. Kendall Thomas, "Beyond the Privacy Principle," in Daniels and Engle, *After Identity*, 277-93.

an origin for trauma, and to rework culture at the violating origin, effectively imagines subjects only within that zone, reducing the social to that zone (in this case the state and the laws that legislate nonnormative sex) and covertly reauthorizing the hegemony of the national. The desire to use trauma as the model for the pain of subordination that gets congealed into identities forgets the difference between trauma and adversity: trauma takes you out of your life shockingly and places you into another one, whereas structural subordination is not a surprise to the subjects who experience it, and the pain of subordination is ordinary life.

I have not meant to argue that identity politics has become a mode of "victim politics" too reductive to see the world clearly or to have positive effects. In its most tawdry version this accusation reads that a politics organized around publicizing pain constitutes a further degradation of subaltern selves into a species of subcivilized nonagency. The people who make this argument usually recognize structural social inequality and the devastating impacts it has on persons but continue to believe that the United States operates meritocratically, for worthy individuals. In contrast, Wendy Brown's deconstruction of contemporary U.S. identity rhetorics places skepticism about traumatic identity in the context of imagining a more radical politics. Brown sees people who claim their pain and build collective struggles around it as potentially overidentifying with their pain then identifying with it, becoming passive to it, becoming addicted to seeing themselves as virtuous in the face of bad, unethical power. She follows Nietzsche's dicta against a passive-aggressive politics of *ressentiment*:

Politicized identity thus enunciates itself, makes claims for itself, only by retrenching, restating, dramatizing, and inscribing its pain in politics, and can hold out no future—for itself or others—which triumphs over this pain. The loss of historical direction, and with it the loss of futurity characteristic of the late-modern age, is thus homologically refigured in the structure of desire of the dominant political expression of the age—identity politics. . . . What if we sought to supplant the language of "I am"—with its defensive closure on identity, its insistence on the fixity of position, its equation of social with moral positioning—with the language of "I want"?<sup>48</sup>

48. Brown, "Wounded Attachments," 220, 221.

The critical clarity of a subordinate population's politicized pain has provided crucially destabilizing material that disaffirms the organization of liberal national culture around a utopian form of personhood that lives in zones of privacy and abstraction beyond pain, and, as a counterhegemonic *tactic*, this logic of radical juridicality affirms more powerfully than anything the fragile and violent disavowals that bolster hegemonic worlds of reason and the law.

But to say that the traumatized self is the true self is to say that a particular facet of subjective experience is where the truth of history lies: it is to suggest that the clarity of pain marks a political map for achieving the good life, if only we would read it. It is also to imply that in the good life there will be no pain. Brown suggests that a replacement of traumatic identity with a subjectivity articulated utopianly, via the agency of imagined demand, will take from pain the energy for social transformation beyond the field of its sensual experience. For this to happen *psychic pain experienced by subordinated populations must be treated as ideology*, not as prelapsarian knowledge or a condensed comprehensive social theory. It is more like a capital letter at the beginning of an old bad sentence that needs rewriting. To think otherwise is to assert that pain is merely banal, a story always already told. It is to think that the moment of its gestation is, indeed, life itself.

#### *Coda: Pregnancy, Paranoia, Justice*

The world I have tried to telegraph here, in this story about privacy's fall from the utopia of normal intimacy, finds the law articulating its subjects as public and American through their position within a hegemonic regime of heterosexuality, which involves coordination with many other normative social positions that are racially and economically coded toward privilege. I have argued that the split between the patriotic context of national metaculture and the practical fragmentations and hierarchies of everyday life has become powerfully mediated by a discourse of trauma, which imagines "relief" through juridicalized national remedies because, in fighting against the false utopia of privacy, it imagines subjects wholly created by law.

Too often, and almost always in the work of legal radicals, the nation remains sanctified as a political "zone of privacy" in *Griswold's* sense: it holds out a promise that it can relieve specific subjects of the pain of their specificity, even as the very project of nation formation vir-

tually requires the public exposure of those who do not structurally assimilate to the national norm (so, if population *x* is relieved of the obstacles to its juridical and cultural citizenship, a given population *y* will almost inevitably come to bear the burden of surrogacy that expresses citizenship's status as *privilege*). Fighting for justice under the law in the face of these normative strategies is crucial, a tactic of necessity. If it means telling half-truths (that an experience of painful identity shocks a minoritized subject) in order to change juridical norms about that kind of subject, it still must be a good thing. But thinking that the good life will be achieved when there is no more pain but only (your) happiness does nothing to alter the hegemonic structures of normativity and mourning whose saturation of the diminished expectations for liberty in national life I have sketched out in this essay. The reparation of pain does not bring into being a just life.

Usually this point is made in studies of testimony and the Holocaust, the unspeakable national violence that generates horrific evidence that will always fail to represent the brutal totality of its referent and which can never be repaired, reparated.<sup>49</sup> The cases addressed in this essay, in contrast, are ever so banal, cruel but not unusual, an ordinary part of everyday citizenship for subordinate populations in the United States. Such a difference advises replacing the model of trauma I have been critically describing as inadequate material for world or nation building with a model of *suffering*, whose etymological articulation of pain and patience draws its subject less as an effect of an act of violence and more as an effect of a general atmosphere of it, peppered by acts, to be sure, but not contained by the presumption that trauma carries, that it is an effect of a single scene of violence or toxic taxonomy. Thus, where certain ordinary identity forms are concerned, the question of suffering's *differend* might be drawn and drawn out differently, without the danger of analytically diffusing any population's subordination into some parodically postmodern miasma of overdetermination and pseudo-agency. (But even *suffering* can sound too dramatic for the subordinated personhood form I am reaching toward here: imagine a word that describes a constantly destabilized existence that monitors, with a roving third eye, every moment as a potentially

49. See Shoshana Felman and Dori Laub, *Testimony: Crises of Witnessing in Literature, Psychoanalysis, and History* (New York: Routledge, 1992); Jean-Francois Lyotard, *The Differend: Phrases in Dispute*, trans. Georges Van Den Abberle (Minneapolis: University of Minnesota Press, 1988).

bad event in which a stereotyped someone might become food for someone else's hunger for superiority and connect that to a term that considers the subjective effects of structural inequalities that are deemed inevitable in a capitalist nation. *Suffering* stands in for that compound word.)

I can provide here only a sketch of this model of pain, subjectivity, and politics. We might start in a place not defined by taxonomic identity, an image of the subject as heterotopic, distracted, or what I have called "loose." Earlier in this essay privacy law was a place of intensified gendering and sexualization: women versus fetuses, wives versus husbands, the law versus the sanctity of the marital couple. Identity was clear; it was bounded; it was opposed to counteridentity. But (as Denise Riley argues), when women are not in any kind of court defending their gender, they experience the relation between their juridicalized femaleness and other scenes of womanhood and identity-style attachment in inconsistent ways.<sup>50</sup> Barbara Duden, Emily Martin, and Rayna Rapp's three ethnographies of the racial, class, and ethnic contexts of reproduction in the United States tell constantly of the minoritization of pregnant women in the face of medical and state expertise about fetuses, health, cleanliness, monitoring.<sup>51</sup> It is as though these women are even more incompetent to the scene of their survival than ordinary consumers, whose desires are at least constantly rerendered as self-expertise by the pedagogies of capitalist culture. Yet the reproducing women have created a sentimental culture of their own, which coexists with the zones of their subordination: it is not that radical, yet it is very critical and, above all, skeptical about the relation between knowing about women's material struggles and making them uninevitable.

I take as an example the book *Peaceful Pregnancy Meditations*. This 1993 book epitomizes much contemporary feminine self-help literature. It merges insights about women's expertise over their bodies from

50. Denise Riley, "Am I That Name?": *Feminism and the Category of "Women" in History* (Minneapolis: University of Minnesota Press, 1988).

51. Emily Martin, *The Woman in the Body: A Cultural Analysis of Reproduction* (Boston: Beacon Press, 1987); Rayna Rapp, "Constructing Amniocentesis: Maternal and Medical Discourses," in *Uncertain Terms*, ed. Faye D. Ginsburg and Anna Lowenhaupt Tsing (Boston: Beacon Press, 1990), 28-42; and "Chromosomes and Communication: The Discourse of Genetic Counseling," *Medical Anthropology Quarterly* 2, no. 2 (1991): 143-57; Barbara Duden, *Disembodying Women: Perspectives on Pregnancy and the Unborn* (Cambridge: Harvard University Press, 1993).

the feminist health movements of the 1970s and the sentimental feminine self-help movement of the 1980s, which emphasizes women's expertise over intimate suffering. It takes pregnancy as the condition of ordinary femininity writ large; it uses twelve-step language to partition and make livable the predictable but excruciating changes of pregnancy; it provides on each page space for the reader to become an author through a routine of daily affirmations that enable pregnant women to apportion their anxieties through a life lived one day at a time. It actively disaffirms the political public sphere as the source of emancipatory public making. It is paranoid about the ceaselessness of women's caretaking burdens in the family and affective burdens in society. Its paranoia is entirely banal, about the conditions of women's ordinary lives.

*Peaceful Pregnancy Meditations* begins with a defensive nod to the world of fetal politics. Day 1, whose title is "Beginnings," begins: "When does pregnancy really begin? At conception? Years ago when we started yearning for a family of our own? Yesterday when our home pregnancy test turned positive? For each mother-to-be, it is different. But no matter where we define our beginning, we know it is truly that: a new beginning."<sup>52</sup> The beautiful tautologies and open questions of this passage provide for the pregnant gender a way of negotiating a complex set of contexts for maternal paranoia and the undue burdens of femininity in the contemporary United States. Pregnancy advice books have long made the woman responsible for fetal health. They have long made the woman feel that the development of her managerial skills is crucial to the happiness of everyone who depends on her to provide clarity for them. But the current public mistrust of women's competence to the maternal service economy has intensified the disciplinary aspects of these discourses and has made women even more defensive.

George's refusal to accede to the priority of fetal personhood or any norm of femininity remains resolute throughout the text. What she does prioritize is ameliorating the shame at the center of the experience of modern pregnancy. She releases women from shame about the ambivalence they feel toward the fetus and the theft of ordinary life that the fetus engenders; she acknowledges women's ambivalence

toward the couple form and supports their need to build a social world to soften the blows and stresses of a marital intimacy that can only be enjoyed in random moments of repose. Above all, she confirms the rationality of women's ambivalent feelings about the pressure not to have a self that is a part of what structural pain demands of dominated persons.

On each page of the book, which represents one day, pregnant femininity is de-shamed by way of a dialectic between the anger/frustration/discomfort of the reader's complicated social meaning and the assurance and comfort of the poetic affirmation that George writes on each page. The affirmation, a kind of lay prayer, enables the reader to endure that life of which she surely is not master. Formally, this is signified by: a top paragraph (with titles such as "Privacy," "Manly Pride," "Chronic Uncertainty," "Ultrasound") that expresses the zone of discomfort that this day's meditation depicts; a middle paragraph that graphs an affirmation of the reader's desire not to be defeated by today's degree of pain (as in "I try to remain positive toward those around me, seeing their attention as love");<sup>53</sup> and then a bottom third made up of four empty lines for women to write on, which begin with the three words "Today I feel. . ."

The book does offer the suffering women a dependable space of feeling and temporal freedom from the cramped conditions of social value and everydayness that pregnant women negotiate: women's culture, a survival mechanism that involves forming a relationship with particular commodity forms and, through them, with other women who feel the way they feel, because they are regendered as pregnant women. In this way this book, and the culture of affectivity and opinion that produces other commodities in support of its project of consolation and buttressing, keeps maternity/femininity in the United States from being merely a humiliating, isolating/collectivizing scene of personal struggle, public embarrassment, and alienated nonrepresentation in the political public sphere. This is what makes it a part of sentimental culture. Its aim, however, is not to change the law but to confirm the sheer difficulty of being made its subject while existing in so many strange relations undecidable by the terms *power/powerlessness, pain/happiness, equality/inequality*.

The suffering that George represents neither clarifies into a single

52. Lisa Steele George, *Peaceful Pregnancy Meditations: A Diary for Expectant Mothers* (Deerfield Beach, FL: Health Communications, 1993), 3.

53. *Ibid.*, 167.

struggle nor confuses the immediate sources of discomfort as the totality of actual sources. She sees a whole structure and a set of different ideologies in place, situating and destabilizing women and the contexts they inhabit: she cannot imagine freedom in these contexts but merely survival. She suffers gendering, and not just for her married self—but imagines the different contexts of struggle occupied by single mothers-to-be, lesbian mothers-to-be, working mothers-to-be, and the most conventional married mothers-to-be. Linked to one another by a collective experience of being public and scrutinized in pregnancy, they can live the unique change from the positions they were in when they were nonreproducing gendered, sexual, and economic subjects. In their intimacy with and alterity to the reduced versions of their gender, the women imagined in this book imagine no outside to history, no radically different future from the one they are presently suffering (and also finding sustenance in), but an ongoing present in which they are fragmented agents whose strange social value forces a constant improvisation and scraping together of a viable existence.

The binary trauma/reparation would not satisfy the conditions of genuine social oppression that (pregnant) women in the U.S. endure. Their issues are not with the past or with events marked by the scars of trauma. Their issues are with the material conditions of intimacy and the normative ideologies of desire; with having more symbolic than social value, derived from their expertise in realms of feeling; and with having no place for and therefore only a weak commitment to their anger, which pulsates instead as a muffled tone of resigned resentment. The heavily symbolized are always supposed to take whatever social value that status accords and hoard it for an always deferred future, meanwhile coping, if they can, in the everyday.

Sentimental culture takes its strength from this recognition and, in this case, by framing normative femininity and reproduction as processes of labor it establishes gender praxis as a ground of solidarity. But because this labor is so mixed up with intimacy, and therefore with the grounds of optimism, a political response would threaten the only domain of experience that women "control": contemporary national/capitalism has made a bargain with "the personal," after all, which is that people can have dignity in its domains only insofar as they inhabit the world passively, through the negativity of trauma and the optimism held out by that Oz over the mountaintop, a (nation-) state of amelioration. The liberal-radical solution to such positioning

has been to deploy an ethics of storytelling about trauma against the normative world of the law, to change the conditions of what counts as evidence, and to make something concrete happen in response, something that pays for the past that is the present. As Derrida has recently argued, however, the dialectic between situated expression that challenges universalist norms and the categorical universalism of law itself constitutes an incommensurateness already within the law that cannot be overcome by law.<sup>54</sup> This suggests why the reparative use of the law I have been tracking is finally, and wearily, sentimental.

Political optimism requires a future, any future that might not be more drowning in the present. This requires a violation of the sentimental contract by an analytically powerful and political rage, a discourse of demand and radical critique, a sacrifice of short-term coalition building to a politics of the long haul. It requires a refusal to be humiliated by its "irrelevance" to policy in an era of transnational capitalist triumphalism, class-bound racism, and sentimental misogyny. It requires a refusal of the seeming rationality of diminished expectations. Most important, at the moment, it requires a refusal of the juro-politics of affect, which uses trauma and stigma to measure injustice through a *feeling* someone has. The everyday struggle is a ground that must be fought for and expanded to include nonsensual experience and knowledge as a part of any "personal" story. This is what was meant by "the personal is the political," a sentence virtually impossible to understand at the present moment. It did not mean that there is only the personal, no such thing as the political. It meant to say that feeling is an unreliable measure of justice and fairness, not the most reliable one; and that new vocabularies of pleasure, recognition, and equity must be developed and taught. And that the everyday of struggle, where people live, is a ground on which ecstasy and theory and unpredicted change can be mapped into a world that will not look like the opposite of the painful one.

Who gave anyone expertise over the meaning of feelings of injustice? I was sympathetic to the cultural politics of pain until I felt the violence of sentimentality: presented as a horror at momentous mass trauma that unifies a fractured society, national sentimentality is too often a defensive response by people who identify with privilege yet

54. Jacques Derrida, "Force of Law: The 'Mystical Foundations of Authority,'" in *Deconstruction and the Possibility of Justice*, ed. David Gray Carlson, Drucilla Cornell, and Michel Rosenfeld (New York: Routledge, 1992), 3–67, esp. 61–63.

fear they will be exposed as immoral by their tacit sanction of a particular structural violence that benefits them. I was a wholly sympathetic participant in practices of subaltern testimony and complaint, until I saw that the different stories of trauma wielded in the name of a population's political suffering not only tended to confirm the state and its law as the core sites of personhood but also provided opportunities to isolate further these dominated populations by inciting competitions over whose lives have been more excluded from the "happiness" that was constitutionally promised by national life. Meanwhile, the public recognition by dominant culture of certain sites of publicized subaltern suffering is frequently (mis)taken as a big step toward the amelioration of that suffering. It is a baby step, if that. I have suggested, in contrast, that the pain and suffering of subordinated subjects in everyday life is an ordinary and ongoing thing that is underdescribed by the (traumatic) identity form and its circulation in the state and the law. If identity politics is a literacy program in the alphabet of that pain, its subjects must also assume that the signs of subordination they feel also tell a story that they do not feel yet, or know, about how to construct the narrative to come.

## Why Culture Matters to Law: The Difference Politics Makes

*Dorothy E. Roberts*

Why does culture matter to law? Notice I have not bothered to ask whether culture does in fact matter. As I will soon elaborate, critical legal scholars have definitively shown that neutral legal principles that pretend to disregard culture in fact privilege dominant cultural norms. This has also been the result of court decisions that place culture outside the law's reach. In *Plessy v. Ferguson*<sup>1</sup> the United States Supreme Court upheld the separate but equal doctrine on the ground that the Fourteenth Amendment could not possibly have been intended to abolish social conventions proscribing the commingling of the races. "Legislation is powerless to eradicate racial instincts . . . and the attempt to do so can only result in accentuating the difficulties of the present situation," the Court explained.<sup>2</sup> It therefore concluded that, although the law required blacks' political equality, "if one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane."<sup>3</sup>

The Court reasoned, in other words, that the law should not interfere with culture—in this case, the social segregation of blacks from whites. Thus, the Court's separation of culture from politics sanctioned both private and official discrimination against blacks. Culture mattered to the Court's decision, whether to affirm the law requiring blacks to ride in separate railway cars or to overturn it. There was no way to avoid the law's impact on the cultural mores of racial separation. That

1. 163 U.S., 537 (1896).

2. 163 U.S., 551.

3. 163 U.S., 552 (emph. added).