

A Jurisprudence of Nonviolence

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Is there a way we could theorize about law that would make the world a less violent place? In the 1980s, cultural, or “different voice,” feminist legal theory seemed poised to take up the mantles of Mohandas Gandhi and Martin Luther King by incorporating nonviolent values into society and the law. Based on the work of psychologist Carol Gilligan, cultural feminist legal theory valorizes the supposedly female virtues of caretaking and connectivity.¹ As elaborated by theorists such as Robin West,² Martha Minow,³ Joan Williams,⁴ and Christine Littleton,⁵ it also celebrates women’s “ethic of care,” which is a brand of moral reasoning that emphasizes empathy, particulars, and human relationships, as opposed to men’s “standard of justice,” which stresses individualism, abstraction, and autonomy.⁶ Though these cultural feminists wrote on issues such as employment law⁷ and family law,⁸ their ideas about caring also promised to transform criminal law, Second Amendment jurisprudence, and international law. Indeed, no other jurisprudential school of thought appeared as well equipped to craft a legal theory of peace.⁹ As we all

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¹ See, e.g., CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT 167-68 (1982).

² See ROBIN WEST, CARING FOR JUSTICE (1997); see also Robin L. West, *The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN’S L.J. 81 (1987).

³ See MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990).

⁴ See, e.g., JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT I (2000).

⁵ See, e.g., Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1335 (1987).

⁶ See GILLIGAN, *supra* note 1, at 50, 73; see also *infra* text accompanying note 84.

⁷ See WILLIAMS, *supra* note 4, at 69-72 (discussing maternity leave); see also Littleton, *supra* note 5, at 1326-27 (discussing pregnancy leave).

⁸ See Littleton, *supra* note 5, at 1328; Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988).

⁹ One possible exception is “therapeutic justice,” a brilliant legal theory that incorporates the insights of the mental health profession into the justice system. Seeking to craft a more “healing” law, therapeutic justice has been most discussed in the context of cases involving drug offenders. See

know by now, however, cultural feminism did not succeed in fashioning a gentler law and society: It lost the feminist wars,¹⁰ and with that loss came also the loss of a theory that put care and nonviolence at its center.¹¹

Nevertheless, after the United States' disastrous war with Iraq and its egregious treatment of prisoners at Abu Ghraib and Guantanamo Bay,¹² the

Teresa W. Carns, Michael G. Hotchkin, & Elaine M. Andrews, *Therapeutic Justice in Alaska's Courts*, 19 ALASKA L. REV. 1, 5-6 (2002) ("[M]uch of the available literature and evaluation is associated with drug courts."). It has also been used as an analytical tool beyond that frame. See Shirley S. Abrahamson, *The Appeal of Therapeutic Jurisprudence*, 24 SEATTLE U. L. REV. 223, 224 (2000). While I do not yet see therapeutic justice as having developed descriptions and theories of nonviolence and violence on the level of cultural feminism, Gandhi, or King, it holds promise for making the courts a less brutal place and also, in some instances, helps clarify our understandings of violence with the aid of modern psychoanalytic insights. Thus, at various points in this article I will refer to therapeutic justice theorists' work to enrich the discussion on violence and nonviolence. Many thanks to Francisco Valdes for introducing me to this body of work.

¹⁰ As far back as 1984, Catharine MacKinnon declared that cultural feminism was in "rather bad odor," see CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination* (1984), in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32, 33 (1987), and, in 1973, the Supreme Court declared that the "paternal[istic]" laws that cultural feminism seemed to call for would put women "in a cage." See *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973). But the final blow to cultural feminism's values probably came in the form of Justice Ginsburg's liberally feminist opinion in *United States v. Virginia*, 518 U.S. 515 (1996). See *infra* text accompanying notes 112-32.

¹¹ For cultural feminism's exhortation that "female" values can help create a nonviolent world, see GILLIGAN, *supra* note 1, at 174 ("[A]n ethic of care rests on the premise of nonviolence—that *no one* should be hurt.") (emphasis added). See also Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L.J. 2665, 2680 (1993) (maternal bonds can create a climate of care not just for a particular woman's children, but for children everywhere); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 14-28 (1988).

¹² See, e.g., Roberta Arnold, *The Abu Ghraib Misdeeds: Will There Be Justice in the Name of the Geneva Conventions?*, 2 J. INT'L. CRIM. JUST. 999, 999 (2004) ("The images of the Iraqi prisoners abused and humiliated by U.S. privates at the Abu Ghraib prison in Baghdad have toured the world, shocking the international – and in particular the American – public. According to the *Taguba Report*, between October and December 2003, 'numerous incidents of sadistic, blatant, and wanton criminal abuses' were inflicted on several detainees. This 'systemic and illegal abuse of detainees' was intentionally perpetrated by several members of the military police guard force (372nd Military Police (MP) Company, 320th Military Police Battalion, 800th MP Brigade), in section 1-A of the Abu Ghraib Prison. The allegations of abuse were substantiated by detailed witness statements and photographic evidence.") (citation omitted); see Heather L. Rooney, *Parlaying Prisoner Protections: A Look at the International Law and Supreme Court Decisions That Should Be Governing Our Treatment of Guantánamo Detainees*, 54 DRAKE L. REV. 679, 728 n.325 (2006) (citing Jessica Azulay, *Guantanamo Abuses Caught on Tape, Report Details*, NEW STANDARD NEWS, Feb. 2, 2005, at 1, available at <http://newstandardnews.net/content/index.cfm/items/1430> (reporting one former detainee's allegations that authorities "pepper-sprayed him in the face, pinned him down and attacked him, poked their fingers in his eyes, forced his head into a toilet pan . . . , dragged him out of his cell in chains, and shaved his beard, hair, and eyebrows"); Hope Lewis, *Embracing Complexity: Human Rights in Critical Feminist Perspective*, 12 COLUM. J. GENDER & L. 510 (2003) (writing that the ICRC report included findings that interrogators had submitted detainees to "humiliating acts" and "some beatings") (internal quotation marks omitted); David Cole, *The Idea of Humanity: Human Rights and Immigrants' Rights*, 37 COLUM. HUM. RTS. L. REV. 627, 636 (2006) ("The double-edged nature of the post-9/11 atmosphere has been made painfully clear by the revelations of torture and other degrading treatment at Guantanamo Bay, Abu Ghraib Prison in Iraq, Bagram Air Force Base in Afghanistan, and unnamed CIA detention centers around the world."); David G. Savage, *Supreme Court Rules on Guantanamo Detainees*, L.A. TIMES, June 13, 2008, at A1; *Boumediene v. Bush*, 128 S. Ct. 2229, 2277 (2008)

time is ripe to rethink the nonviolent values expressed by Gandhi, King, and cultural feminism, and to consider adapting them for the millennial U.S. jurisprudence. In this Article's section I, I will give a brief and selective history of nonviolence by discussing the work and lives of Mohandas Gandhi and Martin Luther King, two of modern history's most prominent nonviolence activists. Next, I will demonstrate how, in the 1980's, culturally feminist legal theory expressed Gandhi's and King's nonviolent values, and made a bid to incorporate those values into the legal realm, but failed, in part because of the apt critiques offered by liberal feminists, radical feminists, critical race scholars and queer legal theorists (who may be collectively known as other equal dignity theorists).¹³ In section III, I will argue that rather than undermining the promise of nonviolence offered by cultural feminism, a careful study of "equal dignity" theory reveals that it actually *shares* the nonviolent values of cultural feminism, and may even expand our understandings of nonviolence. Thus the critiques give us a great opportunity: We may develop a jurisprudence of nonviolence from the legacies of Gandhi and King, the remnants of cultural feminist legal theory, *and* the criticisms and insights of equal dignity theorists. In section IV, I will sketch out a jurisprudence of nonviolence based on these mutual politics of peace. In section V, I will propose a fundamental right to avoidable violence under the 14th Amendment's due process clause. In section VI, I will apply this jurisprudence of nonviolence to one area of law as an illustration: the federal "partial birth abortion" ban act upheld by the 2007 case *Gonzales v. Carhart*.¹⁴ I will also suggest how a jurisprudence of nonviolence may apply to other legal areas.

(holding that the constitutionally-afforded right of habeas corpus applies to detainees at Guantanamo Bay).

¹³ Though I had initially intended to describe feminist, critical race, and queer legal theorists as "outsider" or "anti-subordination" theorists, Janet Halley's book *Split Decisions*, has persuaded me that cultural feminism has achieved sufficient power in government that its proponents do not necessarily qualify as "outsiders." See JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 32 (2006) (discussing the "actual, real-world and theoretical power that feminism was exercising"). Furthermore, Halley specifies that some theories that attempt to secure equality for minorities or other disenfranchised people do not turn upon "anti-subordination." See *id.* at 33 (criticizing feminists' insistence that "all justice projects will track a subordination model"). Thus, I call these theories "equal dignity theories" because they attempt to achieve such a status for women, homosexuals, and people of color, among others.

¹⁴ *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007).

I. GANDHIAN AND KINGIAN NONVIOLENCE

A. The Legacy of Mohandas Gandhi

Mohandas Gandhi, a Hindu born in Porbander, India in 1869,¹⁵ rose to prominence while protesting the discrimination of Indians by the British in South Africa. Inspired by his readings of the Bhagavad-Gita,¹⁶ John Ruskin, Tolstoy, Thoreau,¹⁷ Emerson, and Edward Carpenter,¹⁸ and possibly also the “traditional Kathiawar practice of ‘sitting *dharna*’” (a “hometown” practice of political resistance),¹⁹ he developed a theory and practice of *satyagraha*, that is, nonviolent noncooperation, or “Force which is born of Truth and Love.”²⁰ He used *satyagraha* to meet the British use of violence against South African Indians, most notably in the form of the “Black Acts.”²¹ Gandhi called for Indians to use *satyagraha* in order to resist discriminatory laws.²² He met a partial victory when the South African government eventually guaranteed it would alleviate anti-Indian discrimination.²³

Gandhi then moved back to India in 1915, and led a peaceful resistance movement in the wake of the infamous Amritsar massacre in 1919, wherein Indians who had gathered for the day of Baisakhi were assassinated for failing to abide by the English ban on assembly. Fifty

¹⁵ RAJMOHAN GANDHI, *GANDHI: THE MAN, HIS PEOPLE, AND THE EMPIRE* 1 (2007); LOUIS FISCHER, *THE LIFE OF MAHATMA GANDHI* 13-14 (1950).

¹⁶ GANDHI, *supra* note 15, at 37.

¹⁷ Gandhi did take care to distinguish his philosophies of nonviolence from those of Emerson's, stating that he advocated “Civil Resistance,” as opposed to “Disobedience.” MAHATMA GANDHI, *THE ESSENTIAL GANDHI: AN ANTHOLOGY OF HIS WRITINGS ON HIS LIFE, WORK, AND IDEAS* 76 (Louis Fischer ed., 2d. ed. 2002) (1962).

¹⁸ See GANDHI, *supra* note 15, at 40; see also FISCHER, *supra* note 15, at 91 (discussing the Upanishads, among other literary sources that influenced Gandhi).

¹⁹ ARTHUR HERMAN, *GANDHI & CHURCHILL: THE EPIC RIVALRY THAT DESTROYED AN EMPIRE AND FORGED OUR AGE* 153 (2008).

²⁰ GANDHI, *supra* note 17, at 77. See also MOHANDAS K. GANDHI, *AN AUTOBIOGRAPHY: THE STORY OF MY EXPERIMENTS WITH TRUTH* 274-75 (Mahadev Desai trans., 1993) (discussing his attitude of “perfect[] . . . ease” with South African “Asiatic officers,” who “were grinding . . . down” the Indians and Chinese; Gandhi says that this attitude is an “essential part of Satyagraha, and an attribute of *ahimsa*”).

²¹ These Acts, or Ordinances, deprived Indians of civil rights and also required them to register with the British government. See, e.g., GANDHI, *supra* note 17, at 75-76; see also HERMAN, *supra* note 19, at 138 (“The law required every Indian resident over eight years of age to be fingerprinted and registered, so that he or she could offer proof of residence if and when new restrictions on Indian immigration were imposed.”).

²² See GANDHI, *supra* note 17, at 85 (describing protest of permit offices). See also FISCHER, *supra* note 15, at 46-53 (describing discriminatory laws).

²³ See MANFRED B. STEGER, *GANDHI'S DILEMMA: NONVIOLENT PRINCIPLES AND NATIONALIST POWER* 64 (2000) (noting that Gandhi's victory, in fact, did not achieve very much, as “[i]t soon became evident . . . that Lord Elgin [a negotiator] had engaged in a shrewd strategy of deception”).

colonial soldiers opened fire on a group of more than 10,000, and officials estimated that 379 were killed and more than 1,000 injured.²⁴ In response, Gandhi began to organize nonviolent protest of this atrocity, as well as protesting British control over Indian self-governance generally. He began by urging "India's intellectuals" to "take up the handloom" to protest British control over the sale of cloth.²⁵ In 1930, he organized a similar protest over the British salt tax, leading the famous march to the India shoreline, to "demand possession of [India's] Salt Works," during which his followers gathered salt from the sea in their hands.²⁶ Later, Gandhi also used nonviolent measures to address violence between Hindus and Muslims in India, responding to post-war and post-partition domestic mayhem by fasting and touring the country to monitor relations between these groups.²⁷

Gandhi's politics and public resistance to violence in all its forms caused him great personal risk, and his example is one of bravery and integrity. As a result of his attempts to build bridges with Muslims, he was killed by a Hindu extremist on January 30, 1948.²⁸

1. Gandhi's Theory of Nonviolence: *Ahsima* and *Satyagraha*

Gandhi's *satyagraha* is a philosophy of love, unity, and resistance to tyranny. As an all-round practice of peace, it requires the adherent to observe "self-effacement, greatest humiliation, greatest patience, and brightest faith."²⁹ Additionally, *satyagraha* requires certain dietary and lifestyle restrictions, such as fasting or refusing to eat animal products; these practices can be extremely rigorous and may even put health or life at risk.³⁰ Gandhi's vision of *satyagraha* also frowns upon other practices, such as abortion.³¹

²⁴ GANDHI, *supra* note 15, at 210. See also FISCHER, *supra* note 15, at 183–84.

²⁵ GANDHI, *supra* note 15, at 212.

²⁶ *Id.* at 313. See also FISCHER, *supra* note 15, at 266–69.

²⁷ GANDHI, *supra* note 15, at 609–10. See also FISCHER, *supra* note 15, at 493–501.

²⁸ GANDHI, *supra* note 15, at 652–56.

²⁹ GANDHI, *supra* note 17, at 220; see also FISCHER, *supra* note 15, at 77 ("Satyagraha is peaceful. If words fail to convince the adversary perhaps purity, humility, and honesty will. The opponent must be 'weaned from error by patience and sympathy,' weaned, not crushed; converted, not annihilated."); HERMAN, *supra* note 19, at 153 ("To his mind, satyagraha embodied his fundamental belief that spiritual and moral forces, not material or self-interested ones, ruled the world.").

³⁰ See, e.g., MOHANDAS K. GANDHI, AN AUTOBIOGRAPHY: THE STORY OF MY EXPERIMENTS WITH TRUTH 318–22 (1957). Gandhi also describes being "delighted" at his very ill wife's refusal to take beef tea though she was extremely ill and her doctor thereafter refused to treat her. *Id.* at 323–24.

³¹ Gandhi did not support abortion, declaring "[i]t seems to me clear as daylight that abortion would be a crime." Mahatma Gandhi, *Women and Social Injustice* (1942), reprinted in ALL MEN ARE BROTHERS: AUTOBIOGRAPHICAL REFLECTIONS 160 (Krishna Kripalani ed., Continuum 2005) (1958). See also *infra* text accompanying note 530.

Nonviolence, or *ahimsa*, is a crucial aspect of *satyagraha*. When confronting a tyrannical government, it results in what Gandhi called "noncooperation." In 1920, Gandhi wrote in the magazine *Navajivan*: "Non-cooperation [is] possible only if [we give] up the idea of violence. Even if there was a single murder by any of us or at our instance, I would leave. . . . [N]on-cooperation [is] in many respects, a more potent weapon than violence."³² Gandhi clarified a central feature of nonviolence, which is that its adherents refuse to use "Body-Force," and employ only "Soul-Force."³³ However, *ahimsa* is a larger concept than a mere prohibition on body force, as it grows out of the awareness of the "unity of all life."³⁴ Thus, the adherent of *ahimsa* and *satyagraha* must do more than abstain from harming her enemy; she must love that enemy as well. There must not be "the remotest idea of injuring the opponent."³⁵ Upon the adherent's recognition of the "unity and oneness of spirit . . . Love shall inform [her] actions and pervade [her] life."³⁶ Gandhi's expansive visions of *ahimsa* and *satyagraha* not only called for large duties between the adherent and the other; it also enlarged his understanding of what constituted violence. For Gandhi, violence was not just laying hands on another person. Rather, social ills, such as poverty, might also be tantamount to *himsa*, or violence.³⁷

Nevertheless, despite Gandhi's radicalism, he did not advocate an absolute prohibition on violence. Instead, Gandhi drew the line at "avoidable" violence. To Gandhi, simply living was a kind of violence, and thus it was impossible to create any absolute ban.³⁸ Consequently, he deemed certain types of violence unfortunate but justifiable, such as killing insects or even monkeys in order to ensure the health of crops to feed

³² GANDHI, *supra* note 15, at 226 (citing *NAVAJIVAN*, May 16, 1920).

³³ GANDHI, *supra* note 17, at 78.

³⁴ GANDHI, AN AUTOBIOGRAPHY: THE STORY OF MY EXPERIMENTS WITH TRUTH, *supra* note 20, at 349.

³⁵ GANDHI, *supra* note 17, at 78.

³⁶ *Id.* at 206.

³⁷ See, e.g., *id.* at 113 ("There is no salvation for India unless you strip yourselves of this jewelry and hold it in trust for your countrymen in India.") (in a speech where Gandhi imagines having a conversation with the Maharajah) (internal quotation omitted). *Id.* at 127 ("The grinding poverty and starvation with which our country is afflicted is such that it drives more and more men every year into the ranks of beggars, whose desperate struggle for bread renders them insensible to all feelings of decency and self-respect.").

³⁸ See Mahatma Gandhi, *The Fiery Ordeal*, *YOUNG INDIA*, Apr. 10, 1928, reprinted in GANDHI IN INDIA: IN HIS OWN WORDS 89, 93 (Martin Green ed., University Press of New England 1987) ("All life in the flesh exists by some *himsa*. . . . The world is bound in a chain of destruction. In other words *himsa* is an inherent necessity for life in the body. That is why a votary of *ahimsa* always prays for ultimate deliverance from the bondage of flesh.").

healthy people.³⁹ In drawing this line, Gandhi contradicted the Jains, who believe that even killing insects in order to ensure healthy crops was sinful violence.⁴⁰

Gandhi's philosophy is subtle, intriguing, and complex. It is also not without controversy. For example, Gandhi proposed meeting Hitler's genocidal campaign with *satyagraha*, which many find extremely objectionable.⁴¹ Some have also criticized Gandhi's political theory as patriarchal, based on his assertion that abortion is a "crime," and his arguably sexist attitudes about women.⁴²

B. The Legacy of Martin Luther King, Jr.

Martin Luther King, Jr. was born in Atlanta, Georgia, in 1929. The minister of a Baptist church in Montgomery, Alabama, he headed the boycott of the city's segregated bus lines in 1955. Although King had not yet fully committed to the principles of nonviolence at the beginning of the boycott, and for a time kept a gun beneath his pillow for self defense,⁴³ his Christian faith, exposure to the ideals of civil rights activists Bayard Rustin and James Lawson, and immersion in Gandhi's teachings soon persuaded him to embrace nonviolence as a way of life.⁴⁴ After Montgomery's leaders agreed to desegregate the bus lines, King formed the Southern Christian Leadership Conference, an American civil rights organization. In 1961-62, the SCLC joined with the Student Nonviolent Coordinating Committee and the National Association for the Advancement of Colored

³⁹ See Mahatma Gandhi, *Religion v. No Religion*, HARIJAN, June 9, 1946, reprinted in DARIDRA-NARAYANA 59, 60 (Anand T. Hingorani ed., 1946) ("If I wish to be an agriculturist and stay in the jungle, I will have to use the minimum unavoidable violence in order to protect my fields. I will have to kill monkeys, birds and insects which eat up my crops. If I do not wish to do so myself, I will have to engage someone to do it for me. There is not much difference between the two. To allow crops to be eaten up by animals in the name of *ahimsa* while there is a famine in the land, is certainly a sin. Evil and good are relative terms.").

⁴⁰ See A SOURCE BOOK IN INDIAN PHILOSOPHY 259 (Sarvepalli Radhakrishnan & Charles A. Moore eds., 1957). These quotes and citations are taken from an immensely helpful article on Gandhi's theory of nonviolence, R. Rajmohan, *Gandhi on Violence*, 28 PEACE RES. 27 (1996).

⁴¹ See *infra* note 416.

⁴² See, e.g., HERMAN, *supra* note 19, at 341 ("Gandhi had come to see [women] as the heart and soul of his campaign: he believed females had a greater instinct for self-sacrifice than males and 'greater courage of the right type.' . . . In his chivalrous way, Gandhi still did not want women in 'the front line,' as it were, where people could get hurt. . . . [H]e saw women resisters devoting themselves to spinning khadi, boycotting, and picketing.") (citations omitted); see also STEGER, *supra* note 23, at 125 ("He must have been deeply influenced at a conscious and unconscious level by the ambiguities in Hindu perceptions of womanhood: the sense of woman as temptress and a source of mysterious power, as well as the vision of the self-sacrificing wife and mother.") (quoting Judith Brown).

⁴³ MICHAEL J. NOJEM, GANDHI AND KING: THE POWER OF NONVIOLENT RESISTANCE 183 (2004).

⁴⁴ *Id.*

People to protest segregation in Albany, Georgia.⁴⁵ The protesters employed marches and public prayers, though they did not succeed in getting city leaders to acquiesce to their demands.⁴⁶

A year later, in April 1963, the SCLC waged the Birmingham campaign, devoted to the desegregation of Birmingham, Alabama's merchant district.⁴⁷ Again using nonviolent tactics, protesters sat in diners and marched to challenge the exclusion of African-Americans from merchants' restrooms, fitting rooms, and eating establishments. The police's response was brutal. Led by "commissioner of public safety" Eugene "Bull" Connor,⁴⁸ hundreds of people were jailed, including King, who was subjected to solitary confinement (during which he wrote his famous *Letter from Birmingham Jail*).⁴⁹ Others were attacked by police officers and dogs.⁵⁰

Soon after, King delivered his *I Have a Dream* speech during the August 1963 March on Washington, where he declared: "We must not allow our creative protest to degenerate into physical violence. Again and again we must rise to the majestic heights of meeting physical force with

⁴⁵ *Id.* at 231. Using nonviolent resistance, protesters engaged in sit-ins in segregated lunch counters, and a march on City Hall. Albany, however, did not achieve the same success as the protests in Montgomery, largely due to the maneuvers of its police chief, Laurie Pritchett. Pritchett did not meet the protesters' nonviolent resistance with violence, but instead prayed with them before quietly bundling them off to far-off jails, a strategy that did not garner the protesters much media attention or inspire the outrage of the nation, as did later events in Birmingham. *See also* MARTIN LUTHER KING, JR., *Playboy Interview: Martin Luther King, Jr.*, in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.* 340, 344 (James Melvin Washington ed., 1986) (King discusses his "errors" in Albany, which included conducting a too-"vague" protest that should have focused on "specifics" like lunch counters or buses, instead of resisting segregation "generally").

⁴⁶ KING, *supra* note 45.

⁴⁷ King led a boycott of Birmingham businesses, and also trained protesters with nonviolent workshops, which would "prepare the marchers for the risks that came with protesting in the segregated South." NOJEM, *supra* note 43, at 235. *See also* MARTIN LUTHER KING, JR., *Why We Can't Wait*, in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.* 518, 531 (James Melvin Washington ed., 1986) (discussing the "three day retreat and planning session with SCLC staff and board members at our training center near Savannah, Georgia").

⁴⁸ *See* KING, *supra* note 47, at 527.

⁴⁹ *Id.* at 542-44.

⁵⁰ "The newspapers of May 4 carried pictures of prostrate women, and policemen bending over them with raised clubs; of children marching up to the bared fangs of police dogs; of the terrible force of pressure hoses sweeping bodies into the streets." *Id.* at 548. *See also* NOJEM, *supra* note 43, at 236-37 ("Bull Connor engaged the youths with high-powered fire hoses and attack dogs . . ."). Eventually, business owners did agree to desegregate lunch counters, rest rooms, fitting rooms, and drinking fountains, and to consider African-Americans for salesclerks. KING, *supra* note 47, at 552; NOJEM, *supra* note 43, at 238. Soon after, white supremacists exploded bombs in the home of the Reverend A. D. King (King's brother) and near King's hotel room. KING, *supra* note 45, at 359. Later, in September of that year, the Sixteenth Street Baptist Church in Birmingham was bombed, killing four little girls. *See* MARTIN LUTHER KING, JR., *Eulogy for the Martyred Children*, in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.* 221, 221 (James Melvin Washington ed., 1986).

soul force.”⁵¹ A year later, in 1964, he won the Nobel Peace Prize.⁵² Campaigns in Selma⁵³ and Chicago followed in 1965 and 1966, respectively. Chicago proved difficult for King, as he met resistance to his protest against “slums” (that is, the poverty and lack of economic equality suffered by people of color in that city) not only from Mayor Richard Daley, but also the “black power” movement led by Stokely Carmichael⁵⁴ and white racists, the latter of whom stoned King, hitting him in the head.⁵⁵ Though protesters and the city organized a “Summit Agreement” that promised fairer housing laws, Chicago is now regarded as a failed campaign, in large part because of Mayor Daley’s resistance to King’s demands to eradicate slums.⁵⁶ King later expanded his mission by protesting the Vietnam war,⁵⁷ and planning the Poor People’s Campaign, which was devoted to economic justice. Tragically, he was stopped from achieving this latter goal by an assassin’s bullet in April 1968.⁵⁸

1. King’s theory of nonviolence: *Agape*

In 1960, in a speech to the National Urban League, King identified two key features of nonviolence as being its genesis in love and its capacity to nourish community: “There is another way [to resist] . . . [i]t has been variously called passive resistance, nonviolent resistance, or simply Christian love . . . [i]t is the only way to reestablish the broken community.”⁵⁹

King named this philosophy *agape*, which he said “stands” “[a]t the center of nonviolence.”⁶⁰ From the Greek word for brotherly love, *agape*

⁵¹ See MARTIN LUTHER KING, JR., *I Have a Dream*, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 217, 218 (James Melvin Washington ed., 1986).

⁵² See MARTIN LUTHER KING, JR., *Nobel Prize Acceptance Speech*, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 224, 224-26 (James Melvin Washington ed., 1986).

⁵³ NOJEIM, *supra* note 43, at 240-45.

⁵⁴ See MARTIN LUTHER KING, JR., *Where Do We Go From Here: Chaos or Community?*, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 555, 573-74 (James Melvin Washington ed., 1986) (discussing disagreements between King and Carmichael).

⁵⁵ NOJEIM, *supra* note 43, at 251.

⁵⁶ *Id.* at 252-53.

⁵⁷ See MARTIN LUTHER KING, JR., *Beyond Vietnam*, in A CALL TO CONSCIENCE: THE LANDMARK SPEECHES OF DR. MARTIN LUTHER KING, JR. 139-64 (Clayborne Carson & Kris Shepard eds., 2001).

⁵⁸ See NOJEIM, *supra* note 43, at 283-84.

⁵⁹ See MARTIN LUTHER KING, JR., *The Rising Tide of Racial Consciousness*, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 145, 148 (James Melvin Washington ed., 1986).

⁶⁰ See MARTIN LUTHER KING, JR., *An Experiment in Love*, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 16, 19 (James Melvin Washington ed., 1986).

is "insistence on community even when one seeks to break it. *Agape* is a willingness to go to any length to restore community."⁶¹ King stressed that *agape* and nonviolence were dedicated to healing "cleavage[s]" and "gap[s]" in community, and to "recogni[zing] . . . the fact that all life is interrelated . . . and all men are brothers."⁶²

King further refined his idea of nonviolence; beyond describing its rootedness in *agape*, he also specified that nonviolence constitutes an affirmative form of resistance,⁶³ "does not seek to defeat or humiliate the opponent", attacks evil rather than the people who perform evil deeds, likely brings suffering onto its practitioners, and has the backing of the universe or God.⁶⁴ Like Gandhi's expansive vision of *satyagraha*, which encompasses more than *ahimsa*, King's concept of *agape* is broad and searching. It calls upon adherents to observe right thought and right speech, be courteous, pray, and sacrifice.⁶⁵ Furthermore, the social problems that he sought to repair extended far beyond the elimination of segregation; in the same way that Gandhi protested poverty in the spirit of *satyagraha*, King also protested poverty in the spirit of *agape*.⁶⁶

King's commitment to nonviolence evolved over time, and in ways that set him apart from Gandhi. At the beginning of his career, he wondered if nonviolence might be better used for domestic, rather than international efforts. Indeed, at one point he believed that war might be justified in order to prevent "the spread and growth of an evil force" –

⁶¹ *Id.* at 20.

⁶² *Id.*

⁶³ *Id.* at 17.

⁶⁴ *Id.* at 18, 20.

⁶⁵ See, e.g., KING, *supra* note 47, at 537. Here is a reproduction of the pledge that King's volunteers signed, which committed them to:

1. MEDITATE daily on the teachings and life of Jesus.
2. REMEMBER always that the nonviolent movement in Birmingham seeks justice and reconciliation – not victory.
3. WALK and TALK in the manner of love, for God is love.
4. PRAY daily to be used by God in order that all men might be free.
5. SACRIFICE personal wishes in order that all men might be free.
6. OBSERVE with both friend and foe the ordinary rules of courtesy.
7. SEEK to perform regular service for others and for the world.
8. REFRAIN from the violence of fist, tongue, or heart.
9. STRIVE to be in good spiritual and bodily health.
10. FOLLOW the directions of the movement and of the captain of a demonstration.

Id.

⁶⁶ See MARTIN LUTHER KING, JR., *Remaining Awake Through a Great Revolution*, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 268, 271-72 (James Melvin Washington ed., 1986) ("There is another thing closely related to racism that I would like to mention as another challenge. We are challenged to rid our nation and the world of poverty. . . . [T]he destiny of the United States is tied up with the destiny of India and every other nation.").

presumably, like that of Nazi Germany.⁶⁷ He later, however, decided that violence was likely never justified.⁶⁸ Furthermore, during the Chicago campaign, King's rhetoric began to shift slightly, and he talked of using "militant and extreme" measures to contradict the "tricks" Mayor Daley employed to avoid meeting King's demands that Chicago fix its slum-lord problem.⁶⁹ Nevertheless, in his 1967 book *Where Do We Go From Here?* King reaffirmed nonviolence as the heart of his political philosophy:

The beauty of nonviolence is that in its own way and in its own time it seeks to break the chain reaction of evil. With a majestic sense of spiritual power, it seeks to elevate truth, beauty and goodness to the throne. Therefore, I will continue to follow this method because I think it is the most practically sound and morally excellent way for the Negro to achieve freedom.⁷⁰

Despite King's majestic rhetoric of nonviolence, his politics are not without controversy. In my research, I have been unable to find King's attitudes toward abortion; however if his approach to abortion was the same as Gandhi's, or that of most fundamentalist Christians, then it is likely to be unsupportive of abortion rights. Furthermore, King's nonviolence absolutism may create significant problems for women who suffer from sexual abuse or domestic violence, and feel that they need to use force to defend themselves against patriarchal violence.⁷¹

II. NON-VIOLENCE IN CULTURAL FEMINIST LEGAL THEORY

In this section, I will describe the nonviolent tenets of cultural feminism in psychology and in culturally feminist legal theory. I will then describe how, in the 1980's, cultural legal feminists poised themselves to

⁶⁷ See MARTIN LUTHER KING, JR., *Pilgrimage to Nonviolence*, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR., 35, 39 (James Melvin Washington ed., 1986).

⁶⁸ See *id.* See also KING, *supra* note 57, at 162.

⁶⁹ DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE 490-91 (1986). See also *id.* at 491 (quoting King's statements about his planned protests) ("We'll use something that avoids violence, but becomes militant and extreme enough to disrupt the flow of a city. I know it will be rough on them when they have to get 200 people off the Dan Ryan [Expressway], but the only thing I can tell them is, which do you prefer, this or a riot?").

⁷⁰ KING, *supra* note 54, at 594-95.

⁷¹ See, e.g., Sudarsan Padmanabhan, *Truth and Non-Violence -- Means or Ends*, [http://www.cas.usf.edu/philosophy/amfitan/papersamfitan2002/follow "padmanabhan_ paper.htm"](http://www.cas.usf.edu/philosophy/amfitan/papersamfitan2002/follow%20padmanabhan_paper.htm) (hyperlink) (last visited September 21, 2009) (discussing the work of Kenneth Kaunda).

introduce Gandhian and Kingian as well feminist nonviolent values into the law. Finally, I will describe the decline of cultural legal feminism.

A. Cultural Feminism and Nonviolence in Gilligan's Psychoanalytic Theory

Cultural feminism began as a psychological theory, developed in part by Harvard professor Carol Gilligan when she noticed that "women's voices were conspicuously missing from the psychology that [she] was teaching."⁷² Upon examining psychological studies on moral development, adolescence, and adulthood, she noticed that they "included no women. Girls were missing from studies of adolescence. Men's and boys' lives had served as the basis for theories of identity, morality, creativity, motivation and, most ironically, 'social perspective-taking.'"⁷³ Not surprisingly, Gilligan discovered that when women were judged against the male standards of moral judgment set up by these studies, they usually came up short.⁷⁴ She set out to study the development of girls and women, finding that they harbored a different voice from boys and men, a voice that was expressed an "ethic of care" in moral decision-making, as opposed to the masculinist "standard of justice." Her descriptions of the differences between the female ethic of care and the masculine standard of justice proved the centerpiece of her landmark book *In a Different Voice: Psychological Theory and Women's Development*, published in 1982.⁷⁵

The ethic of care has two crucial features: First, its adherents analyze moral problems by considering them "in the particular, in terms of the actual consequences. . . [decisions] will have in . . . [people's] lives"⁷⁶ Gilligan identifies this method with the visual image of a "web" to show how women's thinking is "contextual" and "informed by a more complex understanding of the psychological dynamics of relationships."⁷⁷ She distinguishes this feminine mode of analysis from the masculine, which

⁷² Carol Gilligan, *Getting Civilized*, 63 FORDHAM L. REV. 17, 17 (1994).

⁷³ *Id.* at 19 (citing DANIEL J. LEVINSON, *THE SEASONS OF A MAN'S LIFE* 8-9 (1978) (adult development study); DANIEL OFFER, *THE PSYCHOLOGICAL WORLD OF THE TEEN-AGER: A STUDY OF NORMAL ADOLESCENT BOYS* (1969) (adolescent development study)).

⁷⁴ See, e.g., GILLIGAN, *supra* note 1, at 10 (citing Jean Piaget's conclusion that "the legal sense," which he considered "essential to moral development" was "far less developed in little girls than boys") (citation omitted).

⁷⁵ See, e.g., *id.* See also *id.* at 50.

⁷⁶ *Id.* at 95.

⁷⁷ *Id.*

analyzes moral problems using “abstract[ions]”⁷⁸ and “moral absolutes,”⁷⁹ a style she characterizes as “math[ematical]”⁸⁰ and “hierarchical.”⁸¹

Reverence for human connectivity constitutes the second feature of the ethic of care, as its adherents “construct[] moral problem[s] as a problem[s] of care and responsibility in relationships. . . . [T]he logic underlying an ethic of care is a psychological logic of relationships”⁸² This is to be contrasted with the standard of justice’s reverence for “rights and rules,” “equality and reciprocity,” and “the formal logic of fairness.”⁸³ Most of all, the difference between an ethic of care and a standard of justice is in attitudes toward connectivity and separateness. As Carrie Menkel-Meadow explains: “Where men see danger in too much connection or intimacy, in being engulfed and losing their own identity, women see danger in the loss of connection, in not having an identity through caring for others and by being abandoned and isolated.”⁸⁴

Gilligan acknowledges that the ethic of care in many cases may be, and in some cases obviously is, a product of patriarchy. The “contextuality” of women’s judgment, for example, may devolve into a refusal to make any judgments in the moral realm: “The hesitance . . . to assert a belief . . . bespeaks a self uncertain of its strength, unwilling to deal with choice, and avoiding confrontation.”⁸⁵ Patriarchy may also account for women’s failure to fully develop their moral sense of care, a malfunction Gilligan identifies as women’s refusal to make themselves recipients of care: “[F]emale self-abnegation and moral self sacrifice . . . [may be rejected] as immoral in their power to hurt.”⁸⁶

Despite these problems, the ethic of care *is* an ethic of nonviolence, as explained by Gilligan: “Care . . . becomes universal in its condemnation of exploitation and hurt. . . . [T]he fact of interconnection informs the central, recurring recognition that just as the incidence of violence is in the end destructive to all, so the activity of care enhances both others and self.”⁸⁷ “Women’s voice,” moreover, allows for a redefinition, and expansion, of

⁷⁸ *Id.* at 19.

⁷⁹ *Id.* at 65 (quoting a participant in a study).

⁸⁰ GILLIGAN, *supra* note 1, at 26 (discussing the comments of “Jake,” an eleven-year-old participant in a study).

⁸¹ *Id.* at 62-63.

⁸² *Id.* at 73.

⁸³ *Id.*

⁸⁴ Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women’s Lawyering Process*, 1 BERKELEY WOMEN’S L.J. 39, 47 (1985).

⁸⁵ GILLIGAN, *supra* note 1, at 68-69.

⁸⁶ *Id.* at 90.

⁸⁷ *Id.* at 74.

the meaning of "violence." For example, Gilligan noted that women may see violence, or "aggression," where there is "fracture of human connection." "Care," on the other hand, may "make" this fracture "safe."⁸⁸ This equivalence between care, connectivity, and nonviolence makes sense in the "logic" of relationships: If awareness of connectivity helps create the conditions of care, or not "hurt[ing]," then a break in connectivity would signal a condition that may become ripe for violence.

The ethic of care's most mature expression will be found where individuals extend the ethic of care to themselves as well as to others, recognizing that all are interconnected, and allowing them to make freely chosen decisions:

By elevating nonviolence, the injunction against hurting, to a principle governing all moral judgment and action, [we may be] able to assert a moral equality between self and other and to include both in the compass of care. Care then becomes . . . a self-chosen ethic which . . . allows the assumption of responsibility for choice.⁸⁹

In sum, the ethic of care recognizes interdependence. The most perfect expression of nonviolence, then, acknowledges connectivity and care not only between the self and other people, but also requires that we connect to and care for the self. Gilligan believes that this mature ethic of care holds great promise for society, citing Jean Baker Miller's conviction that the ethic of care creates the potential for "more advanced, more affiliative ways of living – less wedded to the dangerous ways of the present."⁹⁰ Furthermore, in 1994, Gilligan went so far as to argue that "maternal thinking offers a key to the politics of peace."⁹¹

B. Cultural feminism and nonviolence in feminist legal theory

Soon after the publication of *In a Different Voice*, feminist legal scholars began to employ Gilligan's observations in their work, along with

⁸⁸ *Id.* at 42-43. In chapter two of *IN A DIFFERENT VOICE*, "Images of Relationships," Gilligan cites a study where women and men were asked to write stories about various images, some showing pictures of people physically close together, and others showing people either alone or alienated from others: "As people are brought closer together in the pictures, the images of violence in the men's stories increase, while as people are set further apart, the violence in the women's stories increases." GILLIGAN, *supra* note 1, at 42-43. From this, she concludes, "If aggression is conceived as a response to the perception of danger, the findings of the images of violence study suggest that men and women may perceive danger in different social situations and construe danger in different ways." *Id.*

⁸⁹ *Id.* at 90.

⁹⁰ *Id.* at 49 (quoting JEAN BAKER MILLER, *TOWARD A NEW PSYCHOLOGY OF WOMEN*, (1976)).

⁹¹ Gilligan, *supra* note 72, at 20.

those of theorist of Nancy Chodorow⁹² and Nell Noddings.⁹³ In 1984, Kenneth Karst argued in the *Duke Law Review* that constitutional theory must take into account not just particularity but also relationality, by supplementing

the Constitution's historic protection of the ladder . . . [with] protect[ion of] the web of connection. After all, there is also much to be said for a constitutional law that takes into account a view of life, self, and morality that is the dominant mode among the female half of the nation's population.⁹⁴

In 1986, Suzanna Sherry made a case for a "jurisprudence of community," which made use of contextual judgments,⁹⁵ and that same year, Martha Minow advocated incorporating the ethic of care into a system of restorative, not retributive justice.⁹⁶ A year later, Minow argued in the *Harvard Law Review* that the law should "engender justice" by recognizing that "multiplicity" blasts the illusion of legal neutrality,⁹⁷ and thus judges should make, again, "open," "context[ual]" and "connect[ed]" judgments.⁹⁸ In 1987, too, Robin West crafted new jurisprudential definitions of the female self and sexual violation by building upon Gilligan's work, in particular, using it to help make visible women's hidden suffering.⁹⁹ Also, Christine Littleton, while abstaining on the issue

⁹² See, e.g., Nancy Chodorow, *Family Structure and Feminine Personality*, in *WOMEN, CULTURE, AND SOCIETY* (Michelle Z. Rosaldo & Louise Lamphere eds., 1974); NANCY J. CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* (1978).

⁹³ See NELL NODDINGS, *CARING: A FEMININE APPROACH TO ETHICS & MORAL EDUCATION* (1984).

⁹⁴ Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447, 463 (1984).

⁹⁵ Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 592 (1986).

⁹⁶ Martha Minow, *Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice*, 32 NEW ENG. L. REV. 967, 969 (1998) ("Restorative justice emphasizes the humanity of both offender and victim, and repair of social connections and peace as more important than retribution.").

⁹⁷ Martha Minow, *Justice Engendered*, 101 HARV. L. REV. 10, 69-70 (1987).

⁹⁸ *Id.* at 90 ("This call to be open, to canvass personal experience, applies to all legal controversies, but it is especially important in the context of cases that present the dilemma of difference. Here the judicial mainstays of neutrality and distance prove most risky, for they blind judges to their own involvement in recreating the negative meanings of difference. Yet the dangers of making differences matter also argue against categorical solutions. By struggling to respond humanly to the dilemma in each particular context, the judge can supply the possibility of connection otherwise missing in the categorical treatments of difference.").

⁹⁹ See West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, *supra* note 2, at 81-88. Then, in 1988, she argued for a "feminist jurisprudence" that acknowledged the connection thesis. See West, *supra* note 11, at 1.

of whether women were inherently or naturally different, offered a legal theory of "acceptance," which addresses "the difference that difference makes."¹⁰⁰ Such acceptance required, for example, that mothers be acknowledged as cultural "complements" to male soldiers, and if mothers were not paid benefits for their labors, then warriors should not be, either.¹⁰¹ During these years, and through the early Nineties, Carrie Menkel Meadow made a case for a jurisprudence based on these features of women's different voices, by advocating a "problem solving" style of negotiation that rejected "aggressive tactics" and "intimid[ation]."¹⁰² Cultural feminist legal scholars such as Patricia Cain, Pamela Karlan, Daniel Ortiz, and Leslie Bender¹⁰³ advocated for the different voice in a host of legal contexts through the early Nineties, and Martha Minow and Robin West published their theses in the books *Making all the Difference: Inclusion, Exclusion and American Law* (1990) and *Caring and Justice* (1997).

In this work, cultural legal feminists announced their readiness to take up the tradition of nonviolence left to us by Mohandas Gandhi and Martin Luther King. Like Gandhi emphasized the "unity of life," and "love," and King stressed "community," "interrelate[ion]" and brotherly love, cultural feminists stressed caring human "connection" "relationality" and "community." Moreover, just as King asserted that nonviolence was dedicated to healing "cleavages" and "gaps"¹⁰⁴ in community, cultural feminists discerned violence where there is "fractured" connectivity.¹⁰⁵ Cultural feminism also enriched our understanding of nonviolence by adding a feminist consciousness that offered to ameliorate Gandhi's patriarchal position on abortion, and the problems King's *agape* might cause for women suffering from sexual abuse or domestic violence.¹⁰⁶

If it had succeeded then, cultural legal feminism may have fostered a radically caring U.S. culture and politics. For example, it might have

¹⁰⁰ Littleton, *supra* note 5, at 1285-86, 1301-05.

¹⁰¹ *Id.* at 1329-30.

¹⁰² Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29 (1987); Carrie Menkel-Meadow, *Mainstreaming Feminist Legal Theory*, 23 PAC. L.J. 1493 (1992); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984).

¹⁰³ Leslie Bender, *From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law*, 15 VT. L. REV. 1 (1990); Patricia A. Cain, *Feminist Legal Scholarship*, 77 IOWA L. REV. 19 (1991); Pamela S. Karlan & Daniel R. Ortiz, *In a Diffident Voice: Relational Feminism, Abortion Rights, and the Feminist Legal Agenda*, 87 NW. U. L. REV. 858 (1992).

¹⁰⁴ See KING, *supra* note 60, at 20.

¹⁰⁵ See GILLIGAN, *supra* note 1, at 43.

¹⁰⁶ See Padmanabhan, *supra* note 71.

molded a less violent system of criminal punishment,¹⁰⁷ reconsidered the Second Amendment's supposed right to bear arms,¹⁰⁸ and even have modified the just war doctrine.¹⁰⁹

Yet, this promise never materialized. We live in a society that permits capital punishment, boasts a robust gun market, and at the time of this writing is prosecuting an avoidable war that will have cost more than an estimated 150,000 Iraq lives¹¹⁰ and the lives of more than 4,000 American troops.¹¹¹ Indeed, the values of cultural feminism are in abeyance. It is no exaggeration to say that it is a trend whose day has waned.

In the following section, I will give the reasons why cultural feminism failed as a political theory, both to highlight its theoretical and practical weaknesses, and also to lay the groundwork for a jurisprudence of nonviolence that may be built from its ashes.

C. The Rejection of Cultural Feminism

Cultural feminism lost the feminist wars for several reasons, two of the most important being that Justice Ruth Bader Ginsburg rejected the tenets of cultural feminism in the 1996 case *United States v. Virginia*, and that a number of feminist, critical race, and queer legal theorists criticized the "caring woman" thesis as retrograde. Nevertheless, though these jurisprudential and scholarly attacks have uncovered the dated gender politics of cultural feminism, and its unfortunate capacity to obscure race, gender, and sexual "difference," both cultural feminism and its critiques may be repurposed to meet the aims of nonviolence.

1. The Rejection of Cultural Feminism by the Supreme Court in *United States v. Virginia*

The U.S. Supreme Court struck a serious blow to cultural feminism in 1996, when Justice Ruth Bader Ginsburg adopted liberal or "sameness" feminism as the "official" Supreme Court feminist legal theory opinion in *United States v. Virginia*.¹¹²

In that case, Virginia wanted to keep its distinguished Virginia Military

¹⁰⁷ For example, it may have amended the Supreme Court's approval of the death penalty in *Gregg v. Georgia*, 428 U.S. 153 (1976).

¹⁰⁸ See, e.g., *infra* note 419.

¹⁰⁹ See *infra* text accompanying note 432.

¹¹⁰ New Study Says 151,000 Iraqi Dead, BBC News Online, http://news.bbc.co.uk/2/hi/middle_east/7180055.stm (last visited August 31, 2009).

¹¹¹ Forces: U.S. & Coalition Casualties, CNN, <http://www.cnn.com/SPECIALS/2003/iraq/forces/casualties> (last visited August 31, 2009).

¹¹² *United States v. Virginia*, 518 U.S. 515 (1996).

Institute (VMI) single-sex, and attempted to cure its equal protection problem by creating "Mary Baldwin College," a wholly inferior "parallel program"¹¹³ supposedly sharing VMI's "mission of producing 'citizen-soldiers' and VMI's goals of providing 'education, military training, mental and physical discipline, character . . . and leadership development.'"¹¹⁴ However, Mary Baldwin College "afford[ed] no opportunity to experience the rigorous military training for which VMI is famed."¹¹⁵ Moreover, in its funding, its professors, its admissions criteria, curricular choices, and even its sports facilities, it could not come close to comparing to the lavish appointments of VMI.¹¹⁶

Unsurprisingly, the Court declared that Virginia's single-sex education program deprived its citizens of equal protection of the laws under the intermediate scrutiny standard used to analyze gender classifications since *Craig v. Boren*¹¹⁷ and *Mississippi University for Women v. Hogan*.¹¹⁸ Declaring that Mary Baldwin College did not meet the intermediate scrutiny's requirement that gender classifications are justified by "exceedingly persuasive justification[s]"¹¹⁹ the Court required that Virginia integrate VMI.

In and of itself, this does not mean much for cultural feminism, since Mary Baldwin College was so obviously inferior to VMI that not even under a "different voice" feminist approach could Virginia's segregation pass muster. Under a culturally feminist analysis, Mary Baldwin College would only satisfy the legal test if it equally valorized women's nurturing capacities to men's warlike ones,¹²⁰ and Mary Baldwin's poor coffers could not have equally supported women's educations as nurturers. At first glance, *United States v. Virginia* also does not seem completely antagonistic to culturally feminist values, as Ginsburg acknowledges that there are some differences between women and men that might justify different treatment: "'Inherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for denigration."¹²¹ The Court continues: "Sex classifications may be used to compensate women 'for particular economic disabilities they have

¹¹³ *Id.* at 547-48.

¹¹⁴ *Id.* at 548.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 551-53.

¹¹⁷ *Craig v. Boren*, 429 U.S. 190 (1976).

¹¹⁸ *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1981).

¹¹⁹ *United States v. Virginia*, 518 U.S. 515, 534 (1996). *See also id.* at 558 (Rehnquist, J., concurring).

¹²⁰ *See Littleton, supra* note 5, at 1329-30.

¹²¹ *Virginia*, 518 U.S. at 533.

suffered,” . . . to “promot[e] equal employment opportunity[, and] . . . “to advance full development of the talent and capacities of our Nation’s people.”¹²²

However, in the end analysis, *U.S. v. Virginia* emerges as a triumph of liberal feminism, which is the direct opposite of cultural feminism, as it requires “equal”¹²³ not “asymmetrical”¹²⁴ treatment between men and women. Liberal, or “equal treatment theory” rests on the conviction that “[s]ex based generalizations are generally impermissible whether derived from physical differences such as size and strength, from cultural role assignments such as breadwinner or homemaker, or from some combination of innate and ascribed characteristics.”¹²⁵ Ginsburg’s opinion reflects these liberally feminist values: Despite her nod to differences between the genders, there is nothing in *U.S. v. Virginia* that promises that women’s (or anyone’s) ethics of care and connectivity will be given any quarter: “VMI may be . . . the *Brown* of gender. . . . VMI rules that single-sex public education is constitutional only if it has some ‘exceedingly persuasive justification.’ It is resoundingly silent on what that could be.”¹²⁶ Further, Ginsburg seems enamored with the glamorously macho attributes of VMI, and dismayed by the girlish culture symbolized by Mary Baldwin College, which did not boast the same programs that would school students in the marital arts: “VMI attracts some applications because of its reputation as an extraordinarily challenging military school. . . . ‘[W]omen have no opportunity anywhere to gain the benefits of [the system of education] at VMI.’”¹²⁷ Even if Mary Baldwin College had the same endowment as VMI,¹²⁸ it may not have been accepted as passing the constitutional standard, as Justice Rehnquist noted in his concurrence.¹²⁹ In the end, *U.S. v. Virginia* emerges as a clarion call for “formal

¹²² *Id.* at 533-34 (internal citations omitted).

¹²³ See, e.g., Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN’S RTS. L. REP. 175 (1982).

¹²⁴ See Littleton, *supra* note 5, at 1292.

¹²⁵ NANCY LEVIT & ROBERT R. M. VERCHICK, *FEMINIST LEGAL THEORY: A PRIMER* 16 (2006) (quoting Wendy W. Williams).

¹²⁶ Mark M. Hagar, *Sex in the Original Position: A Restatement of Liberal Feminism*, 14 WIS. WOMEN’S L.J. 181, 204 (1999).

¹²⁷ *Virginia*, 518 U.S. at 523.

¹²⁸ VMI had \$131 million as opposed to Mary Baldwin’s \$19 million. *Id.* at 527.

¹²⁹ “I do not believe the Stat was faced with the stark choice of either admitting women to VMI, on the one hand, or abandoning VMI and starting from scratch for both men and women, on the other.” *Id.* at 563-64 (Rehnquist, J., concurring).

equality,"¹³⁰ which "prohibit[s] state action that classifies individuals based upon their membership in a protected group."¹³¹

Two pressing questions, then, remain in the wake of this decision: Why did the Supreme Court take such a strong liberal feminist tack, and seemingly reject a legal theory that puts care and nonviolence at its center? And, correspondingly, why develop a jurisprudence that honors militarism and engenders more opportunities to foster national war culture?

One reason is that Ginsburg achieved some great successes using a liberally feminist strategy as the chief litigator in the Women's Right Project in the 1970's.¹³² Another may be that many prominent equal dignity theorists have rejected the tenets of cultural feminism in such compelling terms.

2. *The Rejection of Cultural Legal Feminism by Feminist Legal Scholars*

Prominent feminist legal theorists made early attacks on cultural feminism. In 1982 liberal scholar Wendy Williams argued that recognition of feminist difference was dangerous to women, famously declaring "[W]e can't have it both ways, [and] we need to think carefully about which way we want to have it."¹³³ Ultimately, she decided that liberal feminism's "equal" treatment was the best method of jurisprudential repair for sex inequality, because emphasis on female difference was too dangerous, creating the risk that women would be punished for their deviance from the male standard.¹³⁴

As the attacks on cultural feminism evolved, legal theorists focused on two other serious problems in the theory: Its failure to sufficiently account for social construction, and its obscuring of the experiences of women of color, lesbian women, poor women, and other women with "multiple" identities.

a. *The Social Construction Critique of Cultural Feminism*

Social construction theorists "stress the central importance of culture in shaping behavior. These theories posit that most human behaviors are learned, and that most differences between men and women in behavior,

¹³⁰ Valorie K. Vojdik, *Beyond Stereotyping in Equal Protection Doctrine: Reframing the Exclusion of Women from Combat*, 57 ALA. L. REV. 303, 303 (2005).

¹³¹ *Id.* at 304.

¹³² See LEVIT & VERCHICK, *supra* note 125, at 17 ("One of the strengths of Ginsburg's approach in litigating the equal treatment cases was that she directly attacked the notion that 'natural' differences justified dissimilar treatment under the law. She showed that many of these differences were socially constructed.").

¹³³ See Williams, *supra* note 123, at 196.

¹³⁴ *Id.*

preference, cognition, or psychology are created or greatly magnified by society.”¹³⁵ A feminist theorist of social construction, then, would view Gilligan’s “difference” with some skepticism. If “difference” is socially constructed, who constructed it? In a word: Patriarchs.

Although Gilligan did recognize that patriarchy could stunt a woman’s intelligence and moral judgment,¹³⁶ many feminist scholars did not think that she sufficiently dealt with “care’s” patriarchal roots. Attacks on cultural legal feminism that stressed this spin on social construction came fast and thick; one of the most prominent was penned by radical feminist theorist Catharine MacKinnon, who in 1987 contended that the “caring woman” thesis was a product of false consciousness: “Women have a history all right, but it is a history both of what was and what was not allowed to be. So I am critical of affirming what we have been, which necessarily is what we have been permitted, as if it is women’s, ours, possessive.”¹³⁷ In 1989, Joan C. Williams added to the critique, calling difference voice feminism “incorrect as a matter of intellectual history” and “peril[ous],”¹³⁸ while in 1992 Mary Jo Frug called cultural feminism “harmful” “sentimental boosterism,”¹³⁹ a complaint that Lucy Fowler built upon in her 2005 argument that “embracing [a] theory that . . . risks accepting a male standard against which to measure women’s experience...arguably reinforces existing power inequities between men and women.”¹⁴⁰ In line with the contention that women have been forced to become different, other theorists have indicted cultural feminism for ignoring women’s suppressed but emerging capacity for power and even violence.¹⁴¹ These critiques elaborate on Margaret Jane Radin’s 1992 argument that cultural feminism helps “construct [women as] a perfect subordinate group.”¹⁴²

¹³⁵ Julie A. Seaman, *Form and (Dys)Function in Sexual Harassment Law: Biology, Culture, and the Spandrels of Title VII*, 37 ARIZ. ST. L.J. 321, 355-56 (2005).

¹³⁶ See GILLIGAN, *supra* note 1, at 68. See also *supra* text accompanying note 85.

¹³⁷ MACKINNON, *supra* note 10, at 39.

¹³⁸ Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 800 (1989).

¹³⁹ Mary Joe Frug, *Sexual Equality and Sexual Difference in American Law*, 26 NEW ENG. L. REV. 665, 673 (1992). See also Mary Jo Frug, *Progressive Feminist Legal Scholarship: Can We Claim “A Different Voice”?*, 15 HARV. WOMEN’S L.J. 37, 48 (1992) (criticizing cultural feminism). See also Kara Abramson, *Art for a Better Life: A New Image of American Legal Education*, 2006 BYU EDUC. & L. J. 227, 276 (2006) (discussing critiques of cultural feminism).

¹⁴⁰ Lucy Fowler, *Gender and Jury Deliberations: The Contributions of Social Science*, 12 WM. & MARY J. WOMEN & L. 1, 31 (2005).

¹⁴¹ See generally Monica Pa, *Towards a Feminist Theory of Violence*, 9 U. CHI. L. SCH. ROUNDTABLE 45 (2002) (citing, though critiquing, studies indicating an uptick in female violence, noting that some attribute the rise to women’s coming to power).

¹⁴² Margaret Jane Radin, *Reply: Please Be Careful with Cultural Feminism*, 45 STAN. L. REV. 1567, 1568 (1993).

b. The "Essentialism" Critique of Cultural Feminism

The second powerful critique of cultural feminism has focused on its ability to obscure the experiences of women of color, lesbians, and poor women. This has become known as the "essentialism" critique, as cultural feminism purports to build a legal theory around an idealized model or "essence" of womanhood.

As an initial matter, it should be said that cultural feminists have struggled to recognize difference between women. In her 1987 article *Engendering Justice*, Martha Minow acknowledged both that "distinctive aspects of women's experiences and perspectives offer the resources for constructing more empathic, more creative, and in general, better theories, laws, and social practices," and that "[c]laims to speak from women's point of view . . . threaten to obscure . . . multiplicity and install a particular view to stand for the views of all."¹⁴³ However, Robin West's assertion that anti-essentialism threatens "the quality of our public conversations"¹⁴⁴ may inhibit cultural feminism's ability to speak to a broad swath of people, even if her affirmation of women and women's culture remains commendable.

In the 1990 *Stanford Law Review* article *Race and Essentialism in Feminist Legal Theory*, critical race feminist Angela Harris detailed these problems: She argued that West's brand of cultural feminism was fatally essentialist, placed white women at the center of its theory, and obscured the experiences of women of color:

[West] asserts that 'perhaps the central insight of feminist theory of the last decade has been that wom[e]n are 'essentially connected,' not 'essentially separate,' from the rest of human life, both materially, through pregnancy, intercourse, and breast-feeding, and existentially, through the moral and practical life.' . . . Black women are entirely absent from West's work . . . issues of race do not appear even in guilty footnotes. . . [T]he bracketing of issues of race leads to the installation of white women on the throne of essential womanhood.¹⁴⁵

¹⁴³ Minow, *supra* note 97, at 62-63.

¹⁴⁴ ROBIN WEST, CARING FOR JUSTICE 19 (1997).

¹⁴⁵ Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 602-03 (1990).

In lieu of cultural feminism's one-dimensional vision of gender, Harris offered instead a vision of a "multiple consciousness," by which we might study problems of gender, race, and justice.¹⁴⁶

Other critical race feminists similarly tackled the essentialism posed by cultural feminism: The year before Harris published *Race and Essentialism*, Kimberle Crenshaw described women of color as having an "intersectional" identity, which was informed not only by gender, but by race, as well as other factors.¹⁴⁷ And in 1993, Professor Deborah L. Rhode argued in the *Stanford Law Review* that "to divide the world ... along gender lines is to ignore the ways in which biological status is experienced differently by different groups under different circumstances."¹⁴⁸ More recently, cultural feminist legal theory has been criticized for "portraying third-world women as weak and victimized."¹⁴⁹

Queer theorists, too, have either implicitly or explicitly criticized cultural feminism for ignoring or debasing other identities. Francisco Valdes' work on gay identity has described the caring and love that exists between men, which challenges Gilligan's description of women's monopoly on care.¹⁵⁰ Further, in 2007, Janet Halley went so far as to argue that leftists should "take a break" from feminism in part because cultural feminism denies the harm experienced by men, and the caring they might do.¹⁵¹

One of the most telling signs of cultural feminism's decline might come in its entry in Nancy Levit and Robert R.M. Verchick's 2006 "primer," *Feminist Legal Theory*, wherein the authors describe Gilligan's reaction to her critics:

¹⁴⁶ *Id.* at 615.

¹⁴⁷ See Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989); see also Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991).

¹⁴⁸ Deborah L. Rhode, *Missing Questions: Feminist Perspectives on Legal Education*, 45 STAN. L. REV. 1547, 1551 (1993).

¹⁴⁹ See Abramson, *supra* note 139, at 276.

¹⁵⁰ See, e.g., Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to Its Origins*, 8 YALE J.L. & HUMAN. 161, 184-85 (1996) ("[T]o the Greeks, male-to-male sexuality was highly esteemed because it was imbued with high purpose and refined aesthetics: Not only were male same-sex relationships supposed to accomplish the transference of political values, such relations also were deemed the ideal physical and spiritual venue for the pursuit of love, beauty, friendship, and camaraderie among those born to lead. Conversely, cross-sex relations were viewed as merely bio-functional. But this form of instrumentality was not regarded as especially pressing, noble or aesthetic, which vitiated any potential for heterosexist ideology.").

¹⁵¹ See HALLEY, *supra* note 13, at 330. ("[H]armed adult men. West is not very interested in them."). See *id.* at 65 (noting Robin West's failure to "affirm[] ... men's erotic yearning for them.").

A number of these critics deny that many differences exist along gender lines, pointing out that more variation exists among women than between men and women. Others say that creating social policies with an emphasis on difference will reinforce gender stereotypes. Gilligan has replied to these methodological critiques, and others have supported her findings, although the empirical support has not been strong. But, intriguingly, these criticisms have not diminished the general acceptance of her theories.¹⁵²

Far from discerning any “general acceptance” of Gilligan’s theories, a review of contemporary feminist theory instead reveals a robust denial of them. If Levit and Verchick’s primer qualifies as any official account of feminist legal theory, it appears that cultural feminism is now regarded as a weak, stereotypical theory whose adherents ignore common sense and reason.

3. *Why we should retain the contributions of cultural feminism in a jurisprudence of nonviolence, and also add in the insights of its critics*

After a review of these proofs of judges’ and scholars’ rejections of cultural feminism, it becomes apparent that there are significant problems with using cultural feminism as the sole basis for a jurisprudence of nonviolence. Not only does it traffic in outmoded stereotypes, but liberal and radical feminists such as Wendy Williams, MacKinnon, and Radin have also made convincing arguments that women’s “care” has been either partially or wholly constructed by patriarchy in order to keep women subordinated. Furthermore, critical race and queer legal theorists have done a marvelous job of extending the “social construction” critique, by showing how theories that deal in broad concepts of “caring women” obscure the lived realities of women of color, lesbians, poor people, straight and gay men, and other identities.

However, cultural feminism retains its relevance for a jurisprudence of nonviolence for two reasons. First, it would not be well advised to base a jurisprudence of nonviolence solely on the work of activists like Gandhi and King, primarily because they lack a feminist consciousness. Again, Gandhi opposed abortion,¹⁵³ and King’s ideals of nonviolence could preclude women from using force to defend against rape or domestic violence. The work of cultural feminists like West, who has been the most

¹⁵² See LEVIT & VERCHICK, *supra* note 125, at 19-20.

¹⁵³ See Mahatma Gandhi, *supra* note 31, at 160.

eloquent witness to women's pain in relation to pregnancy and sexual abuse,¹⁵⁴ is thus a necessary addition to a jurisprudence of nonviolence. Second, cultural feminists like Gilligan and West have done a brilliant job setting forth the ideals of care, relationality, mutuality, and love as crucial elements of moral and legal reasoning. We should not give this work up, as it offers unique perspectives on care and its relationship to nonviolence. At the same time, however, we should respond to the "stereotyping" critique offered by Ginsburg, and other equal dignity theorists: This response requires that we refrain from attaching the ethic of care to gender.

Yet cultural feminism has so forged its brand of care in exclusively gendered terms that deleting the word "woman" before "ethic of care" will not be enough – the gendered assumptions will probably remain even if the language changes. Thus, we need to retain the lessons of social construction and anti-essentialism taught to us by equal dignity theorists. If a jurisprudence of nonviolence equals care with nonviolence, those thinkers' tools may help us deploy the values of care in ways that are less likely to replicate heteropatriarchy and gender essentialism under the cover of a nonviolent politics and law.

Thus, a jurisprudence of nonviolence should be based on the founding work of Gandhi, King, the insights of cultural feminism, and also the critiques of radical feminists such as MacKinnon, liberal feminists such as Wendy and Joan Williams, Critical Race Theorists like Harrison and Crenshaw, and queer legal theorists such as Valdes, Halley, and others.

Moreover, a review of critical race and queer legal literature reveals that, beyond their valuable "social construction" and "essentialism" critiques of cultural feminism, there are additional reasons to weave in these theories into a jurisprudence of nonviolence:

With the possible exception of liberal feminists, these equal dignity theorists all affirm nonviolent values. Cultural feminists have demonstrated that care and connectivity are crucial components of nonviolence, or not-"hurting."¹⁵⁵ Happily, liberal feminists have struggled (in their own fashion) to include both women and men in a circle of care, dominance feminists have forcefully denounced the manifold ways that patriarchy harms women, and critical race and queer legal theorists have constructed their own values of care and connectivity. Thus, we may turn to the work of these theorists not only to critique care and connectivity, and their relationship to nonviolence, but also to garner richer definitions of these concepts.

¹⁵⁴ See West, *supra* note 2, at 81-88.

¹⁵⁵ See GILLIGAN, *supra* note 1, at 90.

III. INCORPORATING THE VALUES AND INSIGHTS OF LIBERAL FEMINIST, RADICAL FEMINIST, CRITICAL RACE, AND QUEER LEGAL THEORIES INTO A JURISPRUDENCE OF NONVIOLENCE

A jurisprudence of nonviolence benefits from the insights and values of equal dignity theory. In the same way that Gandhian and Kingian nonviolence may benefit from cultural feminism's critiques, particularly by raising questions about women's suffering in the contexts of pregnancy and sexual abuse, a jurisprudence of nonviolence must also share in the values and critiques of equal dignity theorists. These scholars express a strong commitment to nonviolence in their theories and methods, which also expand our understanding of care and nonviolence beyond the frames of Gandhi, King, and cultural feminism.

A. Liberal feminism and nonviolence

As discussed in reference to Ginsburg's decision *U.S. v. Virginia*,¹⁵⁶ liberal feminism seeks equal treatment for the sexes. As Kathryn Abrams succinctly explains: "[L]iberal feminism . . . is grounded in the notions that women are functionally indistinguishable from men and that actionable discrimination arises when institutional actors, as a result of ignorance or prejudice, treat women as if they were different."¹⁵⁷

Admittedly, liberal feminism proves the most difficult of all these theories to describe as nonviolent. Insofar as it "accepts male experience as the reference point or norm,"¹⁵⁸ and these "experiences" are war, gladiatorism, and aggression in sex,¹⁵⁹ then it is antipathetic to nonviolence. A reading of *United States v. Virginia*, in fact, inspires dread, since Ginsburg so glamorizes the ideal of the citizen-soldier that we might worry her decision and rhetoric will help foster a more warlike culture. In short, the worst case scenario threatened by a liberal feminism that encourages women to become "similarly situated to [aggressive] men"¹⁶⁰ by suppressing their maternal identities¹⁶¹ and signing on as soldiers,¹⁶² is

¹⁵⁶ See *supra* text accompanying notes 112-131.

¹⁵⁷ Kathryn Abrams, *The Constitution of Women*, 48 ALA. L. REV. 861, 867 (1997).

¹⁵⁸ See LEVIT & VERCHICK, *supra* note 125, at 18.

¹⁵⁹ See Williams, *supra* note 123, at 179-90.

¹⁶⁰ *Id.* at 181.

¹⁶¹ For example, Wendy Williams has argued that the law should never give women "special treatment" on account of pregnancy. See Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 352 (1985). Robin West argues that such approaches deny the "importance" of pregnancy. See West, *supra* note 11, at 21-22. ("American feminists of all stripes are wary of identifying the material fact of pregnancy as the root of moral, aesthetic, and cognitive difference, because, as liberal feminist and law professor Wendy Williams correctly notes, 'most of the disadvantages imposed on women, in the workforce and elsewhere, derive from this central reality of the capacity of women to become pregnant and the real

that it will help create a universal warrior society.

However, there are other strains within liberal feminism that do reveal a sympathy with the nonviolent values expressed by Gandhi, King, and cultural feminists.

First, just as Gandhi, King, and cultural feminists labored to make the underclass a respected element in the “unity of all life,” or “community,” liberal feminists seek to include women into the circle of care created by the courts when they protect individual rights. While Wendy Williams’ liberal feminism supports measures that some argue will minimize the importance of the “care” that is pregnancy¹⁶³ and usher women into military combat,¹⁶⁴ she also cares for women by making them *count*. In describing her dismay at women’s second-class legal status, she even resembles Gilligan, who was so chagrined at discovering that females had not been consulted in the study of moral reasoning: “[M]an is the measure against which the anatomical features of woman are counted and assigned value, and when the addition or subtraction is complete, woman comes out behind.”¹⁶⁵ In *United States v. Virginia*, Ginsburg, too, echoes the ethic of care when she characterizes Virginia as a bad mother who has deprived its female charges of necessary nurturance: “While Virginia ‘liberally’ ‘serves the State’s sons, it makes no provision whatever for her daughters.’”¹⁶⁶

Second, like Gandhi and King challenged state acts that made Indians and Blacks untouchables, liberal theorists express nonviolent values by crafting a legal theory that protects women from being forced and coerced by the law into demeaning gender roles. For example, in her 1984 article *Rethinking Sex and the Constitution*, Sylvia A. Law asserts that the equal treatment approach is necessary to avoid the “great danger” of “perpetuating . . . differences” between the sexes that are “socially created.”¹⁶⁷ She also alludes to the suffering of individuals who are ostracized or bullied by laws that impose gender norms: “[G]eneral rules premised on assumptions of universal sex-based difference are unjust in

and supposed implications of this reality.’ The response to this ‘central reality’ among American liberal feminists and American feminist lawyers has been to deny or minimize the importance of the pregnancy difference, thus making men and women more ‘alike,’ so as to force the legal system to treat men and women similarly.”).

¹⁶² Martha McSally, *Women in Combat: Is the Current Policy Obsolete?*, 14 DUKE J. GENDER L. & POL’Y 1011, 1044-53 (2007) (arguing that Congress should eliminate the combat ban, include women in the military selective service act, eliminate all gender distinctions in training and dress, and forbid women from getting special treatment due to pregnancy).

¹⁶³ See *supra* note 161 and accompanying text.

¹⁶⁴ See McSally, *supra* note 162.

¹⁶⁵ See Williams, *supra* note 123 at 192.

¹⁶⁶ *United States v. Virginia*, 518 U.S. 515, 540 (1995).

¹⁶⁷ Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 968 (1984).

relation to the individual men and women who do not fit the presumed norm."¹⁶⁸

Third, liberal feminists evince nonviolent values in their stated hopes to create a culture wherein men can become more connected and caring: In her 1989 article *Deconstructing Gender*, Joan Williams advocates a "sex-neutrality,"¹⁶⁹ in the hopes it will prevent "reinforc[ing] the traditional assumption that adherence to gender roles flows 'naturally' from biological sex."¹⁷⁰ Deinstitutionalizing gender in this way will be very profitable for society generally, she maintains, as the "ideology" of sex stereotypes not only prevents women from displaying the attributes of possessive individuality, but also "veils men's needy side."¹⁷¹ A sex neutrality would allow us to both see and foster this hidden nurturing capacity of men:

Men are involved in all kinds of relationships in which they promote another's development in a caring way: as fathers, as mentors, as camp counselors, as boy scout leaders. These relationships may have a somewhat different emotional style and tone than do those of women and often occur in somewhat different contexts: that is the gender difference. But a blanket assertion that women are nurturing while men are not reflects more ideology than reality.¹⁷²

Wendy Williams, too, intimates that equal treatment could reveal the suppressed nurturant capacities of men.¹⁷³ At the very least, she writes, equal treatment may allow us to "rethink our basic assumptions about" the genders.¹⁷⁴

Consequently, though liberal feminism is in many ways antagonistic to a jurisprudence of nonviolence, it does share nonviolent values with Gandhi, King, and cultural feminists. Also, liberal feminists do not just

¹⁶⁸ *Id.* See also Williams, *supra* note 123, at 198-99 (Describing how social and legal attitudes about women's special capacity to nurture infants may be a method by which women are transformed, effectively, into slaves: "It may be, as some have contended, that the monolithic role women have so long played has been triggered and sustained by [the] ['bonding'] phenomenon, that the effect of this bonding has made it emotionally possible for women to submit to the stringent limitations imposed by law and culture upon the scope and nature of their aspirations and endeavors.").

¹⁶⁹ See Williams, *supra* note 138, at 839.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 842.

¹⁷² *Id.* at 841-42.

¹⁷³ See Wendy A. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, in *THE SECOND WAVE: A READER IN FEMINIST THEORY* 71, 84 (Linda Nicholson ed., 1997).

¹⁷⁴ *Id.*

share peaceful values with Gandhi, King, and cultural feminists, but also give us tools to perfect our understandings of nonviolence. Insofar as the nonviolent principles of “care” and “community” have been deployed in sexist fashion – such as by saddling women with the role of being the guardians of nonviolence, and allowing us expect aggressive behavior from men¹⁷⁵ – the insights of liberal feminists warn us against such stereotyping. In short, incorporating liberal feminist insights helps us build a nonviolence law that is conscious of patriarchy.

B. Radical Feminism and Nonviolence

Radical feminism, a legal feminist theory pioneered by Catharine MacKinnon and Andrea Dworkin, is dedicated to eradicating the effects of men’s dominance of women. Building upon the premise that men have their “foot” on women’s “necks”¹⁷⁶ that prevents women’s real voice from ever being heard, radical, or “power”¹⁷⁷ feminism seeks to emancipate women from a system of male power regarded as “nearly perfect”¹⁷⁸ in its ability to construct, create, and perpetuate a gender class system.

MacKinnon flags the nonviolent goals of her radical feminism in her definitions of male supremacy’s harms, which are to “exercise” “force” under the brand of “consent,” and disguise “its authority as participation, its supremacy as the paradigm of order, [and] its control as the definition of legitimacy.”¹⁷⁹ These mind-trips result in a “shadow world of . . . invisible

¹⁷⁵ See, e.g., Tana Dineen and Lori A. McElroy, *Blaming the Boys*, PEACE MAGAZINE, Dec. 1986-Jan. 1987, at 27 available at <http://archive.peacemagazine.org/v02n6p27.htm> (“In the peace movement today, a dangerous message that men are warmakers and women are peacemakers is being delivered by some highly vocal women. As women psychologists concerned with peace issues, we encourage feminist peace activists to refrain from declaring men ‘the enemy.’ By focusing on patriarchy and on aggression as biologically-based male characteristics, we absolve women (us) and blame men (them). In so doing, we could be trapping ourselves in the type of mirror image misperceptions which underlie the superpower conflict. Misperceptions may fuel the battle of the sexes just as they do the arms race.”). See also Rosemary Ruether, *Feminism and Peace*, CHRISTIAN CENTURY, Aug. 31-Sept 7, 1983, at 771-6, available at <http://www.religion-online.org/showarticle.asp?title=1685> (discussing patriarchy in the antidraft movement: “Since only males could be drafted, the ritual act of resistance to war, turning in or burning one’s draft card, was an exclusively male event. The draft resistance movement cultivated a macho image to counteract the image of the dominant society of draft resisters as cowards. One slogan of the movement, ‘Girls say yes to men who say no,’ revealed the sexist insensitivity of the male leadership of the movement, it was assumed that women working in the movement were simply molls of the male resisters. Consciousness of sexism in the peace movement caused women to form networks and caucuses among themselves; many woman [sic] split with these peace organizations and joined the feminist movement.”).

¹⁷⁶ MACKINNON, *supra* note 10, at 45 (“Take your foot off our necks, then we will hear in what tongue women speak.”).

¹⁷⁷ See, e.g., HALLEY, *supra* note 13, at 41.

¹⁷⁸ Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 638 (1983).

¹⁷⁹ *Id.* at 639. See also CATHERINE A. MACKINNON, *WOMEN’S LIVES, MEN’S LAWS* 368 (2005) (discussing, in the context of an argument against pornography, “the role of visceral commitment to

silent abuse [Where] [r]ape, battery, sexual harassment, forced prostitution, and the sexual abuse of children emerge as common and systematic."¹⁸⁰ In sum, women are "subordinated" – that is, "demeaned" or "degraded" – in relationship to men.¹⁸¹ Radical feminism has nonviolent aspirations that resemble those of Gandhi, King, and cultural feminists, because it seeks to put an end to this subordination, which results in not only bloodshed but also psychological and social harms.

Working with Andrea Dworkin, MacKinnon developed three strategies to combat male supremacy that have nonviolent implications. In the first place, MacKinnon proposed legislation that would outlaw physical and psychological outrages against women, which are examples of subordination¹⁸² par excellence. Rallying against mens rea tests for rape that would define "consent" from the standpoint, and desires, of men, MacKinnon argues instead that the law should define rape in accord with "the meaning of the act from women's point of view,"¹⁸³ a designation that has much in common with West's call to decrease violence against women by paying attention to women's feelings.¹⁸⁴ MacKinnon also condemns sexual harassers for "reinforc[ing] and express[ing] women's traditional and inferior role in the labor force,"¹⁸⁵ using "power" to "impose deprivations" on women.¹⁸⁶ Certainly, we can discern in this description of sexual harassment its effect of depriving women of community, safety, and care; in attempting to secure for women these conditions, MacKinnon reveals her nonviolent values that have much in common with Gandhi, King, and Gilligan.

Second, MacKinnon and Dworkin together worked to outlaw pornography, which they consider an engine of male dominance. Dworkin

inferiority in practical systems of discrimination and of the role of denial of inequality in maintaining that inequality" as well as "[t]he cultural legitimization of sexual force, including permission for and exonerated of rape and use of prostitutes and transformation of sexual abuse into sexual pleasure and identity").

¹⁸⁰ CATHARINE A. MACKINNON, *Francis Biddle's Sister: Pornography, Civil Rights, and Speech* (1984), in *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 163, 169 (1987).

¹⁸¹ MacKinnon defined subordination as a person's being "in a position of inferiority or [experiencing a] loss of power, or [being] demeaned or denigrated." *Id.* at 176. See also MACKINNON, *WOMEN'S LIVES, MEN'S LAWS*, *supra* note 179, at 304-5 ("A subordinate is the opposite of an equal. The term 'subordination' in [the anti-pornography ordinance she co-authored] refers to an active practice of making a person unequal or placing a person in an unequal position. The verb 'to subordinate' refers to the active processes of enforcement of second-class status.").

¹⁸² MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 *SIGNS* 635, 652.

¹⁸³ *Id.*

¹⁸⁴ GILLIGAN, *supra* note 1; West, *supra* note 2.

¹⁸⁵ CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 4 (1979).

¹⁸⁶ *Id.* at 1.

defines the dangers of pornography as such: "The insult pornography offers, invariably, to sex is accomplished in the active subordination of women: the creation of a sexual dynamic in which the putting down of women, the suppression of women, and ultimately the brutalization of women, *is* what sex is taken to be."¹⁸⁷ In response to what they deem the evils of pornography, the two lawyers proposed a civil law prohibiting "graphic sexually explicit subordination" of people (regardless of sex) depicting a variety of scenarios, including the subject's enjoyment of pain and humiliation, the subject's being "penetrated by objects or animals," or "shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual."¹⁸⁸ Though their anti-pornography work has received much criticism from cultural feminists, lesbian feminists, and other scholars,¹⁸⁹ in it MacKinnon and Dworkin telegraph their politics of nonviolence, by attempting to make women "safe"¹⁹⁰ through this maternalism.

Third, and perhaps more ambitiously, MacKinnon calls for women to free themselves from the brainwashing of male dominance, whose "metaphysic[s]"¹⁹¹ are so all-pervasive that it is nearly invisible. MacKinnon calls this the problem of "false consciousness,"¹⁹² which is "the idea that women think what they think because they have been programmed to do so and not necessarily because it's what they 'really' think."¹⁹³ In order to be de-programmed, as it were, she tells women to "rais[e]" their "consciousness,"¹⁹⁴ a process Katharine Bartlett helpfully classifies as "seeking insights and enhanced perspectives through collaborative or interactive engagements with others based upon personal experience and narrative."¹⁹⁵ In other words, consciousness raising is women talking to one another. MacKinnon's brand of consciousness

¹⁸⁷ Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L.J. 1, 9 (1985).

¹⁸⁸ *Id.* at 25.

¹⁸⁹ See, e.g., SUSIE BRIGHT, *SEXWISE* 121-27 (1995); PAT CALIFIA, *PUBLIC SEX: THE CULTURE OF RADICAL SEX* 118-20 (2000); Ellen Willis, *Feminism, Moralism, and Pornography*, in *POWERS OF DESIRE: THE POLITICS OF SEXUALITY* 460 (Ann Snitow, Christine Stansell, & Sharon Thompson, eds., 1983) (setting forth a pro-sex approach to feminism); West, *supra* note 2, at 117.

¹⁹⁰ See *supra* note 88. See also Donald P. Judges, *When Silence Speaks Louder than Words: Authoritarianism and the Feminist Antipornography Movement* 1 PSYCHOL. PUB. POL'Y. & L. 643, 689-90 (1995) (arguing with Dworkin's and MacKinnon's efforts to make women "safe" through anti-pornography efforts).

¹⁹¹ See MacKinnon, *supra* note 178, at 638.

¹⁹² CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 115-16 (1989).

¹⁹³ Tamara L. Kuennen, *Analyzing the Impact of Coercion on Domestic Violence Victims: How Much Is Too Much?*, 22 BERKELEY J. GENDER L. & JUST. 2, 6 n.24 (2007).

¹⁹⁴ MACKINNON, *supra* note 192, at 121.

¹⁹⁵ Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 831 (1990).

raising, too, has been criticized, for excluding men,¹⁹⁶ being an ineffective method of achieving social change,¹⁹⁷ being limited in scope in terms of race, class, and sexuality concerns,¹⁹⁸ as well as a means by which the female perspective will ultimately usurp, and dominate the male one in life and law.¹⁹⁹ Still, despite these flaws, feminists of many stripes agree that consciousness raising has the capacity to create community through sharing and "validation,"²⁰⁰ help us experience and uncover love,²⁰¹ "help each other to heal [our] hurts,"²⁰² as well as "make important decisions regarding the violence in [our] lives."²⁰³ Each of these promises of consciousness raising connects to the politics of nonviolence.

As a result, though radical feminism may at times disagree with the work of Gandhi, King, and cultural feminists,²⁰⁴ it shares nonviolent aspirations with them, and (possibly) liberal feminists. Beyond sharing these peaceful goals, moreover, radical feminism can help us craft a better jurisprudence of nonviolence, particularly by submitting definitions of "care" and "connection" to the test of false consciousness. Adding, like

¹⁹⁶ See Devon W. Carbado, *Straight Out of the Closet*, 15 BERKELEY WOMEN'S L.J. 76, 85 n.41 (2000).

¹⁹⁷ See Sharyn L. Roach Anleu, *Critiquing the Law: Themes and Dilemmas in Anglo-American Feminist Legal Theory*, 19 J.L. & SOC'Y 423, 431 (1992) (describing how MacKinnon's theory of "consciousness raising can do no more than describe male domination; there are no guidelines for social change.").

¹⁹⁸ Kimberly Christensen, *Campaign Finance and Electoral Reform: A Feminist Economics Perspective*, 24 BUFF. PUB. INT. L.J. 131, 194 (2005) (noting that consciousness-raising is limited by who is "in the room").

¹⁹⁹ Ruth Colker, *Feminist Consciousness and the State: A Basis for Cautious Optimism*, 90 COLUM. L. REV. 1146, 1156 (1990) (book review) ("By arguing that women's perspective should be embodied in the law, MacKinnon is making women's perspective the dominant, and eventually the universal, perspective of society.").

²⁰⁰ See MACKINNON, *supra* note 192, at 87 ("Consciousness raising alters the terms of validation by creating community through a process that redefines what counts as verification. This process gives both content and form to women's point of view."). Though MacKinnon is well known as a prominent advocate of consciousness raising, other feminists besides those in the radical camp have also espoused it as a method, noting its community-enhancing capacity. See Christensen, *supra* note 198, at 193 ("Since the early days of the second wave of the women's liberation movement, American feminists have relied upon a community-based process of knowledge creation. This public, consciousness-raising (hereinafter "CR") mode of knowledge creation can serve as an archetypal model for the co-creation of knowledge and community necessary for political revitalization.").

²⁰¹ See Ruth Colker, *Feminism, Theology, and Abortion: Toward Love, Compassion, and Wisdom*, 77 CAL. L. REV. 1011, 1021-23 (1989) (noting that though radical feminists are "skeptical" about love, consciousness raising may help us understand the "authentic self," which harbors the "aspiration" of and is "embedded" in love).

²⁰² Ann E. Freedman, *Feminist Legal Method in Action: Challenging Racism, Sexism and Homophobia in Law School*, 24 GA. L. REV. 849, 853 (1990).

²⁰³ Linda G. Mills, *On the Other Side of Silence: Affective Lawyering for Intimate Abuse*, 81 CORNELL L. REV. 1225, 1244 (1996) (citation omitted).

²⁰⁴ For example, radical feminism may regret Gandhi and King's failures to fully recognize the role of male dominance in violence, and the deleterious effects their politics may have upon women.

liberal feminism, an awareness of patriarchy to nonviolent politics, it makes the crucial point that one man's nonviolent care and connection (say, in the case of sex, or sharing pornography) may be another woman's subordination.

C. Critical Race Theories and Nonviolence

Critical Race Theory seeks to "create a community of kinship and safe harbor for all people of color who self-identify as progressive,"²⁰⁵ "remind society 'how deeply issues of racial ideology and power continue to matter in American life,'"²⁰⁶ "expose the fact that racism is deeply ingrained in our legal culture,"²⁰⁷ and "affect the political world" by fighting racial subordination.²⁰⁸ Initiated around 1992,²⁰⁹ Critical Race Theory has now grown into a network of antisubordination theories, including critical race feminism, Latino Critical Race Theory (LatCrit), and Asian American Legal Theory.²¹⁰

Critical Race Theorists express nonviolent values of care, connectivity and peace in multiple ways: 1) a commitment to coalition building, 2) the use of intersectionality theory 3) the use of storytelling, 4) the advocacy of an "open," and "interrogative" jurisprudence, and 5) the commitment to eliminating racial and other subordinations. Just as liberal and radical feminist provide tools for uncovering patriarchal problems in the foundational work of Gandhi, King, and cultural feminism, Critical Race Theorists' insights can hopefully free it of its essentialist trappings.

²⁰⁵ Charles R. Lawrence III, *Foreword to CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* xi, xvii (Francisco Valdes et al. eds., 2002).

²⁰⁶ Carlo A. Pedrioli, *Under a Critical Race Theory Lens*, 7 AFR.-AM. L. & POL'Y REP. 93, 96 (2005) (reviewing JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* (2001) (quoting Charles R. Lawrence III, *Who Are We? And Why Are We Here? Doing Critical Race Theory in Hard Times*, *Foreword to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* xiii, xxxii (Kimberlé Crenshaw et al. eds., 1995))).

²⁰⁷ Minna J. Kotkin, *Creating True Believers: Putting Macro Theory into Practice*, 5 CLINICAL L. REV. 95, 103 (1998).

²⁰⁸ Sumi Cho & Robert Westley, *Historicizing Critical Race Theory's Cutting Edge: Key Movements that Performed the Theory*, in *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* 51 (Francisco Valdes et al. eds., 2002) (discussing these aims and characterizing Critical Race Theory (CRT) as an "antisubordinationist project.").

²⁰⁹ Charles R. Lawrence III, *Foreword to, CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* xii (Francisco Valdes et al. eds., 2002); *See, e.g.*, Alfredo Mirandé, *Alfredo's Caribbean Adventure: LatCrit Theory, Narratives, and the Politics of Exclusion*, 26 CHICANO-LATINO L. REV. 207, 207 (2006) (asserting that Critical Race Theory had its "inception in the 1980's.").

²¹⁰ *See* Pedro A. Malavet, *Afterword: Outsider Citizenship and Multidimensional Borders: The Power and Danger of Not Belonging*, 52 CLEV. ST. L. REV. 321, 323 n.13 (2005) (characterizing these theoretical schools as "outsider jurisprudence.").

1. CRT's Coalition Building

Critical Race Theorists embody the nonviolent values of care, community, and connectivity by emphasizing peaceful, familial,²¹¹ and euphoric²¹² coalition building²¹³ designed to "encourage cross-community understanding and solidarity."²¹⁴ These "alliances . . . are built on a shared goal of a reordered society that eliminates the power of White supremacy." Coalition building requires honesty among its participants, which may be why it is described in such intense, emotive terms.²¹⁵

Insofar as coalition building qualifies as an expression of nonviolent care and connectivity, it also helps free those values from patriarchal or racist constructions.²¹⁶ For example, coalition building creates opportunities to resist the patriarchal constructions of care by emphasizing the common interests and equalities between those forming coalitions. In doing so, it creates a model of care and nurturance that is not based upon the self-abnegation²¹⁷ of one carer, but rather the equivalence and dignity of all parties, who gather together to help each other and themselves.²¹⁸

²¹¹ Enid Trucios-Haynes, *Why "Race Matters": LatCrit Theory and Latina/o Racial Identity*, 12 LA RAZA L.J. 1, 38 (2001).

²¹² See Halley, *infra* note 226.

²¹³ It should be noted, however, that Critical Race Theorists do not always use rhetoric consistent with non-violence when describing coalition building. See Lawrence, *supra* note 209, at xv. Here, Charles R. Lawrence III quotes Roger Wilkins, who asserts that "[f]ighting racism in white institutions is hand-to-hand combat. And if my daughter is among the best trained and most committed freedom fighters, we must have her here with us. We need every warrior we can muster." See also Kimberle Williams Crenshaw, *The First Decade: Critical Reflections, or "A Foot in the Closing Door"* in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 9, 25 (Francisco Valdes et al. eds., 2002) ("So what should we Critical Race Theorists do now, facing the second decade? I think we need to take up a war of maneuver against racial entrenchment.").

²¹⁴ Andrew E. Taslitz, *Racial Auditors and the Fourth Amendment: Data with the Power to Inspire Political Action*, 66 LAW & CONTEMP. PROB. 221, 297 (2003) (arguing that "racial auditors" fulfill the function of coalition builders.).

²¹⁵ See Trucios-Haynes, *supra* note 211, at 37 ("Coalition building requires that each group openly acknowledge the ways in which it has assisted in the maintenance of racial hierarchy.").

²¹⁶ See *infra* note 226 (Halley's analysis of Angela Harris and Mary Coombs).

²¹⁷ See GILLIGAN, *supra* note 1, at 90 (characterizing "the conventions of female self-abnegation and moral self-sacrifice" as "immoral in their power to hurt.").

²¹⁸ See K.L. Broad, *Critical Borderlands & Interdisciplinary, Intersectional Coalitions*, 78 DENV. U.L. REV. 1141, 1153-54 (2001) ("Thus, the problem for coalition politics is not 'What do we share?' but rather 'What might we share as we develop our identities through the process of coalition?' Coalition cannot be simply the strategic alignment of diverse groups over a single issue, nor can coalition mean finding the real unity behind our apparently diverse struggles. Our politics must be informed by affinity rather than identity, not simply because we are not all alike, but because we each embody multiple, often conflicting, identities and locations.").

"As one racial minority builds a coalition with another, both will be helping one another in confronting mutual problems."²¹⁹

Critical Race Theorists' conception of coalition building also includes a scrupulous awareness of racial, gendered, cultural, and sexual multiplicity, which could otherwise be elided by past recitations of Gandhi's assertion that *ahisma* is rooted in the "unity of all life." Keith Aoki, for example, cautions against organized action based on "false homogeneity" and "superficial [work that may] . . . inscribe a monolithic set of values ... and political positions on persons and groups with widely differing agendas."²²⁰ Derrick Bell also recognizes that the "shared interests" of groups may be premised upon the history and reality of racial inequality, and lead whites to coalesce with blacks only where their interests "converge."²²¹ This sensitivity to racism and other inequalities, then, flags the hazards that attend the nonviolent advocate's "insistence on community."²²²

2. Intersectionality Theory

CRT's famous "intersectionality" theory also expresses the nonviolent values of care and connectivity; in addition, it alleviates patriarchal and racially exclusive social constructions of that care.

Intersectionality, a legal theory first developed by Kimberle Crenshaw, clarifies the ways in which women of color may experience discrimination on multiple axes:

Black women can experience discrimination in ways that are both similar to and different from those experienced by white women and Black men. Black women sometimes experience discrimination in ways similar to white women's experiences; sometimes they share very similar experiences with Black men. Yet often they experience double discrimination—the combined effects of practices which discriminate on the basis of race, and on the basis of sex. And sometimes, they experience

²¹⁹ Laurence C. Nolan, *Yellow: Race in America Beyond Black and White—An Interesting Read for the Great Dissenter in Plessy v. Ferguson*, 47 HOW. L.J. 87, 92 (2003) (reviewing FRANK H. WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* (2002)).

²²⁰ Keith Aoki, "Foreign-ness" & Asian American Identities: *Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 ASIAN PAC. AM. L.J. 1, 48 (1996).

²²¹ Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 20, 22 (Kimberle Crenshaw et al. eds., 1995) ("The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.").

²²² See KING, *supra* note 60, at 20 (King's description of agape).

discrimination as Black women—not the sum of race and sex discrimination, but as Black women.²²³

Building upon Crenshaw's work, Darren Lenard Hutchinson's theory of "multidimensionality" proves a contemporary extension of intersectionality, which takes a variety of social identity categories as its subject:

Multidimensionality "recognize[s] the inherent complexity of systems of oppression . . . and the social identity categories around which social power and disempowerment are distributed." Multidimensionality posits that the various forms of identity and oppression are "inextricably and forever intertwined" and that essentialist equality theories "invariably reflect the experiences of class- and race-privileged" individuals. Multidimensionality, therefore, arises out of and is informed by intersectionality theory.²²⁴

Intersectionality and multidimensionality affirm a commitment to nonviolence, because they create opportunities for connectivity and care. In the first instance, intersectionality and multidimensionality theorists help women of color and others connect with themselves. By naming the experience and identity of women of color, intersectionality extends the principle of nonviolence to those women, by bringing them into the circle of care.²²⁵ Intersectionality theory also clarifies the multiple communities

²²³ See Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, in FEMINIST LEGAL THEORY: FOUNDATIONS 383, 385 (D. Kelly Weisberg ed., 1993). See also Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991); Gowri Ramachandran, *Intersectionality as "Catch 22": Why Identity Performance Demands are Neither Harmless nor Reasonable*, 69 ALB. L. REV. 299, 301 (2005) ("I use the term intersectionals to mean persons who are members of more than one 'low-status' category, such as women of color, queer persons of color, or indigent women."). In a series of articles, I have examined the relationships among racism, heterosexism, patriarchy, and class oppression utilizing a model I refer to as "multidimensionality."

²²⁴ Darren Lenard Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 309-10 (2001) (citations omitted). See also Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory, and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 7 (1999).

²²⁵ See GILLIGAN, *supra* note 1, at 90 ("[N]onviolence, the injunction against hurting . . . assert[s] a moral equality between self and other and . . . include[s] both in the compass of care."). Though Angela P. Harris does not specifically speak to this point in her seminal article *Race and Essentialism in Feminist Legal Theory*, her observations about radical feminism have an emotionally cathartic edge to them that speaks of radical feminism's failure to include women of color in that circle: ("I call [Mackinnon's a] 'nuance theory' approach to the problem of essentialism: by being sensitive to the notion that different women have different experiences, generalizations can be offered about 'all

of care to which women of color belong, struggle within, and depend upon for sustenance. As Elvia Ariolla writes:

On the same day that I identify as lesbian and feel validated in my attending a lesbian dance, I might also attend an AA meeting and know that most of its attendees will not also go to the lesbian dance, but instead will reflect a wide cross-section of the non-lesbian or gay community of the town in which I live. Similarly, when I attend a social event in which, through ritual, music, language or foods, I celebrate my being Latina, the lesbian and AA-member aspects of my identity are greatly submerged and in tension with my gendered role in Latino culture. Yet each of those criteria, and many others I use to describe my identity, are strong and important to the definition of “who I really am.”²²⁶

Beyond committing to nonviolent values, intersectionality and multidimensionality also provide important critiques of care. Just as liberal feminists cue us to wonder if “care” has been stereotyped, and radical feminism submits “care” to the test of false consciousness, Critical Race Theory can help us discern when care is ineffective – or harmful –

women’ while qualifying statements, often in footnotes, supplement the general account with the subtle nuances of experience that ‘different’ women add to the mix. Nuance theory thus assumes the commonality of all women—differences are a matter of ‘context’ or ‘magnitude’; that is, nuance . . . In a peculiar symmetry with this ideology, in which black women are something less than women, in MacKinnon’s work black women become something more than women. In MacKinnon’s writing, the word ‘black,’ applied to women, is an intensifier: If things are bad for everybody (meaning white women), then they’re even worse for black women. Silent and suffering, we are trotted onto the page (mostly in footnotes) as the ultimate example of how bad things are.”). Harris, *supra* note 145, at 595-96. On the issue of the emotive and dignitary benefits of intersectionality theory, see Meri O. Triades, Note, *Finding a Hostile Work Environment: The Search for a Reasonable Reasonableness Standard*, 8 WASH. & LEE RACE & ETHNIC ANC. L.J. 35, 71 (2002) (discussing how Crenshaw’s theories “make strides in guaranteeing that African American women are accorded greater dignity by all.”).

²²⁶ See Elvia R. Arriola, *Law and the Gendered Politics of Identity: Who Owns the Label “Lesbian”?*, 8 HASTINGS WOMEN’S L.J. 1, 13 (1997). See also Janet Halley, *Introduction*, 8 YALE J.L. & HUMAN. 93, 94 (1996) (discussing Frank Valdes’s theory that “a single system suppresses all women and all ‘sexual minorities,’ so the academic, political, and legal disruption of that system is a suitable goal for a harmonious coalition of gay men, lesbians, women, and ‘sexual minorities’ generally.”). Note also, however, that Halley does not necessarily believe that these connections are always, by necessity, happy-making. Citing the work of Angela P. Harris and Mary Coombs, she posits: “Coombs and Harris don’t dispute the importance of intersections or the strategic value of coalitions, but they do dispel the warm, fuzzy feeling of Valdes’ and Morris’ euphoria. ‘Not so fast,’ they say: ‘Euphoric intersectionality misses some methodological and even ethical problems.’ Women, and particularly lesbians, have been made invisible by male writers who subsume them into a generic human, or a generic gay, identity; reading native culture from a western perspective may occlude everything that is distinctive about it; mining native culture as a source for legal reform can be a gesture of neo-colonial appropriation.” *Id.* at 95.

because carers are blind to intersectionality issues. Just as one illustration, Kimberly Crenshaw has demonstrated such incidences in state addresses of domestic violence, which sadly obscured the experiences of women of color.²²⁷

3. Storytelling

Critical Race Theorists employ storytelling as a methodology. They do so “to expose discrimination and illuminate how the law often fails to account for the voices of [equal dignities],”²²⁸ as well as further other nonviolent goals.

Specifically, critical race storytelling expresses nonviolent values by connecting or “cohering” people together through the emotional power of narrative.²²⁹ It also may achieve nonviolence in other, more direct ways, as

²²⁷ In her article *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, Crenshaw writes about Los Angeles’s refusal to disseminate statistics concerning domestic violence in communities of color. This refusal came out of a seeming desire to “care,” as both anti-racist and feminist communities had lobbied the police department to keep those statistics to themselves, because the statistics might “undermine long-term efforts to force the Department to address domestic violence as a serious problem” and to prevent domestic violence from being “dismiss[ed] . . . as a minority problem,” as well as to prevent the data from being used to “unfairly represent Black and Brown communities as unusually violent.” See Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, *supra* note 147, at 1253. Crenshaw’s awareness of intersectionality allowed her to see, and complain, that instead of furthering nonviolence, these “caring” impulses were completely obscuring the bloodily violent experiences of women of color. *Id.* For another intersectional analysis of care, see Laura T. Kessler, *Transgressive Caregiving*, 33 FLA. ST. U. L. REV. 1 (2005). In this article, which develops an exciting theory of “transgressive care,” Kessler tracks how “black activists and feminist writers reconceptualized black motherhood as a positive politics of resistance to both racial and gender oppression. For example, black feminist writers recast the black matriarch as a symbol not of emasculation but of ‘maternal fortitude’.” *Id.* at 16-17.

²²⁸ Mario L. Barnes, *Black Women’s Stories and the Criminal Law: Restating the Power of Narrative*, 39 U.C. DAVIS L. REV. 941, 954 (2006). See also Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324-25 (1987) (calling for the inclusion of the “voices” of victims of discrimination in legal scholarship).

²²⁹ As Richard Delgado noted in his seminal article on Critical Race Theory and narrative method, *Storytelling for Oppositionists and Others: A Plea for Narrative*, storytelling brings “outgroup” members together:

Many, but by no means all, who have been telling legal stories are members of what could be loosely described as outgroups, groups whose marginality defines the boundaries of the mainstream, whose voice and perspective—whose consciousness—has been suppressed, devalued, and abnormalized. The attraction of stories for these groups should come as no surprise. For stories create their own bonds, represent cohesion, shared understandings, and meanings. The cohesiveness that stories bring is part of the strength of the outgroup. An outgroup creates its own stories, which circulate within the group as a kind of counter-reality.

Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412 (1989). See also Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 764 (1994) (“Storytelling serves to create and confirm identity, both individual

stories gives energy to the now-“cohesive” group’s political will to work against violence and suffering,²³⁰ harms otherwise known as “spirit murder”²³¹ in critical race parlance. In addition, the very telling of stories may help decrease these kinds of violence by identifying their unrecognized forms and warning against them. Finally, critical race storytelling is perfect method for illustrating when the politics of nonviolence go haywire – as when those in power harm people of color under the auspices of “care.”²³²

4. CRT’s “open” and “interrogative” jurisprudential method

As may be suggested by Critical Race Theory’s use of narrative method, Critical Race Theory resists “univocal” stories of law and justice,²³³ and fosters, instead a “multivocal”²³⁴ method that fosters “full participation”²³⁵ in both law and legal pedagogy. Critical Race Theory’s

and collective. . . . Storytelling in this sense is myth-making: the creation of a new collective subject with a history from which individuals can draw to shape their own identities.”).

²³⁰ See Sheila R. Foster, *Critical Race Lawyering: Foreword*, 73 *FORDHAM L. REV.* 2037-38 (2005) (“These narratives, while often insufficient to give rise to legal causes of action, can be very useful in building social movements.”).

²³¹ Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law’s Response to Racism*, 42 *U. MIAMI L. REV.* 127, 127 (1987).

²³² Regina Austen’s brilliant work deconstructing the racist image of the black “Mammy” as caregiver, and demonstrating how a woman of color could create and even receive care in ways unacknowledged by the courts, provides but one example of how storytelling can be used to this end. In *Sapphire Bound!*, Austen tells the story of Crystal Chambers, an African American instructor who was fired from her position when she became pregnant under the “negative role model” rule (it was feared she would inspire her young black female charges to become pregnant). Through Austen’s fine prose, we can see how the supposedly feminist and caring “role model rule” was in fact used to flatten Chambers into the social construction of a Mammy, instead of “caring” for anyone. Thus, Austen demonstrates that what looked to white administrators like care was in fact racial oppression. In contradiction, Austen argues that had Chambers been allowed to keep her job, she might have offered a role model of single-mother agency and self-sustainment that would have “cared” for her charges in ways far more powerful than her elimination. See Regina Austen, *Sapphire Bound*, 1989 *WIS. L. REV.* 539, 549-58 (1989).

²³³ Philip N. Meyer, *Introduction: Will You Please Be Quiet, Please? Lawyers Listening to the Call of Stories*, 18 *VT. L. REV.* 567, 570 (1994) (“Our communities are multivocal. The law, however, speaks univocally, and systematically excludes the voices and stories of those who ought to be included in the community of authoritative speech. The study of stories provides models for a legal discourse that can achieve a multivocal community.”). See also N. Bruce Duthu, *Incorporative Discourse in Federal Indian Law: Negotiating Tribal Sovereignty Through the Lens of Native American Literature*, 13 *HARV. HUM. RTS. J.* 141, 147 (2000) (“Such inquiries also reveal the ‘multivocal’ nature of not simply literary narratives generally, but particularly of Indigenous narrative traditions, which challenge the law to move beyond its tendency to speak ‘univocally’ (i.e., in terms that exclude many other voices) to a mode of discourse that is truly multivocal and inclusive of other voices.”).

²³⁴ See Duthu, *supra* note 233, at 147.

²³⁵ See John Hayakawa Török, *The Story of “Towards Asian American Jurisprudence” and Its Implications for Latinas/os in American Law Schools*, 13 *LA RAZA L.J.* 271, 284-85 (2002) (“To encourage student expression and risk-taking in the class, I opened with a poem, Marge Piercy’s *To Be of Use*. Class discussion began with the question, ‘Where are you from?’ I wrote the question, and the following words, on the blackboard before class: geography, culture, politics, sexuality, religion,

acknowledgment of a “multiple consciousness”²³⁶ allows it to reject “absolutes,”²³⁷ to “embrace complexity,”²³⁸ and to engage in a “pragmatic,”²³⁹ “open”²⁴⁰ jurisprudence that avoids “broad”²⁴¹ or grand theory. In line with this “textured”²⁴² approach, its practitioners regularly interrogate their own perspectives, assumptions, and privileges,²⁴³ and raise their consciousness of the social construction of race,²⁴⁴ in order to “avoid [the] cultural imperialism that perpetuates the supremacies promoted by

generation, and socioeconomic and educational background. I asked all class participants to answer the question in terms of the categories on the board. I started, and disclosed information about my ethnic, religious, sexuality, generation, gender, immigration, class, and biracial background. This introduction, which moved from me to the rest of the members of the class, ensured full class participation. In later classes we rotated the role of class facilitator. In these ways, participant expression became the classroom norm.”).

²³⁶ Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN’S RTS. L. REP. 7 (1989); see also Harris, *supra* note 145, at 615.

²³⁷ See Gil Gott, Introduction: *Identity and Crisis: The Critical Race Project and Postmodern Political Theory*, 78 DENV. U. L. REV. 817, 851 (2001) (advocating a pragmatic jurisprudence that draws upon Critical Race Theory’s acknowledgement of multiple voices) (“[T]he pragmatist method offers a process for moving toward resolution of a central political antinomy of modernity—identified by Agamben as the split between ‘the People’ and the people—by offering dissident and outsider voices a place in the communal conversation about truth and knowledge, if not a guarantee that their justice concerns will be met through such coming to voice. Under pragmatist rules of the game, the participants must avow the partial, particular and situated nature of their truth and justice claims, i.e., are foreclosed from propounding their ‘particular idea as an absolute.’ They may not claim their positions as representative of either the People as sovereign Self, or of the authentic national-popular ‘concrete universal’ of an oppressed group. Rather, the participants would agree in advance to an openness, a resistance to premature closures and suturings of knowledge and truth claims.”).

²³⁸ Hope Lewis, *Embracing Complexity: Human Rights in Critical Race Feminist Perspective*, 12 COLUM. J. GENDER & L. 510, 513 (2003) (“[E]mergent voices include legal scholars who adopt a transnational Critical Race Feminist perspective on human rights issues and who believe that embracing complexity is necessary to achieve the liberation of women from all forms of subordination.”).

²³⁹ See Gott, *supra* note 237. See also Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763, 1764 (1990); DAVID THEO GOLDBERG, *RACIST CULTURE: PHILOSOPHY AND THE POLITICS OF MEANING* 214-37 (1993) (advocating an anti-racist pragmatism).

²⁴⁰ See Gott, *supra* note 237. In this encouragement of an “open” process, Critical Race Theorists resemble cultural feminist Martha Minow’s “call to be open, to canvass personal experience [which] applies to all legal controversies.” See Minow, *supra* note 97, at 90.

²⁴¹ Sylvia R. Lazos Vargas, *Democracy and Inclusion: Reconceptualizing the Role of the Judge in a Pluralist Polity*, 58 MD. L. REV. 150, 219 (1999) (“Constitutional adjudication maintains its integrity and coherence because judges decide cases discretely and do not always reach for broad theoretical statements that may not reflect what the entire polity agrees are its fundamental values.”).

²⁴² See Margaret E. Montoya, Foreword: *Class in LatCrit: Theory and Praxis in a World of Economic Inequality*, 78 DENV. U. L. REV. 467, 498 (2001) (approving of a theory that “move[s] beyond identity politics to a more textured theory that incorporates difference.”).

²⁴³ See Carbado, *supra* note 196, at 77-78.

²⁴⁴ See, e.g., Robert S. Chang, *Critiquing “Race” and Its Uses: Critical Race Theory’s Uncompleted Argument*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 87, 87 (Francisco Valdes et al. eds., 2002) (“‘Race is a social construct.’ This statement has become a mantra in Critical Race Theory.”).

the colonial power.”²⁴⁵ As such, “as much as [these theorists] might try to avoid it,” they realize that they “may not always be able to resolve [their] differences.”²⁴⁶

CRT’s open method can itself be seen as evidence of a commitment to nonviolence, because its practitioners are dedicated to understanding the perspectives of others. They do not want to dragoon anyone to their point of view or even methodology. Rather, they seek to repair racism in a spirit of collaboration, curiosity, and respect.²⁴⁷ In addition, Critical Race Theory’s “open” method has much to offer a jurisprudence of nonviolence as it was *designed* to interrogate “care,” and determine when it was being used to marginalize people of color.²⁴⁸

²⁴⁵ Pedro A. Malavet, *Outsider Citizenships and Multidimensional Borders: The Power and Danger of Not Belonging*, 52 CLEV. ST. L. REV. 321, 327 (2005).

²⁴⁶ *Id.*

²⁴⁷ As such, Critical Race Theorists resemble the eminent peace activist Thich Nhat Hanh, who tells us, “When you understand, you cannot help but love. You cannot get angry. To develop understanding, you have to practice looking at all living beings with the eyes of compassion. When you understand, you cannot help but love. And when you love, you naturally act in a way that can relieve the suffering of people.” THICH NHAT HANH, *PEACE IS EVERY STEP: THE PATH OF MINDFULNESS IN EVERYDAY LIFE* 79-80 (1991). In addition, Critical Race Theorists’ work on open and respectful methods also have much in common with advocates of therapeutic justice, who deplore the brutality of our current legal culture and seek to develop a healing jurisprudence by incorporating the insights of mental health experts into the legal system. See DEBORAH TANNEN, *THE ARGUMENT CULTURE: MOVING FROM DEBATE TO DIALOGUE* 131 (1998) (“[T]he American legal system is a prime example of trying to solve problems by pitting two sides against each other and letting them slug it out in public.”); Ellen A. Waldman, *The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence*, 82 MARQ. L. REV. 155, 160 (1998) (noting the “psychological brutality of the adversary system”); LeRoy L. Kondo, *Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders*, 28 AM. J. CRIM. L. 255, 262-63 (2001).

²⁴⁸ Critical Race Theorists’ take on affirmative action offers a more recent example of this method’s ability to suss out problems with “care.” Nancy Chung Allred embraces complexity and “texture” in lieu of absolutes or “broadness” by acknowledging that “affirmative action programs may cause some stigmatization,” and that “affirmative action policies can actually improve the self-esteem of students of color.” Nancy Chung Allred, *Asian Americans and Affirmative Action: From Yellow Peril to Model Minority and Back Again*, 14 ASIAN AM. L.J. 57, 77 (2007). John C. Duncan, too, analyzes the paradox of affirmative action, by saying that affirmative action does and does not impose stigma. He does this by admitting that there is “stigma placed via affirmative action,” but that it is also not “logical” to brand it as such, since it does not come close to Martin Luther King’s famous evocation of “nobodiness.” See John C. Duncan Jr., *The American ‘Legal’ Dilemma: Colorblind I/Colorblind II—The Rules Have Changed Again: A Semantic Apothegmatic Permutation*, 7 VA. J. SOC. POL’Y & L. 315, 343-45 (2000). In John C. Duncan’s view, stigma itself becomes both an empty concept and a full one, because “[t]he concept of stigma suggests, but does not fully comprehend, the harm inflicted by racism. ‘Stigma’ thus appears to be an unduly limited and potentially misleading term for the evil it seeks to describe.” In the end, he determines that the state may do more harm than good in caring for African-Americans by saving them from stigma: “The danger created by excessive emphasis on stigma is that it will encourage an empty, symbolic politics, more concerned with gestures of respect for blacks than with concrete measures to improve their lot.” By boldly facing both the stigmatic and salubrious effects of affirmative action, these theorists reveal that affirmative action, while worthwhile, has not yet completely extricated itself from racism. By speaking of the stigmas that may be imposed upon beneficiaries, or supposed beneficiaries, of affirmative action, they offer a kind of companionship to these beneficiaries, who may feel isolated and bereft by such stigma. This constitutes care and

5. The Goals of CRT

Finally, Critical Race Theorists employ their methods of coalition building, use of intersectionality theory, narrative method, and open interrogation in order to fulfill their primary objective, that of freeing people of color from subordination. Critical Race Theory's goal is most certainly an ethically caring, nonviolent one, as it seeks to decrease suffering and eliminate the causes of racism, sexism, homophobia, and other kinds of oppression.²⁴⁹

D. Queer Legal Theory and Nonviolence

As Francisco Valdes explains in his seminar article *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*,²⁵⁰ queer legal theory works to ensure queer "survival."²⁵¹ Other aims of queer legal theorists are to "reclaim sexual identity from the hands of the dominant, heterosexual voice,"²⁵² and to "dissent [from]" and "resist" "the attempt at categorisation [sic] within...dominant culture."²⁵³

A review of queer legal theory demonstrates that its theorists express the values of care, human connection, and nonviolence for which cultural feminists often get credit. Queer legal theory also refines our concepts of care and nonviolence by creating new definitions of care that resist its patriarchal and homophobic social constructions. Queer legal theory adds to these dimensions of care and nonviolence through its 1) struggle with the "sex/gender" conflation, 2) its emphasis on "interconnectivities," 3) its open and interrogative jurisprudence method, 4) and its goals of queer survival and liberation.

nonviolence. By naming this stigma, the theorists also pave the way for a future affirmative action or other inclusive educational advancement system that does not harm people of color. See *id.* at 343-47.

²⁴⁹ See Reginald Leamon Robinson, *Human Agency, Negated Subjectivity, and White Structural Oppression: An Analysis of Critical Race Practice/Praxis*, 53 AM. U. L. REV. 1361, 1364 (2004) ("Critical Race Theory ('CRT') builds its methodology on the idea that law, race, and power oppress ordinary people, denying them the right to live free and to act purposefully. Race Critics have developed deconstructive approaches to unearth how law and race form powerful, objective relations of whites over blacks, men over women, natives over foreigners.").

²⁵⁰ Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 3 (1995).

²⁵¹ *Id.* at 362.

²⁵² R. Scott ShIELDS, Comment, *Suturing Discourses Within the First Amendment*, 34 HOUS. L. REV. 1531, 1558 (1998).

²⁵³ CARL F. STYCHIN, *Towards a Queer Legal Theory*, in LAW'S DESIRE: SEXUALITY AND THE LIMITS OF JUSTICE 140, 141 (1995).

1. The Sex/Gender Conflation

Queer theory seeks to dismantle harmful social constructions of sexual identity by eliminating the “conflation between sex and gender.”²⁵⁴ As Frank Valdes teaches us, the conflation assigns particular sexual desires to the genders, and so “justif[ies] [a] social and sexual *status quo*” that “constructs sexual minorities and women as defective or inferior,” a bias that “is central to the subordination both of sexual minorities and women.”²⁵⁵

Queer legal theory’s efforts to eradicate the conflation between sex and gender express its nonviolent values: First, it seeks to eliminate physical and existential violences committed against women and other “sexual minorities” through homophobia. By creating opportunities for the social recognition of same-sex relationships through the dismantling of anti-sodomy statutes and marriage bans, queer legal theory may prevent the state from covertly encouraging the private citizenry to perform violence on queers.²⁵⁶ It also prevents the existential violence that occurs when the state degrades same sex relationships.²⁵⁷

As in the case of feminists’ efforts to make women “count,” the queer legal effort to eradicate this conflation also constitutes an act of nonviolence on its own, by bringing queers into the circle of legal care.²⁵⁸ In addition, as its proponents work to develop civil and family rights for gays and lesbians, they create more opportunities for connection by lifting the threat of criminal prohibition of sexual intimacy, and securing the rights of families.²⁵⁹

Queer legal theory’s efforts to eradicate the sex/gender conflation, moreover, critiques and expands our conceptions of care. It uncovers the patriarchal constructions of care and also expresses its multiplicity. By untangling patriarchy’s mandate that only opposite genders attach through sex and marriage, it demonstrates that love, care, and desire may cross the boundaries erected by sexism and homophobia.

²⁵⁴ Valdes, *supra* note 250, at 364 (arguing that this conflation maintains hierarchy).

²⁵⁵ *Id.*

²⁵⁶ Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1435 (1992).

²⁵⁷ See Susan Ayres, *Coming Out: Decision-Making in State and Federal Sodomy Cases*, 62 ALB. L. REV. 355, 393 (1998) (“[V]iolence can occur when one is named, a ‘sodomite’ in this case, because of the ‘power of the name’: ‘[o]ne is . . . brought into social location and time through being named.’”) (quoting Judith Butler).

²⁵⁸ See *supra* text accompanying note 225 (discussing the value of the circle of care).

²⁵⁹ See Kessler, *supra* note 227, at 41 (“Psychologists have observed the potentially restorative, affirming effect of parenthood for gay men and lesbians. Children affirm their gay and lesbian parents; this affirmation is important in a society plagued by homophobia.”).

2. Interconnecting . . . or not

In his seminal work on gay rights, Valdes argues that the queer legal theory calls for equality requires its practitioners to “interconnect” with Critical Race Theorists, feminist theorists, and other anti-subordination philosophers²⁶⁰ in order to “appreciat[e] . . . the common ground created through and by multiplicity and intersectionality.”²⁶¹ These interconnective alliances “nurture” and “unif[y]”²⁶² queer theory’s “social justice movement[.]”²⁶³ within a euphoric sense of intimacy,²⁶⁴ which inspires these theorists to help not only other queers but “those who are wholly unlike them.”²⁶⁵ One need not work hard here to see the parallels

²⁶⁰ Valdes, *supra* note 250, at 372-76.

²⁶¹ *Id.* at 372. See also Francisco Valdes, Foreword, *Under Construction: LatCrit Consciousness, Community, and Theory*, 85 CAL. L. REV. 1087, 1111 (1997) (promoting “interconnectivity, cooperation, and coalition” in LatCrit theory); Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities and Inter-Connectivities*, 5 S. CAL. REV. L. & WOMEN’S STUD. 25, 49 (1995). As might not be surprising from this list of Valdes’s work and methods, he is a queer theorist, a critical race theorist and LatCrit theorist, as well as a well-known organizer of the annual LatCrit symposia and a co-editor of CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY, *supra* note 244.

²⁶² As Julie A. Greenberg argues in the intersex context: “[I]ntersex activists need to build and nurture alliances with other groups seeking an end to sex and gender discrimination. . . . [G]roups seeking an end to discrimination based upon gender nonconformity [should] form coalitions around this unifying goal to help these groups avoid the divisiveness that has plagued other social justice movements.” Julie A. Greenberg, *Intersex and Intrasex Debates: Building Alliances to Challenge Sex Discrimination*, 12 CARDOZO J.L. & GENDER 99, 100 (2005). Besides citing Valdes, Professor Greenberg also notes that she builds upon the work of Nancy Ehrenreich, Victor C. Romero, Darren Lenard Hutchinson, and Richard Delgado. See *id.* at 105 n.32.

²⁶³ *Id.* at 99-100.

²⁶⁴ Professor Berta Esperanza Hernández-Truyol, for example, reflects that she engages in interconnective practices within nurturant intimacy: “I engage in extensive conversations about multidimensionality, interconnectivities, and intersectionalities with all those around me—family and friends, colleagues and students.” Berta Esperanza Hernández-Truyol, *The LatIndia and Mestizajes: Of Cultures, Conquests, and LatCritical Feminism*, 3 J. GENDER RACE & JUST. 63, 76 (1999).

²⁶⁵ Professor Aya Gruber argues that progressive scholars should not only build bridges, but affirmatively act to help others not like themselves:

I propose that academicians in the progressive movement devote some part of their academic capital to the struggle of those who are wholly unlike them—those to whom the progressive academicians most likely represent the oppressor class. In this manner, progressives will be able to redistribute to other subordinated groups the power gains they have made in their individual lives and causes.

Aya Gruber, *Navigating Diverse Identities: Building Coalitions Through Redistribution of Academic Capital—An Exercise in Praxis*, 35 SETON HALL L. REV. 1201, 1207 (2005). See also *id.* at 1240 (“[W]riting about the subordination of others is a way to build bridges and conduct fruitful exchanges of knowledge and experiences. One thereby can make connections, conduct research, and learn about areas outside of one’s immediate scholarly agenda. This dialogue will foster new alliances and interconnections between different subordinated groups. It will start positive dialogue amidst perceptions of conflict and competition. Consequently, by consciously redistributing our academic capital, we can create coalitions, exercise praxis, and further the goal of antisubordination.”).

between queer legal theory's brand of interconnecting and Gandhi's, King's, and cultural feminists' descriptions of nonviolence as reflections of the unity of life, community, and caring connection.

While queer legal theory's "interconnectivity" thesis qualifies as a nonviolent ethic of connection and care, its very practice deflates patriarchal and racially or sexually exclusive constructions of these principles. In this way it resembles Critical Race Theory's coalition building: By bringing people of different experiences and disciplines together in theory and in practice, interconnectivity uncovers patriarchal definitions of care that require self-abnegating carers, since interconnectivities seek "alliances" of equals rather than rulers and helpmeets.²⁶⁶

Furthermore, interconnectivity theorists recognize the multiple dimensions of care. They recognize that, in coalition building, groups may simply clash because of their different identities and interests. Or, they risk replicating essentialism in the formation of the groups themselves, thus creating "false coherence."²⁶⁷ Interconnectivity theories attempt to develop ways to transcend these "fractures"²⁶⁸ through measures and concepts that are so far-reaching that they transform queer theory into a kind of meta-interconnectivity theory that goes by such names as "co-synthesis,"²⁶⁹ the above-mentioned multidimensionality,²⁷⁰ "coalition

²⁶⁶ See, e.g., Elizabeth M. Iglesias & Francisco Valdes, *Religion, Gender, Sexuality, Race and Class in Coalitional Theory: A Critical and Self-Critical Analysis of LatCrit Social Justice Agendas*, 19 CHICANO-LATINO L. REV. 503, 506 (1998). In writing of interconnectivity, "wholism" and "cosynthesis" in the context of LatCrit "theory and praxis," the authors develop a vision of connection between groups that is based on alliances that are not "strategic," but ones that create "community" and even "friendship." *Id.* at 506-507, 565.

²⁶⁷ Nancy Levit, *Introduction: Theorizing the Connections Among Systems of Subordination*, 71 UMKC L. REV. 227, 227 (2002).

²⁶⁸ See Elizabeth M. Iglesias & Francisco Valdes, *LatCrit at Five: Institutionalizing a Postsubordination Future*, 78 DENV. U. L. REV. 1249, 1300 (2001) (discussing "the internal fractures that our many differences might at any moment trigger").

²⁶⁹ As developed by Peter Kwan, co-synthesis is a "dynamic model whose ultimate message is that the multiple categories through which we understand ourselves are sometimes implicated in complex ways with the formation of categories through which others are constituted." Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257, 1280 (1997). As it relates to the care created by interconnectivity or coalition building, co-synthesis can allow people to work and help one another while recognizing "the interdependence of identity categories and [so] avoids priority battles among them." Levit, *supra* note 267, at 231.

²⁷⁰ Darren Lenard Hutchinson's theory of multidimensionality also may solder identity groups together, by raising coalitions' consciousness of "the impact of racial and class oppression . . . upon sexual subordination and gay and lesbian experience and identity" which may help coalitions "cease treating these forces as separable . . . or . . . conflicting." Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 641 (1997). It should be noted, however, that some critical race and queer theorists have despaired of authentic and profitable coalition building, out of fear for the intractable problem of false coherence. See Sumi Cho, *Understanding White Women's Ambivalence Towards Affirmative Action: Theorizing Political Accountability in Coalitions*, 71 UMKC L. REV. 399, 408 (2002) ("The move to flatten

critical theory,”²⁷¹ and “symbiosis.”²⁷²

Not all queer theorist, however, advocate wholesale interconnection. Yet even when queer scholars call for “breaking,” rather than building bridges, they still affirm nonviolence. One such scholar is Janet Halley, who encourages leftists to “take a break” from feminism, in order see if there are any other systems of thought – what she calls “prodigal” theories – that may help us discern how better to “distribute myriad social goods and bads” in ways that are inconceivable within feminism’s “presuppositions” and “hegemon[y].”²⁷³ Halley is distrustful of what she regards as feminism’s “will to power,”²⁷⁴ which she argues has birthed its “dark side” that has left the “vanquished” and “prisoners of war” in its wake: “Feminism [has] blood on its hands.”²⁷⁵ Here, Halley is seeking to connect, salvage, and decrease damage, just not with feminists. She dreams of a theory that accounts for people betrayed by feminism, such as “boy[s]” who have been “harmed”²⁷⁶ and to nourish others who might be neglected or even oppressed by “the totalitarian tendency in the feminist politics of injury,” that is, “Mother Feminism.”²⁷⁷

Queer theory’s commitment to nonviolence is so strong, that when they are advocating interconnectivity *or* arguing for “breaks” they affirm the values of nonviolence.

difference in the service of a presumed unity of interests among all subordinated groups relies on an unfortunate avoidance of material distinctions.”); Robert S. Chang & Jerome McCristal Culp, Jr., *After Intersectionality*, 71 UMKC L. REV. 485, 487 (2002) (“Indeed, the hope seems to be to step outside the bounds of all identities and create an anti-essentialist solution to problems caused by identity oppression. This is a great hope. Unfortunately, it is not possible, and as we move to create coalitions, it may prove to be ultimately unsuccessful.”); Samuel A. Marcossan, *Multiplicities of Subordination: The Challenge of Real Inter-Group Conflicts of Interest*, 71 UMKC L. REV. 459, 459 (2002) (“What if subordinated groups, for all they share in common as objects of the symbiotic systems of political, economic, and social subordination, actually have predominate divergent and conflicting interests?”).

²⁷¹ Elvia Arriola has developed a “coalitional critical theory” that uses theoretical concepts of multiplicity to enrich coalition building. Elvia R. Arriola, *Staying Empowered by Recognizing Our Common Grounds: A Reply to Subordination and Symbiosis: Mechanisms of Mutual Support Among Subordinating Systems*, by Professor Nancy Ehrenreich, 71 UMKC L. REV. 447 (2002).

²⁷² Nancy Ehrenreich has developed the theory of “symbiosis,” which recognizes that people “exist in a complex web of relationships in which they are sometimes dominant and other times subordinate.” Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 UMKC L. REV. 251, 279 (2002). For an excellent general description of the interconnectivity, co-synthesis, multidimensionality, and symbiosis developments, see Levit, *supra* note 267, at 227.

²⁷³ See HALLEY, *supra* note 13, at 35.

²⁷⁴ *Id.* at 32.

²⁷⁵ *Id.* at 32-33.

²⁷⁶ *Id.* at 330-31.

²⁷⁷ *Id.* at 339.

3. *Queer theorists' advocacy of an open, interrogative jurisprudential approach*

Like Critical Race Theorists, queer theorists employ open and interrogative methods in their analyses of legal and social problems. Valdes advocates the use of multivocal narrative method,²⁷⁸ while Kim Brooks and Debra Parkes note that "queer theory concerns itself with exposing and deconstructing the normative nature of heterosexuality and other dominant gender models."²⁷⁹ Darren Lenard Hutchinson argues that queer legal theorists should challenge their own assumptions, as they may obscure the experiences of others.²⁸⁰

²⁷⁸ See Valdes, *supra* note 250, at 366 (advocating the use of narrative method in queer legal theory); see also Jeffery C. Mingo, *More Colors Than the Rainbow: Gay Men of Color Speak About Their Identities and Legal Choices*, 8 LAW & SEXUALITY: REV. LESBIAN, GAY, BISEXUAL, & TRANSGENDER LEGAL ISSUES 561, 590-91 (1998); Laurie Rose Kepros, *Queer Theory: Weed or Seed in the Garden of Legal Theory?*, 9 LAW & SEXUALITY: REV. LESBIAN, GAY, BISEXUAL, & TRANSGENDER LEGAL ISSUES 279, 296 (1999-2000) ("Narratives will help judges root legal understanding of Queers in reality rather than heterosexist fiction. As a result, while the evolution of a Queer narrative may be slow, convincing courts to listen will eventually become a self-sustaining task because the judicial narrative will both reflect and construct social reality."). See also Sanja Zgonjanin, *Ruthann Robson: An Annotated Bibliography 1979-2005*, 8 N.Y. CITY L. REV. 681, 683-84 (2005) (setting forth the fictional and autobiographical work of queer legal theorist Ruthann Robson).

²⁷⁹ Kim Brooks & Debra Parkes, *Queering Legal Education: A Project of Theoretical Discovery*, 27 HARV. WOMEN'S L.J. 89, 97 (2004); Mariana Valverde, *Justice as Irony: A Queer Ethical Experiment*, 14 LAW & LITERATURE 85, 95-96 (2002) ("[W]hen I say 'queer,' I am not invoking and reiterating the gay-straight binary: queer is not another word for gay Gays [can] name themselves and can thus be easily identified; 'queer,' by contrast, does not name an identity, deviant or normalized. Queer politics begins where Foucault's analysis of homosexual identity formation ends."). See also STYCHIN, *supra* note Error! Bookmark not defined., at 148 (declaring that queer legal theory exposes the "contingency and contestability of categories—that there is nothing natural about them"); see generally William N. Eskridge, Jr., *A Social Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda*, 102 YALE L.J. 333 (1992-93).

²⁸⁰ See Hutchinson, *supra* note 270, at 602:

In addition to rejecting the importance of racial and class privilege and subordination in gay and lesbian lives, gay and lesbian legal theorists also marginalize racial and class differences by attempting to articulate "common" experiences of or assumptions about all gay and lesbian people. These common experiences and assumptions, however, may obscure the realities of people of color and the poor.

In this article, Hutchinson demonstrates the ways in which this "open" method may help refine definitions of care, and thus nonviolence, by studying the queer legal theory of Marc Fajer, who argues that coming out of the closet is "perhaps the central event[] in gay lives today," and also one that can "counter" homophobic stereotypes, and be psychologically helpful. See Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 515, 520, 596 (1992). Hutchinson counters Fajer's assessment by telling the stories of gays and lesbians of color, who relate that their coming out experiences were not so productive, such as writer Marlon Riggs' experience with racism in the gay community. See Hutchinson, *supra* note 270 at 603-04; Rakesh Ratti, *Introduction to A LOTUS OF ANOTHER COLOR: AN UNFOLDING OF THE SOUTH ASIAN GAY AND LESBIAN EXPERIENCE* (Rakesh Ratti, ed., 1993).

As in the case of Critical Race Theory, these open interrogations are consistent with nonviolence, as its practitioners do not presume to force anyone into static categories, and are sensitive to the needs and desires of others.²⁸¹

4. *The goals of queer legal theory*

Finally, queer legal theory's goal of ensuring queer survival²⁸² puts it well within the tradition of nonviolent values, as nonviolence is dedicated to preserving life. There can be little work more caring than developing a theory and practice designed to preserve queer life in all its fullness. As Nadine A. Gartner refines this point, "[l]esbian legal theory . . . focuses first and foremost on lesbian survival . . . [and the] well-being of lesbian communities."²⁸³

This review of equal dignity theorists demonstrates that they offer a great deal to a jurisprudence of nonviolence. In their methods and goals, they cultivate care, connectivity, community, unity, and thus nonviolence. Moreover, through their examples and critiques, they help us define those values mindful of patriarchy, essentialism, classism, and homophobia. Their teachings will be crucial in the development of a legal theory of peace, which would foster a concept of "care" that is as inclusive as possible.

IV. A JURISPRUDENCE OF NONVIOLENCE

The goal of nonviolent legal theory appears quite simple at first glance: To prevent state and private violence wherever possible, and through nonviolent means. To achieve this objective, however, two complex questions must be answered: Whether the action at stake qualifies as violence, and whether it is justified by some pressing reason.

In developing a jurisprudence of nonviolence, I will draw upon the work of Gandhi, King, cultural feminists, critical race feminists, and other equal dignity theorists; I will also refer to American criminal law. Aided

²⁸¹ But see RUTHANN ROBSON, *SAPPHO GOES TO LAW SCHOOL: FRAGMENTS IN LESBIAN LEGAL THEORY* 7 (1998) (criticizing "postmodernism" for making lesbian identity "impossible"). See also Dana Neașu, *The Wrongful Rejection of Big Theory (Marxism) by Feminism and Queer Theory: A Brief Debate*, 34 CAP. U.L. REV. 125, 129 (2005) ("Feminist and queer symbolism need a grand social theory to attract popular support for their demands and a re-discovery of Marxism may do just that.").

²⁸² See Valdes, *supra* note 250, at 362 ("At the outset, sheer survival is at stake; to ensure our survival (and ultimately, our success) under the (mis)rule of law, Queer legal theory must strive to weave the experiences of sexual minorities as sexual minorities into the law's fabric—at every level and in every context—to make us explicitly and determinedly visible to the law.") (emphasis in original).

²⁸³ Nadine A. Gartner, *Lesbian (M)Otherhood: Creating an Alternative Model for Settling Child Custody Disputes*, 16 LAW & SEXUALITY: REV. LESBIAN, GAY, BISEXUAL, & TRANSGENDER LEGAL ISSUES 45, 51, 53 (2007).

by these combined authorities, I will first construct a definition of "violence," and second, posit tests for when violence may and may not be permissible. I will then adapt these concepts for a proposed constitutional right to nonviolence, which I will thereafter apply to the recent abortion case *Gonzales v. Carhart* to illustrate the workings of the theory.

A. What is "Violence?"

The most rudimentary definition of violence may characterize violence as the use of injurious force by one person against another, or the creation of a risk that such force will be used.²⁸⁴ The Model Penal Code, for example, defines "deadly force" as "force that the actor uses with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily injury."²⁸⁵ "Serious bodily injury" is defined as that "which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."²⁸⁶ The Code also defines "unlawful force" as "force, including confinement, which is employed without the consent of the person against whom it is directed and the employment of which constitutes an offense or actionable tort or would constitute such offense or tort except for a defense"²⁸⁷ Both of these definitions of force focus on there being an actual or threatened *invasion*²⁸⁸ (such as may

²⁸⁴ See Jeremy D. Feinstein, Note, *Are Threats Always "Violent" Crimes?*, 94 MICH. L. REV. 1067, 1069 (1996) (noting that the favored "legal" definition of violence is "the use— or risk of the use— of physical force so as to injure, damage, or abuse.").

²⁸⁵ MODEL PENAL CODE § 3.11(2) (1985). See also Gerald Runkle's definition: "An act in which a person employs physical force directly against a living person for the purpose of harming him." Gerald Runkle, *Is Violence Always Wrong?*, 38 J. POL. 367, 371 (1976).

²⁸⁶ MODEL PENAL CODE § 210.0 (3) (Official Draft and Revised Comments 1980).

²⁸⁷ MODEL PENAL CODE § 3.11(1) (Proposed Official Draft 1962).

²⁸⁸ Eileen McDonagh discusses "harm" in torts, which includes unconsented ruptures of the body:

The legal definition of harm rests upon the right of a person to consent to what is done to her/his body and liberty. Thus, the presence of coercion is the chief characteristic defining any and all legal injuries. "The law defines injury as 'the invasion of any legally protected interest of another.'" [citing Restatement (Second) of Torts §7 (1965)]. The legal issue is whether one party has intruded upon the other party's right to consent to what is done to her or him. For example, one person may injure another when making deep incisions with sharp instruments into the other person's body. Yet if the person using the instruments is a surgeon, and even more important, if the patient consents to the actions of the surgeon, then cutting into a person's body, far from being an injury, can be a life-saving action. On the other hand, from the standpoint of the law, an operation without consent, regardless of its success as measured in medical terms, is a battery, a legal injury.

Eileen L. McDonagh, *My Body, My Consent: Securing the Constitutional Right to Abortion Funding*, 62 ALB. L. REV. 1057, 1069-70 (1999)

occur with injuries that threaten life) or *compulsion*²⁸⁹ (such as that which may occur during confinement) of the body, and a lack of *consent* on the part of the victim.

A review of Gandhi's writings and life example demonstrates that he agreed with unconsented invasion and compulsion as a baseline definition of violence. Gandhi's nonviolence efforts most visibly contested physical, involuntary invasion, as he protested England's physical occupation of India. He also protested the "Black Acts," which compelled Indians to register with the British Government, among other indignities. However, Gandhi's evocation of *ahimsa* admits a far greater range of wrongs into the concept of violence. Again, Gandhi believed that life *itself* was violence, and that *ahimsa* is premised on the unity of life.²⁹⁰ This comprehension of violence transcends binary categories – it may be found both in "life" and in the rupture of the "unity of all life." It consequently encompasses both affirmative acts and omissions, and may include everything from "body-force" to social ills such as poverty. Gandhi's is obviously an extremely expansive and ambitious definition of violence. Philosopher R. Raj Singh has argued that Gandhi's conception of violence and its antithesis are so vast and textured that "fuller implications and potentials of non-violence have yet to be thought of and realized."²⁹¹

Similarly, King protested physical violence that takes the forms of physical invasion, famously indicting white racists with killings committed via bombs.²⁹² However, like Gandhi, King's was a wide-ranging understanding of violence, which may be better understood by studying his description of its reverse, being *agape*: Again, King described *agape* as "a willingness to go to any length to restore community."²⁹³ As *agape* proved central to King's vision of nonviolence,²⁹⁴ a *withdrawal* of *agape* may thus be seen as violence, either in commission or omission. As an illustration, King used powerful storytelling to describe the effects of segregation (a type of unconsented compulsion as well as a withdrawal of *agape*) in terms that denoted them as violent: In his *Letter from Birmingham City Jail*, he wrote that racism is a "cage" that makes you "stammer[]" and "cry," is

²⁸⁹ *Id.*

²⁹⁰ See GANDHI, AN AUTOBIOGRAPHY: THE STORY OF MY EXPERIMENTS WITH TRUTH, *supra* note 20, at 349.

²⁹¹ R. Raj Singh, *Gandhi and the Causes of War*, in PHILOSOPHIEN UBER DEN KRIEG 167, 172 (Hans-Georg Möller & Günter Wohlfart eds., 2008).

²⁹² See MARTIN LUTHER KING, JR., *Eulogy for the Martyred Children*, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 221, 221 (James Melvin Washington ed., 1986).

²⁹³ MARTIN LUTHER KING, JR., *An Experiment in Love*, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 16, 20 (James Melvin Washington ed., 1986).

²⁹⁴ See text accompanying notes 59-71.

“ominous,” “bitter,” and “mean,” creates physical discomfort, and makes you “harried,” and “never . . . know[] what to expect next.”²⁹⁵ In short, it creates “nobodiness.”²⁹⁶ In this description, he shows how state sanctioned segregation is violence that flows into the private spheres of African-Americans, so they cannot even live moment to moment without feeling a threat to themselves and their communities.

Feminist scholars also agree that “violence” and “compelled” “invasion” are coupled concepts. Robin West has describes women’s experiences of violence as experiences, specifically, of “*invasion*” of the “home,” the “body,” “security,” and “privacy.”²⁹⁷ MacKinnon, too, has

²⁹⁵ MARTIN LUTHER KING, JR., *Letter from Birmingham City Jail*, in TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 289, 292-93 (James Melvin Washington ed., 1986).

[W]hen you see the vast majority of your twenty million Negro brothers smothering in an airtight cage of poverty in the midst of an affluent society; when you suddenly find your tongue twisted and your speech stammering as you seek to explain to your six-year-old daughter why she can't go to the public amusement park that has just been advertised on television, and see tears welling up in her little eyes when she is told that Funtown is closed to colored children, and see the depressing clouds of inferiority begin to form in her little mental sky, and see her begin to distort her little personality by unconsciously developing a bitterness toward white people; when you have to concoct an answer for a five-year-old son asking in agonizing pathos: “Daddy, why do white people treat colored people so mean?”; when you take a cross-country drive and find it necessary to sleep night after night in the uncomfortable corners of your automobile because no motel will accept you; when you are humiliated day in and day out by nagging signs reading “white” and “colored”; when your first name becomes “nigger” and your middle name becomes “boy” (however old you are) and your last name becomes “John,” and when your wife and mother are never given the respected title “Mrs.”; when you are harried by day and haunted by night by the fact that you are a Negro, living constantly at tiptoe stance never quite knowing what to expect next, and plagued with inner fears and outer resentments; when you are forever fighting a degenerating sense of “nobodiness”; then you will understand why we find it difficult to wait.

Id.

²⁹⁶ Id. at 293.

²⁹⁷ See WEST, CARING FOR JUSTICE, *supra* note 2, at 102 (emphasis in original).

When invaded with violence and the threat of it, rather than simply violated or threatened with violence, the home and the body—and specifically the sexual body—become themselves dangerous. Marital rape, domestic violence, incest, and more generally the sexual abuse of young children by intimates all trigger invasive harms of this sort: not only is the body physically invaded, but the sense of security one should garner from intimacy is shattered, and the privacy of one’s body and home is extinguished.

See also Gavin Last, Note, *Advances Less Criminal than Hormonal: Rape and Consent*, in R. v. Ewanchuk, 5 APPEAL REV. CURRENT L. & L. REFORM 18 (1999) (approving of West’s definition of rape as sexual invasion); Martha Chamallas, Lucky: *The Sequel*, 80 IND. L.J. 441, 469-70 (2005) (citing West’s theories of invasion and violence, and also describing the violence of rape as made up of invasion, penetration, as well as psychological alienation, or destruction of the ability to “connect”).

noted that rape and other kinds of nonconsensual “penetr[ation]” are outrages committed against women.²⁹⁸

Like Gandhi and King, cultural feminists list other dimensions of violence. Gilligan may provide the most expansive definition of violence, citing studies indicating that women perceive violence wherever there is a fracture of connectivity – that is, “failure[s] of relationship[s].”²⁹⁹ While West does not advance so broad a construction of violence, she does argue that unwanted pregnancy may be as violent as sexual assault because it, too, constitutes a fracture of human connection as a forced nurturance.³⁰⁰ Since the unwanted pregnancy constitutes a connectivity that is not “free,” the woman becomes not just alienated from her connective self, but “contrary to”³⁰¹ that self. In short, her experience is the antithesis of care.³⁰²

While liberal feminism has not yet developed a coherent theory of violence, Sylvia A. Law³⁰³ agrees with the relationship between

²⁹⁸ See *Hudnet v. Am. Booksellers Ass’n*, 771 F.2d 323, 324-25 (7th Cir. 1985) (noting MacKinnon and Dworkin’s anti-pornography ordinance, which would outlaw images of women being penetrated by objects or animals). See also text accompanying notes 188-89.

²⁹⁹ GILLIGAN, *supra* note 1, at 43.

³⁰⁰ WEST, CARING FOR JUSTICE, *supra* note 2, at 105 (“[T]he physical invasion of the body occasioned by pregnancy . . . sexual penetration, when unwanted, is itself a harm . . . [and may be] life threatening The woman who is pregnant but does not wish to be is doing nurturant work *which she does not wish to do*. Her moral, relational life is thus as fully invaded as is her physical body.” The violent compulsion, then, stems in part from the compulsory nurturing work the woman does while pregnant.) (emphasis in original).

³⁰¹ *Id.* at 106.

³⁰² As such, cultural feminism’s descriptions of violence seem to have a strong connection with a more recent jurisprudential development, being that of “therapeutic justice.” Pioneered by David Wexler and Bruce Winick, therapeutic justice seeks laws and legal methods that “heal”—just as cultural feminism seeks care. They also valorize justice systems that proffer a form of therapy, rather than being “anti-therapeutic.” See David B. Wexler, *Putting Mental Health Into Mental Health Law: Therapeutic Jurisprudence*, in *ESSAYS IN THERAPEUTIC JURISPRUDENCE* 3, 8 (David B. Wexler & Bruce J. Winick eds., 1991) (“Therapeutic justice is the study of the role of the law as a therapeutic agent. It looks at the law as a social force that, like it or not, may produce therapeutic or anti-therapeutic consequences. Such consequences may flow from substantive rules, legal procedures, or from the behavior of legal actors (lawyers or judges).”). See also David B. Wexler, *Reflections on the Scope of Therapeutic Jurisprudence*, 1 PSYCHOL. PUB. POL’Y & L. 220 (1995); Susan Daicoff, *Law as the Healing Profession: The “Comprehensive Law Movement”*, 6 PEPP. DISP. RESOL. L.J. 1, 5-6 (2006); Lynette M. Parker, *Increasing Law Students’ Effectiveness When Representing Traumatized Clients: A Case Study of the Katharine & George Alexander Community Law Center*, 21 GEO. IMMIGR. L.J. 163, 166 n.11 (2007) (“Therapeutic Jurisprudence is part of the Comprehensive Law Movement, which also includes collaborative lawyering and transformative mediation and has as its goal the ‘transform[ation of] the practice of law into a humanistic and healing force rather than a confrontational and hurtful process.’”). As a jurisprudential theory that puts care at its center, like cultural feminism, but enriches its concept of care with mental health expertise, therapeutic justice may help us further define violence, by taking special care to analyze fractures of connectivity that are anti-therapeutic, and anti-healing.

³⁰³ Sylvia Law’s work, though not liberally feminist in an extreme sense, shares liberal feminism’s suspicion of the “caring woman” thesis. See Sylvia A. Law, *Rethinking Sex and the*

disconnectivity and violence, arguing that women should have the right to an abortion because its denial forbids them from “hav[ing] a full, humanly connected and satisfying life,” and may prevent them from “undertak[ing] the challenging work of nurturing the next generation.”³⁰⁴ Law explicitly describes unwanted pregnancy as violence: “When the state prohibits abortion, all women of childbearing age know that pregnancy may violently alter their lives at any time.”³⁰⁵

Radical feminists, too, have developed a metaphysics of violence. MacKinnon’s work on “subordination” allows us to construct a definition of violence that moves beyond the M.P.C. “bloodshed” paradigm. To MacKinnon, subordination’s effect of “demeaning,” and “degrading” women creates violence in women’s lives by removing them from the circle of care and disconnecting them from dignity and their very selves.³⁰⁶ Indeed, under male supremacy, male dominance may have so annihilated women that there is not even any female “self” to connect to or care for, as it is a fully artificial and nonexistent patriarchal construct.³⁰⁷

Critical Race Theorists have also focused on how bodily compulsion and invasion (through the forms of rape and murder as examples) destroy the lives of women of color, and constitute a “major obstacle to the achievement of peace.”³⁰⁸ But like the aforementioned thinkers, they have noticed how “fractures” in connectivity also create violence. For example, critical race feminists have used their understanding of intersectionality to expand definitions of domestic violence by referring to “interlocking economic and social realities.”³⁰⁹ Specifically, Kimberle Crenshaw has

Constitution, 132 U. PA. L. REV. 955, 996 (1996) (“Although it is critical for children that someone assume responsibility for them, that response is not determined by biology.”).

³⁰⁴ Sylvia A. Law, *Abortion Compromise—Inevitable and Impossible*, 1992 U. ILL. L. REV. 921, 936 (1992).

³⁰⁵ Law, *supra* note 303, at 1017.

³⁰⁶ See MACKINNON, *supra* note 176, at 176.

³⁰⁷ MacKinnon, *supra* note 178, at 635, 639 (“Feminism claims the voice of women’s silence, the sexuality of our eroticized desexualization, the fullness of ‘lack,’ the centrality of our marginality and exclusion, the public nature of privacy, the presence of our absence. This approach is more complex than transgression, more transformative than transvaluation, deeper than mirror-imaged resistance, more affirmative than the negation of our negativity.”).

³⁰⁸ See Adrienne Katherine Wing, *A Critical Race Feminist Conceptualization of Violence: South African And Palestinian Women*, 60 ALB. L. REV. 943, 944 (1997) (“This Article seeks to conceptualize violence against women, under both international and foreign domestic law, from the perspective of critical race feminism. . . . Global statistics demonstrate that the very act of ‘being female is life threatening.’ For purposes of this Article, ‘violence against women’ will be defined as the United Nations defined it in the Declaration on the Elimination of Violence Against Women: ‘any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.’”).

³⁰⁹ See Julie Goldscheid, *Elusive Equality in Domestic and Sexual Violence Law Reform*, 34 FLA. ST. U. L. REV. 731, 775 (2007) (“At least one recent study of domestic violence victims confirms what

noticed how domestic violence shelters' failures to understand the intersectionalities embodied by women of color may prevent those shelters from preserving those women's lives.³¹⁰ Critical Race Theorists have also made ties between "fractures" of connectivity and existential forms of violence: Patricia Williams has described the alienation experienced by victims of discrimination as a kind of "spirit murder."³¹¹

Finally, queer theorists have identified violence with physical invasions and compulsions, and have also created more elaborate definitions as well. Lesbian theorist Adrienne Rich argues that women are "compelled" to become heterosexual via a variety of forced physical and existential invasions upon the body;³¹² Frank Valdes argues that the sex/gender conflation implicates queer "survival," and David Cruz has described state discrimination as "forc[ing]" and "coerce[ing]" queers to "affirm gender beliefs or engage in gendered behavior."³¹³ Finally, in ways similar to King's observation that segregation encouraged racists to hurt Blacks,³¹⁴ Kendall Thomas has noticed that state discrimination that socially constructs homosexuals as "the other" inspires private violence.³¹⁵

This review of the work of Gandhi, King, and feminist, critical race, and queer theorists, then, allows us to define violence with reference to a variety of factors: These activists and theorists do not just define violence as physical invasions and compulsions on the body. Gandhi specifies that

antiessentialist scholars have argued: that when asked about social and structural aspects of domestic and sexual violence, women of color tend to define domestic violence in terms of interlocking economic[,] political and social realities rather than in terms of gender alone.").

³¹⁰ See Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, *supra* note 147, at 1263 (telling a story of a woman denied access to a shelter because of her "failure" to speak English, Crenshaw argues that this failure of connectivity on the part of the administrators of the shelter created its own form of violence, as they might well be held responsible if this woman did not wind up "alive and well"—that is, survive the streets).

³¹¹ See Williams, *supra* note 231, at 129.

³¹² See Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS 631, 635, 638 (1980) ("[F]ew women have been in an economic position to resist marriage[,] and "attacks against unmarried women have ranged from aspersion and mockery to deliberate gynocide, including the burning and torturing of millions of widows and spinsters during the witch persecutions of the fifteenth, sixteenth, and seventeenth centuries in Europe, and the practice of suttee on widows in India." Among the sundry forced measures that have been arrayed against women's loving women are: "clitoridectomy and infibulation; chastity belts; punishment, including death, for female adultery; punishment, including death, for lesbian sexuality; psychoanalytic denial of the clitoris; strictures against masturbation; denial of maternal and postmenopausal sensuality; unnecessary hysterectomy . . ."). Darren Lenard Hutchinson, another queer as well as multidimensionality theorist, has also focused on violence against homosexuals, describing cases wherein the victim's body is compelled and forced open. See Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 224, at 1.

³¹³ David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997, 1056 (2002).

³¹⁴ See KING, *supra* note 295.

³¹⁵ Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1435 (1992) ("[Anti-sodomy laws] legitimize homophobic violence, ... violat[ing] the right to be free from state-legitimated violence at the hands of private and public actors.").

ruptures in the unity of life may create violence, as might an abandonment of the ideal of *satyagraha*. King teaches that violence exists where there is a fracture of the community or other withdrawal of *agape*.

Feminist theorists also identify violence as an invasion (in the rape and unwanted pregnancy contexts), and a fracture of connectivity, either in the form of forced nurturance (in the pregnancy or stereotyping contexts), or subordination. Critical Race Theorists show us that violent “fracturing” may also be caused by ignorance of intersectionality and the commission of spirit murder. In addition, queer legal theorists identify violence with existential compulsions (such as “forcing” people to affirm gender beliefs) and with harmful social constructions that identify lesbians, gay men, bisexuals, transgenders, and intersexuals as “the other,” which threaten “survival” or may inspire private violence.

Furthermore, Gandhi’s almost paradoxical comprehension of violence,³¹⁶ King’s use of narrative,³¹⁷ and the work of these equal dignity theorists encourage us to use an open and interrogative³¹⁸ process of defining violence that allows us to navigate these manifold factors. Above all, in our efforts to define the term, we should remain mindful that “violence” itself is a social construction.³¹⁹

B. When is violence justified?

Once we have performed the hard work of defining violence, the question that remains is when is violence justified. This brings us to the second central question of a nonviolent legal theory: Assuming that violence has occurred, was it permissible? At least three authorities that form the basis for a jurisprudence of nonviolence suggest that once we answer the first question “yes,” we have answered the second “no.” According to Gandhi, avoidable violence is never justified because it violates the unity of life,³²⁰ and King developed the seemingly absolute principle that “any” “degradat[ion] of human personality” is “unjust.”³²¹ Furthermore, under West’s cultural feminism, non-consensual violence

³¹⁶ See GANDHI, AN AUTOBIOGRAPHY: THE STORY OF MY EXPERIMENTS WITH TRUTH, *supra* note 20.

³¹⁷ See KING, *supra* note 295.

³¹⁸ See, e.g., *supra* text accompanying notes 233-48.

³¹⁹ See GILLIGAN, *supra* note 1, at 42 (“If aggression is conceived as a response to the perception of danger, [our] findings . . . suggest that men and women may perceive danger in different social situations and construe danger in different ways—men seeing danger more often in close personal affiliation than in achievement and construing danger to arise from intimacy, women perceiving danger in impersonal achievement situations and construing danger to result from competitive success.”).

³²⁰ See *supra* text accompanying note 34.

³²¹ See KING, *supra* note 295, at 293.

against women is *never* justified,³²² possibly because violence contradicts women's inherently nurturing nature, which may cause them to suffer more.³²³

However, to draw such an absolute line based on Gandhi's philosophy, King's conception of justice, or West's conception of women may not be a good idea if this mandate amounts to a brand of natural law: That is, as a law rooted in some kind of absolute principle, such as a "higher logic" and "morality,"³²⁴ God's law, or women's nature, or laws of being.

Natural law has been described as a system based on "first-order realities," which are designed to preserve the "human good."³²⁵ Natural law inclines toward "objective and immutable rules,"³²⁶ based on "objective and unchanging truths"³²⁷ such as "facts of human nature and the nature of the world"³²⁸ As natural law is premised on "moral absolutes," some natural law theorists hold that there may also be absolute prohibitions.³²⁹

King's advocacy of nonviolence appears premised on natural law, as he took care to draw parallels between his definition of nonviolence and Thomas Aquinas's theory of natural or universal law when writing his famous letter from Birmingham jail.³³⁰ West's invocation of women's

³²² I use this slightly torturous phrasing out of regard for the work of Robin West. See WEST, CARING FOR JUSTICE, *supra* note 2, at 209 ("Too many people do not know that the only sharp line that matters, and should matter, in domestic relations, is between violence and nonviolence, not between bad violence and okay violence. No level of violence is acceptable; none should be tolerated.").

³²³ See West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, *supra* note 2, at 85 (noting that women suffer differently, and offering childbirth as an example of this different suffering).

³²⁴ Richard Devlin et al., *Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or Towards a "Triple P" Judiciary*, 38 ALTA L. REV. 734, 741 (2000).

³²⁵ JOHN FINNIS, AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY 309 (1998).

³²⁶ See Devlin et al., *supra* note 324, at 742.

³²⁷ Jack B. Sarno, Note, *A Natural Law Defense of Buckley v. Valeo*, 66 FORDHAM L. REV. 2693, 2727 (1998). ("[N]atural law philosophers do not hold that individuals must adhere to a single, uniform way of life.").

³²⁸ Randy E. Barnett, *A Law Professor's Guide to Natural Law and Natural Rights*, 20 HARV. J.L. & PUB. POL'Y 655, 662 (1997) (contrasting natural law with social construction theory).

³²⁹ See JOHN FINNIS, MORAL ABSOLUTES: TRADITION, REVISION, AND TRUTH (1991); Mark C. Murphy, *Natural Law and the Moral Absolute Against Lying*, 41 AM. J. JURIS. 81, 86-91 (1996) (analyzing Finnis' account of the moral absolute against lying).

³³⁰ See KING, *supra* note 295, at 293 ("[A]n unjust law is a human law that is not rooted in eternal and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust."). See also George H. Taylor, *Race, Religion, and Law: The Tension Between Spirit and Its Institutionalization*, 6 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 51, 65 n.98 (describing King as an "adherent[] of natural law"); Blake D. Morant, *The Teachings of Dr. Martin Luther King, Jr. and Contract Theory: An Intriguing Comparison*, 50 ALA. L. REV. 63, 75-77 (1998); David A. J. Richards, *Ethical Religion and the Struggle for Human Rights: The Case of Martin Luther*

nature as a basis for nonviolence also may look like a variant on “natural” law, as may Gandhi’s description of *ahimsa* as an extension of the “unity of all life”, which is notable for its abstraction and moral elevation.³³¹

While these philosophies do promise a highly robust theory of nonviolence, there are two problems with creating a natural law basis for a jurisprudence of nonviolence: First, a characterization of Gandhi, King, and West as “pure” natural law theorists who never deviate from absolute principles is overly simplistic: Gandhi crafted an ideal of *unavoidable* violence, by recognizing that some violence was inevitable, and, indeed, necessary.³³² In addition, King once believed (though later appeared to repudiate that belief) that tyranny, or the “spread and growth of an evil force” such as “totalitarian[ism]” created an exception to his doctrine of nonviolence.³³³ Furthermore, as has been noted, King’s rhetoric grew more aggressive toward the end of his life: in 1966, King advocated the use of nonviolent, though “militant and extreme” tactics that might “disrupt the flow of” Chicago to protest Mayor Daley’s “trick[y]” refusal to fix the slums.³³⁴ Finally, despite West’s assertion that violence is “never” justified, she otherwise appears to abhor absolutes in legal dogma, advocating instead “particularity” and “context” in decision-making.³³⁵

Second, a nonviolent jurisprudence that resembles absolutist natural law may be antipathetic to feminist, critical race, and queer theorists, who have excellent reasons for rejecting very strong (or perhaps any) natural law principles. Natural law, which evokes images of justice that resemble the perfection of Plato’s Forms,³³⁶ is at odds with equal dignity theorists’ emphasis on social construction.³³⁷

Equal dignity theorists might also reject natural law as a basis for a nonviolent legal theory because natural law principles have oppressed the underclass throughout intellectual history. Thomas Aquinas, one of the

King, Jr., 72 FORDHAM L. REV. 2105, 2143 (2004) (making the connection between King and universal law, and noting that “King achieves . . . a universal ethical voice, timeless and beyond race.”).

³³¹ See Morant, *supra* note 330, at 76-77 (describing natural law as reflective of God’s will, therefore becoming a higher authority and one that retains its lofty tenets of morality and rationality).

³³² See *supra* text accompanying note 39.

³³³ See KING, *supra* note 67, at 39.

³³⁴ DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE 490, 490-491 (1986) (quoting King, “We’ll use something that avoids violence, but becomes militant and extreme enough to disrupt the flow of the city. I know it will be rough on them when they have to get 200 people off the Dan Ryan [Expressway], but the only thing I can tell them is, which do you prefer, this or a riot?”).

³³⁵ See WEST, CARING FOR JUSTICE, *supra* note 2, at 205-207 (lauding Minow’s advocacy of contextualized decisionmaking).

³³⁶ But see Sarno, *supra* note 327, at 2730-31 (rejecting the relationship between natural law and platonic forms).

³³⁷ See, e.g., *supra* text accompanying notes 244 & 254.

oldest proponents of natural law, famously employed it to demean homosexuals as sinners, an accusation which was then used to justify their persecution.³³⁸ Natural law has also been used as a justification for slavery,³³⁹ segregation,³⁴⁰ and anti-sodomy statutes,³⁴¹ as well as the prohibition on abortion.³⁴²

As a consequence, I propose *qualified* human rights³⁴³ to nonviolence, for which I find support in Gandhi's concept of "unavoidable violence," King's interest in allowing for war to combat the evil voice of tyranny, and equal dignity theorists' general skepticism of absolutes. Based on these insights, I argue that the right to nonviolence may be trumped by a compelling interest in combating totalitarianism or other great threat, or the fact that the use of the violence is otherwise unavoidable.

To determine when violence is "avoidable" or when an "evil force" exists, I again refer to the open, interrogative process pioneered by equal dignity theorists. Assumptions must be interrogated, stories heard. Appropriate factors to consider on the element of "avoidability" may touch

³³⁸ See, e.g., Andrew Koppelman, *Is Marriage Inherently Heterosexual?*, 42 AM. J. JURIS. 51, 70-72 (1997) ("Aquinas had his own argument why marriage was necessarily heterosexual, and why homosexual conduct was necessarily inferior to it. . . . He thinks that homosexual conduct can be shown to be contrary to natural law . . . [and he concludes] elsewhere that homosexual intercourse is one of the worst of the vices of lust, worse even than rape . . .").

³³⁹ See, e.g., James Muldoon, *Spiritual Freedom—Physical Slavery: The Medieval Church and Slavery*, 3 AVE MARIA L. REV. 69, 72 (2005) ("[T]here were long-standing justifications for slavery that Christian thinkers adopted in the course of developing a Christian social ethic. These justifications were drawn from ancient philosophy as in the case of Aristotle's theory of natural slavery . . .").

³⁴⁰ Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 936 (1986) (reviewing the history of the Civil Rights Act and noting that "not all courts agreed that the Civil Rights Act secured these rights or that access to places of public accommodation was a natural right of American citizenship."). See also Paul Savoy, *The Spiritual Nature of Equality: Natural Principles of Constitutional Law*, 28 HOW. L.J. 809, 834 (1985) (making connections between segregation and natural law); Michael W. Dowdle, Note, *The Descent of Antidiscrimination: On the Intellectual Origins of the Current Equal Protection Jurisprudence*, 66 N.Y.U. L. REV. 1165, 1207 (1991) (tracing natural law's relationship to segregation).

³⁴¹ The question posed by the "laws of nature" exception to the interjurisdictional marriage recognition principle is whether legally endorsed homosexual marriages, involving (as they must) societal approval and endorsement of homosexual conduct, are contrary to natural law. An idea of the older attitude in Anglo-American jurisprudence towards homosexual conduct (or "sodomy" as it was generally known) can be gleaned from a listing of a legal maxim in old Law-French in the old Corpus Juris: "*Sodomie est crime de majeste vers le Roy Celestre*," and translated in a footnote as "Sodomy is high treason against the King of Heaven." At common law "sodomy" and the phrase "infamous crime against nature" were often used interchangeably.

See Raymond B. Marcin, *Natural Law, Homosexual Conduct, and the Public Policy Exception*, 32 CREIGHTON L. REV. 67, 67 (1998).

³⁴² See, e.g., JOHN M. FINNIS, RESTRICTING LEGALISED ABORTION IS NOT INTRINSICALLY UNJUST, IN COOPERATION, COMPLICITY AND CONSCIENCE: PROBLEMS IN HEALTHCARE, SCIENCE, LAW AND PUBLIC POLICY 209 (Helen Watt ed., 2005); HADLEY ARKES, NATURAL RIGHTS AND THE RIGHT TO CHOOSE 72-111 (2002).

³⁴³ A jurisprudence of nonviolence naturally applies to animal rights and other ecological contexts, but I will reserve that application for further articles.

upon whether the violence has a disparate impact on men and women, the impact of the violence on “intersectional” identities, and whether it perpetuates violence against the underclass via social constructionism, subordination, or other technologies. Furthermore, if the violence would guard against tyranny, insurrection, or mass public violence, yet seems so dangerous in terms of a slippery slope, it may again be prohibited as being never justified,³⁴⁴ or, violative of *agape*.

This jurisprudence of violence that I have thus far sketched out may be engaged in a variety of ways. When employed in works of theory, it may be used in the quasi-“grand theory” tradition to examine a host of legal concerns. Or, it may partner with critical race, feminist, and queer legal theorists to help further develop theories of justice. Or it may just be used as a reference point in jurisprudential analyses, and not take center stage at all.

In practice, it may be used in constitutional, criminal, tort, regulatory, or international contexts, to study whether public or private actions are permissible. Moreover, a nonviolent jurisprudence may not only call for prohibitions on private or state violence, but also positive state support of programs that teach individuals how to connect, nurture, and perform the ethic of care.

In the remainder of this Article, however, I will limit myself to positing a *constitutional* theory that analyzes whether a state action causes impermissible violence – that is, whether the state has violated my proposed fundamental right to nonviolence under substantive due process.

V. APPLYING THE THEORY: THE CONSTITUTIONAL CASE

In this section, I will demonstrate that the Supreme Court has already announced a commitment to nonviolence, specifically in its privacy cases, which have been decided on substantive due process grounds. Second, using this constitutional authority, as well as the work of Gandhi and King, and the host of equal dignity theories, I will lay out the formula for analyzing a constitutional theory of nonviolence that is based on substantive due process. Third, I will show the theory in practice, applying it to *Gonzales v. Carhart*,³⁴⁵ the 2007 case on the federal Partial-Birth Abortion Ban Act.

³⁴⁴ See *supra* text accompanying notes 68, 320 & 322.

³⁴⁵ *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007).

A. Toward a Constitutional Theory of Nonviolence: Tracing a constitutional commitment to nonviolence in the Supreme Court's privacy cases

A constitutional theory of nonviolence may find roots in substantive due process, and constitute an extension of the "privacy" jurisprudence made famous by such cases as *Griswold v. Connecticut*,³⁴⁶ *Eisenstadt v. Baird*,³⁴⁷ *Loving v. Virginia*,³⁴⁸ *Meyer v. Nebraska*,³⁴⁹ *Roe v. Wade*,³⁵⁰ *Planned Parenthood v. Casey*,³⁵¹ *Cruzan v. Missouri Department of Health*,³⁵² *Lawrence v. Texas*,³⁵³ and *Stenberg v. Carhart*.³⁵⁴ Specifically, in *Griswold*, *Eisenstadt*, *Loving*, and *Meyer* the Court identified contraception, marriage, sex, and abortion, respectively, as fundamental rights that are "deeply rooted" in the U.S. history and tradition and "implicit in the concept of ordered liberty."³⁵⁵ Because these rights were deemed to be fundamental, the Court applied strict scrutiny to state and federal regulation, a level of scrutiny requiring that relevant governmental bans are narrowly tailored to serve a compelling state interest.³⁵⁶ In more recent cases, such as *Casey*, *Cruzan*, and *Lawrence*, the Court has determined that individuals have "liberty"—not "fundamental"—interests that are implicated by abortion regulations, state imposition of medical treatments, and anti-sodomy statutes; in those cases, the Court applied what appears to be a heightened, but not strict, scrutiny.³⁵⁷

³⁴⁶ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

³⁴⁷ *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

³⁴⁸ *Loving v. Virginia*, 388 U.S. 1 (1967).

³⁴⁹ *Meyer v. Nebraska*, 262 U.S. 390 (1923).

³⁵⁰ *Roe v. Wade*, 410 U.S. 113 (1973).

³⁵¹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

³⁵² *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261 (1990).

³⁵³ *Lawrence v. Texas*, 539 U.S. 558 (2003).

³⁵⁴ *Stenberg v. Carhart*, 530 U.S. 914 (2000).

³⁵⁵ See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (describing tests for determining whether a right is fundamental).

³⁵⁶ *Glucksberg*, 521 U.S. at 721.

³⁵⁷ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 915 (1992) (Stevens, J., concurring in part and dissenting in part, in which he applied the "undue burden" standard as opposed to classic "strict scrutiny" ("In counterpoise is the woman's constitutional interest in liberty. One aspect of this liberty is a right to bodily integrity, a right to control one's person.")); see also *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261, 278 (1990) ("The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions."); Pamela S. Karlan, *Loving Lawrence* 5 (Stanford Pub. Law & Legal Theory Working Paper Series, Paper No. 85, 2004), available at <http://www.ssrn.com/link/stanford-public-law.html> ("In prior substantive due process cases, the Supreme Court had stressed the importance of providing 'a careful description of the asserted fundamental liberty interest.' If the liberty interest is fundamental, then strict scrutiny applies: a reviewing court can uphold the government's restriction only if the

An analysis of these cases and others reveals that the Court is quite sympathetic to the politics of nonviolence, and in many instances appears committed to safeguarding people from a variety of violent behaviors through substantive due process. The Court in these cases has prohibited unwarranted state invasion and compulsion upon the person and her privacy, defining "invasion" and "compulsion" in ways that are not only consistent with the limited "physical" definitions of force proffered by the M.P.C.,³⁵⁸ but also with equal dignity theorists' definitions of violence as invasive or compelled fractures of care and connectivity. Additionally, the Court has demonstrated its commitment to nonviolence by noticing, as do queer theorists and as did King, the illegitimacy of laws that may inspire private violence.

1. *The Court demonstrates its commitment to nonviolence by protecting individuals against unwarranted "invasion" and "compulsion" under due process.*

In, *Griswold, Eisenstadt, Roe, Casey, Washington v. Harper, Lawrence, and Stenberg. v. Carhart* the Court created rights to be free of unwarranted physical invasion and compulsion through its due process jurisprudence. In so doing, it protects against conduct that qualifies as violence under both mainstream and equal dignity jurisprudence: As stated, the Model Penal Code designates illegal force as force that physically invades or compels without consent, and equal dignity theorists have discerned violence in situations where people are physically or existentially invaded or compelled.³⁵⁹

The *Griswold* Court built its right of privacy (in that case, the privacy right of married couples to use contraceptives) up from the foundation of the First, Third, Fourth, and Fifth Amendments' prohibitions on state acts that invade and compel the private citizenry. In setting forth a substantive due process privacy, it noted the "penumbral" privacy rights conveyed by the First Amendment, which protected groups such as the N.A.A.C.P. from being physically compelled to give over members' names and suffer other

'infringement is narrowly tailored to serve a compelling state interest.' *Lawrence* marks a striking departure from this approach. First with respect to the liberty interest at issue, the Court was magisterial but vague. Second, the Court never reached the question whether to apply strict scrutiny.") (citations omitted); Howard J. Vogel, *The "Ordered Liberty" of Substantive Due Process and the Future of Constitutional Law as a Rhetorical Art: Variations on a Theme from Justice Cardozo in the United States Supreme Court*, 70 ALB. L. REV. 1473, 1498 (2007) ("In more recent years the debate has become more complex as the Court has begun to talk about a category of 'liberty interests' protected by the Due Process Clause that is entitled to some form of heightened scrutiny, which is less than strict scrutiny and greater than traditional scrutiny.") (citations omitted).

³⁵⁸ See *supra* text accompanying note 285.

³⁵⁹ See, e.g., *supra* text accompanying notes 188, 256, & 311-12.

“governmental intrusion,”³⁶⁰ the Third Amendment’s protection “against the quartering of soldiers ‘in any house’ in time of peace without the consent of the owner,”³⁶¹ the Fourth Amendment “protection against all governmental invasions ‘of the sanctity of a man’s home and the privacies of life,’”³⁶² and the Fifth Amendment protection against the compulsion to speak.”³⁶³

Based on these Amendments, the Court indicated that penumbral privacy conveyed a right against state’s physical invasion of the bedroom: “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.”³⁶⁴

In *Eisenstadt*, the court extended the right to use contraceptives to singles, elaborating that a right to be free of psychological or metaphysical invasion prohibits the state from “intru[ding] into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”³⁶⁵ Though the facts of *Eisenstadt* did not contain incidences of state actors physically compelling or invading the petitioners, the Court analogized state prohibitions on sales of contraceptives to such drastic invasions and reaffirmed that its privacy jurisprudence objects to such physical interventions by citing two cases; first, *Skinner v. Oklahoma*, which protected an inmate against forced sterilization (both a physical invasion and compulsion), and second, the First and Fourth Amendment case *Stanley v. Georgia*, which protects us against the state’s “drastic invasion” of a man’s library (even if these included illegal pornography).³⁶⁶

Roe v. Wade also designated a qualified right to be free of a state’s invasion or compulsion. Though the Court refused to find a right “to do with one’s body as one pleases,”³⁶⁷ it grounded the right to abortion in a woman’s privilege to be free of the state’s “impos[ition]”³⁶⁸ of the rigors of childcare, as well as the right to be free from the “distressful life and

³⁶⁰ *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (analyzing *N.A.A.C.P. v. Alabama*’s protection of “freedom to associate and privacy in one’s associations,” as prohibiting the government from compelling groups to disclose membership rosters, and noting “the First Amendment has a penumbra where privacy is protected from governmental intrusion.” *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 462 (1958)).

³⁶¹ *Griswold*, 381 U.S. at 484.

³⁶² *Id.* (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1885)).

³⁶³ *Id.*

³⁶⁴ *Id.* at 485-86.

³⁶⁵ *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (emphasis added).

³⁶⁶ *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

³⁶⁷ *Roe v. Wade*, 410 U.S. 113, 154 (1973).

³⁶⁸ *Id.* at 153.

future” “force[d] upon the woman” by state-mandated “maternity.”³⁶⁹ In addition, the court worried that the absence of an abortion right might cause “imminent” “psychological harm” upon women.³⁷⁰ Beyond this language, which evokes almost Westian³⁷¹ images of a woman being violently raided or overrun by unwanted pregnancy, and being compelled to carry an unwanted fetus to term – the very facts of pregnancy and the declared right to be free of it (under certain conditions) specifically creates a right to be free of a fetus that invades and compels her body. Though the Court nearly annihilated this right with its later determinations that viability testing,³⁷² waiting periods,³⁷³ informed consent procedures,³⁷⁴ and denials of state support³⁷⁵ were not unconstitutional, *Roe* has not yet been overruled. As such, it may still stand as a prohibition on state violence – that is, as an injunction preventing the state’s requirement that women suffer this violence.

The *Roe* Court additionally affirmed nonviolent values by safeguarding women’s “survival,”³⁷⁶ specifying that the right to abortion would be given in absolute terms if it were necessary for the woman’s “health” or “life.”³⁷⁷ Even *Planned Parenthood v. Casey*, which approved the aforementioned waiting periods and informed consent procedures, retained that guarantee.³⁷⁸ 2002’s *Stenberg v. Carhart* (but not 2007’s *Gonzales v. Carhart*) also placed itself in this camp by striking down a Nebraska “partial birth abortion” ban that did not have a health exception.³⁷⁹

Finally, among other due process cases that also protect individuals against invasion and compulsion are *Washington v. Harper*, which permits prisoners to refuse anti-psychotic medication,³⁸⁰ and *Cruzan v. Missouri Department of Health*, which declared the qualified right of a mentally

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ See WEST, CARING FOR JUSTICE, *supra* note 2, at 94-178 (discussing invasive harms, such as unwanted pregnancy).

³⁷² *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 519 (1989).

³⁷³ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 881-87 (1992).

³⁷⁴ *Id.*

³⁷⁵ *Harris v. McRae*, 448 U.S. 297, 326 (1980).

³⁷⁶ Cf. *supra* text accompanying note 251.

³⁷⁷ *Roe v. Wade*, 410 U.S. 113, 164-65 (1973).

³⁷⁸ *Casey*, 505 U.S. at 846. (“[We confirm] the State’s power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a woman’s life or health.”).

³⁷⁹ *Stenberg v. Carhart*, 530 U.S. 914, 937 (2000).

³⁸⁰ *Washington v. Harper*, 494 U.S. 210, 229 (1990) (“The forcible injection of medication into a nonconsenting person’s body represents a substantial interference with that person’s liberty.”).

competent person to refuse medical treatment based the principle that her person “be held inviolable.”³⁸¹

2. *The Court demonstrates a commitment to nonviolence by using substantive due process to strike down laws that threaten “connectivity”*

In *Meyer v. Nebraska*, *Griswold*, *Eisenstadt*, *Loving v. Virginia*, *Roe v. Wade*, and *Lawrence v. Texas*, the Court protects individuals from violence by using substantive due process to strike down laws that threaten connectivity. Using language that casts such laws’ regulations of “relationships”³⁸² and “family,”³⁸³ as “destructive,”³⁸⁴ “invasions,”³⁸⁵ and uses of “harmful” “force,”³⁸⁶ that require people to “care” when they are “unable,”³⁸⁷ it appears to agree with King, Gandhi, and equal dignity theorists who contend that state threats to consensual connectivity qualify as violence. At the very least, the Court is using language that *describes* these state acts as violent.

As far back as 1923, the *Meyer v. Nebraska* Court declared that a prohibition on teaching children foreign language (there, German) violated the Fourteen Amendment’s due process clause in part because it threatened connective family values. The court’s “connection thesis” was made most plain in its effort to distinguish American culture from the values expressed by Plato in *The Republic*, specifically, in its rejection of Plato’s recommendation that children be educated in the following ways: “no parent is to know his own child, nor any child his parent. . . . The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be.”³⁸⁸ Though a thorough reading of the *Meyer* case does not indicate that the Court believed that preventing parents from being fully involved in their children’s education technically qualified as violent, it did

³⁸¹ *Cruzan v. Miss. Dep’t of Health*, 497 U.S. 261, 278 (1990) (quoting *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957)).

³⁸² *Griswold v. Connecticut*, 381 U.S. 479, 485 (1964).

³⁸³ *Moore v. City of E. Cleveland*, 431 U.S. 494, 504 (1977).

³⁸⁴ *Griswold*, 381 U.S. at 485.

³⁸⁵ *Id.* at 516.

³⁸⁶ *Roe v. Wade*, 410 U.S. 113, 153 (1973).

³⁸⁷ *Id.*

³⁸⁸ *Meyer v. Nebraska*, 262 U.S. 390, 401-02 (1923).

affirm the values of connection that feminists, King, and Gandhi asserted were central to nonviolence.³⁸⁹

The more recent “family values” case, *Moore v. City of East Cleveland*, which struck down a “nuclear family” housing ordinance, also demonstrates the court’s dread of laws that inhibit connectivity. There, the Court held that such laws constitute a “force” that prevents a family from coming together.³⁹⁰ Conceivably, though less likely, *Michael H. v. Gerald D.*³⁹¹ may also announce nonviolent values in the form of fostering connectivity, as there the court upheld a California family law presumption in marital paternity under the thesis that such a law “preserve[s] the integrity of the traditional family unit.”³⁹²

Similarly, the court in *Loving v. Virginia* struck down an anti-miscegenation law because it would fracture existential, emotional, as well as physical connectivity by threatening human “survival.”³⁹³ *Griswold*, moreover, did not just protect individuals against a state’s physical invasion of the bedroom, but rather the Court took pains to guard against governmental “invasions”³⁹⁴ that would visit “maximum destructive impact”³⁹⁵ on marital relationships, which it famously described as “a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.”³⁹⁶

In line with this, *Roe*’s creation of an abortion right was rooted not only in the specter of physical invasion, but also the state’s “forc[ing]” a child upon a woman that might not only “distress” her connection with herself in the form of “imminent” “psychological harm,”³⁹⁷ and threaten her connection with the community because of “stigma,” but also “impose”

³⁸⁹ Though I do not want to make too much of this, as it might just be a rhetorical flourish, I will note here that the Court intriguingly phrased its reasons for striking down the prohibition. See *id.* at 402 (“Although such [Platonic] measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.”).

³⁹⁰ Such as the “nuclear family” housing ordinance struck down by *Moore*, 431 U.S. at 504-06.

³⁹¹ *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

³⁹² *Id.* at 130. But cf. *id.* at 141 (Brennan, J., dissenting) (“I cannot accept an interpretive method that does such violence to the charter that I am bound by oath to uphold.”); *Id.* at 142-43 (Brennan, J., dissenting) (“Though different in factual and legal circumstances, these cases have produced a unifying theme: although an unwed father’s biological link to his child does not, in and of itself, guarantee him a constitutional stake in his relationship with that child, such a link combined with a substantial parent-child relationship will do so.”).

³⁹³ *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”). Cf. *supra*, text accompanying note 251.

³⁹⁴ *Griswold v. Connecticut*, 381 U.S. 479, 484 (1964).

³⁹⁵ *Id.* at 485.

³⁹⁶ *Id.*

³⁹⁷ *Roe v. Wade*, 410 U.S. 113, 153 (1973).

upon her and her “family” what West might call a “forced nurturance,”³⁹⁸ that is, the obligation to “care for it”³⁹⁹ (“it” being the child) when they may not be able to.

Finally, *Lawrence v. Texas*, the 2003 case wherein the Court declared a substantive right to same-sex intimacy or connectivity, was also described as a right to be free of violence within the meaning of this Article. The Court condemned the government’s physical and quite frightening invasion of intimate space,⁴⁰⁰ as well as its legislative “intervention” with,⁴⁰¹ and metaphorical “enter[ing]” of the “realm”⁴⁰² of “intimate conduct” that “can be but one element in a personal bond that is more enduring.”⁴⁰³

3. *The Supreme Court has Declared its Commitment to Nonviolence by Recognizing that Some Laws May Incite Private Violence*

In two of its substantive due process cases, namely *Lawrence* and *Casey*, the Supreme Court has also acknowledged the ways in which certain laws may incite private actors to violence. Just as King and equal dignity theorist Kendall Thomas have traced the ways in which discriminatory laws may perpetuate private violence,⁴⁰⁴ the Court, too, has grown conscious of the relationship between state laws and private violence, and struck down laws it fears may be used as an incitement or justification for that violence.

In *Casey*, the court invalidated a Pennsylvania provision requiring that,

³⁹⁸ See WEST, CARING FOR JUSTICE, *supra* note 2, at 105.

³⁹⁹ *Roe*, 410 U.S. at 153.

⁴⁰⁰ The *Lawrence* decision alludes to this fearful brand of state force in two places. First, it describes the events surrounding the reversed *Bowers v. Hardwick*, specifically how “[a] police officer, whose right to enter seems not to have been in question, observed Hardwick, in his own bedroom, engaging in intimate sexual conduct with another adult male.” *Lawrence v. Texas*, 539 U.S. 558, 566 (2003). As has now become well known, this Officer Torick seemed to have had a personal vendetta against Michael Hardwick, and threatened Hardwick with prison rape. See Peter Irons, *What Are you Doing in My Bedroom?*, in THE COURAGE OF THEIR CONVICTIONS 392 (1988), reprinted in LESBIANS, GAY MEN AND THE LAW 125, 127-28 (William B. Rubenstein ed., 1993). The second place where Kennedy alludes to frightening forms of state conduct is in his description of an Irish case declaring that anti-sodomy statutes violated human rights. *Lawrence*, 539 U.S. at 573 (quoting *Dudgeon v. United Kingdom*, 45 EUR. CT. H. R. 52 (1981) (“An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right. He alleged that he had been questioned, his home had been searched, and he feared criminal prosecution. The court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights.”)).

⁴⁰¹ *Lawrence*, 539 U.S. at 578 (“Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”).

⁴⁰² *Id.* (“It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.” (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992))).

⁴⁰³ *Id.* at 567.

⁴⁰⁴ See *supra* text accompanying note 315.

before a married woman might get an abortion, she sign a statement promising that she has told her husband.⁴⁰⁵ The state attempted to defend this provision by stressing that only about 20 percent of the women who obtain abortions are married, [that] . . . about 95 percent notify their husbands of their own volition . . . [and] that since some of these women will be able to notify their husbands without adverse consequences or will qualify for one of the exceptions, the statute affects fewer than 1 percent.⁴⁰⁶

The Court, however, rejected the state's argument with the observation that

there are millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands. Should these women become pregnant, they may have very good reasons for not wishing to inform their husbands of their decision to obtain an abortion. Many may have justifiable fears of physical abuse, but may be no less fearful of the consequences of reporting prior abuse to the Commonwealth of Pennsylvania. . . . [Yet] these women are not exempt from the §3209's notification requirement.⁴⁰⁷

As a consequence of the danger of spousal violence, the court struck down the notice requirement, responding to Pennsylvania's argument that "fewer than one percent" would be affected with language demonstrating a very strong commitment to nonviolence: "The analysis does not end with the one percent of women upon whom the statute operates, it begins there."⁴⁰⁸

The Court also declared its abhorrence of laws that might inspire private violence in *Lawrence*. When giving its reasons for overturning *Bowers*, the Court observed that "[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."⁴⁰⁹ While this passage may be read as a

⁴⁰⁵ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895.

⁴⁰⁶ *Id.* at 894.

⁴⁰⁷ *Id.* at 893.

⁴⁰⁸ *Id.* at 894.

⁴⁰⁹ *Lawrence*, 539 U.S. at 575. Another feature to consider here is the Court's use of the word "demean," which Kennedy uses three times. See *id.* at 567; *id.* at 558 ("To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."); *id.* at 575 ("[*Bowers*'] continuance as precedent demeans the lives of homosexual

declaration that anti-sodomy laws may inspire bigots to deny homosexuals jobs and housing (which may itself qualify as a kind of violence, depending upon one's definition), its language also contains a not-so-veiled reference to more bloody kinds of force. In particular, Kennedy dreads "discrimination" that occurs in "private" – a chilling picture, particularly as homophobic conduct that occurs outside of the public gaze may create specifically physical hazards.⁴¹⁰ This hazard was, in fact, realized in the case of *Bowers*, when Michael Hardwick was beaten by three men who may have been plainclothes police officers.⁴¹¹ The Supreme Court has announced a commitment to nonviolence through its substantive due process jurisprudence, which has struck down laws that unjustifiably invade or compel, fracture connectivity, or inspire private violence.

How strong is this commitment? Obviously, not nearly strong enough. The Court has not declared the current war illegal, nor has it announced a constitutional right against domestic violence or poverty, nor has it addressed a multitude of other issues that introduce violence into our lives. Nevertheless, it creates a foundation upon which to build a jurisprudence of nonviolence, based on the dread of invasion, the value of connectivity, the primacy placed on survival, and the horror of state incitements of private violence.

B. The Proposed Constitutional Standard

As stated, I propose a substantive due process right to nonviolence. This involves asking at least three questions: First, is the state action

persons."); *Id.* at 578 ("The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.").

What, precisely, does Kennedy mean by this term? One intriguing possibility is that Kennedy believes that anti-sodomy statutes reduce gay identity to sex acts, just as a "sex right" foundation for a Griswoldian marital right would reduce marriage to heterosexual sex. What is wrong with that? In reducing identity to a specific set of sex acts through the power of state enactments and punishments, the state would be imposing, or even forcing, a socially constructed identity upon gays and lesbians, which David Cruz identifies as a type of homophobic force. Through punishment, then, the State would be coercing gays and lesbians "to affirm gender beliefs or engage in gendered behavior" – that is, by the physical example of their punishment, they would involuntarily affirm to society that gays and lesbians are reducible to sex, and that that sex is demonstrably bad. *See Cruz, supra* note 313, at 1056. And if this compulsion qualifies as a kind of violence, then that would simply be another iteration of state violence, and thus these passages of Kennedy's prove another announcement of his nonviolent values.

⁴¹⁰ Scholars have noted the connections between anti-sodomy statutes and gay bashing. *See Thomas, supra* note 315.

⁴¹¹ *See Ayres, supra* note 257, at 392 ("Another form of violence associated with sodomy laws is homophobic violence. For instance, in recounting the 'untold' facts of *Bowers*, Kendall Thomas described Hardwick's beating three weeks after his original arrest (for drinking in public) by three men who may have been plainclothes officers.").

violent? Second, if it is, under which standard should the violence be judged? Third, does the violence satisfy that muster?

1. *Is the State Action Violent?*

As to the question of whether a state action qualifies as violent, I posit that we draw upon the work of Supreme Court jurisprudence, as well as upon King, Gandhi, cultural feminists, and other mentioned equal dignity theorists to determine whether the challenged conduct qualifies as “violence.” As discussed in Section IV, this requires that the process of answering this question be particularized, pragmatic, be critical of absolutes, conscious of social construction, and involve storytelling. Through this method, we may ask whether the state action 1) causes injurious force or force that causes serious bodily harm; 2) invades or “penetrates” the body or other realm of privacy; 3) compels without consent; 4) fractures human connection, including “intersectionalities;” 6) subordinates; 5) threatens “survival;” 6) legitimates or inspires private violence; 7) violates *satyagraha* or *ahimsa*; 8) or constitutes a withdrawal of *agape*.

2. *If the Conduct is Violent, Under which Standard do we Review it?*

Once we determine that state conduct qualifies as “violent,” I advocate that we move to an elevated standard of review. As noted, not all of the above-mentioned privacy cases were analyzed under strict scrutiny – namely, *Cruzan*, *Casey*, *Stenberg*, and *Lawrence*. There, the Court invoked “liberty interests” as opposed to “fundamental” ones,⁴¹² and employed what has been called “heightened review.”⁴¹³ I propose that we use a similarly adaptable test, in this case, one which would operate on a “sliding scale” basis, and adopt “an approach that allows for varying levels of scrutiny.”⁴¹⁴ *If we deem that the state has committed violence, we gauge the degree of scrutiny based upon the severity of the violence: The more severe the state violence, the higher the scrutiny.* Thus, a low level of violence would receive minimum scrutiny, intermediate levels of violence would require an important state justification, and high levels of violence could only withstand scrutiny if narrowly tailored to fulfill the most

⁴¹² See *supra* text accompanying note 357.

⁴¹³ *Id.*

⁴¹⁴ *Plyler v. Doe*, 457 U.S. 202, 231 (1982) (Marshall, J, concurring). This test is adapted from the equal protection context, namely Justice Marshall’s famous concurrence in *Plyler v. Doe*, which invalidated a Texas law that “den[ie]d undocumented school-age children the free public education that [the state] provides to children who are citizens of the United States” even though undocumented children were not a suspect class, and education did not qualify as a fundamental right. *Id.* at 205. See ALLAN IDES & CHRIS MAY, CONSTITUTIONAL LAW: INDIVIDUAL RIGHTS 318 (4th ed. 2007).

compelling reason. This sliding scale approach, as opposed to one-size-fits all choice of minimum, intermediate, or strict scrutiny, is far more in keeping with the open and interrogative jurisprudence advocated in this article, as well as its anti-absolutism.

Happily, the writings of both King and Ghandi are immensely helpful in filling out the contours of the standard that I propose.

a. The Severity or “Avoidability” of the Violence

Once a state action qualifies as violence, the “sliding scale” scrutiny approach that I advocate first inquires about the severity of the violence. Here, Gandhi’s writings on nonviolence are quite useful in shaping this question. Gandhi believed that all life was violent, but objected to what he called “avoidable” violence.⁴¹⁵ A human being’s simple existence, for example, is not a severe form of violence, since it is unavoidable. However, if state violence is “avoidable,” then may be so severe that it can only be justified by a significant exigency, the subject of the next prong of inquiry.

While Gandhi believed that much violence was unavoidable, his tolerance for suffering remains untenable for most people, as, famously, he offered the practice of *satyagraha* as a remedy for Hitler’s genocide.⁴¹⁶ Furthermore, his philosophy of *satyagraha* also approved of rather extreme lifestyle and dietary adaptations, some of which may harm the adherent’s health.⁴¹⁷

Yet Gandhi’s thoughts on unavoidable violence need not be the last word. As the proposed jurisprudence of nonviolence calls for an “open” process that interrogates different meanings of a violence’s “severity” or “avoidability,” we may test out the extremity of the questioned violence by determining whether it qualifies under all or most of the above-mentioned

⁴¹⁵ See *supra* text accompanying notes 38-39.

⁴¹⁶ Regarding Hitler, see MAHATMA GANDHI, *The Jews*, in 74 THE COLLECTED WORKS OF MAHATMA GANDHI 240-41 (“If I were a Jew and were born in Germany and earned my livelihood there, I would claim Germany as my home even as the tallest gentile German may, and challenge him to shoot me or cast me in the dungeon; I would refuse to be expelled or to submit to discriminating treatment. And for doing this, I should not wait for the fellow Jews to join me in civil resistance but would have confidence that in the end the rest are bound to follow my example. If one Jew or all the Jews were to accept the prescription here offered, he or they cannot be worse off than now. And suffering voluntarily undergone will bring them an inner strength and joy . . . The calculated violence of Hitler may even result in a general massacre of the Jews by way of his first answer to the declaration of such hostilities. But if the Jewish mind could be prepared for voluntary suffering, even the massacre I have imagined could be turned into a day of thanksgiving and joy that Jehovah had wrought deliverance of the race even at the hands of the tyrant. For to the God-fearing, death has no terror.”). See also GANDHI, *supra* note 15, at 420-21 (“Martin Buber, the Jewish Philosopher, protested at Gandhi’s willingness to prescribe satyagraha without understanding German realities. The sufferings of Indians in South Africa or in British-ruled India paled, he said, before the Jewish experience of Nazi horrors.”).

⁴¹⁷ See *supra* text accompanying note 30.

definitional factors. That is, is the violence a physical or existential invasion and compulsion? Does it also rupture the unity of life and the community? Does it hurt those with intersectional identities? Additionally, is it an abandonment of *satyagraha* or a withdrawal of *agape*? Does it make the victim subordinate and force negative social constructions upon him? And does it also threaten the victim's survival and inspire private violence? The more factors under which the violence qualifies, the more severe or avoidable (that is, the less like a human being simply being alive) it may be.

Examples of "severe" or "avoidable" state violence may include capital punishment,⁴¹⁸ allowing the sales of guns,⁴¹⁹ failure to stop rape in prison,⁴²⁰ the prohibition on same-sex marriage,⁴²¹ the incarceration of Japanese citizens upheld in the notorious case *Korematsu*,⁴²² the use of waterboarding in interrogation,⁴²³ and the United States' use of U.S. troops in the Iraq war.⁴²⁴

b. Does the Violence Fulfill a State Interest?

The more intense or avoidable state violence is, the more exacting must be the state's justification for it, should the violence pass constitutional muster. King's work and words provide ample authority for helping us determine this "state's interest" prong of my proposed test, as he left us with guidance for how to determine whether violence is ever justified as fulfilling a state objective.

⁴¹⁸ Capital punishment, though it fulfills the compelling aim of retribution and incapacitation (and possibly deterrence), is not a last option, as the offender may live behind bars for the rest of her life. See *Gregg v. Georgia*, 428 U.S. 153, 169-74, 207 (1976) (upholding the Georgia death penalty against an Eighth Amendment challenge).

⁴¹⁹ *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821 (2008) (declaring that the Second Amendment entitles individuals to possess firearms and striking down a District of Columbia ban on the sales of guns).

⁴²⁰ *Farmer v. Brennan*, 511 U.S. 825 (1994) (requiring deliberate indifference for a prison rape claim under the Eighth Amendment).

⁴²¹ States that bar same-sex marriage via constitutional amendments include Nebraska, Nevada, and Oregon. States that bar same-sex marriage via constitutional amendment and statutory enactment include Alaska, Arkansas, Georgia, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, North Dakota, Ohio, Oklahoma, Texas, and Utah. See Erik J. Lobsinger, Comment, *A National Model for Reconciling Equal Protection for Same-Sex Couples with State Marriage Amendments*: Alaska Civil Liberties Union ex rel. *Carter v. Alaska*, 23 ALASKA L. REV. 117, 118, n.2 (2006). See also HUMAN RIGHTS CAMPAIGN, STATEWIDE MARRIAGE PROHIBITIONS (2009), available at http://www.hrc.org/documents/marriage_prohibitions_2009.pdf.

⁴²² *Korematsu v. United States*, 323 U.S. 214, 245 (1944).

⁴²³ See, e.g., John R. Crook, *Senior U.S. Officials Acknowledge Waterboarding of Three Suspected Terrorists; Administration Defends Practice*, 102 AM. J. INT'L L. 359 (2008).

⁴²⁴ See *supra* text accompanying note 12, see *infra* text accompanying note 432.

Though King later took an absolutist stance against violence, a position that I have explained I find too unworkable,⁴²⁵ he admitted that he once believed that violence might be justifiable to resist tyranny.⁴²⁶ As he wrote in 1960, in *Pilgrimage to Nonviolence*:

While I was convinced during my student days of the power of nonviolence in group conflicts within nations, I was not yet convinced of its efficacy in conflicts between nations. I felt that while war could never be positive or absolute good, it could serve as a negative good in the sense of preventing the spread and growth of an evil force. War, I felt, horrible as it is, might be preferable to surrender to a totalitarian system. But more and more I have come to the conclusion that the potential destructiveness of modern weapons of war totally rules out the possibility of war ever serving again as a negative good. If we assume that mankind has a right to survive then we must find an alternative to war and destruction The choice today is no longer between violence and nonviolence. It is either nonviolence or nonexistence.

I am no doctrinaire pacifist. I have tried to embrace a realistic pacifism. Moreover, I see the pacifist position not as sinless but as the lesser evil in the circumstances. Therefore I do not claim to be free from the moral dilemmas that the Christian nonpacifist confronts.⁴²⁷

Though King indicates in *Pilgrimage to Nonviolence* that, as of 1960, he would never countenance violence, he nevertheless suggests that he *had* been ambivalent about the “dilemma” of using nonviolence in the face of an international totalitarian force. Furthermore, his rhetoric did grow more aggressive toward the end of his life. As noted above, in 1966, King became so frustrated with then Mayor Richard Daley’s “tricks,” that is, his refusal to combat poverty in Chicago, that he advocated using “militant” and “extreme” tactics, such as “disrupting the flow” of the Dan Ryan expressway in order to protest inequality in the city.⁴²⁸

In order to avoid a “natural law” absolutism, I call for adapting King’s searching, conflicted theories of violence as a “negative good” and his embrace of “moral dilemmas” in the workings of this prong of the

⁴²⁵ See *supra* text accompanying notes 324-44.

⁴²⁶ See *supra* text accompanying note 333.

⁴²⁷ KING, *supra* note 67, at 39.

⁴²⁸ See GARROW, *supra* note 334, at 490-91.

proposed “sliding scale” scrutiny. King’s philosophy creates a foundation for a contextual economy of violence. For example, under nonviolence’s version of strict scrutiny, warfare may be permitted if narrowly tailored to combat martial force employed by a totalitarian, international enemy,⁴²⁹ while “militant” tactics that do not involve bloodshed, but conceivably could qualify as an intermediate level of “violence” under my very broad, contestable definition of the term, may be permitted to combat evils such as the poverty that King protested in 1966.⁴³⁰ On the lowest end of the spectrum, state acts of violence that are unavoidable (e.g., byproducts of simply existing) may be justified if they are reasonable means used for reasonable ends.⁴³¹

In other words, when determining whether violence satisfies a state interest on my proposed “sliding scale”, we may ask whether even extreme or “avoidable” violence may be permissible as a “negative good” that must be used to resist totalitarianism, tyranny, and other “evils.” So, we may inquire, in employing severe violence, is the state doing so because it is necessary to prevent the spread of an “evil force,” like Hitler’s Third Reich? Such a scenario would exist where the United States conscripted citizens for a war against an *authentic* imminent threat of a totalitarian international enemy.⁴³² It is also conceivable that the state may use violence to combat domestic tyranny, keeping in mind that King did not believe that violence (that is, the kind using “modern weapons of war,” as quoted above) should ever be used domestically, but that “extreme” and “militant” tactics that did not involve bloodshed could be used to resist poverty and “tricks” the likes of which were used by Mayor Daly. Such state actions, then, *may* be permissible where the state police uses physical force to prevent one individual from wrongfully killing another, which is

⁴²⁹ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1964) (striking down an anti-contraception law under strict scrutiny because it invaded “the zone of privacy created by several fundamental constitutional guarantees”); *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (invalidating a classification under equal protection because the interest was insufficiently compelling); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986) (determining that strict scrutiny under equal protection requires that a law be narrowly tailored, or “fit”).

⁴³⁰ See, e.g., *United States v. Virginia*, 518 U.S. 515, 533 (1996) (setting forth intermediate standard under equal protection, requiring that gender classifications “serve[] ‘important governmental objectives, and that the . . . means employed’ [to fulfill them] are ‘substantially related’ [to those ends]”).

⁴³¹ Cf., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938).

⁴³² See, e.g., THOMAS E. RICKS, *FIASCO: THE AMERICAN MILITARY ADVENTURE IN IRAQ* (2006); BOB WOODWARD, *STATE OF DENIAL* (2006); Saby Ghoshray, *When Does Collateral Damage Rise to the Level of a War Crime?: Expanding the Adequacy of Laws of War Against Contemporary Human Rights Discourse*, 41 CREIGHTON L. REV. 679, 680 n.7 (2008) (“The United States and British troops invaded Iraq under the preventative war paradigm, but the invading armies did not have a specific and relevant United Nations mandate, nor did they have any international authorization.”). See G.A. Res. 1441, U.N. Doc. S/RES/1441 (Nov. 8, 2002), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N02/682/26/PDF/N02682226.pdf?OpenElement>.

an obviously tyrannical act; however, insofar as the state uses “weapons of war” to excess, this would violate the right against nonviolence. Similarly, the state’s incarceration of rapists to punish and incapacitate them for violently injuring their victims (a variant on the use of tactics that would “disrupt” the “flow” of the offenders’ lives in order to meet their tyrannical abuse of the victim) may also satisfy the proposed constitutional inquiry. Again, however, the more severe the state invasion of the offender’s physical and mental boundaries, the more searching would be the constitutional inquiry.

Whether the state uses violence to combat tyranny or “evil,” however, is not the only question. We must also recognize that in giving permission to use violence, we may be taking the risk of “plung[ing] into the abyss” of non-existence.⁴³³ Furthermore, we must recognize that regardless of the choice we make, we are not taking the “sinless position.” This requires us to embrace our moral dilemma.

These mandates prompt us to ask whether, in the State’s use and permission of violence to challenge tyranny, it *itself* is acting like a tyrant? Police use of excessive force,⁴³⁴ martial law,⁴³⁵ prison overcrowding,⁴³⁶ and the government’s promiscuous use of wiretapping⁴³⁷ are among various invasive, and thus violent, state actions that might fail this first prong of heightened scrutiny.

In line with the above analysis concerning the definition of “violence,” I recommend that this inquiry into tyranny be, again, “open,” interrogative,

⁴³³ KING, *supra* note 67, at 40.

⁴³⁴ *Graham v. Connor*, 490 U.S. 386, 396 (1989) (“Determining whether the force used to effect a particular seizure is ‘reasonable’ under the Fourth Amendment requires a careful balancing of ‘the nature and quality of the intrusion on the individual’s Fourth Amendment interests’ against the countervailing governmental interests at stake.” (quoting *United States v. Place*, 462 U.S. 696, 703 (1983))). Because “[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,” *Bell v. Wolfish*, 441 U.S. 520, 559 (1979), however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. See *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985) (“the question [is] whether the totality of the circumstances justify[s] a particular sort of . . . seizure.”). It is also worth noting that a jurisprudence of nonviolence may expand our definitions of excessive force by referencing factors such as fractures of connectivity and compulsion in its analysis.

⁴³⁵ See, e.g., Kirk L. Davies, *The Imposition of Martial Law in the United States*, 49 A.F. L. REV. 67 (2000).

⁴³⁶ See e.g., *Wilson v. Seiter*, 501 U.S. 294, 302 (1991) (requiring prison overcrowding claims to demonstrate wanton behavior such as deliberate indifference); Adam M. Gershowitz, *An Informational Approach to the Mass Imprisonment Problem*, 40 ARIZ. ST. L.J. 47, 64 (2008) (“[I]t is . . . clear that the Supreme Court has no appetite for eliminating the core problem of prison overcrowding except when it manifests itself in other appalling conditions.”).

⁴³⁷ See George W. Bush, President’s Radio Address on Homeland Security (Dec. 17, 2005), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2005/12/20051217.html> (describing the National Security Agency’s surveillance program).

and involve a variety of methods, including storytelling. Those who analyze this question, also, must be aware that “violence” and “tyranny” are incomplete and unsteady social constructions.

VI. APPLYING THE THEORY TO GONZALES V. CARHART

In the following sections, I will first describe the abortion procedure outlawed in *Gonzales v. Carhart*. Next, so as to put the case in context, I will discuss its departure from an earlier case, 2000’s *Stenberg v. Carhart*, which invalidated a nearly identical Nebraska “partial birth abortion ban” act. Finally, I will analyze the abortion procedure at stake, and determine whether *Gonzales v. Carhart* was wrongly decided according to the proposed jurisprudence of nonviolence.

A. The “Intact D & E” Prohibited by the Federal Ban, as Upheld by *Gonzales v. Carhart*

In its 2007 *Gonzales v. Carhart* opinion, the Supreme Court upheld the federal government’s so-called “Partial Birth Abortion Ban Act.”⁴³⁸ The act forbids a particular type of abortion procedure, known as “intact dilation and extraction,” or “intact D & E,” or “D & X,”⁴³⁹ whether the procedure occurs pre- or post-viability,⁴⁴⁰ and whether or not the procedure is necessary for the woman’s health.⁴⁴¹

Intact D & E is a variant on the non-intact dilation and extraction (“non-intact D & E”) procedure, which is used to perform abortions in the second or third trimester; D & E procedures are used to perform abortions in 10 to 15 percent of all second trimester cases.⁴⁴² The Court in the 2000 opinion *Stenberg v. Carhart* and the 2007 decision *Gonzales v. Carhart* describe the specific procedure in markedly different ways.

As detailed in *Stenberg*, which struck down the Nebraska “partial birth abortion ban,”⁴⁴³ physicians performing non intact D & E procedures “disarticulate”⁴⁴⁴ or “dismember”⁴⁴⁵ the fetus in utero before extracting it

⁴³⁸ *Gonzales v. Carhart*, 127 S. Ct. 1610, 1614 (2007); 18 U.S.C. § 1531 (Supp. IV 2000).

⁴³⁹ *Stenberg v. Carhart*, 530 U.S. 914, 927 (2000). This Article will use the term “intact D & E.”

⁴⁴⁰ *Gonzales*, 127 S. Ct. at 1627 (“The Act does apply both previability and postviability.”).

⁴⁴¹ The Court specified that the absence of a health exception in the partial birth abortion ban act did not invalidate the law because of the physician disagreement as to whether intact D & E preserves health: “[t]he medical uncertainty over whether the Act’s prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the act does not impose an undue burden.” *Id.* at 1637.

⁴⁴² *Id.* at 1642 n.3 (noting that 85 to 90 percent of all abortions occur in the first trimester, using the vacuum aspiration method).

⁴⁴³ *Stenberg*, 530 U.S. at 929-30.

⁴⁴⁴ *Id.* at 925.

from the fetus. Specifically, intact D & E involves the following procedures:

removing the fetus from the uterus through the cervix 'intact,' *i.e.*, in one pass, rather than in several passes. It is used after 16 weeks at the earliest, as vacuum aspiration becomes ineffective and the fetal skull becomes too large to pass through the cervix. In intact D & E proceeds in one of two ways, depending on the presentation of the fetus. If the fetus presents head first . . . the doctor collapses the skull; and the doctor then extracts the entire fetus through the cervix. If the doctor presents feet first . . . the doctor pulls the fetal body through the cervix, collapses the skull, and extracts the fetus through the cervix.⁴⁴⁶

The *Stenberg* court also noted that intact D & E procedures may be performed on nonviable fetuses, such as in cases involving fetuses "with abnormal fluid accumulation in the brain,"⁴⁴⁷ or where patients have "prior uterine scars, or [where] . . . induction of labor would be particularly dangerous."⁴⁴⁸ Intact D & E abortions are performed in a very small percentage of cases; out of approximately 1.3 million abortions performed in the U.S. annually,⁴⁴⁹ intact D & E may be performed in between 640 to 5,000 of cases.⁴⁵⁰

Seven years later, the *Gonzales v. Carhart* court described intact D & E in much more vivid terms. Writing for the majority, Justice Kennedy characterized it as a procedure requiring physicians to "grasp" and "grab" the fetus with forceps, "pull[] it back through the cervix and vagina," then "tear" and "rip[]" it apart.⁴⁵¹ Kennedy also acknowledged that in intact D & E,

[t]he process of evacuating the fetus piece by piece continues until it has been completely removed. A doctor may make 10 to 15 passes with the forceps to evacuate the fetus in its entirety, though sometimes removal is completed with fewer passes. Once the fetus has been evacuated, the

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.* at 927.

⁴⁴⁷ *Id.* at 929.

⁴⁴⁸ *Stenberg*, 530 U.S. at 929.

⁴⁴⁹ *Gonzales*, 127 S. Ct. at 1620.

⁴⁵⁰ *Stenberg*, 530 U.S. at 929.

⁴⁵¹ *Gonzales*, 127 S. Ct. at 1621.

placenta and any remaining fetal material are suctioned or scraped out of the uterus. The doctor examines the different parts to ensure the entire fetal body has been removed.⁴⁵²

B. The Law of Stenberg v. Carhart Compared to that of Gonzales v. Carhart

As might be obvious from these dueling descriptions of the procedure, the *Stenberg* and *Gonzales* courts held different attitudes about the nature of intact D & E. If anything, *Gonzales* decision appears a complete reversal of *Stenberg* considering how synonymous were the respective federal and state laws at stake in those cases.

Stenberg invalidated the Nebraska “partial birth abortion ban act,” because it created an undue burden on nonintact D & E procedures used to abort nonviable fetuses, and did not contain a health exception. With respect to the undue burden on nonintact D & E’s, the Court recounted *Casey*’s development of the undue burden standard,⁴⁵³ which prohibits a “substantial obstacle”⁴⁵⁴ from being placed in the path of the woman seeking the abortion of a nonviable fetus. The Court determined that such an obstacle existed because the Nebraska statute’s prohibited abortions performed where a “substantial portion”⁴⁵⁵ of the living fetal body was extracted during the procedure. Observing that a “substantial portion” could be pulled out during a nonintact D & E procedure, “say an arm or leg,”⁴⁵⁶ the Court determined that the Nebraska law constituted an undue burden on a procedure used in 10 to 15 percent of cases, including cases involving nonviable fetuses.

The Court also deemed the law invalid because of its lack of a health exception, observing that both *Roe* and *Casey* prohibited post-viability bans where such abortions were necessary “for the preservation of the life or health” of the patient.⁴⁵⁷ Though Nebraska provided evidence that some physicians believed that intact D & E creates more hazard than safety (“The Association of American Physicians and Surgeons, et al., *amici* supporting Nebraska, argue that elements of the D & X procedure may create special risks”⁴⁵⁸) the Court reviewed the District Court’s

⁴⁵² *Id.*

⁴⁵³ *Stenberg*, 530 U.S. at 938. See also *id.* at 948 (O’Connor, J., concurring) (submitting that “Nebraska’s statute is unconstitutional . . . [because] it imposes an undue burden on a woman’s right to choose terminate her pregnancy before viability.”), and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 845-46 (1992) (delineating undue burden standard).

⁴⁵⁴ *Casey*, 505 U.S. at 877.

⁴⁵⁵ *Stenberg*, 530 U.S. at 938 (quoting NEB. REV. STAT. ANN. § 28-326(9) (Supp. 1999)).

⁴⁵⁶ *Id.* at 939.

⁴⁵⁷ *Id.* at 930 (quoting *Casey*, 505 U.S. at 879 and *Roe v. Wade*, 410 U.S. 113, 164-65 (1973)).

⁴⁵⁸ *Stenberg*, 530 U.S. at 933.

examination of contrasting medical findings. Namely, the District Court's analysis of "significant medical authority" indicated that intact D & E "reduces operating time, blood loss and risk of infection; reduces complications from bony fragments; reduces instrument-inflicted damage to the uterus and cervix; prevents the most common causes of maternal mortality . . . and eliminates the possibility of 'horrible complications' arising from retained fetal parts."⁴⁵⁹ Based on these findings, the Court determined that the law required a health exception. The fact that physicians disagreed weighed in favor of the law's illegitimacy: "the division of medical opinion about the matter at most means uncertainty, a factor that signals the presence of risk, not its absence."⁴⁶⁰

In drafting the federal law at issue in *Gonzales v. Carhart*, Congress copied most of the Nebraska statute, attempting to cure its fatal flaws by making three changes. First, it changed statutory language by replacing the aforementioned "substantial portion" language with a prohibition on aborting fetuses where "the entire fetal head is outside the body of the mother" or "any part of the fetal trunk past the navel is outside the body of the mother."⁴⁶¹ Congress also added an "overt-act requirement."⁴⁶² More than that, it bolstered the medical findings upon which the Nebraska statute had been founded, citing "doctors who testified" that the "alleged health advantages [of intact D & E] were based on speculation without scientific studies to support them."⁴⁶³ Premised on this, Congress made "findings"⁴⁶⁴ that "there existed a medical consensus that the prohibited procedure is never medically necessary,"⁴⁶⁵ as well as the fact that "no medical schools provide instruction"⁴⁶⁶ on intact D & E.

With respect to the change in statutory language, the *Gonzales* court determined that the federal law's "identification of specific anatomical landmarks" and "adding an overt-act requirement" "differentiates the Act from the statute at issue in *Stenberg*."⁴⁶⁷ Namely, it "extinguishes any lingering doubt as to whether the act covers the prototypical [non-intact] D & E procedure."⁴⁶⁸ Also, while the Court acknowledged the falsity of

⁴⁵⁹ *Id.* at 932.

⁴⁶⁰ *Id.* at 937.

⁴⁶¹ *Gonzales v. Carhart*, 127 S. Ct. 1610, 1627 (2007) (citing 18 U.S.C. § 1531(b)(1)(A) (Supp. IV 2000)).

⁴⁶² *Id.* at 1630.

⁴⁶³ *Id.* at 1635.

⁴⁶⁴ *Id.* at 1638.

⁴⁶⁵ *Id.*

⁴⁶⁶ *Gonzales v. Carhart*, 127 S. Ct. 1610, 1638 (2007).

⁴⁶⁷ *Id.* at 1630.

⁴⁶⁸ *Id.* at 1631.

Congress's assertion of medical consensus regarding the medical necessity of intact D & E's,⁴⁶⁹ it established that the rift in medical opinion did not require that the law contain a health exception. Rather, it now *obviated* such a requirement: "The medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden."⁴⁷⁰ This, despite the fact that "[n]one of the six physicians who testified before Congress had ever performed an intact D & E," and one was "not even an ob/gyn."⁴⁷¹ The Court determined that, if physicians did happen to seek a safer method of abortion than "ripping" a fetus in utero, they could instead

[a]bort a fetus through medical induction. The doctor medicates the woman to induce labor, and contractions occur to deliver the fetus. Induction, which unlike D & E should occur in a hospital, can last as little as 6 hours but can take longer than 48. . . . [Doctors can also perform] hysterotom[ies] and hysterectomy[ies], [though] only in emergency situations because they carry increased risk of complications.⁴⁷²

The Court also advised that physicians may "kill the fetus a day or two before performing the surgical evacuation" though it noticed that "doctors refrain from injecting chemical agents, believing it adds risk with little or no medical benefit."⁴⁷³

Gonzales thus represents a significant shift in Supreme Court rhetoric and opinion about late term abortions. In its description, it uses language that is far more colorful and, yes, violent, than that used in *Stenberg*. Furthermore, it blurs the line between viability and nonviability respected since *Roe v. Wade*; it also does away with a health protection guarantee that has been created by the *Roe* court and preserved by its progeny. The upshot is *Gonzales v. Carhart* allows the federal government to require that women suffer more dangerous late term abortion procedures, through invasive disarticulation that may require "10-15" more passes, induction,

⁴⁶⁹ *Id.* at 1637-38 ("As respondents have noted, and the District Courts recognized, some recitations in the Act are factually incorrect.").

⁴⁷⁰ *Id.* at 1637.

⁴⁷¹ *Gonzales*, 127 S. Ct. at 1643 (Ginsburg, J., dissenting) (quoting Planned Parenthood Fed'n of Am. v. Ashcroft, 320 F. Supp. 2d 957, 1019 (N.D. Cal. 2004)).

⁴⁷² *Id.* at 1623.

⁴⁷³ *Id.* at 1621.

hysterectomy, or the introduction of a dangerous toxin into the patient's body.

C. Argument: Gonzales v. Carhart was Wrongly Decided under a Jurisprudence of Nonviolence because the Federal Partial Birth Abortion Ban Act Qualifies as Avoidable State Violence that is not Justified by a Compelling State Interest

Gonzales v. Carhart was incorrectly decided because it violates the proposed right to nonviolence. The Partial Birth Abortion Ban Act qualifies as a state act of violence against women, and it does not satisfy the proposed sliding scale scrutiny that requires that intense or avoidable state violence be justified by a compelling state interest. In other words, the federal government is not justified in employing this violence against women because it is severe, and not justified as a resistance to tyranny.

1. The Partial Birth Abortion Ban Act Qualifies as a State Act of Violence

The Partial Birth Abortion Ban Act imposes violence upon women because it 1) causes injurious force or force threatens serious bodily harm; 2) invades the body or otherwise subordinates women; 3) threatens "survival;" 4) fractures human connection, including "intersectionalities;" 5) violates *satyagraha* or *ahimsa*; 6) and constitutes a withdrawal of *agape*.

The Act imposes a physical invasion or nonconsensual "penetration"⁴⁷⁴ upon the body by requiring women to have a non-intact D & E that requires "10 to 15 passes" of medical instruments within the patient's body, and forbids a procedure where the physician may "gently draw the tissue out."⁴⁷⁵ Furthermore, existential "invasion" or "subordination" may also occur on account of the required extra "passes," as they could conceivably fracture the woman's connectivity with her body. Analogizing to Robin West's description of compelled pregnancy and sex, the patient's "moral, relational life" may be "as fully invaded as is her physical body"⁴⁷⁶ by this procedure, which is painful, and requires numerous sharp stabbings in the womb. Similarly, the Act threatens serious bodily harm and "survival," as the Act requires physicians to perform non-intact D & E procedures that can cause the patient's death, trauma, perforation, infection, hemorrhage, and infertility, and exposure to sharp bony fragments.⁴⁷⁷

⁴⁷⁴ See *supra* text accompanying note 188 (regarding MacKinnon's argument that unconsented and patriarchal penetration is violent).

⁴⁷⁵ *Gonzales*, 127 S. Ct. at 1622 (quoting one doctor who testified).

⁴⁷⁶ WEST, *supra* note 2, at 105.

⁴⁷⁷ *Stenberg v. Carhart*, 530 U.S. 914, 932 (2000).

In addition, Justice Ginsburg, in her *Gonzales* dissent, noted that “[a]dolescents and indigent women . . . are more likely than other women to have difficulty obtaining an abortion during the first trimester of pregnancy.”⁴⁷⁸ As such, the partial birth abortion ban act will disparately impact on them; this means that the ban will have an adverse, intersectional impact upon young and poor women, which increases the probability of this ban qualifying as violent under a jurisprudence of nonviolence.⁴⁷⁹

Gandhi’s glosses on the meanings of violence may also help buttress this qualification, as he described the principles of *ahimsa* as “all-embracing” “love,”⁴⁸⁰ whose adherents act from “compassion,”⁴⁸¹ and thus win “freedom from ill will and anger and hate.”⁴⁸² Insofar as the court blinds itself to the fact that it is requiring a more painful and dangerous abortion method (recall the coldness of the description of “10 to 15 passes”), it is not abiding by these principles. It also fails to uphold King’s vision of *agape* as brotherly love that restores community, since it denies women admittance into the community of care.

In the spirit of openness and interrogation, however, we must acknowledge that there *are* competing arguments. The most compelling argument is that the ban *is* an act of *ahimsa* and love, because it forbids the “ripping . . . apart” of “babies.”⁴⁸³ In other words, it could be argued that the act satisfies the legitimate congressional object of preserving and revering fetal life: “Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life”⁴⁸⁴ Moreover, the ban may be seen as a restoration of the female community, insofar as women might regret their abortions, and methods of abortion, particularly as their fetuses took “human form.” As Justice Kennedy asserted in *Gonzales*, the Partial Birth Abortion Ban Act protects a woman against the “anguish” of having allowed a doctor to “pierce” her baby’s “skull.”⁴⁸⁵ “Respect for human life finds an ultimate expression in

⁴⁷⁸ *Gonzales v. Carhart*, 127 S. Ct. 1610, 1642 n. 3 (Ginsburg, J. dissenting).

⁴⁷⁹ *Supra* text after note 315.

⁴⁸⁰ See GANDHI, *supra* note 17, at 14.

⁴⁸¹ *Id.* at 109.

⁴⁸² *Id.* at 180.

⁴⁸³ *Gonzales*, 127 S. Ct. at 1622 (quoting a nurse who witnessed an intact D & E procedure, and who described the fetus as a “baby”).

⁴⁸⁴ *Id.* at 1633 (quoting Congressional Findings (14)(N), in notes following 18 U.S.C. §1531 (Supp. IV 2000), at 769).

⁴⁸⁵ *Id.* at 1634 (“In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound

the bond of love the mother has for her child. The Act recognizes this reality as well.”⁴⁸⁶

However, the ban protects neither fetal life nor female psychology. As Justice Ginsburg noted, the Partial Birth Abortion Ban Act does not prohibit non-intact D & E procedures, or the “delivery” of a terminated fetus, or “a fetus delivered through medical induction.”⁴⁸⁷ The ban will not “save[] a single fetus from destruction,” but only require more dangerous methods of abortion.⁴⁸⁸ In light of this, the ban achieves only one effect: it punishes women who seek late abortions. Even if the Court views late term abortion with particular abhorrence, this still violates Gandhi’s law of *ahimsa*, which requires that we “not think evil of those who we may consider are dealing unjustly by us. There is hardly any virtue in the ability to do a good turn to those who have done similarly by us. That even criminals do. But it would be some credit if a good turn could be done to an opponent.”⁴⁸⁹

In addition, the stories told by women who have had intact D & E abortions contradict Justice Kennedy’s tale that the Act will save women from anguish. Instead, they demonstrate that these abortions, while emotionally painful,⁴⁹⁰ may help relieve these women of considerably more pain. For example, in 1992, while Congress considered enacting an earlier version of the Partial Birth Abortion Ban Act, a woman named Tammy Watts appeared before Congress, describing her story as “one of heartbreak, one of tragedy, but also one of compassion.”⁴⁹¹ She described how she and her husband learned, in her seventh month of pregnancy, that her “baby,” a “girl” she named “Mackenzie,” suffered from a severe and rare condition. The doctor told her:

when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.).

⁴⁸⁶ *Id.*

⁴⁸⁷ *Gonzales v. Carhart*, 127 S. Ct. 1610, 1647 (Ginsburg, J., dissenting).

⁴⁸⁸ *Id.*; see also *id.* at 1646 n.6 (detailing “risk[y]” and “inappropriate” methods of abortion).

⁴⁸⁹ See GANDHI, *supra* note 17, at 73.

⁴⁹⁰ See *Gonzales*, 127 S. Ct. at 1634 (“Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.”) (citations omitted). Cf. Harper Jean Tobin, *Confronting Misinformation on Abortion: Informed Consent, Deference, and Fetal Pain Laws*, 17 COLUM. J. GENDER & L. 111, 121 (2008) (“Justice Kennedy’s citation for these arguments to an amicus brief describing the discredited ‘post-abortion syndrome’ does suggest sympathy with a growing strain of anti-abortion rhetoric that describes abortion as by its nature harmful to women.”).

⁴⁹¹ 141 CONG. REC. S. 16761, 16763–16774 (Nov. 8, 1995) (statement of Tammy Watts).

“Your daughter has no eyes. Six fingers and six toes, and enlarged kidneys which were already failing. The mass on the outside of her stomach involves her bowel and bladder, and her heart and other major organs are also affected.” This is part of a syndrome called trisomy-13, where on the 13th gene there's an extra chromosome. They told me, “Almost everything in life, if you've got more of it, it's great, except for this. This is one of the most devastating syndromes, and your child will not live.”⁴⁹²

Watts suffered terribly, as might be imagined. She testified:

I had a choice. I could have carried this pregnancy to term, knowing that everything was wrong. I could have gone on for 2 more months doing everything that an expectant mother does, but knowing my baby was going to die, and would probably suffer a great deal before dying. My husband and I would have to endure that knowledge and watch that suffering. We could never have survived that, and so we made the choice together, my husband, and I, to terminate this pregnancy.⁴⁹³

Watts did experience grief as a result of her abortion, but not because the physicians harmed her or lied to her: “The doctor, nurses, and counselors were absolutely wonderful. While I was going through the most horrible experience of my life, they had more compassion than I have ever felt from anybody.”⁴⁹⁴ The D & E abortion procedure, moreover, helped assuage some of Watts’ agony: “Thanks to the type of procedure that Dr. McMahon uses in terminating these pregnancies, we got to hold her and be with her and love her and have pictures for a couple of hours, which was wonderful and heartbreaking all at once. They had her wrapped in a blanket. We spent some time with her, said our goodbyes, and went back to the hotel.”⁴⁹⁵

Even if it is true, as Justice Kennedy claims, that some women suffer more because of the nature of intact D & E abortion, that does not weigh in favor of outlawing D & E. Instead, it requires that women be equipped with sufficient information to make voluntary choices about their

⁴⁹² *Id.*

⁴⁹³ *Id.*

⁴⁹⁴ *Id.*

⁴⁹⁵ *Id.*

abortions.⁴⁹⁶ In sum, the Partial Birth Abortion Ban Act's requirement that women suffer more physically and psychologically invasive and dangerous abortion procedures than they might otherwise qualifies as violence.

2. Does the Violence Satisfy "Sliding Scale" Scrutiny?

Again, in my non-violent legal theory, I propose that acts of state violence be made to pass an adaptable, "sliding scale" scrutiny. This scrutiny requires that that we first examine the severity or avoidability of the violence. The more severe or avoidable the violence is, the more compelling must be the state justification for its employment.

a. The Severity or Avoidability of the Violence

Under my proposed scrutiny, we first examine the severity of the violence. Again, a benchmark for unavoidable violence is Gandhi's observation that simply living is a kind of violence. If the violence qualifies under most or all of the above-mentioned definitional factors, it will be considered severe and avoidable (that is, less like simply living) and the state interest will have to be that much more compelling.

The violence here is severe and avoidable. As noted above, the Partial Birth Abortion Ban Act qualifies under almost every factor used to define violence: It causes injurious force and force that threatens serious bodily harm, invades the body or otherwise subordinates women, threatens "survival," fractures human connection, including "intersectionalities," violates *satyagraha* or *ahimsa*, and constitutes a withdrawal of *agape*.

b. Does this Severe Violence Satisfy the Corresponding Strict Scrutiny?

An act of severe state violence may satisfy a compelling state interest where it is necessary to resist a tyranny, in the form of King's evocation of "totalitarianism," or the "spread and growth of an evil force."⁴⁹⁷ Again, there is a sliding scale economy of violence, as state acts such as warfare could only be used to combat authentic international threats; lesser tactics,

⁴⁹⁶ See *Gonzales v. Carhart*, 127 S. Ct. 1610, 1648-49 (Ginsburg, J., dissenting) ("Revealing in this regard, the Court invokes an antiabortion shibboleth for which it concededly has no reliable evidence: Women who have abortions come to regret their choices, and consequently suffer from '[s]evere depression and loss of esteem.' Because of women's fragile emotional state and because of the 'bond of love a mother has for her child,' the Court worries, doctors may withhold information about the nature of the intact D&E procedure. The solution the Court approves, then, is not to require doctors to inform women, accurately and adequately, of the different procedures and their attendant risks. Cf. *Planned Parenthood Se. Pa. v. Casey*, 505 U.S. 833, 873 (plurality opinion). ("States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning.") Instead, the Court deprives women of the right to make an autonomous choice, even at the expense of their safety.

⁴⁹⁷ See KING, JR., *supra* note 67, at 39.

such as those that “disrupt flow” but do not shed blood, may be permissible to meet other evils.⁴⁹⁸

The question is whether the Partial Birth Abortion Ban Act resists the spread and growth of King’s “evil force,” which amounts to totalitarianism or another kind of evil.

In my analysis, the answer is no. The partial birth abortion ban act was enacted *not* in order to save lives—as the abortion right (including abortions using non-intact D & E procedures) is still protected—but in order to prevent three other things: First, the Court approved Congress’s efforts to forestall the “coarsen[ing]” of society, which may be so disturbed by the intact D & E procedure that it could become blind “to the humanity of not only newborns, but all vulnerable and innocent human life.”⁴⁹⁹ Second, the Court applauded Congress’s goal of “protecting the integrity and ethics of the medical profession,” which would be compromised if physicians “act directly against the physical life of a child.”⁵⁰⁰ It also lauded the Partial Birth Abortion Ban act as a prophylactic against untutored abortions. Though it admitted that it could “find no reliable data to measure the phenomenon,” the Court maintained that some women would come to regret their intact D & E procedures, and by taking this option away, there would simply be less really unwanted abortions.⁵⁰¹ The Court also accused doctors of keeping details away from their patients, which presumably would exacerbate this regret, though, again, the Court offered no data for this indictment against physicians.⁵⁰²

The state violence at issue here does not satisfy compelling state interests because the bloodshed and physical invasion required by the Partial Birth Abortion Ban Act (in the form of “10 to 15 passes”) does not combat tyranny on the level of an international martial threat. Rather, Congress enacted the law to prevent “coarsening” the medical profession and women’s uneducated choices to have intact D & E abortions. Further, because the Partial Birth Abortion Ban Act requires women to undergo such invasive and dangerous abortion methods, it cannot be considered a “lesser” act of state violence conceivably permitted under the “sliding scale” intermediate scrutiny suggested by King’s philosophy of nonviolence. Even if “coarsening” and the unsupported allegations of

⁴⁹⁸ See GARROW, *supra* note 69, at 491.

⁴⁹⁹ *Gonzales*, 127 S. Ct. at 1633 (quoting Congressional Findings (14)(N), in notes following 18 U.S.C. § 1531 (Supp. IV 2000)).

⁵⁰⁰ *Id.*

⁵⁰¹ *Id.* at 1634.

⁵⁰² *Id.* (“In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details.”) *But see also id.* (“Most of [the plaintiffs’] experts acknowledged that they do not describe to their patient what [the procedures] entail”) (quoting *Nat’l Abortion Fed’n v. Ashcroft*, 330 F. Supp. 2d at 466, n.22 (S.D.N.Y. 2004)).

uneducated and regretted female choices to have intact D & E procedures could qualify as the type of evil King resisted in Chicago – that is, Mayor Daley and his “trick[y]” refusal to address poverty and slums in the city – the “10 to 15 passes” amounts to far more violence than the “disruption” of “flow” advocated by King in that instance.

The violence required by the partial birth abortion ban act thus cannot satisfy a compelling state interest. In the end, *it* is acting like a tyrant. Kennedy’s refusal to acknowledge that women will be forced to endure egregious, harmful violence as a result of this Act itself smacks of tyrannical propaganda, in its rendering invisible women’s risk of “nonexistence” that threatens them with “annihilation.”⁵⁰³ Kennedy himself acknowledges that there is medical uncertainty as to the question of the medical benefits of intact D & E procedures; by erring on Congress’s side, and thus forcing women to face the perils of “horrible complications” and “maternal mortality,”⁵⁰⁴ he threatens to “plunge[]” women into the “abyss.”⁵⁰⁵ Consequently, the Partial Birth Abortion Ban Act is intensely and avoidable violent, and does not service compelling state interests. Under a jurisprudence of nonviolence, it is bad law.

Nevertheless, that conclusion is not the end of the analysis. As might be evident to most readers, to reach the answer to that question is merely to ask another, more difficult one: the conclusion that the partial birth abortion ban act does not satisfy compelling state interests is founded on the fact that that no “lives” will be saved by the Partial Birth Abortion Ban Act. It only requires that abortions be more violent. As Ginsburg noted in her dissent in *Stenberg*, the Partial Birth Abortion Ban Act does not prevent abortions, but just a type of abortion.⁵⁰⁶

However, what happens if the challenge does not concern a law that requires women to withstand more invasive and dangerous abortion procedures, but simply eliminates the abortion right altogether? If that were the case, then we would no longer be dealing with a constitutional question that assumed that the abortion right was secure, and addressed only the Partial Birth Abortion Ban Act’s mandate that women suffer more. If, instead, the basic right to abortion became the issue, then arguably the conclusion would be completely different.

That is, if abortions destroy fetuses, might a jurisprudence of nonviolence in fact legitimate all abortion bans because they ensure fetal “survival”? In that case, then, is a jurisprudence of nonviolence good for peace generally but . . . *bad for women*? As this question is a crucial one

⁵⁰³ See KING, JR., *supra* note 67, at 39–40.

⁵⁰⁴ *Stenberg v. Carhart*, 530 U.S. 914, 932.

⁵⁰⁵ See KING, JR., *supra* note 67, at 40.

⁵⁰⁶ *Stenberg*, 530 U.S. at 951 (Ginsburg, J., concurring).

for nonviolence politics, I will take the time to address it. In fact, I believe the answer to that question is no, as I will demonstrate in the following section.

D. Whether a Jurisprudence of Nonviolence Supports Abortion Rights Generally

Here, I will briefly sketch out my argument for why I believe that a jurisprudence of nonviolence supports abortion rights, deal with opposing arguments, and also describe the particular challenges that a jurisprudence of nonviolence poses for the development of reproductive freedoms.

1. The Case that Nonviolence Supports Abortion Rights

A jurisprudence of nonviolence supports abortion rights because the state denial of abortions constitutes severe violence that is not justified as a narrowly drawn measure designed to satisfy a compelling state interest.

a. A Denial of the Abortion Right Qualifies as a Severe Form of Violence

As Robin West has noted, women may experience unwanted pregnancy as a physical and psychic invasion⁵⁰⁷ that compels nurturance and fractures the woman's connection with herself. In *Gonzales v. Carhart*, Justice Kennedy echoed Congress's concern that physicians' "integrity" might become corrupted by performing abortions requiring them to "act[] directly against the physical life of a child"⁵⁰⁸ but completely ignored the fact that unwanted pregnancy may cause women to also lose a kind of integrity of self, by not only feeling alienated from her connective self, but contrary to that self.⁵⁰⁹

Women's own abortion narratives demonstrate that they perceive unwanted pregnancies as a kind of violence. They have described such pregnancies as "cancer[s]" and that make them "sick in [their] heart[s]."⁵¹⁰ And the women who are able to describe such horrors are, in a way the lucky ones: some women who have become pregnant as a result of sexual assault feel such grief that they may not even have any language to

⁵⁰⁷ See WEST, *supra* note 2.

⁵⁰⁸ *Gonzales*, 550 U.S. at 157.

⁵⁰⁹ See WEST, *supra* note 2.

⁵¹⁰ See Eileen L. McDonagh, *My Body, My Consent: Securing The Constitutional Right To Abortion Funding*, 62 ALB. L. REV. 1057, n.232 (1999) (quoting Amicus Brief for the National Abortion Rights Action League et al. at 17-18): see also *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) (nos. 84-495 and 84-1379) (Providing many personal experiences of women, including that of one who recounted: "[When] I learned I was pregnant... I was sick in my heart and I thought I would kill myself. It was if I had been told my body had been invaded with cancer. It seemed that very wrong.").

describe their emotions.⁵¹¹ Further, women who are forced to have babies that they do not want sometimes report feeling alienated from themselves, and changed for the worse;⁵¹² they may also be desperate to obtain an abortion because of poverty or domestic violence,⁵¹³ because they want to achieve professional or educational ambitions, because of their health problems,⁵¹⁴ or because they simply do not feel ready to become mothers.⁵¹⁵

Denial of the right to abort thus qualifies as violence because it compels women to nurture fetuses they do not want results in nonconsensual invasion and subordination of the female body and fractures women's connectivity. Denial of the abortion right would also qualify as violent because it would cause deleterious effects on women's physical and mental health,⁵¹⁶ implicating "survival." Abortion bans would additionally have an adverse "intersectional" impact on women who cannot afford to travel internationally to secure abortions. And requiring women to remain pregnant can also put them at risk for private violence, in the form of

⁵¹¹ See Jodi Enda, *The Women's View: The Pro-Choice Movement Has Seen Moral Complexity as its Enemy. But Moral Complexity is Exactly Why Choice Must be Saved*, 16 AM. PROSPECT 22, 22 (2005) (telling the story of a woman who sought a pregnancy after rape: "[Kimberly] wanted an abortion, but she couldn't afford one. 'I didn't know what to do,' she said. 'There was no way I could have had that baby. My ex would have killed me. That was never an option.' Adoption wasn't, either. Kimberly couldn't bring herself to let her pregnancy show in Phoenix, and she couldn't leave town for several months the way women used to when they got pregnant out of wedlock. 'I couldn't take my kids, and I couldn't leave them with my ex. I couldn't bring another child into this world. It came out of this . . .,' she said, swallowing the word 'rape' as she uttered it.").

⁵¹² See GILLIGAN, *supra* note 1, at 123 (citing an interview with "Lisa," a 15 year old mother: "I am not the same person I was a year and a half ago. I was a very happy person then. I am just not myself anymore. I feel I lose all my friends now because I am somebody else. I am not me. I don't like myself, and I don't know if other people would either. I don't like the way I am now. That's why I am so unhappy. Before I had the baby, I was free.").

⁵¹³ See Enda, *supra* note 511, at 22 (discussing Kimberly's poverty and abuse).

⁵¹⁴ See, e.g., I'mNotSorry.net, Alexandra's Story, <http://www.imnotsorry.net/alexandra.htm> (last visited Aug. 30, 2009) ("I am a 35-year-old mother of two delightful boys, 5 and 10. When my youngest was two, I became pregnant unexpectedly, unintentionally. I was using a diaphragm/spermicide as I was breastfeeding. We were desperately poor at the time, though we were both working, and I was battling severe depression (for which there was no money with which to seek professional help—the poor are not allowed mental illness). Obviously, there was no question about having an abortion. My responsibility was towards my young sons, my husband and myself. The only regret was towards the sanctimonious cowards that made it necessary to enter the clinic surreptitiously and half-wondering whether we would be picked off by some coward's high-caliber rifle for having made a logical, sound decision to go ahead with a legal medical procedure.").

⁵¹⁵ Dorothy C. Lewis & Barbara Coy, *Sisterly Solidarity in Anonymity*, 3 OUR TRUTHS-NUESTRAS VERDADES 20, 20 (2007) ("My primary reason for aborting the fetus was that one has to be selfless in order to be a parent. Having a child at such a young age would have robbed me of my freedom as a young adult. I knew I would resent having to be responsible for another person's life and also resent or even hate the child. I did not and do not want that kind of responsibility.").

⁵¹⁶ *Roe v. Wade*, 410 U.S. 113, 153 (1973).

domestic violence⁵¹⁷ or be an product of compelled heterosexuality if the sex that led to pregnancy satisfies Adrienne Rich's meaning of that phrase,⁵¹⁸ and otherwise be seen as "forcing" women to "affirm gender beliefs or engage in gendered behavior."⁵¹⁹

If the denial of the abortion right constitutes violence, it must be subjected to a sliding scale of scrutiny under my proposed standard. First, the question is whether this violence is "severe" or "avoidable." The more severe the violence, the more taxing will be our examination of the state justification. The most violent acts will only be justified if it qualifies as a resistance to an "evil" such as tyranny.

i. The Severity or Avoidability of the Violence

The denial of abortions qualifies as severe and avoidable violence. As noted in the immediately preceding section, it qualifies under every factor used to define violence: It compels, physically and existentially invades, fractures connectivity, negatively influences intersectional identities, may inspire private violence, subordinates, and threatens survival.

ii. The State's Justification

Under a jurisprudence of nonviolence, the State must answer the charge that it is using severe or avoidable violence with proof that it uses such violence to combat the "spread" or an "evil force" such as totalitarianism. The availability of abortions, however, does not constitute the "spread" of such an "evil force." Women who have abortions do so for a variety of reasons, as discussed. These include poverty, depression, feelings of disgust and invasion, health problems of the woman and/or the fetus, a desire to achieve professional or education success, or the understanding that they may not be ready for motherhood. In other words, they seek abortions to prevent their own "nobodiness."⁵²⁰ As such, these women do not qualify as tyrants and genocidal murderers like Hitler or Stalin, or even the "trick[y]" Mayor Daley, who sought to destroy or exploit full-fledged human beings in order to achieve supreme power, or economic gain. As say the editors of *I'm Not Sorry: Celebrating the Right to Choose*, an online repository of abortion stories: "You are not a baby killer. You are not irresponsible. You are not selfish. And, above all, you are not evil."⁵²¹

⁵¹⁷ See Enda, *supra* note 511, at 22.

⁵¹⁸ See generally Rich, *supra* note 312.

⁵¹⁹ See Cruz, *supra* note 313, at 1056.

⁵²⁰ See KING, *supra* note 295, at 293.

⁵²¹ I'mNotSorry.net, Why INS Was Created, <http://www.imnotsorry.net/whythis.htm> (last visited Sept. 26, 2009).

Furthermore, even if the state did have a compelling state interest (preserving fetal life), a denial of abortion rights is insufficiently tailored to withstand scrutiny; it is not the “last option.” Insofar as the state seeks to protect fetal life, it may achieve this goal through other means, without sacrificing women’s bodily and psychological integrity. Women seek abortions because of health, financial, psychological, professional, and other family pressures. Many women simply do not feel able to take on the stress of another child, and the prospect of adoption may not decrease their agonized sensation of invasion, compulsion, danger, and grief.⁵²² Thus, the state may take other measures to preserve fetal life by *supporting women* in the spirit of *satyagraha* and *agape* and creating the conditions necessary for women to be able to get pregnant when they want to, and to support their children. These measures may include buttressing welfare rights, educational resources, and state-sponsored childcare, as well as pursuing domestic violence and rape issues with greater vigor.

⁵²² See, e.g., Posting of nephemera to LiveJournal, Our Abortion Stories, <http://community.livejournal.com/imnotsorry/2007/01/07> (Jan. 7 2007, 21:21 EST). (“I’m 17 weeks pregnant, and I know he’ll just use the child as another way to control me if I carry it to term. I want a divorce, and I don’t want to have anything tying me to him. I’d go with adoption, but since I’m married, he has a say in it too, and I know he’ll never agree to it. On top of all that, this pregnancy has been absolutely miserable. Morning sickness so severe that I’ve had four trips to the ER in the last month for dehydration, repeated infections, exhaustion, acne...it hasn’t been fun, let’s leave it at that. I think an abortion would be the best choice, all things considered.”); Posting of Kim to PASS Support Site, Stories from Women Who’ve Had Abortions, http://afterabortion.com/sharing_page4.html (last visited Sept. 1, 2009) (“The entire reason I chose to have an abortion was because I was SELFISH. I had my life planned out, college, a big wedding. I knew if I kept the baby my parents would never allow any of those to happen. Plus I was into my cheerleading and other activities at school. I was really horrible selfish. Adoption was not an option because the being pregnant and people knowing was the whole issue. I wanted to have the abortion and no one to know about it. . . . My dad being the abusive father he is called me a whore over and over. My mom just cried. She hasn’t looked at me the same since. Oh were [sic] best friends now, but that’s a subject we can’t talk about. My dad for about 5 years afterwards when we fought, would remind me that I was a whore and killed my baby....The thing is I honestly believe I would not have changed my decision if I could. Even though I’m a Christian, I believe abortion should be legal. I am not for abortions later than the first trimester, but I feel there ought to be a safe and clean place for women choosing abortion. I ended up becoming a Registered Nurse in Obstetrics. It doesn’t bother me to work with pregnant women or babies. Most women I see have abortion histories in their past. Its more common than a lot of people think. I feel being a Christian and believing abortion should be legal is my own personal decision. I don’t feel anyone has the right to judge for that but God. Thanks for letting me share my story with you.”) (Though Kim condemns herself for being selfish here, her story reveals that she lived under patriarchal dominance in the form of her father, desired freedom and privacy, and did not believe that adoption was an “option.”); I’mNotSorry.net, Stacy’s Story, <http://www.imnotsorry.net/stacy.htm> (last visited Sept. 1, 2009) (“I was not emotionally or physically ready to be pregnant. I was seriously under weight. I was wearing size 2 jeans at 5’7” tall. My diet consisted of 1 diet Pepsi and a package of crackers, and then a small dinner at night. I had no family or friend support. This was my life. Adoption was not an option. It had been implied heavily to me that if I ever came up pregnant that I would be made to keep the baby, and adoption would not be considered.”).

2. Counter Arguments, and the Challenges that a Jurisprudence of Nonviolence Creates for Reproductive Rights

Several counterarguments may be lobbied against the case set forth above. First, that the denial of abortion rights is not violence, but rather just a denial of the right to a violent procedure that “rips apart” fetuses. The second objection is that the denial of abortion rights satisfies heightened scrutiny, because women who seek abortions and the doctors who provide them are a “spreading evil” and like “tyrants” who kill to achieve their own objectives; and that barring abortion is unavoidable if such tyrannical violence is to be prevented.

Retorts to these arguments are as follows: though the Supreme Court has determined that the refusal to provide abortions does not itself impose harm upon women,⁵²³ nonviolence philosophers have rejected any fine omission/commission distinctions. Again, Martin Luther King protested Mayor Daly’s refusal to act upon the poverty problem in Chicago, and Gandhi insinuated that a maharaja’s neglect of Indians’ poverty qualified as a kind of violence.⁵²⁴ Thus, the state’s refusal to allow women to obtain abortions – and, indeed, to pay for indigent women’s abortions – may be seen as a cognizable act of violence.

The second counter argument maintains that the state possesses a compelling interest to bar abortion because abortions are “evil.” It is true that many have characterized the women who get abortions and the doctors who give them as mass murderers and genocidal tyrants: A review of abortion literature demonstrates that for every story of a woman who seeks an abortion to prevent “nobodiness,” there is another story of a female who less undergoes an abortion procedure than engages in a pogrom:

Suffice it to say that more people have died at the hands of abortionists than all the lives Joseph Stalin, Pol Pot or Adolph Hitler took prior to modernity’s liberal slaughtering of the unborn. Under the auspices of modern mans narcissistic proclamation of science enlightenment and advances they yet choose to hide behind the incongruous and cowardly thin veil of “I don’t know when life actually begins.”⁵²⁵

⁵²³ Harris v. McRae, 448 U.S. 297, 314 (1980).

⁵²⁴ See GANDHI, *supra* note 17.

⁵²⁵ Rev. Michael Bresciani, *Who Would the Innocents Choose — Blago, Bush or Obama*, RENEW AMERICA, Feb. 1, 2009, <http://www.renewamerica.com/columns/bresciani/090201>. See also Chris Blank, *Huckabee Likens Abortion to Slavery at Fundraiser*, THE HUFFINGTON POST, Mar. 24, 2009, http://www.huffingtonpost.com/2009/03/24/huckabee-likens-abortion_n_178433.html; Posting of Bluebear to Suvivors of the Abortion Holocaust to Hold “Pro-Life Boot Camp” for Teens,

It was only after I decided to join the Catholic church in 2004 that I knew that I would need to address the issue of the aborted pregnancy. Before I began the RCIA program, I spoke to a priest and told him about the abortion. He told me to give the child a sex, a name, and ask the child for forgiveness. I did everything he asked. The child, I always felt, would have been a girl and I named her Maria. Since that day, I have been asking her forgiveness daily. Twenty-three years is a long time to carry the burden of shame and guilt. However, through the grace of God, I have received good counseling and I have been able learn to handle these difficulties, and to accept that the rape wasn't my fault.⁵²⁶

[ad for an anti-abortion protest sign, showing an intense image of an aborted late term fetus, alongside images of Holocaust victims]: America's Holocaust: This powerful sign illustrates the horrible similarity between Hitler's murder of 6 million Jews, and America's murder of over 30 million pre-born babies since 1973. Let your community know about AMERICA's holocaust, by showing them the truth about this horror. It is available in 36"x21" and 63"x36" sizes, fully laminated.⁵²⁷

[poem of abortion regret]: It was **June 19**, the day they ripped you away
The pain hurt so much, I didn't know what to do
I tried to take my life away
Your daddy killed himself when he found out you were gone
Dear baby boy, you were the second Jordy Joel JR., I murdered you
Your daddy and your aunt, they left me too
If I could get you back, I would any day⁵²⁸

From this perspective, since abortion constitutes a holocaust and a murder spree, denial of the abortion right would be considered a narrowly tailored measure designed to prevent evil atrocities.

The retort to this characterization of women and physicians as genocidal killers must emphasize the ways in which these accusations and labels victimize women. The language, itself, may be perceived as

http://www.democraticunderground.com/discuss/duboard.php?az=view_all&address=389x902121
(May 16, 2007 16:24 EST).

⁵²⁶ The Silent No More Awareness Campaign, Anonymous Testimonial, <http://www.silentnomoreawareness.org/testimonies/testimony5097.htm> (last visited Aug. 30, 2009).

⁵²⁷ Abortion is Murder!, America's Holocaust, <http://www.jesus-is-savior.com> (follow "Evils in America" hyperlink; then follow "Abortion is murder" hyperlink) (last visited Aug. 30, 2009).

⁵²⁸ After Abortion, <http://www.afterabortion.blogspot.com> (last visited Aug. 30, 2009).

violence against women.⁵²⁹ However, I have no other new arguments other than those recited above: Rather, I respond to this claim that abortion constitutes a spreading “evil” with the same assertion that the women who seek abortions do so in order to prevent a fracture to their connectivity, and physical as well as psychological invasion and compulsion. Women’s suffering and exigency, in my mind, certainly makes any description of them as genocidal killers tantamount to hate speech.

Nevertheless, I admit that tackling the abortion question under a jurisprudence of nonviolence may create risks to the creation and maintenance of robust abortion rights. First of all, Gandhi himself did not support abortion, declaring: “It seems to me clear as daylight that abortion would be a crime.”⁵³⁰ The Dalai Lama, our era’s most visible advocate of nonviolence, has pronounced abortion to be “an act of killing.”⁵³¹

In addition, another risk that the proposed jurisprudence of nonviolence poses for abortion rights lies in its open interrogative method. If we employ this expansive and unreliable process, who “wins?” Those who describe the abortion right as a means by which women may be able to achieve “somebodiness?” Or anti-abortion activists, who claim abortion is like genocide?

I do not have a definitive answer as to who succeeds in this contest, as the open and interrogative method that I employ creates the hazard that competing nonviolence advocates (championing the woman, the fetus) “may not always be able to resolve [their] differences.”⁵³² However, I do call for a jurisprudence of nonviolence *that is infused with a feminist, antiracist, and queer consciousness.*

Further, though a jurisprudence of nonviolence does not create any absolute guarantees for the reproductive rights of women, I nevertheless remain its advocate for two major reasons. A legal theory of nonviolence may allow us to bridge the unfathomable canyon that now exists between pro-choice and pro-life advocates, because it requires us to empathize with each other. As Gandhi said,

⁵²⁹ See Ayres, *supra* note 257, at 393 (describing the violent effects of “naming”).

⁵³⁰ See GANDHI, *supra* note 31, at 160.

⁵³¹ Ed Kaitz, Looking at the Prisoners of Shangri-La, HUMAN EVENTS ONLINE, April 22, 2008, <http://www.humanevents.com/article.php?print=yes&id=26148> (reviewing Donald Lopez’s THE PRISONERS OF SHANGRI-LA). See also MAYANK CHHAYA, DALAI LAMA: MAN, MONK, MYSTIC 233 (2007) (noting that at times the Dalai Lama has come out against homosexuality; in the interview quoted, the Lama does not do so, but does note that homosexual sex’s failure to “produce another human being” gives it an ambiguous moral status; presumably, the abortion of that “human being” would be considered a sin under the Lama’s Buddhist faith).

⁵³² See Malavet, *supra* note 245, at 327.

Three-fourths of the miseries and misunderstandings in the world will disappear if we step into the shoes of our adversaries and understand their standpoint. . . . In our case there is no question of our agreeing with them quickly as our ideals are radically different. But we may be charitable to them and believe they actually mean what they say . . . Our business, therefore, is to show them that they are in the wrong, and we should do so by our suffering. I have found that mere appeal to reason does not answer where prejudices are age-long and based on supposed religious authority. Reason has to be strengthened by suffering, and suffering opens the eyes of understanding.⁵³³

Acknowledgment of the suffering that pro-choice folks may have endured in connection with their reproductive lives “open the eyes of [our] understanding” when it comes to pro-life rhetoric. Even a cursory glance at pro-life propaganda reveals that pro-life advocates are expressing deep trauma in their relentless description of “ripped-apart” babies, guilt over “murdering” and comparisons between abortions and the atrocities of the Holocaust. Instead of reacting to pro-choice rhetoric with rage and argument—might we respond in the spirit of unity, community, coalition building, and radical interconnectivity that characterizes a jurisprudence of nonviolence? If both sides did meet in an attitude of listening, pro-choice advocates might ask Life-ists: where is all this business about calling women little Hitlers even *coming from*? Why are you tirelessly deploying these images? What kind of hurt are you processing through your advocacy? Why do you only conceive of fetal suffering, and not of women’s—*really*? Similar questions, of course, would be asked of pro-choicers. And, in the disclosures of suffering that are likely to emerge from these inquiries, it is possible that we could find more of a connection between pro-lifers and pro-choicers than we might have suspected. Though Gandhi’s and King’s ethic of connectivity—that is, of connecting emotionally with “adversaries,” we might finally find the door through which both sides may enter and begin the conversation that can help end the abortion wars.

What’s more, though a jurisprudence of nonviolence does not immediately guarantee the safety of abortion rights, in the end it may strengthen them. Abortion rights are already in serious jeopardy, in part because the Court refuses to recognize the violence that women experience through unwanted pregnancy, and laws that require them to undergo the likes of “10 to 15 more passes.” Justice Kennedy and his ilk are already

⁵³³ See GANDHI, *supra* note 17, at 255.

excruciatingly aware of the rigors of the abortion process on the fetus. However, if we develop a jurisprudence of nonviolence that incorporates feminist, anti-racist, and queer understandings of violence, women's suffering will be made more visible. If those in power choose to extend the principles of *ahimsa* not only to fetuses but also to grown women, they may find that they must support abortion rights. And that can only serve to increase women's access to reproductive freedom, and our collective human rights to be free from violence generally speaking.

VII. CONCLUSION

In a time of war and vast international strife, we must now begin to reconsider the nonviolent teachings of Gandhi, King, and cultural feminists if we seek to create a more peaceful world. Constitutional law, and fundamental rights jurisprudence, is a natural place to locate these politics of nonviolence, and the resulting protections may prove a particularly powerful remedy to brutality if combined with the insights of modern equal dignity theorists.

As in any important debate, there are no easy answers; my analysis of nonviolence and abortion rights only lays bare the painful and competing claims of antagonists who disagree in everything save that their way is the path to peace. The most important contribution that my proposed jurisprudence of nonviolence offers is that it makes nonviolence a specific, visible aim in constitutionalism—an aim that has been there all along, yet all too easily diminished or mangled because it was not placed at the forefront of a rights analysis. By articulating a human and U.S. constitutional right to be free of avoidable violence, we may finally get to the difficult, and sometimes seemingly impossible, work of bringing peace to our people. That my proposed methods are challenging, and possibly even imprecise, should not be seen as drawbacks; rather, as in any mindful effort to decrease suffering and savagery, they require us to both do our best and admit that we don't always know how to do just that. In being diligent and honest about the struggle to decrease violence, we may forge a gentler world, and also keep open avenues that future lawyers may travel upon in their journey to build upon our progress.

