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THE COMMON LAW AND CRITICAL THEORY

CHARLES L. BARZUN*

Before I got out of bed this morning, I had an exchange on Facebook Messenger, which began this way:

Aunt Lucy: Question for you. Do you actually think there is no Marxist attempt, ongoing for years, to undermine and destroy America? Now most clearly involving China, but a la Gramsci, also in virtual total control of the media, universities, and Hollywood, seen most particularly in the denigration of religious people and the natural family?

Me: No, I don't, at all. But I understand why you do.

Aunt Lucy: Ok. Not just me, but lots of people way smarter than I am. And [they] make very powerful arguments. Where else do second wave feminism and identity politics come from? And Critical Race Theory?¹

Aunt Lucy is not technically my aunt; she is my wife's aunt. But I have adopted her as my own because we have maintained a more or less constant political dialogue through various online platforms for over a half decade now. She is a graduate of Bryn Mawr College (Ancient Greek, '71), a devout Catholic, a fierce Trump supporter, and a self-described "deplorable."²

The exchange excerpted above (which continues at the time of this writing) is typical of our conversations. She probably read

*Horace W. Goldsmith Professor of Law, University of Virginia. I'd like to thank Justin Desautels-Stein for introducing me to critical theory and for inviting me to contribute an essay to this Symposium, Josh Bowers and David Plunkett for helpful comments on the Essay that resulted, and John Henry Schlegel for an offhand comment that inspired its central theme.

1. Facebook message from Aunt Lucy, to author (Sept. 6–7, 2020) (on file with author).

2. Katie Reilly, *Read Hillary Clinton's 'Basket of Deplorables' Remarks About Donald Trump Supporters*, TIME (Sept. 10, 2016, 12:27 PM), <https://time.com/4486502/hillary-clinton-basket-of-deplorables-transcript/> [<https://perma.cc/TM5M-MZ72>].

about Trump's memo forbidding the use of "critical race theory" in diversity training programs in federal government, and it reminded her (yet again) that Trump is fighting to save America from its enemies.³ She then reached out to me to see if I am really as oblivious to these threats as she suspects. I went on to defend critical theory, cautioning that I am no expert in the field. I explained that critical theory is used in a broad sense to refer to those social theories that seek to expose relations of domination in society for the sake of liberating those oppressed by such domination.⁴ Without endorsing every theory to which that label applies, I suggested that critical theories often yield genuine insights about how power operates in society.

But Aunt Lucy remained unpersuaded. There can be no true understanding of society, she explained, "until people embrace the true God. Justice depends on truth, especially on an accurate anthropology, which is what Marxism, paganism, and Islam do not and never will have."⁵ Our conversation will probably end with my telling her (yet again) that she is in the grip of a nativist and paranoid right-wing ideology and with her reminding me that she continues to pray for me.

I mention this exchange for two reasons. First, it illustrates the difficulties of engaging in political dialogue in an age of media saturation and polarization.⁶ Aunt Lucy and I begin with different political orientations and moral intuitions, and then we are fed different narratives by our media sources about what is going on in our country, making agreement on big issues nearly impossible.⁷ The second reason follows from the first: the

3. Josh Dawsey & Jeff Stein, *White House Directs Federal Agencies to Cancel Race-Related Training Sessions It Calls 'Un-American Propaganda'*, WASH. POST (Sept. 5, 2020, 8:52 AM), <https://www.washingtonpost.com/politics/2020/09/04/white-house-racial-sensitivity-training/> [<https://perma.cc/9BBY-75ZW>].

4. James Bohman, *Critical Theory*, STAN. ENCYC. PHIL. (Mar. 8, 2005), <https://plato.stanford.edu/entries/critical-theory/> [<https://perma.cc/X6CL-S39F>].

5. Facebook message from Aunt Lucy, *supra* note 1.

6. Justin Desautels-Stein & Akbar Rasulov, *Deep Cuts: Four Critiques of Legal Ideology*, 31 YALE J.L. & HUMAN. (forthcoming 2021) ("For so many of us, media saturation leads to paralysis of judgment, or the curious reverse, judgement without any reflection at all.").

7. Sometimes, but only sometimes, our disputes are resolvable by reference to common facts. At the time of this writing, the jury is still out as to whether Aunt Lucy will ever concede that Trump's allegations of massive voter fraud in the 2020 election are baseless. But to the extent she does, it will likely be because of Trump's lawyers' inability to persuade anyone in a court of law (not just on cable television)—a fact that is itself not irrelevant to the theme of this Essay. See Michael D.

question I am interested in is this: What kind of reasoning process (if that's even the right word) would be required for one of us to persuade the other to come around to our view of things?

Critical theory seems to me to be well suited to that task. The reason is that such theories tend to be *holistic* in structure in the sense that they have explanatory and normative aims; they seek enlightenment (or understanding) *and* emancipation (or freedom).⁸ They are interpretive or “hermeneutic” theories, rather than narrowly scientific or “positivist” ones.⁹ A critical theory could thus (in *theory*) offer me resources to both explain to Aunt Lucy why she has been led astray and show her a path forward.

The purpose of this Essay is to show that there is one distinctive interpretation of the common-law tradition—one that I call the “holistic” account—that has the same analytic structure as critical theory. On the holistic view of the common law, we can rationally change our evaluation of some practice on the basis of moral argumentation *and* historical or sociological explanation. For it treats the various practices that constitute the law as themselves the products of tradition, history, and society. The best explanation of any given practice—and of its underlying moral motivations—thus becomes relevant to a rational assessment of its value today. The process of reasoning envisioned is akin to the scientist who, when trying to decide whether to

Shear et al., *Business and World Leaders Move on as Trump Fights to Reverse Election*, N.Y. TIMES (Nov. 23, 2020), <https://www.nytimes.com/2020/11/20/us/politics/biden-world-leaders.html?action=click&module=Spotlight&pgtype=Homepage> [<https://perma.cc/4EHN-AAWM>].

8. Bohman, *supra* note 4 (“Critical Theorists have always insisted that critical approaches have dual methods and aims: they are both explanatory and normative at the same time, adequate both as empirical descriptions of the social context and as practical proposals for social change.”); RAYMOND GEUSS, *THE IDEA OF A CRITICAL THEORY* 1–2 (1981) (explaining that one of the three central theses of critical theory is that such theories enable agents to better understand their own interests and to emancipate them from forms of coercion).

9. GEUSS, *supra* note 8, at 2; *see* Chrysostomos Mantzavinos, *Hermeneutics*, STAN. ENCYC. PHIL. (June 22, 2016) <https://plato.stanford.edu/archives/spr2020/entries/hermeneutics/> [<https://perma.cc/47EJ-2LPQ>] (defining “hermeneutics” as “the methodology of interpretation [that] is concerned with problems that arise when dealing with meaningful human actions and the products of such actions, most importantly texts”); Brian Z. Tamanaha, *The Internal/External Distinction and the Notion of a “Practice” in Legal Theory and Sociological Studies*, 30 L. & SOC’Y REV. 163, 166 (1996) (explaining that “two characteristics of the leading versions of positivist social science” are that “[t]hey discounted or eliminated consideration of the meaningfully oriented human subject, and they did so for the purpose of meeting the strictures of naturalistic science”).

modify a theory in light of evidence from an experiment, must not only consider the plausibility of the revised theory but also whether the procedures involved in conducting the experiment were followed properly. Because of their shared structure, the holistic interpretation of the common law is particularly hospitable to arguments sounding in critical theory.

Or so I argue in this Essay. I do so by drawing on a case study: Catharine MacKinnon's argument that sexual harassment constitutes sex discrimination under Title VII of the Civil Rights Act of 1964.¹⁰ That argument revolutionized the law of antidiscrimination, yet the standard forms of legal reasoning—which I call the empiricist and rationalist interpretations—cannot account for its success. Only the holistic interpretation can explain the power of MacKinnon's argument.

In what follows, I will first describe MacKinnon's argument and explain why it constitutes a form of critical theory. I will then show why the conventional forms of legal reasoning cannot account for its rational force, before going on to explain why a holistic account can do so. I conclude by suggesting that critical theory and the common law might each learn something from the other, which will take us back to my debate with Aunt Lucy.

* * *

Published in 1979, MacKinnon's *Sexual Harassment of Working Women* is an extended argument in support of the claim that a male employee who sexually harasses a female subordinate has "discriminate[d] against an[] individual with respect to h[er] compensation, terms, conditions, or privileges of employment because of such individual's . . . sex," thereby violating Title VII of the Civil Rights Act of 1964.¹¹ The structure of her argument is deceptively straightforward. Sexual harassment is a "condition of employment" that (a) many women experience, (b) they would not have experienced if they were men, and (c) harms them materially and psychologically.¹² It is thus a form

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

11. *Id.* at 6.

12. *Id.*

of sex discrimination on either of two theories of discrimination that can be found in Title VII caselaw.¹³

The simplicity of the above syllogism is deceptive, however, because at the time MacKinnon was writing, only a few courts had found that women who alleged conduct we would today call sexual harassment had stated a valid cause of action under Title VII.¹⁴ MacKinnon thus takes on the burden of showing that sexual harassment is pervasive (which goes to factor (a)) and then explaining why courts had failed to see sexual harassment as sex discrimination (which goes to factors (b) and (c)). In her efforts to meet that burden, MacKinnon's argument emerges as an example of critical theory.

According to MacKinnon, courts had traditionally explained the sort of conduct we know now as sexual harassment either as a purely private affair or as an inevitable product of biology. An inappropriate advance upon a female employee was either seen as one man's flirtation-gone-wrong or simply the consequence of male-female sexual attraction in general.¹⁵ Thus, at *most* such conduct might qualify as some form of tort, but more likely it was just part of life (for women).¹⁶

MacKinnon rejects both the individualistic and the biological explanations, offering instead a *social* explanation of such behavior. The explanation is social in two senses. First, women experience the harm of sexual harassment by virtue of their membership in a social group—that is, being a woman.¹⁷ Second, the conduct in question involves men exercising a form of social power.¹⁸ By coercing women into offering them sex, they perpetuate women's roles as little more than objects of sexual desire, thus maintaining their inferior social position. Under this view, sexual harassment is merely an extreme instance of how men objectify women in the workplace more generally. As MacKinnon puts it, “[I]t is the very qualities which men find sexually attractive in the women they harass that are the real qualifications for the jobs for which they hire them.”¹⁹ The highly sex-segregated nature of the workforce in the 1960s and '70s, in which most

13. *Id.* MacKinnon refers to these two theories as the “differences” approach and the “inequality” approach. *Id.* at 4–6.

14. *See, e.g.*, *Barnes v. Costle*, 561 F.2d 983, 991–92 (D.C. Cir. 1977).

15. MACKINNON, *supra* note 10, at 86–88, 92.

16. *Id.* at 11.

17. *Id.* at 14.

18. *Id.* at 156.

19. *Id.* at 23.

women worked in “women’s jobs,” was evidence of this fact. In other words, not only were women sexually harassed “as women” but “women *work[ed]* ‘as women.’”²⁰

This interpretation of sexual harassment, however, invites a demand for further explanation. Why is it that so few people—even few women themselves—have seen the power dynamics at play in the workplace?²¹ MacKinnon’s answer is that people are oblivious to the depth and degree to which gender is itself the product of social power.²² The “feminine” qualities that *define* women as women—as submissive, weak, and vulnerable—are not essential features of a biological sex.²³ They are *socially* determined (by men) for the purpose of keeping women powerless in the home, workplace, and in society more generally.²⁴ Thus, because such an understanding of women seems so natural to judges, they end up perpetuating the “mystification” that a harasser’s conduct is the product of private motivations or biological necessities.²⁵

After analyzing various cases and showing why the caselaw supports her interpretation of sexual harassment as a form of sex discrimination, MacKinnon emphasizes that she hopes that litigating (and winning) cases will improve the lives of women. Litigation gives women a voice, enabling them to “push to expand th[e] concept” of discrimination.²⁶ It is, in her words, a “two-way process of integration” between the law and women’s experience.²⁷ The law develops in such a way that “what *really* happens to women, not some male vision of what happens to

20. *Id.* at 9 (emphasis added).

21. Catharine A. MacKinnon, *The Logic of Experience: Reflections on the Development of Sexual Harassment Law*, 90 GEO. L.J. 813, 818 (2002) (recalling that when she sought to enlist 9-to-5, an organization representing working women, in her fight against sexual harassment, she received a call declining the request on the ground that members were “afraid of giving up their only source of power”).

22. See MACKINNON, *supra* note 10, at 120 (“If women’s inferiority is noticed at all, it is seen as ‘merely’ social—meaning an unfortunate, irrational, outmoded, superficial, and quite eradicable mistake.”).

23. *Id.* at 156.

24. *See id.*

25. *Id.* at 90 (“These most ‘private’ of relations, instead of providing a sphere for particularity and uniqueness, appear in this perspective distressingly stereotypical, as each man and woman, in their own particular way, reproduce in these most personal interactions the structure of dominance and submission that characterizes the entire socioeconomic system.”).

26. *Id.* at 26.

27. *Id.*

women, is at the core of the legal prohibition,” and, as a result, it changes what women do, in fact, experience.²⁸

* * *

MacKinnon’s argument is a form of critical theory. As indicated above, I use that term broadly to describe those social theories that seek to identify sources of social (including economic) domination and to help the oppressed both better *understand* their own situation (by escaping “false consciousness”) and *overcome* the oppression they experience.²⁹ These theoretical and practical goals are interdependent.³⁰ Agents develop clearer understandings of their true interests or needs as they find ways to live under freer, less coercive conditions. Thus, the process envisioned is a “dialectical” one in which increasing understanding and freedom are mutually reinforcing.³¹ It is, in MacKinnon’s words, “a two-way process of interaction.”³²

MacKinnon’s argument assumes a distinctive model of legal reasoning and process of legal development that fit awkwardly with some of the most conventional forms of legal argument.

It is easy to see why it does not fit well with a formalist or textualist approach to interpreting the Civil Rights Act. Under that view, the question would be what a reasonable interpreter of the words “discrimination because of . . . sex” would think those words mean and whether that meaning includes the defendant’s alleged conduct in any particular case.³³ There would be no room for the “two-way process of interaction” MacKinnon envisions in which the meaning and scope of application of the statute changes over time. What is needed instead is a model of case-by-case decision-making whereby the law is developed over time—in short, a model of common-law reasoning.

28. *Id.*

29. GEUSS, *supra* note 8, at 4–44.

30. *Id.* at 45–54; see also Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 752 (1994) (observing that critical race theories offer explanations of racism as social, rather than individual, phenomena with the hope that “readers will come to a new and deeper understanding of reality, an enlightenment which in turn will lead to legal and political struggle that ultimately results in racial liberation”).

31. GEUSS, *supra* note 8, at 36.

32. MACKINNON, *supra* note 10, at 26.

33. For an example of this approach, see *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

Let's consider the two dominant models, which we may label *rationalist* and *empiricist*. Ronald Dworkin is a good representative of the rationalist approach. According to his view, judges do and should decide cases by reference to moral and legal principles. More specifically, their task is to identify the principles that best "fit" and "justify" the relevant legal materials and then to apply those materials to the case at hand.³⁴ Dworkin makes clear that the sort of judicial argument envisioned is a rationalizing one in the sense that it aims to justify, not explain, the relevant legal materials. Such an argument is thus immune from skeptical accounts of legal doctrines that seek to undermine those doctrines by showing how they function to maintain social hierarchy or by revealing whose interests they serve. His approach takes the "internal point of view" of the judge deciding cases, and he insists that judges "want theories not about how history and economics have shaped their consciousness but about the place of these disciplines in argument about what the law requires them to do or have."³⁵

One can see why Dworkin's approach would have a hard time accommodating MacKinnon's argument. As we've seen, one of MacKinnon's core tasks is to explain why judges have failed to see sexual harassment as fundamentally an exercise of power, and part of the reason for that is that their society has shaped their consciousness to see as natural or biological what is in fact a social construction.³⁶ But for Dworkin, that task is irrelevant to the judicial inquiry. Dworkin's model of reasoning thus leaves no room for MacKinnon's claim that judges have engaged in "mystification" that functions to further entrench women's inferiority.³⁷ For him, judicial argument is fundamentally moral and political in orientation, not sociological or historical. It seeks to justify, not explain.

The common-law rival to Dworkin's rationalism is the empiricist approach, most associated in recent decades with former Judge Richard Posner. Posner insists that his approach to judicial decision-making, which he calls "legal pragmatism," rests on "everyday pragmatism" as distinguished from philosophical pragmatism.³⁸ The approach is "practical and businesslike" and

34. RONALD DWORKIN, *LAW'S EMPIRE* 52, 65–68 (1986).

35. *Id.* at 13.

36. MACKINNON, *supra* note 10, at 156.

37. *Id.* at 87.

38. RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 49–50 (2003).

“disdainful of abstract theory and intellectual pretension.”³⁹ In some ways, Posner’s empiricist model represents the opposite of Dworkin’s. Whereas Dworkin sees judges as deducing proper outcomes through the application of abstract principles to a set of facts, Posner considers it absurd for judges to answer what amount to hard policy questions by reference to such “question-begging vacuities.”⁴⁰ The judge should instead begin with the facts of the case, consider the possible consequences of a decision either way, and then seek to achieve a “reasonable” decision under the circumstances.⁴¹ In short, Posner’s pragmatist judge looks forward and treats law instrumentally.

Yet despite his rejection of Dworkin’s principled approach, Posner’s legal pragmatist judge fares no better when it comes to explaining the rational force of MacKinnon’s argument about sexual harassment. The legal pragmatist is just as incapable of accounting for the way in which the true nature of sexual harassment—as a social practice of domination—has been long obscured. Posner himself praises MacKinnon’s book on sexual harassment, observing that it “did much to alert the legal community to the need for legal remedies for sexual harassment.”⁴² He says that MacKinnon got people’s attention “by pointing to the problem and suggesting specific, concrete remedies for its solution.”⁴³ But MacKinnon’s whole point was that merely pointing to the behavior was not enough. When people (including judges) looked, they only saw sporadically offensive or possibly abusive behavior. They did not see the systematic domination of one gender by another. As MacKinnon puts it, a “failure to *perceive* the nature and extent of gender classifications fairly characterizes the consciousness of both the judiciary and the society as a whole.”⁴⁴ The empiricist cannot explain such a failure of perception.

* * *

The *holistic* interpretation of the common law offers a third way between its two rivals—the rationalist and empiricist

39. *Id.*

40. *Id.* at 79–80.

41. *Id.* at 59.

42. RICHARD A. POSNER, PUBLIC INTELLECTUALS: A STUDY OF DECLINE 331 (2002).

43. *Id.*

44. MACKINNON, *supra* note 10, at 129.

interpretations. It looks to moral theory *and* social facts, justification *and* explanation. For that reason, it fits MacKinnon's argument well.

The basic idea of the holistic approach is compactly conveyed by Oliver Wendell Holmes's famous statement that "[i]t is the merit of the common law that it decides the case first and determines the principle afterwards."⁴⁵ The thought is that the law develops in the right way when judges are guided by their intuitions as to a dispute's proper resolution, even when they have not yet fully articulated them into clear rules. It is "empiricist" in the sense that experience is the judge's guide, but it adopts a wider sense of "experience," which includes a judge's moral and legal intuitions, not just her observations of facts.⁴⁶

This is an old idea. In 1791, the founder James Wilson wrote that "common law, like natural philosophy, when properly studied, is a science founded on experiment. The latter is improved and established by carefully and wisely attending to the phenomena of the material world; the former, by attending, in the same manner, to those of man and society."⁴⁷ Over a century later, the sociological jurists elaborated the point, though with more appreciation for the way in which a judge's intuitions could be shaped—and distorted—by social influences. For Benjamin Cardozo, the judge's task was to "balance" the relevant interests at stake in some decision, but such a task required an act of judgment that "will be shaped by his experience of life, his understanding of the prevailing canons of justice and morality; his study of social sciences; at times, in the end, by his intuitions, his guesses, even his ignorance or prejudice."⁴⁸

More recently, former Justice David Souter explicitly adopted this view of the common law. He stressed the value of taking a "bottom-up" approach to deciding cases, which instructs judges to "have great respect for fact because your first job is to

45. Oliver Wendell Holmes, *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1, 1 (1870).

46. See Charles L. Barzun, *Three Forms of Legal Pragmatism*, 95 WASH. U. L. REV. 1003 (2018) (distinguishing among different understandings of "experience" and ascribing this wider view to various legal theorists).

47. JAMES WILSON, *THE WORKS OF JAMES WILSON* 458 (James DeWitt Andrews ed., Callaghan & Co. 1896) (1791).

48. BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* (1924), reprinted in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 223 (Margaret E. Hall ed., 1947).

decide the case, not to embody principles.”⁴⁹ But Souter was careful to distinguish this view from one that authorizes judges to decide cases “on a kind of functional ground that gets [them] to whatever that better answer is,” which he considered “essentially antithetical to what we like to call principled judicial decision-making.”⁵⁰ In short, the holistic approach has a long pedigree.

The holistic model fits MacKinnon’s argument far better than does either of its rivals because although it trusts the judges’ intuitions as guides to decision-making, it leaves open the possibility that those intuitions may be corrupted by social prejudice, bias, or some sort of moral myopia. For the holist recognizes the judicial tendency to rationalize the irrational (or at least non-rational). Cardozo warned that judges “are constantly misled by our extraordinary faculty of ‘rationalizing’—that is, of devising plausible arguments for accepting what is imposed upon us by the traditions of the group to which we belong.”⁵¹ Thus, MacKinnon’s claim that judges have been blind to what is really going on in sexual harassment cases fits well with the holistic model’s understanding of how our social and moral—and hence legal—norms change over time. People are brought to see things differently (and more clearly), leading them to reevaluate the moral stakes involved.

The holist’s willingness to abandon a doctrine if it is revealed to be a mere rationalization is akin to what the critical theorist would call “ideology critique.”⁵² Both forms of inquiry are “reflective” in the sense that they involve scrutinizing one’s substantive moral judgments in light of the epistemic conditions under which those judgments were formed.⁵³ The nature of the reasoning involved is thus not easily classed as either first-order moral theorizing of the sort Dworkin engages in or positivist social science of the sort the empiricist looks to. It is simultaneously responsive to ethical and epistemic demands.

49. Harvard University, *Former Justice Souter on the Constitution*, C-SPAN at 19:00–21:00 min. (Sept. 17, 2009), <http://www.c-span.org/video/?288993-2/former-justice-souter-constitution> [https://perma.cc/5SGQ-5K8P].

50. *Id.* at 16:00–18:00 min.

51. *Cf.* BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 175 (1921).

52. GEUSS, *supra* note 8, at 26–45; TERRY EAGLETON, *IDEOLOGY: AN INTRODUCTION* 40 (2007) (observing that “[o]ne traditional form of ideology critique assumes that social practices are real, but that the beliefs used to justify them are false or illusory”).

53. GEUSS, *supra* note 8, at 62.

* * *

Why does it matter that the holistic interpretation of the common law shares a structural affinity with critical theory? There are two reasons. First, it reminds us that the common law contains seeds of radicalism. Although its historical tendency to protect property, to encourage markets, and, in general, to privilege “private ordering” has long made the common law the target of critical theorists, the case-by-case *process* by which the law develops means it is always open to revision.⁵⁴ And even though its official position is one of incremental change, under the holistic interpretation, courts must confront the law’s tendency to rationalize, rendering the doctrine constantly vulnerable to being upended.

The success of MacKinnon’s theory of sexual harassment is proof of such vulnerability to upheaval. At the time of her writing, only a few courts had interpreted Title VII to cover sexual harassment claims.⁵⁵ Less than a decade later, her theory was ratified by a unanimous Supreme Court.⁵⁶ Today, sexual harassment claims account for about a third of all Title VII cases decided by federal courts.⁵⁷ MacKinnon’s theory revolutionized our understanding of sex discrimination and essentially created the modern law of sexual harassment.⁵⁸ No surprise, then, that

54. See Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 568 (1983) (“The general theory of contract and property provided the core domain for the objectivist attempt to disclose the built-in legal content of the market . . .”).

55. See *Barnes v. Costle*, 561 F.2d 983, 991–92 (D.C. Cir. 1977); *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1048 (3d Cir. 1977); *Miller v. Bank of Am.*, 600 F.2d 211, 212 n.1 (9th Cir. 1979).

56. *Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 57, 64 (1986) (“Without question, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.”).

57. Charles L. Barzun, *Catharine MacKinnon and the Common Law*, in UNIV. VA. SCH. OF L. PUB. L. & LEGAL THEORY RSCH. SERIES 4 (Paper No. 2020-69). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3696540 [<https://perma.cc/EMV6-3CLD>].

58. Carrie N. Baker, *Race, Class, and Sexual Harassment in the 1970s*, 30 FEMINIST STUD. 7, 7 (2004) (recounting MacKinnon being largely credited as the principal architect of sexual harassment jurisprudence who “creat[ed] the law of sexual harassment in the United States”); Deborah N. McFarland, *Beyond Sex Discrimination: A Proposal for Federal Sexual Harassment Legislation*, 65 FORDHAM L. REV. 493, 510 (1996) (“MacKinnon’s theory of sexual harassment as sex discrimination was revolutionary and it radically altered the case law regarding sexual harassment.”).

MacKinnon herself has praised the common-law method as one that, at its best, is “open to reality.”⁵⁹

In this way, MacKinnon’s legal theory can be seen as analogous to (or perhaps an example of) the sort of insight that the philosopher Philip Kitcher has argued critical theory offers American pragmatism. Taking a cue from the philosophers William James and John Dewey—whose understanding of experience underlies holistic tradition of the common law—Kitcher argues that moral progress depends on hearing and responding to the “cries of the wounded.”⁶⁰ Critical theory is useful to the pragmatist, he explains, because it aims to “recognize structural problems of societies, conditions giving rise to the aspects of social life that provoke the cries of the wounded.”⁶¹ Under this view, MacKinnon in effect offered an explanation of workplace behavior that enabled judges to hear the cry of wounded working women.

But if the common-law tradition has something to learn from critical theory, is the reverse also true? I think so, which is the second reason why the affinity between the two traditions matters. Like critical theory, the holistic interpretation of the common law rejects crude empiricism or positivism. It denies that we can cleanly separate matters of “fact” from those of “value.” At its best, though, its practitioners adopt an attitude or posture akin to what the philosopher Bas van Fraassen has called the “empirical stance” or what the legal theorist Jerome Frank called the “scientific spirit.”⁶² Both describe a posture of openness and willingness to revise one’s belief in light of new experience. As former Justice Souter put it, there are “no resolutions immune to rethinking when the significance of old facts may have changed in the changing world.”⁶³

59. Catharine A. MacKinnon, *Freedom from Unreal Loyalties: On Fidelity in Constitutional Interpretation*, 65 *FORDHAM L. REV.* 1773, 1777 (1997).

60. Philip Kitcher, *John Dewey Goes to Frankfurt: Pragmatism, Critical Theory, and the Invisibility of Moral/Social Problems*, in *DEBATING CRITICAL THEORY: ENGAGEMENTS WITH AXEL HONNETH* 247, 251 (Julia Christ et al. eds., 2020).

61. *Id.* at 260.

62. BAS C. VAN FRAASSEN, *THE EMPIRICAL STANCE* 47 (2002) (endorsing a “calling us back to experience,” a “rebellion against theory,” and “an idea of rationality that does not bar disagreement” as empiricist attitudes); JEROME FRANK, *LAW AND THE MODERN MIND* 98 (1930) (endorsing the “spirit of the creative scientist, which years not for safety but risk, not for certainty but adventure, which thrives on experimentation, invention and novelty and not on nostalgia for the absolute . . .”).

63. Justice David H. Souter, *Harvard Commencement Remarks (as Delivered)*, *HARV. GAZETTE* (May 27, 2020),

In my view, the critical theorist does, or should, adopt a similar stance. How could she fail to adopt it if she takes seriously the tradition of critical theory *as a whole*? If there is any lesson that feminist and critical-race critiques of traditional Marxism have taught us, it is that domination and oppression can take different forms and are often hard to spot. That is because ideology rarely functions in ways that are obvious to those participating in its production.

But that point is a quite general one and so cuts both ways. So, for instance, as the repeated killings of unarmed Black men by the police have rightly brought the concerns of racial justice (or, rather, *injustice*) to the forefront of public debate, one hears occasional warnings that efforts to explain modern conditions solely by reference to race may function to further entrench other forms of oppression.⁶⁴ Debates within feminism over “sex positivity” are to the same effect.⁶⁵ Precisely because we live in a capitalist society beset by racism and sexism (not to mention religious bigotry, homophobia, ageism, and other forms of prejudice), it is hard to know which relations of domination are doing what work, and when—and, therefore, whether we are ourselves participating in them (and, if so, how).⁶⁶

Which brings us back to my exchange with Aunt Lucy. I asked what kind of reasoning, if any, could persuade one of us to come around to the other’s quite different worldview. In practice, the answer is that neither one of us is likely to experience the

<http://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech> [<https://perma.cc/HV25-EXMJ>].

64. David North & Eric London, *The 1619 Project and the Falsification of History: An Analysis of the New York Times’ Reply to Five Historians*, WORLD SOCIALIST WEB SITE (Dec. 28, 2019), <https://www.wsws.org/en/articles/2019/12/28/nytr-d28.html> [<https://perma.cc/UK2E-YFYL>] (“[T]he exaltation of [identity] politics has nothing in common with the theory, principles, and political program of the socialist movement. The historical slogan of the socialist movement is ‘Workers of the World, Unite!’ not ‘Races of the World, Divide!’”).

65. Compare Glosswitch, “*Sex-Positive*” *Feminism Is Doing the Patriarchy’s Work for It*, NEW STATESMAN (Mar. 7, 2014), <https://www.newstatesman.com/life-style/2014/03/sex-positive-feminism-doing-patriarchy%E2%80%99s-work-it> [<https://perma.cc/SES4-7VM5>], with *Sex Positivity*, COLO. ST. U. WOMEN & GENDER ADVOC. CTR., <https://wgac.colostate.edu/education/bodyimage/sex-positivity/> [<https://perma.cc/8JU4-434F>].

66. Cf. Michael J. Sandel, *Disdain for the Less Educated Is the Last Acceptable Prejudice*, N.Y. TIMES (Sept. 2, 2020), <https://www.nytimes.com/2020/09/02/opinion/education-prejudice.html> [<https://perma.cc/7MGE-YFFM>] (“[T]he study also found that elites are unembarrassed by this prejudice [against less-educated people]. They may denounce racism and sexism, but they are unapologetic about their negative attitudes toward the less educated.”).

sort of wholesale conversion that would be required. There is, however, an asymmetry in theory, because although Aunt Lucy and I can both offer accounts explaining why the other is radically deceived about his or her true interests (hers would look to original sin, mine to social power), only my critical-theory account applies to *both* of us. Whereas Aunt Lucy's account is premised on the idea that she has access (through the Church's teaching) to the Truth about what human beings need, my view is premised on the assumption that either of us could be wrong because any of our judgments could be distorted by power relations of which we are not wholly aware. So, my account allows for the possibility that I am the deluded one in a way that is not reciprocated by her account.

That is why the attitude I am endorsing strikes many as naïve, if not dangerous. When Nazis are marching in the streets, a nativist demagogue is in the White House, and the Supreme Court seems increasingly willing to accommodate Christian nationalism,⁶⁷ a stronger response to Aunt Lucy seems called for. No doubt many of the debates on the Left, such as those over the value of “civil discourse”⁶⁸ or the existence of “cancel culture,”⁶⁹ reflect deep disagreement over the moral and intellectual value of such “open-mindedness.” As against the zealotry of the Catholic integralist, Adrian Vermeule, it seems like pretty weak tea.⁷⁰

Perhaps so. Maybe what is needed is more action and less reflection, more *critique* and less self-critique. All I can say in defense of my claim—that none of us can know with certainty that the categories we use to describe and construct the social

67. Rich Schragger & Micah Schwartzman, *Religious Antiliberalism and the First Amendment*, 104 MINN. L. REV. 1341 (2020).

68. Zach Beauchamp, *Sarah Sanders and the Failure of “Civility”*, VOX (June 25, 2018, 1:00 PM), <https://www.vox.com/policy-and-politics/2018/6/25/17499036/sarah-sanders-red-hen-restaurant-civility> [<https://perma.cc/8YRL-UAA8>].

69. Eve Fairbanks, *The ‘Cancel Culture’ Debate Gets the Fight for Free Speech Entirely Wrong*, WASH. POST (July 28, 2020, 9:17 AM), https://www.washingtonpost.com/outlook/free-speech-cancel-culture/2020/07/28/f53e9740-cd4e-11ea-91f1-28aca4d833a0_story.html [<https://perma.cc/2KWY-JMKS>].

70. Adrian Vermeule, *Beyond Originalism*, ATLANTIC (Mar. 31, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/> [<https://perma.cc/3FF3-76MC>] (“Subjects will come to thank the ruler whose legal strictures, possibly experienced at first as coercive, encourage subjects to form more authentic desires for the individual and common goods, better habits, and beliefs that better track and promote communal well-being.”).

world are doing more good than harm—is that it is undeniably true.