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Just Talking with the Furniture

*Emily Albrink Hartigan**

I. INTRODUCTION

“Ma’am, trying to have a conversation with you would be like trying to argue with a dining room table. I have no interest in doing it.”—Rep. Barney Frank¹

Faced with a woman at a health care town hall in the contentious times of August, 2009, Representative Barney Frank made clear that someone carrying a picture of President Barack Obama with a Hitler mustache and referring to Frank’s policies as “Nazi” was not his ideal interlocutor. But those who “spend most of [their] time” on another planet² are (despite the “politics of disinformation,” the likes of Carl Rove see “Republicans can get to heaven,” *infra*³), as well as the empirical insights of the sociology of knowledge (that where you stand influences what you think), still roughly half of the electorate.⁴ This Article is about the prospects for conversation, both about and constituting justice, across differences so vast that they seem to turn those who disagree with us into pieces of furniture.

II. THEORIES OF JUSTICE

When I began my doctoral studies over forty years ago, the primary text on justice in political philosophical circles was John Rawls’ manuscript

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1. Associated Press, *Dem Lawmaker Blasts Protester at Town Hall: Frank Responds to Woman who Likened Health Care Stance to Nazi Policy*, MSNBC, Aug. 19, 2009, http://www.msnbc.msn.com/id/32474591/ns/politics-capitol_hill/.

2. *Id.*

3. See *infra* text accompanying note 129.

4. This is true no matter which “side” you tend to vote on, and despite the growing self-identification of voters as independents; my citation to Carl Rove is a confession of my own political location.

for *A Theory of Justice*.⁵ Because John Rawls circulated his developing draft (based on his 1958 article *Justice as Fairness*⁶), the book had a communal ring to it by its publication in 1971. It was situated in moderately progressive politics of the time and place: mid-twentieth-century academia in the United States. *A Theory of Justice* aspired to pure proceduralism, much as Anglo-American thought in the post-war period yearned to transcend ideology, and its most dynamic moving part was the theory of reflective equilibrium.⁷ One pondered one's sense of fairness and values, matched them to the considered judgments about procedural institutions, and chose.⁸

After the book came out, I was the token graduate student on the first American Political Science Association panel for the book, and thus received written comments from the great man himself. After some irritation, he conceded my main point: the alleged thought-experiment was primarily a justification for much of the status quo of U.S. political systems.

The betrayal I experienced then has abated. I am no longer surprised that a Harvard professor might align his sense of justice with the structures that supported him—though he nestled his justificatory system subversively deeper than many more conservative commentators would agree to; Rawls, for all his procedural posturing, presented a psycho-social analysis highly sympathetic to the vicissitudes of social and biological constructions. His “difference principle” was redistributive, aimed at the bottom.⁹ Wrapped in abstractions, there was a compassionate agenda of sorts, unacknowledged as it was. But his phobia against substance was powerful, premised on a fear of religion and totalitarian thinking simultaneously.

We are in more substantive but also less stable times. The epistemology Rawls and his critics inhabited has been deconstructed, liberating multiple perspectives. Within the dominant Anglo-American strand of thought itself, Michael Walzer's *Spheres of Justice*¹⁰ brought out

5. JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

6. John Rawls, *Justice as Fairness*, 67 *PHILA. REV.* 164 (1958).

7. JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 29–32 (Erin Kelly ed., 2001).

8. *Id.*

9. RAWLS, *supra* note 7, at 61–66.

10. MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY*

the plural nature of justice and proposed an “ethics of communal provision” recognized as socialist.¹¹ Walzer carefully exposed his underlying Judaism, referring to Talmudic attention to the poor, the alien, and the dispossessed. Rawls and others tried to reframe and rescue proceduralism but the moderately monolithic discourse of the U.S. academy was already fraying.

Now we are post-modern, post-colonial, post-critical, post-secular, and currently located in a two-party system in which the substantive values of the population are radically fragmented. I propose to enter a discourse on substantive justice in a way that uses the imagined unity of modernist thought as a way station for something both old and new: Socrates called it dialectic; Jesus used it in parable; Immanuel Kant gathered it into antinomies; and Jacques Derrida played with it as paradoxical supplement on the edge of the abyss. There is something that is not a procedure but is process-like that mystics find in the major faith traditions, something that sustains incommensurates and keeps them in conversation. This something is what I need as a Christian socialist if I do not want to be talking to myself, but engaging in a true conversation. In my tradition, it involves accepting (welcoming, even) that I have a perceptual splinter or mote in my eye, and so, well, I need Republicans. I need the Other, and I will never myself be one of them. I just do not see voting for Sarah Palin, but I do see perfectly intelligent, well-intentioned people who feel she brings out an aspect of reality that liberal discussion has suppressed. These Others range, depending on the issue, up to half or more of the population, and history tells me that they will not disappear, or suddenly (or ever) see justice exactly as I do.¹²

So I conceive of justice in context. That context involves the reality of ways of thinking and acting politically that I must engage respectfully,

(1984).

11. *The United States in the World—Just Wars and Just Societies: An Interview with Michael Walzer*, 7 IMPRINTS (2003), <http://eis.bris.ac.uk/~plcdib/imprints/michaelwalzerinterview.html> (“In 1971, Nozick and I taught a course together called ‘Capitalism and Socialism,’ which was a semester-long argument—out of which came his *Anarchy, State, and Utopia* and my *Spheres*.”); Interview by Harry Kreisler, Institute of International Studies, U.C. Berkeley, with E.J. Dionne, Jr., *Ideas Matter in Politics: Conversation with E.J. Dionne, Jr.* (Mar. 8, 2001), <http://globetrotter.berkeley.edu/people/Dionne/dionne-con1.html> (“Michael Walzer, the great democratic socialist”).

12. I do not even agree with myself, as the Heraclitean fire of consciousness in post-modernity reflects some sense of the non-unitary self and the constant flux of context, both inner and outer.

trying to reduce expectations and listen for surprises in how those who see justice differently view things. The liberation theology and preferential option for the poor that my tradition stresses do not disappear—but they know they are situated in a final difference that is conceptually more challenging than my race or class privilege. This difference seems to require even more than a reason-based commitment to radical epistemic plurality. As Rowan Williams, philosopher, archbishop of Canterbury, and one of my favorite Northern European white males, suggests, “[E]conomic justice arrives only when everyone recognises [sic] some kind of shared vulnerability and limitation in a world of limits and processes (psychological as well as material) that cannot be bypassed.”¹³

My resolution is not to reduce the Other to either “false consciousness” or “false spirituality” because they seem to fail to see structural inequalities and social coding the way I do. In a world that has absorbed the insights of Karl Marx and Michel Foucault, not to mention neuroscience, this is not easy. For someone who experienced Ludwig Wittgenstein’s late work as a conversion experience and Derrida as a spiritual thinker, it is a personal challenge—but also an invitation, because decentering is only one move in the dance, and there is substance to the dance.

Conceptual consistency is not the primary virtue here because the context from which any concept arises has shattered into a proliferating plurality, and the center has not held. This is one of the reasons that I look to my faith tradition (including its heresy) for insights: St. Bernard of Clairvaux said long ago that the finite mind could not capture or understand the infinite God, but that because God is love, love could comprehend.¹⁴ This means that any such sense of—momentary, contingent, fragile, fragmented—comprehension is of its nature ineffable but need not be a conversation-stopper. This “love’s knowledge”¹⁵ is a source of wisdom, a

13. Rowan Williams, Archbishop of Canterbury, Lecture at Cardiff, Wales: Ethics, Economics and Global Justice (Mar. 7, 2009), available at <http://www.archbishopofcanterbury.org/2323>.

14. 2 NEW ENCYCLOPEDIA BRITANNICA, *Bernard de Clairvaux, Saint* 144, 145 (15th ed. 2010), available at <http://www.britannica.com/EBchecked/topic/62413/Saint-Bernard-de-Clairvaux/8211/Pillar-of-the-church> (last visited Apr. 12, 2010).

15. This notion of the epistemic power of love is beautifully explored through classical texts in MARTHA C. NUSSBAUM, *LOVE’S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE* (1990).

voice to aid discernment, and a cherisher of parables and paradox. This is not a claim to epistemic superiority; it is a reference to my particularity and an opening into the dominant religious sensibility in the United States, but my theology tells me that its sense is available in Other particular resonances, including that of the atheist.

A key paradox for discussions of social justice is that which Paul Ricoeur dubbed the political paradox: justice involves goods other than political power, yet justice in any sense tied to law and institutions is such that political power's distribution is different from the distribution of other "goods" in society.¹⁶ The paradox turns again when we consider the influence that money has, for instance, on political power—the translation is never exact, but almost all other goods have some currency in the meta-good of political power.¹⁷ A second, intimately related paradox is that of what Derrida calls "founding violence" echoing Walter Benjamin's initial divine violence.¹⁸ As law is something like "the *monopoly* of the *legitimate* use of physical force," even in a self-styled democracy, justice begins and must dance with violence.¹⁹

16. PAUL RICOEUR, *THE JUST* 97–93 (David Pellauer trans., 2000).

17. Note the equation of money with speech and corporations with personhood in the *Citizens United v. Federal Election Commission* decision; it stands loudly for the proposition that money talks and the rich speak most—or *Buckley v. Valeo*, which made the original equation of money and speech. See generally *Citizens United v. Fed. Elections Comm'n*, No. 08-205 (U.S. Jan. 21, 2010); *Buckley v. Valeo*, 424 U.S. 1 (1976) (extending the First Amendment "free speech" coverage to a right to spend money on elections).

In *Buckley*, the Court runs the risk of endorsing the view that fair representation is representation according to the amount of influence effectively exerted. On this view, democracy is a kind of regulated rivalry between economic classes and interest groups in which the outcome should properly depend on the ability and willingness of each to use its financial resources and skills, admittedly very unequal, to make its desires felt.

John Rawls, *The Basic Liberties and Their Priority*, 3 TANNER LECTURES ON HUM. VALUES 1, 76 (1982).

18. Jacques Derrida, *Force of Law: The "Mystical Foundations of Authority,"* 11 CARDOZO L. REV. 919 (Mary Quaintance trans., 1990), reprinted in *DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE* 3 (Drucilla Cornell et al. eds., 1992).

19. MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 154 (Talcott Parsons ed., A.M. Henderson & Talcott Parsons trans., 1947); see also ROBERT A DAHL, *ON DEMOCRACY* 44 (1998) ("The state . . . is a unique association whose government possesses an extraordinary capacity for obtaining compliance with its rules by (among other means) force, coercion, and violence.").

Two faces of violence that seem key in substantive justice are: first, the experiences of distribution and redistribution; and, second, the threat/promise of chaos. Allied is another unstable notion—that of morality pursued through the state.

This Article focuses on several dialectical pairs, several parabolic movements, to consider justice. The political paradox of Ricoeur, the seeming oxymoron of divine foundational violence, the balance of order and chaos, the quandary of privilege and redistribution, and the conundrum of morality, are my current choices. The latter, as I will show, comes from the conservative side of the political spectrum of our given democracy, and from the paradox of a nation–state in a global world. And always haunting justice, in my experience, is that most dynamic duo, equality and liberty.

I will touch one last note of prelude about an emergent face of justice that has a novel ring while resounding in indigenous traditions—restorative justice. This movement is from the bottom-up and needs primarily permission, rather than power, from the state. It is not conceived in the way theories of substantive justice might be because it is importantly atheoretical. Victim–offender mediation, community-based policing, and sentencing circles are all practices that are redolent with spirit but that the law cannot dictate.²⁰ Practitioners insist that the government cannot legislate or order such justice and that it requires volunteers from the full community.²¹ Restorative justice seems a face of justice that is simultaneously procedural (“trust the process”) and substantive, because the process is a loving attention to the Spirit. However, it is not primarily conceptual. It is a phenomenon that provides hope for the substance of things not seen, while this paper attempts to give idea to the construction of some sense of vision, of substance, for public justice.

Power and violence are tied to each other. The second major reorientation Walzer contributed to the discussion of justice, after the notion of plurality, was a focus on domination.²² This concept involves both liberty and equality, as unequal power is constituent of domination, and the loss for

20. See generally Mark S. Umbreit et al., *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251 (2005).

21. In conversation, the insight of Kay Pranis informed the author; see also Kay Pranis, *A State Initiative Toward Restorative Justice: The Minnesota Experience*, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES 493, 496 (Burt Galaway & Joe Hudson eds., 1996).

22. WALZER, *supra* note 10, at 10–13.

the lesser, the dominated, is a loss of liberty. Power over another is a peculiarity of the politics of law that involves the circumscribing of another's possibilities through greater force in influencing or determining the Other's actions. Were there no domination among humans, politics would not arise—and the status quo maintains sufficient domination to sustain a sense of injustice that thinkers like Judith Shklar considered the primordial face of justice.²³ Yet there is a defensive sense of domination, the idea of one's own dominion over one's own sphere. Conservatives tend, as did Robert Nozick, to start with the given distribution, and to see any change as an encroachment, a restriction on their liberty.²⁴ They do not imagine their property as held over against another, but as their simpliciter. This is, to them, order, which the law must maintain—the substance of justice.²⁵

Rawls, despite his elaborate thought-experiments of contractual original positions, began with the initial distribution, which is why, although his “difference principle” was tilted toward change for the underprivileged, change was not mandated. And we begin, in reality, with the given distribution. Although some critical stances stress the foundational violence and the questionable validity of the current situation, attempting to deprive the status quo of legitimacy,²⁶ they must contend with the issue of stability. Thus, Paul Ricoeur's analysis of Rawls and Walzer searches for the balance points that allow a conception of justification-and-challenge, of maintenance-and-change, in the face of the need for some basic functional system—rather than either a “failed” or a “revolutionary” state.²⁷ Political scientist James C. Scott has chronicled the forms of resistance to (unjust) regimes in places around the globe, yet he makes clear that the indigenous

23. See generally JUDITH SHKLAR, *THE FACES OF INJUSTICE* (1990).

24. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974) (beginning with a flat declaration that there are rights).

25. Rawls, *supra* note 6.

26. See generally Anthony Paul Farley, *Accumulation*, 11 MICH. J. RACE & L. 51 (2005); Muneer I. Ahmad, *A Rage Shared By Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259 (2004); Tracey Meares, *The Legitimacy of Police Among Young African-American Men*, 92 MARQ. L. REV. 651 (2009).

27. RICOEUR, *supra* note 16, at 36–57, 78.

fight against domination is of positive valence only in certain regimes.²⁸ The United States has many flaws, but I would wager that few would equate it to Myanmar (even though it may have helped create the unjust regimes Scott examines). Absent sufficient popular appreciation of a non-extant version of justice, would it not become unjust to impose it (if one could)? The task is not mere legislation; it also involves the popular imagination. So Scott's elegant and vibrantly textured rendition of anarchist strands of popular resistance has limited application to the United States today, although it should linger persistently in our political imagination.

Despite the need for some pole of stability, justice must keep vivid the violence involved, and that is what thinkers following Benjamin through Derrida into Slavoj Žižek animate in our discussion, bringing Scott's anti-state perspective into our conceptualizing, keeping any idea of justice contingent.²⁹ Thus we must consider the extant structural violence in the substantial injustice shot through our system. The demographics of our institutions manifest this substantive injustice: the gender, class, and race of the incarcerated population,³⁰ school financing;³¹ unemployment;³² the make-up of our Congress and Supreme Court.³³ The defense of the current structure of property uses state violence to maintain a distribution that the

28. JAMES C. SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* (1998).

29. *See generally* RICOEUR, *supra* note 16, at vii–xxiv.

30. David Cole, *What's Criminology Got to Do with It?*, 48 *STAN. L. REV.* 1605 (1996) (reviewing MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME AND PUNISHMENT IN AMERICA* (1995)); *CRIME AND INEQUALITY* (John Hagan & Ruth D. Peterson eds., 1995).

31. *See* Martha Minow, *Just Education: An Essay for Frank Michelman*, 39 *TULSA L. REV.* 547, 558–61 (2004).

32. *See* Marion Crane, *Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech*, 82 *GEO. L.J.* 1903, 1911 (1994) (“More women than men lack basic benefits, including health insurance, family and medical leave, pension benefits, and unemployment compensation.”); Marion Crane, *Colorblind Unionism*, 49 *UCLA L. REV.* 1313, 1315 (2002) (“Black unemployment is twice that of white unemployment.”).

33. *Population Versus Congress (Race and Gender)*, <http://www.scribd.com/doc/11486640/Population-Versus-Congress-Race-and-Gender> (last visited Apr. 11, 2010) (noting that according to 2007 statistics roughly 49% of the general population is male while around 82% of Congress people are male, and that while whites constitute approximately 66% of the general population, they make up about 85% of Congress); *see also* *Race, Gender, and the US Congress*, <http://www.justjackfruit.com/2009/01/28/race-and-the-us-congress/> (Jan. 28, 2009, 23:55).

extraordinary level of incarceration suggests is askew. The violence obscured by the system cuts back only theoretically against stability—unless the “haves” get so greedy (or careless) that they render their own dynamic of appropriation unstable.

It is as I begin to shift toward the perspective of the social, political, demographic, and class syndromes that privilege predictable groups and disproportionate concentrations of wealth, that I call myself back. I am following Žižek³⁴ (and perhaps Emmanuel Levinas³⁵ and Alain Badiou³⁶) back to where I have known that I am not a philosophical liberal since I gained the perspective to know what that meant. Until that realization, I was a liberal because that was the only language of politics that could be spoken in the United States. Louis Hartz’s *The Liberal Tradition in America* chronicled the foreshortened political philosophical spectrum of the United States,³⁷ leading to more courses in anarchy and traditional conservatism for graduate students. George Will’s work began the expansion of traditional conservatism as a legitimate position³⁸ followed by various less philosophical, but every bit as Burkean, commentators and many non-philosophical, but still conservative, voices. Walzer quietly added socialism to the spectrum, but few outside the academy took advantage of that ground. Now the “S” word arises in a changed context, one in which authoritarian state socialism has declined globally but, finally, capitalism itself has tripped and threatens to fall. The prospect of a hybrid economic-political model terrifies some of the population, as the 2009 Teaparty movement³⁹

34. See generally Matthew Sharpe, *Slavoj Žižek (1949–)*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY, July 25, 2005, <http://www.iep.utm.edu/zizek/> (last visited Mar. 10, 2010) (quoting Terry Eagleton describing Žižek as “the most formidably brilliant recent theorist to have emerged from Continental Europe”).

35. See generally EMMANUEL LEVINAS, *OF GOD WHO COMES TO MIND* (Bettina Bergo trans., 1998).

36. See sources cited *infra* notes 64 & 67.

37. See generally LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* (1955).

38. See generally GEORGE F. WILL, *STATECRAFT AS SOULCRAFT: WHAT GOVERNMENT DOES* (1983).

39. See David Barstow, *Tea Party Lights Fuse for Rebellion on Right*, N.Y. TIMES, Feb. 16, 2010, at A1, available at <http://www.nytimes.com/2010/02/16/us/politics/16teaparty.html>.

and the Limbaugh phenomenon⁴⁰ manifest. An entire major news network takes this stance seriously. This is why I summon my anarchist–socialist tendencies, asking them to sit on their critical, post-colonial, post-modern haunches⁴¹ for the moment, and listen.⁴²

It is hard. I want to listen to the Other in democratic dialogue because conversation, not force, is what democracy requires. Yet I try to read a conservative text respectfully, and find myself repeatedly bouncing off it as I hit what are to me nearly incomprehensible suppositions. I persist, despite what are to me deeply difficult, even threatening, postures of patriarchal white dominance. Now Haidt and Graham are invoking hierarchy and fatherliness,⁴³ conjuring up images of the Pope as these non-Catholics call him,⁴⁴ the one I call Ratzinger because he so challenges my relationship to my church. I'm melting . . . no, wait, that is another story. This is one in which water does not melt the wicked, or the elect, or even this reader. But this encounter with such difference decenters me because it threatens my deliberate decentering from a dominant discourse that has witnessed such violence. I do not only fear falling back into that paradigm, I also fear getting lost in a landscape so alien in its presuppositions that I cannot make sense of it without gathering it neatly into my patterns of critique. So I return to the only ground that is sufficient for me truly to hope to hear the Other: the great mystery of the inappropriable (and inappropriate) spirit.⁴⁵

40. See Brian Stelter, *Master of the Airwaves*, N.Y. TIMES, July 3, 2008, at C1, available at <http://www.nytimes.com/2008/07/03/business/media/03radio.html?scp=45&sq=limbaugh&st=nyt> (noting that Limbaugh's 2008 deal for his radio show, providing him with \$400 million through 2016, "underscore[s] his position as the leading purveyor of political talk radio"). See generally Times Topics: Rush Limbaugh, http://topics.nytimes.com/top/reference/timestopics/people/l/_rush_limbaugh/index.html?scp=1-spot&sq=rush%20limbaugh&st=cse (last visited Apr. 11, 2010).

41. This and the haunches of Patricia Williams' polar bears, see *infra* note 42, resound in the final line of Nadine Gordimer's story of political opposites dissolved into love: "She shuffled across the bed on her haunches and took his head in her hands, holding him." Nadine Gordimer, *Crimes of Conscience*, in LITERATURE AND THE LAW 156, 161 (Thomas Morawetz ed., 2007).

42. These are the hauntings of Patricia Williams' iconic polar bears from PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* (1991).

43. Jonathan Haidt & Jesse Graham, *When Morality Opposes Justice: Conservatives Have Moral Intuitions that Liberals may not Recognize*, 20 SOC. JUST. RES. 98, 105 (2007).

44. *Id.* at 106.

45. See generally JAMES ALISON, *ON BEING LIKED* (2003); MARY DALY, *BEYOND GOD THE FATHER: TOWARD A PHILOSOPHY OF WOMEN'S LIBERATION* (1985); MARY DALY, *OUTCOURSE:*

It is not heroic virtue, brilliant analysis, or elegiac poetry that can keep me moving, finally, with good faith into a hope for conversation—it is the promise that even with the splinter in my eye and that in my neighbor’s, something new can happen from the unnamable ground of the creator/sustainer of the cosmos, a ground that extends beyond extension and suffuses both me and the Other in ways I cannot know. And I need every bit of that because these guys drive me nuts with their assertions that I have to respect a view in which subordination is a virtue and civil disobedience is “not heroic” (their category of scorn), but “antisocial”—until I realize that I think civil disobedience is not heroic, and is, in an interesting sense, antisocial. Maybe we can talk about this.

III. THE OTHER: AN INTRODUCTION

The text off which I have been bouncing is written by two University of Virginia scholars, Jonathan Haidt and Jesse Graham.⁴⁶ In part of an ongoing conversation on social justice, Haidt and Graham suggest that conservative opposition to social justice is not morally inferior.⁴⁷ In order to establish what is moral, the authors rely on a schema of five modalities: harm/care; fairness/reciprocity; ingroup/loyalty; authority/respect; purity/sanctity.⁴⁸

These categories, Haidt and Graham argue, contain the basic themes of moral concern throughout human history, across cultures. The mistake that liberals make, Haidt and Graham contend, is that they think only harm/care and fairness/reciprocity, the justice concerns, are truly of moral concern in

THE BE-DAZZLING VOYAGE (1992); ROWAN WILLIAMS, *A RAY OF DARKNESS: SERMONS AND REFLECTIONS* (1995); ROWAN WILLIAMS, *WRESTLING WITH ANGELS: CONVERSATIONS IN MODERN THEOLOGY* (Mike Higon ed., 2007); JAMES ALISON, *WHAT SORTS OF DIFFERENCE DOES RENÉ GIRARD MAKE TO HOW WE READ THE BIBLE?* (May 26, 2009), <http://www.jamesalison.co.uk/pdf/eng56.pdf> [hereinafter ALISON, *WHAT SORTS OF DIFFERENCE*]; David Tracy, *Form & Fragment: The Recovery of the Hidden and Incomprehensible God*, REFLECTIONS, 2002, <http://web.archive.org/web/20021028191614/http://www.ctinquiry.org/publications/tracy.htm>.

46. Haidt & Graham, *supra* note 43. For a somewhat more complex investigation of the five modalities of political morality, see Jesse Graham et al., *Liberals and Conservatives Rely on Different Sets of Moral Foundations*, 96 J. PERSONALITY & SOC. PSYCHOL. 1029 (2009) [hereinafter Graham et al., *Liberals and Conservatives*].

47. Haidt & Graham, *supra* note 43, at 102.

48. *Id.* at 104–06.

the political realm.⁴⁹ In contrast, Haidt and Graham argue that human concerns are broader, and the conservatives who are involved in all five modalities are more moral. The article actually contains the heading “Is Justice Half of Morality, or One-Fifth?”⁵⁰ Categories can be so helpful.

I’m doing it. I am using what at best is irony, not very respectfully. The authors quote Jon Stewart,⁵¹ so I don’t feel totally guilty that he came to mind spontaneously several times as they talked of treason when authority was challenged—I keep imagining them with teabags. No, not that way. This is not respectful—or is it, in one sense? Is humor an aspect of justice? Is the absurdity of human life in which we have always killed—and I believe always (this side of the eschaton) will kill—each other so often in earnest, not something that requires a discourse on justice to remember humor?⁵² And I do chuckle at how quickly I assumed that these obviously well-educated University of Virginia scholars were ignorant and missed the intentionally provocative strand of their approach.⁵³ But I persist; they are too didactic in that they do not simply ask liberal commentators to cease viewing conservatives as less moral, but they also try to suggest a comparative, even competitive analysis complete with numeric scorecard, to indicate that, *au contraire*, the conservatives are more moral. There, I can legitimately laugh—but not derisively at their conceptions of what the political realm requires of conservatives as good, political/moral human beings.

Nor can I laugh carelessly at what they suggest that conservatives value, or fail to consider it. These are people who are willing to live and die according to a story in which ingroup traditional loyalty, authority, and purity are foundational. They believe that these values offset, outnumber, or relativize social justice values. The conservatives represent my neighbor, the traveler beaten on the path who believes in a different God (Samaritans

49. *Id.* at 101, 107–09.

50. *Id.* at 107.

51. *Id.* at 111.

52. For an example of reflection on such redemptive humor, see Rowan Williams, Archbishop of Canterbury, Lecture at St Cyprian’s, Clarence Gate, London: Not Being Serious: Thomas Merton and Karl Barth (Dec. 10, 2008), available at <http://www.archbishopofcanterbury.org/2071>; see *infra* note 63.

53. Haidt self-identifies as a liberal. See *infra* note 88.

worshipped Baal⁵⁴), whom I am called simply to provide for in need and to listen to as a fellow-citizen. Haidt and Graham inject into the conversation a lived, perceived reality that sees more violence from outgroups than I am prone to attend to, but they see it in the threat posed by the outsider.⁵⁵ They point to the constancy of war; I think of the injustice we do that leads to the conditions for war. They look for treason; I think of the gift of disruptive stories of people who are so damaged by the system. They honor authority; I believe that I am trying to incorporate into my Walzerian concern for lessening domination, their concern that there must be authority.

But they have a point: I tend to side with insubordination. Justice as insubordination appeals to me—and then, my slight glee wilts with the burden of disrespect for what I do not fully see but intuit has real, human moral commitment behind it. The image of how people and society work that Haidt and Graham portray for conservatives is so very far from mine, and it is shared by other, less credentialed citizens with whom I hope to fashion a just state. About half of my fellow citizens tend to see the world that way, and an egalitarian democratic commitment precludes me from dismissing that world view disrespectfully. Haidt and Graham do not dismiss the ethics of care—an ethic prominent in Walzer's ethics of communal provision—that, as they note, Carol Gilligan champions.⁵⁶ They also value fairness, Rawls' theme.⁵⁷ They want to defend the basic stance of people like Rick Santorum, and other traditions that Irving Kristol, they note, defended thus:

Institutions which have existed over a long period of time have a reason and purpose inherent in them, a collective wisdom incarnate in them, and the fact that we don't perfectly understand or cannot perfectly explain why they "work" is no defect in them but merely a limitation in us.⁵⁸

54. Siméon Vaillhé, *Samaria*, CATHOLIC ENCYCLOPEDIA, <http://www.newadvent.org/cathen/13416a.htm>.

55. See Haidt & Graham, *supra* note 43.

56. *Id.* at 100.

57. See *supra* notes 6–12.

58. Haidt & Graham, *supra* note 43, at 112 (quoting J.Z. Muller, *Introduction: What is Conservative Social and Political Thought*, in CONSERVATIVISM: AN ANTHOLOGY OF SOCIAL AND

As Haidt and Graham say, “These are not crazy ideas.”⁵⁹ They are much like what Edmund Burke said centuries ago in England.⁶⁰ They are not contradictory to what I have been saying about epistemic plurality, or what others call epistemic humility.⁶¹ These authors are saying something crucial: this is where they stand, and like Luther, at some level they can do no other. Substantive justice as change must take them into account. They are every bit the products of their life stories as are those on death row or in the unemployment line. The privileges visible to my eye may be nearly irrelevant to their lived existence. The attribution of bad faith (or even great overall ignorance) to those with privilege should be a circumscribed, tentative, negotiable resort; who are we to say that we have fewer rationalizations, fewer patches of false consciousness, less false spirituality, than they? Derrida wrote that Justice should speak the language of the Other.⁶² In some profound sense, those who tempt me to judge them as callous, uninformed, or morally impervious (or convenient) are the Others from whom I have the most to learn, even more perhaps (though perhaps not) than the prisoners with whom I work and learn.

IV. RELATIONSHIP TO THE OTHER

My sense of justice is at once akin to what the conservatives imagine a progressive vision might be and quite different. Part of my hope is that the ground on which I hope to hear them is one that will also allow an articulation on my part that is audible to them. Another convoluted academic reflection on post-modern justice may be helpful to some strands of discourse, but here I find affinities in Žižek’s impatience with the academy.⁶³ Once, I would have pursued Badiou’s lack of the lack,⁶⁴ but not

POLITICAL THOUGHT FROM DAVID HUME TO THE PRESENT 3, 7 (J.Z. Muller ed., 1997) (quoting IRVING KRISTOL, TWO CHEERS FOR CAPITALISM 161 (1978)).

59. *Id.*

60. See EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (Frank M. Turner ed., Yale University Press 2003) (1790).

61. See, e.g., David Luban, *The Inevitability of Conscience: A Response to My Critics*, 93 CORNELL L. REV. 1437, 1450 (2008).

62. Derrida, *supra* note 18, at 949.

63. Žižek also sees the humor in Christianity, just noted in my text; that aspect of his thought is consonant with my approach.

only do I read *Antigone*⁶⁵ differently than that thread of scholarship does,⁶⁶ but also I am decreasingly interested in trading neologisms beyond the few that can capture a more pedestrian imagination.⁶⁷ The administration of justice is as important as the theorization of justice; the imagination of the ordinary person is as powerful as the perhaps imaginary symbolic lack.

That said, some aspects of the animation of a concept of justice are open to wider imagination, in my view. To reduce domination, one may look to the structure of society and also to the discourse that surfaces in public. How people talk about justice affects how it works, both in terms of legislation and in terms of what prosecutors, prison guards, and voters perform. Perhaps we can all affirm Martha Nussbaum's call in *Poetic Justice* to focus on literature because it tends to fracture stereotypes and render more particular stories of those too easily lumped into categories of disposability,⁶⁸ but I believe that the ground of sacred scripture, religious traditions, and forays into the spirit point to a less solitary and even more resonant source of revelation.

In reality, I have found that for students and scholars alike, the shared vocabulary of what some call God is tricky and transformative. Heresy, exclusion, guilt, judgment, and condemnation lurk in these conversations,

[T]his mocking is an inherent part of religious life. As for Christianity, we must not forget the moments of carnivalesque irony in Christ's parables and riddles. . . . Christianity disrupts the pagan notion of the slapstick reversal of the proper relations of authority in which, for a limited time, a fool is celebrated as a king. In Christianity, the "true" king is revealed to be his own blasphemy, a Lord of Misrule, a fool.

SLAVOJ ŽIŽEK, VIOLENCE: SIX SIDEWAYS REFLECTIONS 106 (2008).

64. See generally ALAIN BADIOU, THEORY OF THE SUBJECT 111–76 (Bruno Bosteels trans., 2009) (featuring a collection of Badiou's seminars under the heading "Lack and Destruction"). For a more accessible introduction to Badiou in the legal context, see Bruno Bosteels, *Force of Nonlaw: Alain Badiou's Theory of Justice*, 29 CARDOZO L. REV. 1905 (2008).

65. SOPHOCLES, *ANTIGONE* (Reginald Gibbons & Charles Segal trans., Oxford Univ. Press 2003).

66. See BADIOU, *supra* note 64, at 161–67; ŽIŽEK, *supra* note 63, at 68–70, 194–95.

67. Badiou may be cognizant of the playfulness potential in the move to "forget the forgetting of the forgetting" but at this point that language game does not appeal to me. ALAIN BADIOU, *The (Re)turn of Philosophy Itself*, in MANIFESTO FOR PHILOSOPHY 113, 115 (Norman Madarasz ed. & trans., State University of New York Press 1999) (1992).

68. See MARTHA C. NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* (1995).

but an allegedly sanitized language of public reason only makes the resort to arcane Lacanian vocabulary of the symbolic and unconscious more likely.⁶⁹ For some, this dense discourse becomes illuminating, and I salute (and to some extent have participated in) that—but it is esoteric in the extreme. And those for whom I am concerned in the area of justice are excluded from that discourse. For me, it is like my leaving a Friends' Meeting to return to Mass—the Silence was wonderful, and liturgically irrelevant to those for whom Quakers have advocated so passionately. There are just not a lot of poor, uneducated persons of color in Friends' Meeting. If I cannot share worship or conversation with those with whom I aspire to solidarity, something is missing for me. If my views of law and justice are comprehensible to only a few, then I have perhaps focused too much on a hermetic scholarly discourse.

So I turn to Matthew 25 and the invitation to see the Christ-event in the least of these for a discussion of justice.⁷⁰ I look to Hebrew scripture for the widow and orphan and stranger. I listen to my Muslim friends for the Koran's call to alms. These discourses contain what true persuasion requires—a reorientation to the most centrally decentered sources of inspiration toward and with the Other.⁷¹ And they remind me not to become enmeshed in another ingroup conversation too exclusively. Ironically, Haidt and Graham tell me that ingroup loyalty with those looking toward the bottom is a value, and I am grateful for that conversation. But it cannot stop with the insights and solidarity gained by such conversation, and it cannot aspire to a justice for all simply by seeing the bottom in the terms that first present themselves to me. Make no mistake: children in poverty disturb me even more than disoriented Republicans do. Wildly disproportionate inmate populations of poor persons of color wake me more abruptly than “absurd” conservative political claims. But I also hear, in the discourse of conservatives, the same fear that others will unfairly judge them as morally

69. See JACQUES LACAN, *THE FOUR FUNDAMENTAL CONCEPTS OF PSYCHO-ANALYSIS* (Jacques-Alain Miller ed., Alan Sheridan trans., W.W. Norton & Co. 1998) (1978).

70. *Matthew 25:31–46* (New Jerusalem).

71. Reorientation is the essence of the call of traditions to “awaken” and “convert” (teshuva in Judaism, metanoia for Christians, both suggesting turning and changing of mind) that permeates the sacred texts. The “illusion” from which the Buddha was enlightened followed much of his Hindu predecessors; the “seeming” in the Tao again asks us to change how we perceive Rumi's Islamic koans. What else is the call to follow the Spirit rather than the letter of the Law?

deficient that I hear from those whose conduct conservatives judge to be morally deficient. Christ hung around with tax collectors and Pharisees, not just prostitutes and lepers.⁷²

I cannot hope to imagine justice in a way that does not take people as they are given, whether the prisoners of an atrocious system of over-incarceration or the denizens of an ideologically-gated community of privilege. Both are crucial. I cannot abandon, or leave as Other, either of these—even though the difference in power remains a true difference. Somewhere, mostly in my rationalized, suppressed unconscious, I am not only a mortgage-payer and person of race and class privilege, but I am also like the rich young man who went away sad because he could not sell all he had and give it to the poor.⁷³ None of us has either. We can hope, my tradition has told me, that the young man grew to be Joseph of Aramitheia, and provided the tomb needed to nurture the mystery of transformation into new life.

V. THE OTHER THREE MODALITIES

Haidt and Graham claim that liberals focus only on the first two of five modalities, harm/care and fairness/reciprocity. This Section examines the remaining three modalities, ingroup/loyalty, authority/respect, and purity/sanctity.

A. Tradition: Ingroup/Loyalty & Authority/Respect

Both ingroup/loyalty and authority/respect rely on tradition and dominance based on established social constructions. These two valences that Haidt and Graham construe as crucial to social functioning tend away from, for example, the resistance to dominance in Walzer and other egalitarian thinkers.⁷⁴ The concerns for ingroup and authority exemplify the traditional conservative philosophy, also called Continental Conservatism,

72. See, e.g., *John* 3:1, 19:39–40 (New Jerusalem); *Matthew* 21:31–32 (New Jerusalem); *Mark* 1:40–45 (New Jerusalem).

73. *Matthew* 19:16–22 (New Jerusalem); *Mark* 10:17–22 (New Jerusalem); *Luke* 18:18–23 (New Jerusalem).

74. RICOEUR, *supra* note 16; WALZER, *supra* note 10.

that stresses hierarchy within an organic society with a natural aristocracy secured by tradition. Tradition as a rallying cry always begs the question of how we hope to distinguish good traditions from bad traditions. Tradition, like pragmatism, is a porous justification. What “works” must work for some and not for others, and according to some criteria. We must decide which tradition we will honor and which we will throw out. Thus, Žižek’s rereading of *Antigone*, playing with who is the transgressor, the violent one,⁷⁵ should signal that the answer is not stable. A foundational tale of sovereignty and law reveals that the millennia of tradition that make *Antigone* a classic have not resolved its ambiguities. Nor can slavery, a near-universal practice that has its own reincarnation in the contemporary United States,⁷⁶ hide behind its traditional status or fail to render the evocative Kristol passage more tentative.⁷⁷ Tradition gives pause but not full stop. Attributions of violence are always moving in and out of context, which is why the substance of justice must be in part about communication.

The notion that the silenced one should speak first contains both process and substance, but it reminds us that right now many Republicans (and conservatives and libertarians) feel silenced, bizarre as that may seem to some. Such experienced censorship may not balance, much less outweigh, the silence imposed by poverty, prejudice, moralism, fanaticism, and militarism—but in the context that these are citizens who must somehow be moved with any transformation, the conversation cannot *simply* be for the benefit of the disadvantaged. Ironically, there is some duty of hospitality to Republicans, particularly now that Obama is in the White House.

Pointing to the tradition of loyal and faithful dissent is the jurisprudence of love that Anthony Cook has given us, out of his faith.⁷⁸ This is the tradition of the underdog outgroup, to add to the conservative call for ingroup solidarity. Professor Ana Novoa writes of the *Virgen de*

75. ŽIŽEK, *supra* note 63, at 68–73, 194–95.

76. See, e.g., Melissa Holman, *The Modern-Day Slave Trade: How the United States Should Alter the Victims of Trafficking and Violence Protection Act in Order to Combat International Sex Trafficking More Effectively*, 44 TEX. INT’L L.J. 99 (2008).

77. See *supra* text accompanying note 58.

78. Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985 (1990).

Guadalupe and her galvanizing presence among Chicanas/os, tapping another powerful, supplementary tradition.⁷⁹ We do not need to negate the value of loyalty to the group in order to suggest the plurality of groups and the beauty of those traditions—ones that the mainstream has embraced as part of our *complexity* of traditions.

More important, perhaps, is the societal dynamic that René Girard examined in *Violence and the Sacred*, the scapegoat phenomenon through which societies create cohesion.⁸⁰ The community bonds Haidt and Graham valorize have a destructive side that Girard and others argue that Jesus broke via the willing victimhood of love on the cross.⁸¹ Short of such stunning love, societies have a penchant for conformity that can become pathological. Further, the notion that community solidarity is a high value flies in the face of the alleged thirst for liberty above all in the United States. As there is no prospect that such uniformity of values will suddenly occur in anything but the false nostalgia recently phrased as “Give me back my America,”⁸² the conservative longing for belonging⁸³ requires contortion into a strangely undemocratic form of morality.

B. Purity/Sanctity

I hope that I have taken my own admonitions well to heart, because the fifth category, “purity/sanctity,” does not start well. Haidt and Graham begin with the move to meat-based diet in human evolution, citing codes for dealing with corpses and other sources of disease.⁸⁴ For them, “[d]isgust

79. Ana M. Novoa, *Lessons From La Morenita Del Tepeyac*, 20 J.L. & RELIGION 267, 267–71 (2005).

80. See generally RENÉ GIRARD, *VIOLENCE AND THE SACRED* (Patrick Gregory trans., 1977) (1972).

81. See ALISON, *ON BEING LIKED*, *supra* note 45, at 38–46; ALISON, *WHAT SORTS OF DIFFERENCE*, *supra* note 45.

82. Anyone wishing to have buttons or t-shirts emblazoned with this slogan, visible in news clips, may order them at Zazzle, available at http://www.zazzle.com/give_me_back_my_america_. Those wishing to sing along with John Berry will find his song with this title at <http://america.frisbee2010.com/>.

83. Haidt & Graham, *supra* note 43, at 103 (noting that “[m]ost conservatives . . . embrace the ethic of community” as well as institutions and traditions).

84. *Id.* at 105–07.

appears to function as a guardian of the body in all cultures,” and this “nativist” strand of human morality transmutes into the ethic of divinity.⁸⁵ They are talking about chastity and other forms of sexual morality, so that the carnal realm helps to define the divine.⁸⁶ I immediately ask: so why did Christ hang around with lepers, prostitutes, bleeding women, and the ritually impure and why cure with spit? The two practices, which Haidt and Graham choose to establish the normalcy of disgust at lower castes, for instance, are the difficulties of teaching children to turn in their family members (as in Mao’s China) or to love their enemy (Mao and Christ?⁸⁷ (I am trying not to be cute; it is hard to contain irony⁸⁸)).

I question whether I have given them a true narrative space, interrupting even my own attempt to render their view as I have. A voice in my memory interrupts with Rachael Adler’s passionate denunciation of ritual purity codes in Judaism, as *niddah* (impurity) was a term of abhorrence used to condemn women nearly exclusively.⁸⁹ Earlier, Adler had seen the sacred laws of purity as neutral and fair, but came to see that the traditional purity codes “dr[e]w a crucial distinction between men’s and women’s capacities for holiness.”⁹⁰ I am doing the best I can. One need only embrace the story of one who came “not to abolish” the law but to “complete” it⁹¹ in order to find the traditional, Christian, dominant ingroup scripture for why sanctity is not solely about chastity and divinity not reserved for the abstinent. After writing in the dust, as the elders pondered

85. *Id.* at 106.

86. *Id.*

87. Haidt & Graham, *supra* note 43, at 106; see *Matthew* 5:44 (New Jerusalem) (“But I say this to you, love your enemies and pray for those who persecute you . . .”).

88. And hard to admit to falling for stereotypes—Haidt and Graham are not both conservatives, despite their academic location and their presentation in this article. Haidt describes himself as a liberal and an atheist. See Jonathon Haidt, Book Proposal, *The Righteous Mind: Why Good People are Divided by Politics and Religion*, <http://www.righteousmind.com/> (last visited Apr. 11, 2010). Haidt’s use of irony here to grant apparent quantitative superiority to conservatives, and his other work, suggests a fine sense of humor about his progressive audiences. See *infra* note 98.

89. Rachel Adler, *In Your Blood, Live: Re-Visions of a Theology of Purity*, *TIKKUN*, Jan.–Feb. 1993, at 38–40.

90. *Id.* at 40.

91. *Matthew* 5:17 (New Jerusalem).

who was without sin and quietly dropped their accusatory stones, Jesus said that there was no one left to condemn the woman caught in adultery and he would not condemn her either.⁹² For Jesus, if there was an ingroup and an outgroup, neither group was successfully socially constructed.

But that is my perspective. How can I say that those who read the same scripture and see a different story are wrong and that I am right? If I can, I am claiming to be one who sees, and Christ tells me that that makes me blind.⁹³ So all my inability to comprehend, all my reactive-responsive ripostes, are also blind. Perhaps what I really learn from these Republicans at the most profound level is how blind human beings are, and I have to drop my stone.

C. How to drop the stone but not the conversation?

Back to their text.

Haidt and Graham's marker, "whether or not something is disgusting"⁹⁴ is monumentally over-inclusive. If we start trying to pass laws prohibiting disgusting behavior, we would have to outlaw adolescence. The fragility of disgust has many faces, one of which appears in our food consumption. To follow the carnal metaphor, former FDA head, Harvard-educated Dr. David Kessler, recently commented about shifting attitudes toward food groups: "when people who once loved to eat steak become vegetarians, they typically begin to view animal protein as disgusting."⁹⁵ Bernard Madoff redefined obscene, stomach-turning. The ABA Model Rules of Professional Conduct exclude "personal morality" from actionable

92. *John* 8:1–11 (New Jerusalem). The first question this Scripture raises is where is the man with whom she was caught?

93. *Matthew* 7:3–5 (New Jerusalem).

94. Haidt & Graham, *supra* note 43, at 108.

95. Tara Parker-Pope, *How the Food Makers Captured Our Brains*, N.Y. TIMES, June 22, 2009, at D1, available at http://www.nytimes.com/2009/06/23/health/23well.html?_r=1&em ("As head of the Food and Drug Administration, Dr. David A. Kessler served two presidents and battled Congress and Big Tobacco. But the Harvard-educated pediatrician discovered he was helpless against the forces of a chocolate chip cookie.").

misconduct,⁹⁶ not because they are unimportant but because, as Newt Gingrich's history⁹⁷ reminds us (as I write this, Governor Mark Sanford is admitting his affair . . . was Ensign last week?) who can cast the first stone?⁹⁸

As I was writing this last paragraph, I wrote "help" in the margin. I am sorely tried when I think of the numbers of revelations about politicians, and Republicans disproportionately, who have done—well, I do consider preaching morality in public while having an adulterous affair with your head of staff⁹⁹ potentially "disgusting," but I'm not tossing stones. I'm still trying to stay in what cannot but seem to me the insular logic of Haidt and Graham that ends in what I consider homophobic policies.¹⁰⁰ Insular is, I remind myself, what Jesus meant by the splinter in each and every eye.¹⁰¹ I cannot see my own insularity.

I'm trying.

Haidt and Graham's conservatives do not seem to imagine that some may experience conspicuous consumption, health costs, homeless children, CEO "compensation," and self-righteous preaching as stomach-turning. But

96. MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 2 (2009) (noting that "some matters of personal morality, such as adultery and comparable offenses . . . have no specific connection to fitness for the practice of law"). The ABA's reasoning was subject to intense public debate in the Clinton-Lewinsky episode, a public controversy that brought out the complexity of these issues.

97. Stanton Peele, *Politics and Sex VI: Let's Add up the Cheaters in the Lewinsky Affair*, PSYCHOL. TODAY, July 11, 2009, <http://www.psychologytoday.com/blog/addiction-in-society/200907/politics-and-sex-vi-lets-add-the-cheaters-in-the-lewinsky-affair> ("First, that conservative stalwart Newt Gingrich, as Speaker of the House and the man spearheading the whole impeachment process, was cheating on his wife at the time of the impeachment.").

98. In his YouTube appearance before a Technology, Entertainment, Design (TED) audience, Haidt used the phrase about throwing stones despite his professed atheism. Jonathon Haidt, *The Real Difference Between Liberals and Con* (Feb. 18, 2008), <http://www.youtube.com/watch?v=vs41JmGaxc> (last visited Mar. 10, 2010). See generally *John 8:1–11* (New Jerusalem).

99. Peele, *supra* note 97.

100. See MARTHA C. NUSSBAUM, *FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW*, at xiii (2010) for a substantive response to the use of disgust as a moral category: "Disgust, so described, seems pretty nasty, a fundamental refusal of another person's full humanity."

101. *Matthew 7:3–5* (New Jerusalem).

lest we inadvertently invite a mutual vomitorium rather than a conversation, we may have to find out what is truly something we cannot stomach. My problem is that, for me, it might be torture.

Help.

Their conservative story does something that I cannot affirm in this area: it frames sexual morality within a history of health codes that suddenly monopolizes sanctity. They hop first from health concerns to spiritual pollution-control, and then from the body as “a temple housing divinity” to moral regulations.¹⁰² This may betray Haidt’s atheism and an attendant lack of imagination about the spirit. Religion is neither a monopoly nor is it merely a form of evolution. The progressives fear religious Darwinism, the survival of the most aggressive organized politicized religion. The conservatives seem to fear that anything less than political dominance becomes tantamount to extinction. *We cannot offer to defer to a need for dominance*, but perhaps the exercise of respect and loving kindness can transform the perception of what it would be to be dethroned but not banished. If the conservative, Western, white, straight male is no longer the default version of the human, it is still a form of the human to be cherished. That is what I hope to accomplish by engaging Haidt and Graham’s presentation of the conservative—to exercise respect and loving kindness because that is the only way that something New can happen.

VI. THE POTENTIAL FOR THE NEW

The day I presented this Article as a paper to a self-selected progressive group of legal academics, I told the following story, saying that it felt very difficult, and subject to misinterpretation. I noted my sense of danger (the audience was convened on the ground of critical race and gender theory), but the story is what came to mind the night before as I was working on the presentation, trying to enter that realm of the New.

Over the past few years, I have done ministry work in prisons. My reason is the promise of Matthew 25 as I read it: if I want to meet Christ now, I should look for Christ among “the least of these” my brothers and

102. Haidt & Graham, *supra* note 43, at 103.

sisters.¹⁰³ (When I was giving the paper, for that audience, Republicans were “the least,” although not all the laughter was nervous, and a number of participants strongly embraced the edgy necessity to address the Other with respect and loving kindness, although some remained skeptical.) That Christ-among-us, which for me is not doctrine-specific but is the be-here-now of enlightenment and mindfulness and Sufism and so many paths, came clear in one retreat we did at a woman’s prison. The entire thing took place on the ground prepared by the particular minister and his wife over the years in that tough Texas institution. These two are among the most loving and present folks with whom I’ve worked, although we see our shared faith tradition (Roman Catholicism) in some ways quite differently. Among their beliefs is that homosexuality is wrong, a view shared by some in my church, and wonderfully interrogated by others (James Alison’s *The Joy of Being Wrong*¹⁰⁴ is one of my very favorite books of out gay Catholic theology, and in my view the Pope has failed to catch up to him). In my prison work, I have always tried to do a “both/and” affirmation of difference on that issue with the inmates, many of whom are only “gay for the stay” and others of whom were out lesbians before they were incarcerated, without criticizing the deacon and his wife.

The last time I was there, a woman who had gone by a masculine name (let us say “Mario”) until then, got up at the final session, which allowed inmates to share their experiences. She talked about how much the deacon and his wife had done, and how deeply she was convinced of God’s all-abiding love. So, she said, she was no longer Mario. She was (let us say) Maria, and she was living the life to go with the name.

In that narrative context, abstractions cracked and broke. This redoubtable woman—who had talked in the past about how she had dealt drugs to kids for years, been part of a murderous enforcement network, and lived by violence, this person who had the physique and stance of the most “masculine” dyke in the room, this woman claiming something about herself as a loved child of God—was moving. It was the “motion beneath the emotion” that one of my Quaker elder friends used to talk about, the flow of the spirit, the celebration of newness that confounded my complex

103. *Matthew 25:40* (New Jerusalem).

104. See JAMES ALISON, *THE JOY OF BEING WRONG: ORIGINAL SIN THROUGH EASTER EYES* (1998).

mental construct of post-modern gender. She inhabited the fragment of her life where she found herself, and found that love led her to this renaming. She radiated love for her sisters. She blew me away.

The sophisticated critical analyses of gender in which Latinas like Gloria Anzaldúa educated me are still indispensable, and have truth and their own transformative newness.¹⁰⁵ But Maria decentered the de-centering, by attending to love. An anthropology of her movement might be fabricated from critical perspectives, but what could they say in the face of the narrative that she lived? Much as Mary McLintock Fulkerson affirms the wit and insight of conservative Christian women in *Changing the Subject*,¹⁰⁶ I heard Maria's story and it rang true and beautiful. I knew her and her story from prior retreats, and she really surprised me. I can imagine her finishing her time, re-entering the Real World, and finding a life partner and embracing that love because it comes from the same source of love she found in prison with the minister and his wife, but that is not the only possible ending to the story. I do not see Maria as bowing to the stupidity of the Church's teaching, but as by-passing its false condemnation and simply troping toward love, like a wise, canny sunflower turning toward the solar warmth. That love, wiser than we even in our best intellectual passions, will be her best guide. She obviously saw that while society condemned her (to many years in the toughest level of prison in the killingest state in the Union¹⁰⁷), God loved her and that allowed her to love her sisters as herself.

This is the potential for newness (and not a stasis or an end-point; the

105. GLORIA ANZALDÚA, *BORDERLANDS/LA FRONTERA: THE NEW MESTIZA* (1987); *see also*, e.g., GLOBAL CRITICAL RACE FEMINISM: AN INTERNATIONAL READER (Adrien Katherine Wing ed., 2000); Elvia Arriola, *Queering the Painted Ladies: Gender, Race, Class, and Sexual Identity at the Mexican Border in the Case of the Two Paulas*, 1 SEATTLE J. FOR SOC. JUST. 679 (2003); Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329 (2006).

106. MARY MCCLINTOCK FULKERSON, *CHANGING THE SUBJECT: WOMEN'S DISCOURSE AND FEMINIST THEOLOGY* (1994).

107. Amnesty International USA, *Executions by State in the U.S.*, <http://www.amnestyusa.org/death-penalty/death-penalty-facts/executions-by-state/page.do?id=1011590> (last visited Apr. 21, 2010) (showing that from 1976, as of March 12, 2010, Texas has executed the most people, 452, of any state, with Virginia and Oklahoma ranking second, with 106 executions, and third, with 92 executions, respectively); Death Penalty Information Center, *State Execution Rates*, <http://www.deathpenaltyinfo.org/state-execution-rates> (last visited Mar. 12, 2010) (indicating that between 1976 and April 17, 2009, Texas had the highest number of executions (437), though per capita Oklahoma ranked first and Texas ranked second).

story continues) that Republicans may offer (yes, I would bet the ranch that the minister and his wife are Republicans). Because they carry love both inadvertently and intentionally, (at least) every bit as much as we do. Socrates told us that we do not know what we are doing.¹⁰⁸ He led us in striving to learn what we can never know, following the profound embracing Eros of the Good.¹⁰⁹ The ancient conversations, Socrates' dialogues, Christ's parables, and our ruminations, are not empty or futile, but they cannot claim knowledge—and while that claim to static Truth is one we can easily resist from Republicans, we cannot fall into it ourselves.

VII. CONSERVATIVE DISGUST

The presumed trajectory of the Haidt–Graham article is revealed in the subsequent study of disgust in the political spectrum by a quartet of high-powered academics from Yale, Harvard, Cornell, and the University of North Carolina. Although Haidt and Graham never mention homosexuality in the section of their article on purity/sanctity,¹¹⁰ the studies linking conservative moral judgment of gays with a low threshold for disgust make the tie explicit. In fact, in more politically conservative individuals, disgust sensitivity appears to be related to a willingness explicitly to endorse anti-gay attitudes.¹¹¹ Three of these scholars, Yoel Inbar, David A. Pizarro, and Paul Bloom, conducted two studies that they argued demonstrated that political conservatives are more disgust-sensitive than most people and that this penchant is particularly strong for “purity-related” issues such as gay marriage.¹¹² Interestingly, the feelings these obviously progressive scholars chose to study were not cognitive but intuitive; they noted that often the

108. See Plato, *Meno*, in 1 THE DIALOGUES OF PLATO 349 (B. Jowett trans., Random House 1937) [hereinafter Plato, *Meno*]; Plato, *Symposium*, in 1 THE DIALOGUES OF PLATO 301 (B. Jowett trans., Random House 1937) [hereinafter Plato, *Symposium*].

109. See Plato, *Meno*, *supra* note 108; Plato, *Symposium*, *supra* note 108.

110. At the beginning of the Article, however, the authors use a hypothetical yard sign “Gay marriage will destroy society” to initiate the reader into a stance of moral incredulity at the views of the Other. Haidt & Graham, *supra* note 43, at 99.

111. Yoel Inbar et al., *Disgust Sensitivity Predicts Intuitive Disapproval of Gays*, 9 EMOTION 435, 438 (2009).

112. See Yoel Inbar et al., *Conservatives Are More Easily Disgusted Than Liberals*, 23 COGNITION & EMOTION 714, 714 (2009).

subjects had a different considered view than their initial emotive reaction.¹¹³ However, the data are construed in a way to frame political conservatives as responding to the world differently, because of their senses of both disgust and sanctity.¹¹⁴

All the scholars so far discussed have used disgust in the sense of revulsion to physical things that has sometimes been expanded to encompass outgroups.¹¹⁵ Conservatives perceive lower-caste people as potential sources of contamination, as well as ritually impure, and as such, less close to God. This discussion lacks a crucial thread: both the conservatives and progressives in this social science discourse do not consider whether for some, the refusal of respect to “the least of these” might produce revulsion for the spiritually concerned. The insight that Christ spent time breaking the rules of ritual purity is not new, but his response to injustice has not been so fully explored. In law discourse, Fred Gedicks has suggested the “gag” test for when constitutional analysis ignores religion beyond acceptable limits,¹¹⁶ an application of the sense of revulsion to an area not particularly connected with sexual morality. Similarly, progressive commentators have used the language of disgust in relation to the mistreatment of those without societal advantage.¹¹⁷ Thus, the entire enterprise of pursuing disgust may not only allow progressives to understand conservatives,¹¹⁸ but to speak to them in the language of

113. *Id.* at 718.

114. *Id.*

115. Lauren Gold, *Easily Grossed Out? You're More Likely a Conservative, Says Cornell Psychologist*, CORNELL CHRON. ONLINE, June 3, 2009, <http://www.news.cornell.edu/stories/June09/pizarro.disgust.lg.doc.html>; Yoel Inbar et al., *Disgust Sensitivity Predicts Intuitive Disapproval of Gays*, 9 EMOTION 435, 438 (2009), available at <http://www.unc.edu/~knobel/implicit-moral-judgment.pdf>.

116. Frederick Mark Gedicks, *The Establishment Clause Gag Reflex*, 2004 BYU L. REV. 995, 999 (2004).

117. Yusef Najafi, *Charge: Injustice; GLOV Calls Misdemeanor Indictment Against Gay Man's Alleged Attacker "Disgusting"*, METRO WKLY., July 16, 2009, available at <http://www.metroweekly.com/news/?ak=4397>. In fact, psychological research suggests that this is not just a rhetorical turn. See Mark Henderson, *Injustice Leaves a Bad Taste in Mouth*, AUSTRALIAN, Feb. 27, 2009, <http://www.theaustralian.com.au/news/injustice-leaves-bad-taste-in-mouth/story-e6frg6u6-1111118982453>; see also Graham et al., *Liberals and Conservatives*, *supra* note 46.

118. Although, they may not use it for such a compassionate purpose. See David Kirkpatrick,

revulsion on behalf of social justice. As Haidt and Graham frame the matter, social justice is radically distinct from questions of divinity.¹¹⁹ This is an apparent artifact of well-meaning non-believers not seeing the face of justice in the Scriptures or the history of social movements on behalf of justice explicitly moved by the spirit.¹²⁰

Perhaps conservatives also do not realize that they have claimed to monopolize sanctity. In my experience, the progressives have (as do we all) some tendency to claim a monopoly on righteousness.¹²¹ Each stance may have more common ground than they realize. The ensuing discourse may perhaps open to something that accepts the givenness of conservatives' instincts (and, I suspect, that of each of our inner conservatives) but expands the imaginative space to suggest that such visceral penchants are not the monopoly of right-wing moralisms. An expansion of what is considered divine is also needed. Between the conservatives and progressives, the nature of risk is also in play; the reaction to those perceived as dirty is one of perceived risk. Even with potential trajectories of shared language games, political differences and differing views of what politics is to accomplish persist.

Among the emerging studies that sustain a belief that political penchants are genetic is the work of Jaime E. Settle, Christopher T. Dawes, and James H. Fowler on the heritability of partisan attachment.¹²² Other studies suggest that risk-taking behavior is to some degree genetic, as are other political dispositions.¹²³ God, nature, and the demographics of human distribution suggest that we humans vary. How we see political values is in

The "Ick" Factor and Conservatives, <http://www.davidkirkpatrick.wordpress.com/2009/06/05/the-ick-factor-and-conservatives> (June 5, 2009, 00:21).

119. See Haidt & Graham, *supra* note 43.

120. For a fine example, see PIERRETTE HONDAGNEU-SOTELO, *GOD'S HEART HAS NO BORDERS: HOW RELIGIOUS ACTIVISTS ARE WORKING FOR IMMIGRANT RIGHTS* (2008).

121. See Haidt & Graham, *supra* note 43, at 107 (noting that liberals could not understand how those who voted for George W. Bush could claim to vote based on moral values when liberals saw Bush as amoral by their standards).

122. Jaime E. Settle et al., *The Heritability of Partisan Attachment*, 62 *POL. RES. Q.* 601, 607 (2009) ("We find that heritability plays a significant role in partisanship, accounting for almost half of the variance in strength of partisan identification.").

123. See e.g., Press Release, American Political Sci. Ass'n, *Researchers Find Genetic Link in Political Orientations* (June 22, 2005), <http://www.apsanet.org/imgtest/geneticsAPSR0505release.pdf>.

our bones, not just our heads—or hearts.

New York Times columnist Nicholas Kristof argues (citing Haidt, who agrees, ironically, that evolution is not always adaptive): “Evidence is accumulating that the human brain systematically misjudges certain kinds of risks. In effect, evolution has programmed us to be alert for snakes and enemies with clubs, but we aren’t well prepared to respond to dangers that require forethought.”¹²⁴ Consequently, the whole idea of purity as healthier, which Haidt and Graham connect with sanctity, tradition, and the accepted order,¹²⁵ is destabilized. Accepted versions of right, truth, and holiness may be misconstructions, while the holiness of trafficking with the despised of the earth is in the very foundational scripture of the allegedly Christian nation of the United States of America.

VIII. CONCLUSION

In the light of such inversions of “logic” and persistent paradox, we return to our endemic ignorance. So, where would our ignorant searching take us in the quest for justice among disgusted conservatives and critical progressives? To loving the enemy, I still think. The world of paradox asks us to claim for the “least of these” that they have food, shelter, education, health care—and also to see the hungry, ignorant, and fearful in even the most privileged, upper-class U.S. citizen, white, able-bodied, straight male. Every person at some point experiences bewildering suffering. Is compassionate recognition of the vulnerable in each person, however, simply a procedural form of justice? Does it fail to accord sufficient value to critical race, LatCrit, Critical Legal Studies, class analyses?¹²⁶ Only if somehow this suggests that these critical moments are superfluous. Loving the enemy is not surrendering critiques of patterns of behavior or of modes of thought. Such paradoxical love does, however, finally dislocate even critique. Critique is not the end truth, nor the final heresy. Critical stances are the essence of human reflection and, thus, our growth in the intensity

124. Nicholas D. Kristof, *When Our Brains Short-Circuit*, N.Y. TIMES, July 2, 2009, at A23, available at <http://www.nytimes.com/2009/07/02/opinion/02kristof.html?hpw>.

125. See Haidt & Graham, *supra* note 43.

126. Athena D. Mutua, *Introducing Classcrits: From Class Blindness to a Critical Legal Analysis of Economic Inequality*, 56 BUFF. L. REV. 859 (2008).

and richness of meaning and action. Critique's necessity calls on the Other—the perceived-enemy, Republicans for the riff I am following—to love me, whom they have perhaps perceived as enemy. Thus the love permeates the process, including the critical analysis. If the process is love, is that not the final substance?

Analytically, the process–substance distinction now enters deliberate paradox. In the process is the substance. The process is overtly based in radical equality. We are each and all children of God, the Universe, Buddha-mind, Kali, the Prophet, a “higher power,” the continuing story, the flow, the force, love, good, truth, beauty, the void, the face, and the Other. Whatever it is that animates and breathes through the cosmos, it is what the eleventh-hour laborers got: the same wage as those who came early in the day.¹²⁷ To paraphrase Jesus, what complaint do we have, if Republicans also get to heaven?¹²⁸ In fact, won't it be more interesting with them there?

The problem is that Republicans may not want progressives in their heaven. The very equality on which I base my invitation to loving discourse—the rejection of righteousness, the embrace of the Other without subsuming the Other—is contrary to the conservative worldviews Haidt has portrayed. My paradigm suggests that such a paradox is not a defeat. It would not be central to the teaching of the predominant spiritual tradition of the West that we must learn not to judge, that there is no condemnation,¹²⁹ if it were simple. We would not have needed the wild paradox, what Žižek calls a “mocking blasphemous spectacle in the donkey-riding king who is Christ, his own crown a matter of thorns,”¹³⁰ at the center of the story.

“And what if excess of love [b]ewildered them till they died?” Yeats asks in his iconic poem of the widening gyre where the “center cannot hold” and things fly apart.¹³¹ These are times of fracture and dissonance. Even in

127. *Matthew* 20:1–16 (New Jerusalem).

128. *Matthew* 20:13–15 (New Jerusalem).

129. *Romans* 8:1 (New Jerusalem); *John* 3:17 (New Jerusalem). As Levinas opens the people of Israel to all humankind, so do some Christians believe that all are in Christ. See Universal Salvation and the Roman Catholic Church, <http://www.romancatholicism.org/universal-salvation.htm> (last visited Apr. 11, 2010) (describing the doctrine of universal salvation, which holds that all people will be saved and that God's and Christ's intention was the salvation of the whole human race).

130. ŽIŽEK, *supra* note 63, at 106.

131. William Butler Yeats, *Easter 1916*, in *THE COLLECTED POEMS OF W.B. YEATS* 180, 182

our bewilderment, we can address the Other with respect, and perhaps love,
in the hopes of something New.

