

## COMPASSION AND CRITIQUE

*Angela P. Harris\**

### INTRODUCTION

*Where does compassion begin?*

Perhaps with the experience of caring. Caring happens in the body and in the moment: a quick squirt of oxytocin, a firing of mirror neurons, the sudden perception of a link between the so-called self and the so-called other. Caring is unpredictable and unwilling, a reaction, an eruption along the shifting surfaces between you and not-you, suddenly experienced in the “flinching of an eye.” Kathleen Stewart describes an observer’s emotional reaction to the pain of another:

The young miner who showed me the mine put out every cigarette he smoked on his hand, which was covered with scar tissue. Then I saw the other young miners all had the backs of their hands covered with scar tissue . . . when my eye fell on them it flinched, seeing the burning cigarette being crushed and sensing the pain . . . . The eye does not read the meaning in a sign; it *jumps* from the mark to the pain and the burning cigarette, and then jumps to the fraternity signaled by

---

\* Professor of Law, University of California—Davis (King Hall). Although the participants in this Symposium were instructed to reflect on race and Marxism, I found myself reflecting instead on the work of the Symposium’s organizer, Anthony Paul Farley. His classic treatment of the pleasures of anti-black racism, *The Black Body as Fetish-Object*, 76 OR. L. REV. 457 (1997), continues to instruct all who read it, and his writing and speaking—laced always with compassion and outrage—reminds me to watch out and take care. I also wish to thank Caitlin Sislin, who first drew my attention to the opinion in *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008), and Tucker Culbertson, who provided helpful comments on an early draft of this Essay and whose work constantly pushes me to question the boundary of “the human.” Blunders are all mine.

the burning cigarettes.<sup>1</sup>

But compassion also passes through judgment. The body-mind, flinching and sparked, engages with the norms that tell us how to feel, or not, and what to do, or not. There is a struggle, or a series of choices: to suffocate the spark or to fan it into a flame that may set others alight through emotional contagion; to decide that what looked like suffering was actually something else: reflex, perhaps, or cold calculation; to conclude that the suffering is too overwhelming, too immense, or too baffling to address, and so to turn uneasily away.<sup>2</sup> These choices suggest that compassion has a relationship with critique. Harriet Beecher Stowe, in the final chapter of *Uncle Tom's Cabin*, addresses her readers in the North directly about their role in slavery:

Do you say that the people of the free state[s] have nothing to do with it, and can do nothing? Would to God this were true! But it is not true. The people of the free states have defended, encouraged, and participated; and are more guilty for it, before God, than the South, in that they have not the apology of education or custom . . . .

But, what can any individual do? Of that, every individual can judge. There is one thing that every individual can do,—they can see to it that *they feel right*. An atmosphere of sympathetic influence encircles every

---

<sup>1</sup> KATHLEEN STEWART, ORDINARY AFFECTS 40 (2007) (quoting Alphonso Lingis, *The Society of Dismembered Body Parts*, in DELEUZE AND THE THEATRE OF PHILOSOPHY 296 (Constantin Boundas & Dorothea Olkowski eds., 1993)).

<sup>2</sup> I draw here on the work of sociologist Candace Clark, who argues that “empathy,” or “feeling with” another sentient being, can occur in three different modes: cognitive, physical, and emotional. CANDACE CLARK, MISERY AND COMPANY: SYMPATHY IN EVERYDAY LIFE (1997). If we take the example of empathizing with another’s pain, cognitive empathy means recognizing intellectually that the other is feeling pain. *Id.* at 36-37. Physical empathy refers to the physical reactions found in witnesses to suffering—trembling, rapid heartbeat, nausea, or tears. *Id.* at 37. Emotional empathy, which is closely intertwined with physical empathy, is the subjective feeling that ordinarily accompanies physical empathy—the sense that one is “feeling another’s pain,” or at least experiencing a direct emotional response that seems to resonate with the suffering of another. *Id.* These three types of empathy apparently can occur either simultaneously or in stages. *Id.* at 38. Culture, in the form of social norms, narratives, and rules, obviously may influence the experience of empathy in all three of its modes, and Clark devotes much of her book to explaining the social rules of empathy in different settings.

human being; and the man or woman who *feels* strongly, healthily and justly, on the great interests of humanity, is a constant benefactor to the human race. See, then, to your sympathies in this matter! Are they in harmony with the sympathies of Christ? Or are they swayed and perverted by the sophistries of worldly policy?<sup>3</sup>

Marx famously wrote, “The philosophers have only interpreted the world, in various ways; the point is to change it.”<sup>4</sup> Critical theory differs from pure philosophy in its motivation to provoke change, and thus it necessarily traffics in the emotions.<sup>5</sup> Challenging power relations, as critical theorists love to do, means provoking anger, disquiet, anxiety, and even fear in those with a settled understanding of who they are and where they belong. But

---

<sup>3</sup> HARRIET BEECHER STOWE, *UNCLE TOM’S CABIN: OR, LIFE AMONG THE LOWLY* 476 (1852).

<sup>4</sup> KARL MARX, *Theses on Feuerbach*, in *MARX-ENGELS SELECTED WORKS*, VOL.1, at 13, 15 (1969).

<sup>5</sup> Following Maroney, I will use “emotions” as an umbrella term that includes feelings, moods, and affect. See generally Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, 30 *LAW & HUM. BEHAV.* 119 (2006) (establishing a rubric for understanding the legal relevance of emotion) [hereinafter Maroney, *Law and Emotion*]. See also Terry A. Maroney, *Emotional Competence, Rational Understanding, and the Criminal Defendant*, 43 *AM. CRIM. L. REV.* 1375, 1401 (2006) [hereinafter Maroney, *Emotional Competence*]. Emotions are subjective psychological states associated with specific physiological processes. A small list of basic emotions including sadness, surprise, joy, and anger, is believed to be experienced by all humans and some nonhuman animals. (The number and definition of these core emotions differ, however, depending on who is making the list. See Maroney, *Emotional Competence*, *supra* note 5, at 1402 n.147.) The basic emotions can be combined in elaborate and various ways. People can experience several emotions at once: in English, we speak of having “mixed feelings.” There are also complicated and subtle emotions, sometimes generated by life in a particular place or time, which not everyone may experience. An example is the German term *Schadenfreude*, usually defined as the pleasure one feels in someone else’s misfortune. It is even possible to have emotions about emotions: to feel ashamed of feeling ashamed, for instance, or guilty for feeling happy. Emotions can be dissected into component parts. The term “feelings” describes the subjective experience of an emotion. The term “mood” is generally used to describe a more diffuse subjective state, not necessarily tied to a single emotion. For instance, people with bipolar disease often swing between two families of emotions, or moods—excitement, euphoria, benevolence, and joy on the one hand, and sadness, apathy, despair, and anxiety on the other. The term “affect” is used both to evaluate emotions (as in the distinction between “positive” and “negative” affect) and to refer to the outward expression of a feeling state (for example, a person with a “flat affect” is someone who appears to others to be lacking in emotion). Maroney, *Emotional Competence*, *supra* note 5, at 1402.

critical theorists are motivated not only by the desire to provoke and unsettle,<sup>6</sup> but also by the desire to provoke compassion. Stowe can justly be criticized for implying that “feeling right” is sufficient. Compassion, however, is not the same as pity; it is the desire to relieve another’s suffering, the desire to act.<sup>7</sup> Compassion, that is to say, may sometimes begin in critique.

In this Essay, I am interested in the relationship among ideology, ideological critique, and emotion. I argue that the ideological critique produced by Marx in the nineteenth century and by critical legal theorists in the twentieth and twenty-first centuries undertakes not only to persuade our minds but also to rally our emotions. To accomplish this, critical theorists show us that ideology is already a technique of emotion management. Ideology makes suffering invisible and compassion inappropriate by assuring us that the status quo is natural, normal, and necessary. Ideological critique, in turn, reveals the suffering beneath the bland façade of ideological concepts like “capital” and “property.” It tries to persuade us, moreover, that this suffering is unjust and unnecessary: that politics and not nature is its source, and that we should act to relieve it.

Like Marx, critical race theorists therefore want us to care about the subordinated.<sup>8</sup> Yet several pitfalls await. First, caring

---

<sup>6</sup> For a classic text on the joy of “trashing,” a technique employed in critical legal studies, see Mark Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984).

<sup>7</sup> I follow Andrew Taslitz (who in turn follows Paul Ekman and the Dalai Lama) in defining compassion as “the active desire to relieve another’s suffering.” See Andrew Taslitz, *Why Did Tinkerbell Get Off So Easy? The Roles of Imagination and Social Norms in Excusing Human Weakness*, 42 TEX. TECH L. REV. 419, 426 (2009). Compassion is, as Taslitz suggests, somewhere between an emotion and a character trait: it must be cultivated to be reliably experienced, but once it is deeply rooted in one’s being it takes on the perceptual, evaluative, and motivational characteristics of an emotion. *Id.* at 427. See also PAUL EKMAN & THE DALAI LAMA, EMOTIONAL AWARENESS: OVERCOMING OBSTACLES TO PSYCHOLOGICAL BALANCE AND COMPASSION: A CONVERSATION BETWEEN THE DALAI LAMA AND PAUL EKMAN, PH.D. 166 (2008) (describing compassion as a combination of the desire to relieve suffering and the courage to do whatever is necessary in one’s own life to bring this about).

<sup>8</sup> In this Essay, I will use the term “caring” to refer to at least two clusters of emotions. First, and more broadly, caring refers to the feelings, moods, and affects associated with concern for another for the other’s own sake. The defining characteristic of this concern is a decentering of the self: when we care about someone or something, we want it to flourish regardless of whether that flourishing has instrumental value for us. A paradoxical result of setting one’s narrow interests aside is that caring enlarges the self. If I care

must be connected to moral outrage to produce a commitment to action. Caring without outrage is only merely pity, an emotion that requires no action, only the feeling of sympathy. Critical theorists must strive to cultivate indignation as well as caring in their readers' hearts. A second pitfall is related to the first. Observing the suffering of others may provoke compassion, but it may also reinforce a sense of their inferiority, their need for our charity. Conversely, a politics rooted in displays of suffering threatens to become "therapeutic," a politics in which the subordinated seek only public recognition of their wounds and a sense of moral superiority rather than the transformation of social relations.<sup>9</sup> Third, critical theory must simultaneously convince us that injustice is everywhere, and that change is possible. Critical race theory, for example, takes the position that racism pervades our institutions, our beliefs, and our everyday practices.<sup>10</sup> Critical race theorists thus reject the view that racism can easily be rooted out of our lives. Yet to join the battle seems to require some optimism that improvement is possible. Critical race theory thus walks, along with its readers, a thin line between hope and despair.

## I. EMOTIONAL REASONING

Emotions are increasingly of interest to legal scholars as well as scientists.<sup>11</sup> Law has long distrusted emotion, treating it as the opposite of rationality.<sup>12</sup> But researchers are coming to understand that emotions are deeply embedded in reason. They influence what

---

about you, then good things that happen to you will make me happy too, as if they had happened to me. In a sense, what counts as "me" has expanded through my caring about you—even though that expansion was not my intention. Second, and more narrowly, when I refer to caring I mean the feelings, moods, and affects associated with compassion as discussed in Maroney, *Law and Emotion*, *supra* note 5.

<sup>9</sup> See generally WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* 52 (1995) (explaining how the portrayal of victims as helpless and in continual need of governmental protection can cause further harm and disempowerment).

<sup>10</sup> See Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1336 (1988) ("[R]acism is a central ideological underpinning of American society.").

<sup>11</sup> See generally Maroney, *Law and Emotion*, *supra* note 5.

<sup>12</sup> See SHARON R. KRAUSE, *CIVIL PASSIONS: MORAL SENTIMENT AND DEMOCRATIC DELIBERATION* 21 (2008) ("[T]he whole purpose of law, it is often thought, is to regulate unruly affect through the application of cool-headed cognition."); see also SUSAN A. BANDES, *THE PASSIONS OF LAW* (1999).

we perceive and how we perceive it.<sup>13</sup> They help us appraise the value of what we perceive: emotional evaluation is what we mean when we distinguish between “knowing” something and “understanding” or “appreciating” it. Finally, emotions are the engines of action. They drive us to act, help us make and implement choices, and orient our goals. From this perspective, emotions are not opposed to, but rather central to what we mean by “reason” or “rationality.”

This approach to emotion has implications for critical theorists, who aim to identify and expose “ideology.” For our purposes, ideology is a cluster of ideas, beliefs, and associations, either consciously held, unconsciously held, or unexamined—taken as “common sense.” This ideology, in Alan Hunt’s words, “provides a justification or legitimation for the interests of the dominant class in society in terms of some higher and apparently universal interest of all classes.”<sup>14</sup> According to E.B. Thompson, law itself is ideological, to the extent that it allies itself with justice while masking, when necessary, actual injustice.<sup>15</sup> Critical legal theorists have described this as the “legitimation function” of law: every conflict is an opportunity for lawyers to declare that “the

---

<sup>13</sup> See Maroney, *Emotional Competence*, *supra* note 5, at 1407 (“[N]ot only is emotion not the natural enemy of rationality, it is intimately connected to the perception and processing of information, appraisal of value, formation of goals, motivation of behavior, and implementation of choice”).

<sup>14</sup> ALAN HUNT, *EXPLORATIONS IN LAW AND SOCIETY: TOWARDS A CONSTITUTIVE THEORY OF LAW* 121 (1993).

<sup>15</sup> E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 263* (1975) (“If the law is evidently partial and unjust, then it will mask nothing, legitimize nothing, contribute nothing to any class’s hegemony. The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity: indeed, on occasion, by actually being just.”). Thurman Arnold makes a similar claim even more forcefully, arguing “[T]he function of law is not so much to guide society, as to comfort it . . . Though the notion of a ‘rule of law’ may be the moral background of revolt, it ordinarily operates to induce acceptance of things as they are. It does this by creating a realm somewhere within the mystical haze beyond the courts, where all our dreams of justice in an unjust world come true . . . From a practical point of view it is the greatest instrument of social stability because it recognizes every one of the yearnings of the underprivileged, and gives them a forum in which those yearnings can achieve official approval without involving any particular action which might joggle the existing pyramid of power.” THURMAN ARNOLD, *THE SYMBOLS OF GOVERNMENT* 34-35 (1935).

system works.”<sup>16</sup>

But we need not wander into the thickets of trying to evaluate the legitimacy of the legal system as a whole to see the point that legal rules may serve an ideological function. When human beings could be bought, sold, bequeathed, rented, and mortgaged, the ability to do these things shaped understandings of property and of personhood. When legal rules incorporate ideology, they help legitimate privilege in the guise of reflecting truth. Critical legal theorists are committed to discovering and de-legitimizing this kind of hidden privilege. Understanding emotion and reason as inextricable helps us see that if discovering that seemingly neutral rules, practices, or institutions benefit one group at the expense of another fills the reader with outrage or anger and inspires her to act, critical legal theory is an emotional as well as an intellectual project.<sup>17</sup>

This understanding of critical legal theorists as emotional entrepreneurs,<sup>18</sup> and the importance of the emotional dimension of ideology critique, has a history. Stowe’s aim of getting her readers to “feel right” stemmed from, and built on, an eighteenth-century English development that Karen Halttunen calls the “culture of sensibility.”<sup>19</sup> Nineteenth-century Americans adopted this culture of sensibility, drawing on it to develop a language of rights. Elizabeth Clark argues, for instance, that stories describing “the suffering slave” became popular with Northern readers in 1830s America, and helped contribute to the idea that freedom from pain and coercion

---

<sup>16</sup> See Crenshaw, *supra* note 10, at 1352.

<sup>17</sup> Even the critical theorist’s signature interpretive method—the “attempt[] to expose hidden meaning from the person making the expression and not the expression itself—is known by its association with a mood: the “hermeneutics of suspicion.” See Andrew F. Sunter, *TWAIL as Naturalized Epistemological Inquiry*, 20 CAN. J.L. & JURIS. 475, 498 (2007). Paul Ricoeur originally coined the phrase to describe the interpretive methods of Freud, Marx, and Nietzsche. *Id.* at 499-500.

<sup>18</sup> Here, I am expanding the term “sympathy entrepreneurs,” which Clark uses to describe individuals and organizations that consciously “help[] to set the cultural parameters of what we recognize as plights.” CLARK, *supra* note 2, at 85.

<sup>19</sup> See Karen Halttunen, *Humanitarianism and the Pornography of Pain in Anglo-American Culture*, 100 AM. HIST. REV. 303 (1995). Halttunen argues that “[t]he culture of sensibility steadily broadened the arena within which humanitarian feeling was encouraged to operate, extending compassion to animals and to previously despised types of persons including slaves, criminals, and the insane and generating a reformist critique of forms of cruelty that had once gone unquestioned.” *Id.* at 303.

was a fundamental human right.<sup>20</sup>

In the twentieth century, Eva Illouz argues, the language of psychology infiltrated popular culture, the home, and the workplace.<sup>21</sup> We now live in a “culture of therapy” in which skillfully identifying, expressing, and managing one’s emotions is an important marker of middle-class status. Ensuring that we “feel right” is thus a cultural preoccupation that embraces, and extends well beyond, law and legal theory.

## II. CAPITALISM, IDEOLOGY, AND EMOTION

Marx’s dazzling analysis of capitalism and his conviction that the laws of historical materialism would bring on the revolution of the proletariat as inevitably as the sun rises are still riveting to contemporary theorists. One reason is his skill at describing suffering and evoking compassion. His concepts of alienation and commodity fetishism draw the reader’s attention to the worker’s body and mind, revealing suffering and the system’s attempt to deny or make invisible that suffering. In Marx’s view, under capitalist production the worker is alienated (or “estranged”) from the product of her labor and also from the process of production. “Alienation” means, among other things, the disruption of a kind of behavior that Marx identified as inherent to human nature (which he called “species-being”).<sup>22</sup> For Marx, intrinsic to human species-being is the capacity and urge to make things and, in the process, to re-create oneself and all of nature; as Marx put it, man makes his life-activity itself an object of his will.<sup>23</sup> Under capitalist production, however, the worker no longer experiences her labor as her own: it belongs to someone else, and the harder she works, the less of herself she owns.<sup>24</sup> The product of her labor, the commodity—

---

<sup>20</sup> Elizabeth B. Clark, *“The Sacred Rights of the Weak”:* Pain, Sympathy, and the Culture of Individual Rights in Antebellum America, 82 J. AM. HIST. 463, 463 (1995).

<sup>21</sup> See generally EVA ILLOUZ, SAVING THE MODERN SOUL: THERAPY, EMOTIONS, AND THE CULTURE OF SELF-HELP 1 (2008).

<sup>22</sup> See Karl Marx, *Estranged Labor*, in ECONOMIC AND PHILOSOPHICAL MANUSCRIPTS OF 1844, reprinted in THE POLITICAL THEORY READER 137, 138 (Paul Schumaker ed., 2010).

<sup>23</sup> *Id.* at 139.

<sup>24</sup> *Id.* at 138 (“The alienation of the worker in his product means not only that his labor becomes an object, an external existence, but that it exists outside him, independently, as something alien to him, and that it becomes a power of its own confronting him; it means that the life which he has conferred on the object confronts him as something hostile and alien”).

described by Marx as nothing but “congealed labor”—similarly appears alien to the worker<sup>25</sup>. This alienation produces a deep unhappiness:

[I]n his work, therefore, he does not affirm himself but denies himself, does not feel content but unhappy, does not develop freely his physical and mental energy but mortifies his body and ruins his mind. The worker therefore only feels himself outside his work, and in his work feels outside himself. He is at home when he is not working, and when he is working he is not at home. His labor is therefore not voluntary, but coerced; it is *forced labor*.<sup>26</sup>

Following Marx, contemporary theorists have suggested that workers suffer not only from having their creativity thwarted, but from having their own emotionality turned into a commodity. Feminist sociologists, following Arlie Hochschild, have named “emotional labor” as a vivid example of alienation.<sup>27</sup> Many service jobs require laborers to produce an emotional experience for the customer. Flight attendants, waitresses, professional escorts, nurses, retail and childcare workers, Disneyland employees, sex workers, and therapists of various kinds, are required to seem to care, and in laboring to do so, may experience an exhausting disconnect between their smiling, laughing, flirting bodies and their subjective emotional state, which may be boredom, sadness, numbness, or anger. This is alienation: not only from the other (because the caring connection does not feel real to the person affecting to care), but also from the self (because the person affecting to care experiences the body-mind itself as fragmented, lacking integrity, “inauthentic”).<sup>28</sup>

---

<sup>25</sup> *Id.* at 137.

<sup>26</sup> *Id.* at 138.

<sup>27</sup> See, e.g., ARLIE HOCHSCHILD, THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING 7 (1985).

<sup>28</sup> When caring is commodified, workers may experience another kind of disconnect: between their subjective experience of caring and their impulse, directed by the incentive structure of their employment, to function as a rational profit-maximizer. Nancy Folbre and Katherine Silbaugh, for instance, argue that women’s emotional labor is hyper-exploited in the workplace and the home because women are supposed to accept caring as its own reward. In a capitalist context, this produces the worst of both worlds: Women are materially exploited if they work for less than their labor is worth, but if they attempt to negotiate adequate wages, they are shamed as heartless and uncaring. See generally NANCY FOLBRE, THE INVISIBLE HEART: ECONOMICS AND FAMILY VALUES (2002); Nancy Folbre & M.V. Lee Badgett,

The pain and disorientation caused by these internal contradictions and physical and emotional suffering, Marx thought, would eventually rouse workers to rebel against the capitalist system itself. While workers constantly do rebel in large and small ways against the conditions of their employment—finding ways to “get by” or “get back,” instigating or joining unions—the global revolution Marx expected has not materialized. Instead, two other emotional phenomena Marx identified, which he called “human nature alienation” and “fellow beings alienation,” have pervaded the social world. These forms of alienation not only create suffering, but inhibit compassion.

Under human nature alienation, the body-mind energetic reaction of caring, denied expression in acts of creation, may be turned perversely toward destruction. For instance, the industrial production of food leads to conditions in slaughterhouses and farms that make caring for and about animals difficult. Huge numbers of animals are crammed into small spaces and raised in a short span of time, with technology replacing human labor whenever possible. Jonathan Safran Foer interviews a slaughterhouse worker about the feelings associated with killing animals on an industrial scale and finds that frustrated caring can become a form of worker suffering:

The worst thing, worse than the physical danger, is the emotional toll. If you work in the stick pit for any period of time, you develop an attitude that lets you kill things but doesn't let you care. You may look a hog in the eye that's walking around down in the blood pit with you and think, God, that really isn't a bad-looking animal. You may want to pet it. Pigs down on the kill floor have come up and nuzzled me like a puppy. Two minutes later I had to kill them—beat them to death with a pipe . . . . When I worked upstairs taking hogs' guts out, I could cop an attitude that I was working on a production line, helping to feed people. But down in the stick pit I wasn't feeding people. I was killing things.<sup>29</sup>

---

*Assigning Care: Gender Norms and Economic Outcomes*, 138 INT'L LABOUR REV. 273 (1999); Katherine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1996).

<sup>29</sup> JONATHAN SAFRAN FOER, EATING ANIMALS 254 (2010). As Foer describes the process at a typical slaughter facility:

[c]attle are led through a chute into a knocking box—usually a large

In some cases, frustrated caring can become cruelty. Foer notes that when slaughterhouse expert Temple Grandin first began to record abuses against animals, she “reported witnessing ‘deliberate acts of cruelty occurring on a regular basis’ at 32 percent of the [slaughterhouses] she surveyed during announced visits in the United States.”<sup>30</sup> Despite subsequent improvements, in a more recent survey of beef plants, Grandin found that twenty-five percent of the slaughterhouses she visited had abuses so severe that they automatically failed her audit.<sup>31</sup> As an example, Grandin describes a worker “dismembering a fully conscious cow, cows waking up on the bleed rail, and workers ‘poking cows in the anus area with an electric prod.’”<sup>32</sup>

The final form of alienation Marx identified is fellow-beings alienation, under which capitalism weakens humans’ emotional ties to one another.<sup>33</sup> The opposed interests of owner and worker clearly encourage this alienation, for one’s profit is the other’s loss.

---

cylindrical hold through which the head pokes. The stun operator, or ‘knocker,’ presses a large pneumatic gun between the cow’s eyes. A steel bolt shoots into the cow’s skull and then retracts back into the gun, usually rendering the animal unconscious or causing death . . . . In twelve seconds or less, the knocked cow—unconscious, semi-conscious, fully conscious, or dead—moves down the line to arrive at the ‘shackler,’ who attaches a chain around one of the hind legs and hoists the animal into the air. From the shackler, the animal, now dangling from a leg, is mechanically moved to a “sticker,” who cuts the carotid arteries and a jugular vein in the neck. The animal is again mechanically moved to a “bleed rail” and drained of blood for several minutes. . . . The cow should now be carcass, which will move along the line to a “head-skinner,” which is exactly what it sounds like—a stop where the skin is peeled off the head of the animal . . . . After the head-skinner, the carcass (or cow) proceeds to the ‘leggers,’ who cut off the lower portions of the animal’s legs. . . . The animal then proceeds to be completely skinned, eviscerated, and cut in half, at which point it finally looks like the stereotyped image of beef—hanging in freezers with eerie stillness.

FOER at 229-33.

<sup>30</sup> *Id.* at 255.

<sup>31</sup> *Id.* at 255-56.

<sup>32</sup> *Id.* at 256.

<sup>33</sup> KARL MARX, ECONOMIC AND PHILOSOPHIC MANUSCRIPTS OF 1844, at 32 (Martin Mulligran, trans., 1959) (1932), available at <http://www.marxists.org/archive/marx/works/download/pdf/Economic-Philosophic-Manuscripts-1844.pdf> (stating that “an immediate consequence of the fact that man is estranged from the product of his labor, from his life activity from his species-being, is the *estrangement of man from man*”).

But the most notorious example of Marx's notion of fellow-beings alienation is what he named commodity fetishism: As consumers in a capitalist society, we lavish our creative and caring energies on things, ignoring the social relations that each object represents.<sup>34</sup> Advertising thrives on, and seeks to encourage, commodity fetishism. Commodity fetishism, moreover, crosses paths with human nature alienation. Possessing things is a substitute for caring for others as well as making things; possessing things becomes crucial to buttressing the self, and self-indulgence emerges as the flip side of the disciplinary urge to improve oneself. "It's all about you," a thousand commercials promise, and rather than needing to "work on yourself," you can become your highest and best self through things money can buy.

Roberto Unger carefully examines the affective experience of commodity fetishism with a discussion of luxury, which in his view has four facets.<sup>35</sup> He begins, like Marx, by observing that luxury involves the enjoyment of a good or service while ignoring the labor that brought it into being.<sup>36</sup> Luxury has nothing to do with either creativity or survival, and its pleasures do not require or encourage involvement with other people. At this level, it is utterly asocial, "the consumer's orgasm."<sup>37</sup> But luxury for Unger contains other levels as well. The pleasure of luxury is also in its signaling of social rank, and more specifically, the assertion of privilege.<sup>38</sup> At this level, luxury is not asocial; it is, however, a sociability that consists precisely of excluding the others who cannot afford what you can.<sup>39</sup> At a third level, luxury is actively antisocial: "[I]he passive pleasures of luxury offer an alternative to the joys of serious involvement . . . . They promise us a bright happiness without subjection to the risks and disappointments of the personal

---

<sup>34</sup> *Id.*; see also Isaac Balbus, *Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law*, 11 LAW & SOC'Y REV. 571, 574 (1977) ("Products appear to take on a life of their own, dominating the very human subjects who in fact bring them into existence but who no longer 'know' this.").

<sup>35</sup> See ROBERTO M. UNGER, *PASSION: AN ESSAY ON PERSONALITY* (1986).

<sup>36</sup> Marx asserts that a commodity is nothing more than "congealed labor." See Karl Marx, *CAPITAL: A CRITIQUE OF POLITICAL ECONOMY* 46 (Fredrick Engels ed., Samuel Moore & Edward Aveling trans., Random House 1906) (1894) ("As values, all commodities are only definite masses of congealed labour time").

<sup>37</sup> UNGER, *supra* note 35, at 137.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 138.

encounter.”<sup>40</sup> Luxury thus permits us to avoid possibly frightening encounters with less privileged others. Fourth (and most ethereally), Unger argues that luxury plunges us into the experience of “an utter and irredeemable solitude, apparent in an experience of self that cannot be translated into the categories of established social discourse.”<sup>41</sup> Here, Unger argues, luxury is not only asocial, but like art and sex it fills us with sensations and impulses that can never be met fully or captured in social life, alerting us to the limitations of the social.

As Adam Smith did, Marx and the theorists of capitalism who have built on Marx’s work recognize the world of “moral sentiments” that underpins the world of market relations.<sup>42</sup> Marx does so by making visible the social relations congealed in passionless words like “capital,” “labor,” and “commodity.” Reading Marx, we feel with the worker; reading Unger, we feel with the buyer of commodities, and both analyses fill us with disquiet. Marx’s purpose, however, is critical: he calls the workers of the world to unite. His task, therefore, is not only to stir pity for human workers and disapproval of humans as consumers, but also to view capitalism itself as an ideology-laden enterprise that will, and should, collapse. Presented by its advocates as a good that benefits everyone through the workings of an invisible hand, in fact capitalism causes suffering for the many and privileges the few. Thus, Marx’s mission as an emotional entrepreneur is a double one: both to reveal the suffering caused by capitalism, and to inspire our outrage at the lies and contradictions that underpin the system. This combination of compassion and outrage is meant to produce in us the courage to transform our social relations, to join the revolution and make capitalism obsolete.

### III. RACE, IDEOLOGY, AND EMOTION

However strenuously its proponents may sometimes attempt to portray it as a force of nature, capitalism is clearly only one among many ways of organizing relations of production, consumption, distribution, and exchange among human beings. Race and gender, however, appeal to ideas about biology and culture—supposedly universal and nonpolitical—to make inequality

---

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 139.

<sup>42</sup> ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* (2d. ed. 1761).

seem natural, normal, and necessary.<sup>43</sup> Ideological critiques of race and gender thus quickly become epistemological critiques: They persuade us to question what seem to be matters of simple common sense. As instances of emotional entrepreneurship, ideological critiques of the natural not only stir compassion for suffering and instill outrage over the denial of that suffering. They also reach deep into the emotions by disturbing our own conception of who we think we are, and where we think we belong.

An ideological critique of race and gender may, indeed, subject Marx's own critique to critique. Consider his assumptions about human nature. Marx's account of human nature alienation, as we have seen, proceeds from a particular conception of the human: for him, a central part of human "species-being" is the capacity to reshape the rest of nature. Although embracing Marx's critique of the commodity, critical theorist Bob Torres argues that Marx failed to recognize the ideology buried in this notion. When Marx tells us that the capacity to reshape nature is uniquely human, he asks us to infer that it is unlimited by ethical or moral considerations (because we easily assume that something "natural" is therefore good). In Torres's view, Marx's notion of species-being ultimately implies—wrongly—that "our dominating nature is a positive force in the world, a taming of a wild and unruly natural sphere for the betterment of it and of humanity."<sup>44</sup>

Torres observes that the distinction between dominating Man and passive Nature is an invention of the European Enlightenment, not a universal truth.<sup>45</sup> For him, however, the

---

<sup>43</sup> In Nicolas de Condorcet's words, ideologies of race and gender "make nature herself an accomplice to the crime of political inequality." STEPHEN J. GOULD, *THE MISMEASURE OF MAN: THE DEFINITIVE REFUTATION TO THE ARGUMENT OF THE BELL CURVE* 53 (Rev. ed. 1996) (quoting Nicolas de Condorcet). For example, Frank Valdes conducts an ideological critique of "Euro-American heteropatriarchy" in law, finding that legal rules reflect a series of false ideas—that there are only two genders, determined by biological sex; that passivity defines femininity and activity defines masculinity; that the "opposite" sexes inevitably attract one another; and so on. See generally Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender" and "Sexual Orientation" in Euro-American Law and Society*, 83 CALIF. L. REV. 1 (1995).

<sup>44</sup> BOB TORRES, *MAKING A KILLING: THE POLITICAL ECONOMY OF ANIMAL RIGHTS* 78 (2007) (drawing on the work of Murray Bookchin).

<sup>45</sup> *Id.* For discussions of the gendered opposition between active Man and passive Nature that emerged in the European Enlightenment, see generally CAROLYN MERCHANT, *REINVENTING EDEN: THE FATE OF NATURE IN WESTERN CULTURE* (2003); DONNA HARAWAY, *SIMIANS*,

problem with Marx's concept of species-being goes even deeper than its culture-bound quality. The idea of species-being is ideological. It presents itself as a universal truth, but in fact "the human" is a political concept that has produced, and continues to produce, systematic violence and suffering. Maneesha Deckha notes that the major narratives of moral order produced by European philosophy are all organized around the idea of humanity.<sup>46</sup> To be human is to be included in "society"; it potentially conveys "the right to have rights," including the right to be protected from violence, and the privilege to demand a caring response to one's suffering. As a corollary, violence against a being deemed non-human—an "animal," say, or a human that has been "dehumanized"—is morally unproblematic, or even not recognizable as violence at all. As Kelly Oliver notes, drawing on Giorgio Agamben, "[w]ho is included in human society, and who is not is a consequence of the politics of 'humanity,' which creates the polis itself."<sup>47</sup>

The definition of the human in this context is inherently political; it marks the border between legitimate and illegitimate violence, the world where everything is permitted and the world governed by rules, norms, and ethics. Not surprisingly, the cultural work done to draw a protective boundary around the human is associated with political and economic projects of domination, both targeted at homo sapiens and other species. As Deckha notes, for example, when juxtaposed against "the animal," the figure of the human makes it possible to tolerate the industrial production of food, which as we have seen requires the systematic production of violence and suffering.<sup>48</sup> To be an animal is not to have interests, or at least, not to have interests that really matter. Juxtaposed against the "subhuman," the figure of the human similarly gives license to practices and institutions that systematically bring suffering and death to human beings.<sup>49</sup>

---

CYBORGS, AND WOMEN: THE REINVENTION OF NATURE (1990).

<sup>46</sup> Maneesha Deckha, *The Subhuman as a Cultural Agent of Violence*, 8 J. CRIT. ANIMAL STUD. 28, 28 (2010).

<sup>47</sup> *Id.* at 33.

<sup>48</sup> *Id.* at 31.

<sup>49</sup> Deckha examines the productive role of the "subhuman" in three different contexts: the detention of Muslims suspected of terrorism in military camps like Guantanamo Bay; contemporary slavery, or slavery-like practices of hyper-exploitation; and the laws of war. In each circumstance, once a person or group has been "dehumanized," extreme violence against them is justified and their suffering is ignored, or even enjoyed, as in the case of informal

Dehumanization produces a kind of pleasure that, like luxury, has both asocial and anti-social elements. The pleasure of degrading another who has been deemed “subhuman” is in part the pleasure of being accountable to no one. In its most intense form, torture, dehumanization produces a pleasure for the torturer in forcing the body and the will of another to attest to the torturer’s power, thereby producing a fantasy of power without limits. Enacted within a cultural form, moreover, rituals of dehumanization combine these asocial and antisocial thrills—the pleasure of doing to people formerly unthinkable, unspeakable, impossible things—with the pleasure of social approbation. It is acceptable to do anything to a person who is less than a person.

Moreover, the animal and the subhuman are categories with a certain amount of overlap. Violence and exploitation of humans is informed by violence and exploitation of animals, and sometimes the reverse (as when, for example, animal experimentation substitutes for experimentation on humans). At the symbolic level, people are regularly dehumanized by being “treated like animals,” or compared verbally to animals.<sup>50</sup> To be a subhuman is to be an animal in human form.

The category of “the subhuman” and its overlap with “the animal,” in fact, carries a special kind of emotional valence born from a specific history. The story of racial difference—told to legitimize slavery, colonization, and mass killing of humans by people who believed in liberty and equality—took power from the twin assertions that groups of humans differ from one another as species of animals do and that higher forms of life were meant to dominate the lower.<sup>51</sup> This logic produced a close connection between the inferior races and the animals. Africans and persons of African descent, for example, were, and are imagined to be, more closely related to apes and monkeys than to Europeans.<sup>52</sup>

Yet despite the just-so story of species difference and repeated attempts to stabilize the story with scientific proof, the

---

torture at Guantanamo Bay. *Id.*

<sup>50</sup> For a sustained analysis of the overlaps among images of sexual violence against women, violence against animals, and images of dismemberment of nature and the body in Western culture, see generally CAROL ADAMS, *THE SEXUAL POLITICS OF MEAT: A FEMINIST VEGETARIAN CRITICAL THEORY* (1990).

<sup>51</sup> See MARJORIE SPIEGEL, *THE DREADED COMPARISON: HUMAN AND ANIMAL SLAVERY* 20 (1996).

<sup>52</sup> See Angela P. Harris, *Should People of Color Support Animal Rights?*, 5 *J. ANIMAL L.* 15, 22 (2009) [hereinafter Harris, *Animal Rights*].

color line is much more difficult to maintain than the line between human and animal.<sup>53</sup> The more precarious the distinction, however, the more insistent and shrill becomes its assertion. Social theorists use the concept of abjection to describe how people come to reject as something that is intimately connected to the self, identifying it instead as other.<sup>54</sup> Strong emotions are necessary to accomplish this work: in the process of being defined as not-self, the abject becomes an uncanny thing, viewed with disgust, even horror; and the process of abjection is pervaded by anxiety. In the emotional economy of white supremacy, the figures of the savage and the black have been subjects of fantasies about the unclean, undisciplined, wild body; about sexuality and brutality without restraint; and both the seduction and the horror of “race-mixing.” These fantasies and emotional lures are, more or less transparently, what Freudians would call “projections,” longings and fantasies that, unacceptable to the self, are attributed to the other.<sup>55</sup> They are the product of abjection.

The task of intervening in this web of belief, imagery, fantasy, and emotion is all the more complex because race is intertwined not only with our ideas about the human but with political economy and class. Race emerged in part as an apology for the violent Euro-American seizure of the means of agricultural mass production in the New World: Indian land and African labor.<sup>56</sup> As

---

<sup>53</sup> For example, Ariela Gross examines trials that put individual racial identity into issue, showing just how difficult it has been to define “white” and “black” in the United States. ARIELA GROSS, *WHAT BLOOD WON’T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA* (2008).

<sup>54</sup> JULIA KRISTEVA, *POWERS OF HORROR: AN ESSAY ON ABJECTION* (1982). Kristeva begins her examination of abjection with food loathing, waste, and cadavers—objects that demonstrate the thin border between life and death, being and non-being. *Id.* at 2-3. Subsequent theorists have used the notion of abjection to argue that becoming a “subject” requires abjection; that is, to say who I am requires me to say who I am not and thus create a ghostly other who could be but is not me. *See, e.g.*, Judith Butler, *Bodies That Matter, in FEMINIST THEORY AND THE BODY: A READER* 235, 237 (Janet Price & Margrit Shildrick eds., 1999). The philosopher Martha Nussbaum also explores the constitutive functions of disgust, suggesting that it plays a role in group subordination. MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* 107 (2004).

<sup>55</sup> Nussbaum, for example, argues: “Because disgust embodies a shrinking from contamination that is associated with the human desire to be nonanimal, it is frequently hooked up with various forms of shady social practice, in which the discomfort people feel over the fact of having an animal body is projected outwards onto vulnerable people and groups.” *Id.* at 74.

<sup>56</sup> I mean to incorporate within “race” the opposition between

with European colonialism around the globe, the strong justified their exploitation by asserting the inherent inferiority of the weak. The meaning of white supremacy, moreover, shifted as underlying political and economic conditions shifted. As Barbara Fields puts it, “There is, after all, a profound difference in social meaning between a planter who experiences black people as ungrateful, untrustworthy, and half-witted slaves and a planter who experiences black people as undisciplined, irregular, and refractory employees.”<sup>57</sup> “White supremacy” meant different things, Fields adds, to the planter, to a New England abolitionist, and to a hill-country white farmer.<sup>58</sup> But the centrality of slavery to political economy and political theory in the early United States, and the agreement of nearly all observers that slavery was centrally a question of “race,” meant that race became an inescapable language for talking about labor, freedom, class, and work.<sup>59</sup> Indeed, Fields says, race became a grammar of governance: “Race became the ideological medium through which people posed and apprehended basic questions of power and dominance, sovereignty and citizenship, justice and right.”<sup>60</sup>

Critical race theory was born from the attempt to treat both race and law as ideological. Critical legal scholars describe one of the functions of law as “reification”—describing contingent and dynamic social relationships as fixed and stable, and thereby achieving fixedness and stability. Property law, for example, re-describes complicated and changing relationships among people as a relation between an owner and a possession. In this way, property law creates things and people: It differentiates between subjects, who have rights, and objects, which do not.

As Cheryl Harris has shown, the law of property is also a

---

“savagery” and “civilization” that, as Robert A. Williams documents, has long been used to justify the subjugation of native peoples in the Americas and elsewhere. See ROBERT WILLIAMS, *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990).

<sup>57</sup> Barbara Fields, *Ideology and Race in American History*, in REGION, RACE AND RECONSTRUCTION: ESSAYS IN HONOR OF C. VANN WOODWARD, 147, 154-55 (J. Morgan Kousser & James McPherson eds., 1982).

<sup>58</sup> *Id.* at 156.

<sup>59</sup> David Roediger argues that the existence of slavery encouraged white wage-workers to define themselves against slaves: to define free labor as white and to demand the “wages of whiteness.” DAVID ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* 13 (1991).

<sup>60</sup> Barbara Fields, *supra* note 57, at 162.

place where race and capitalism visibly intertwine.<sup>61</sup> Property law is central to the operation of capitalism: it puts state power behind the capitalist's control of land, labor, and technology. Property law is also central to political governance. Innovations in property law, for instance, set in motion the political economy of the early United States. Several contemporary property casebooks begin with *Johnson v. McIntosh*,<sup>62</sup> the Supreme Court case that recognized in Indian tribes only a right of "occupancy" in land, not full title.<sup>63</sup> This decision has been rationalized on the grounds that, as Joseph Singer puts it,

The tribes arguably did not "possess" the land because they did not enclose it, improve it [sic] occupy it, or otherwise treat it as something they owned and which therefore was reduced to private property. Under this view, when the Europeans came, the land was unpossessed; thus the Europeans were the first possessors.<sup>64</sup>

The story of the Indians as "wasting" the land and the Europeans as making it "productive" has played a role in other decisions at the intersection of "Indian law" and property law. Examining a long line of Supreme Court decisions concerning Indian tribes, Singer concludes,

Rights in real property in the United States are based on a scheme of redistribution from those who were thought not to need the property or who were thought to be misusing it to those who were thought to need the property or who would use it for more socially valuable purposes. This redistribution was based on perceived racial hierarchies and transferred interests from the vulnerable to the powerful.<sup>65</sup>

A second innovation in property law that shaped the political economy of the United States in its early days is slavery, which legally rendered humans objects of property. Slaves were not governed solely as things, of course; they could be prosecuted and

---

<sup>61</sup> Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1992).

<sup>62</sup> 21 U.S. 543 (1823).

<sup>63</sup> Joseph William Singer, *Starting Property*, 46 ST. LOUIS U. L.J. 565, 567 (2002).

<sup>64</sup> *Id.* at 567.

<sup>65</sup> Joseph William Singer, *Property and Sovereignty*, 86 NW. U. L. REV. 1, 5 (1991).

punished for crimes. Moreover, some states imposed duties on owners not to abuse their slaves, and some courts imposed a duty on those who hired slaves to compensate their owners if the slave were injured or killed.<sup>66</sup> But these protections were not couched as individual rights belonging to the slave; they were reflections of the view that slaves, like children, were vulnerable, helpless, and incompetent, requiring the master's protection and control.<sup>67</sup>

Contemporary property law continues to serve an ideological function in drawing the line between persons and things. For example, animals are defined not as legal subjects but as objects that can be bought, sold, and transferred. Their status as property makes the idea of "animal rights" odd, radical, and even incoherent to many. Rather than advocating for animal rights, people who care for and about animals are encouraged to promote "animal welfare."<sup>68</sup> Animal welfare law, like slave welfare law, is addressed to humans, prohibiting certain specific abuses and generally placing on humans the duty not to perpetrate gratuitous cruelty or neglect in the name of human decency and dignity. Although animal welfare law modifies the absolute liberty granted by property rights to do whatever you like with what you own (and in this way points toward a non-thing-like status for animals), it accommodates rather than challenges the fundamental demarcation between human and non-human. Thus, for example, if the suffering of animals promotes any legitimate human interest (such as the desire to test drugs or cosmetics, the pursuit of basic scientific or medical knowledge, or the industrial production of flesh for eating), that suffering will be protected and facilitated by animal welfare law. The human—not the animal or the subhuman—remains the measure of all things.

Yet another example of the ideological function of property law is visible in the *Navajo Nation v. United States Forest Service* decision of the United States Court of Appeals for the Ninth Circuit.<sup>69</sup> In that case, the court, sitting en banc, held that spraying 1.5 million gallons of treated sewage effluent on Humphrey's Peak, in the San Francisco Peaks of northern Arizona—a sacred mountain for several indigenous nations—in order to make artificial snow for a

---

<sup>66</sup> See William W. Fisher, *Ideology and Imagery in the Law of Slavery*, in *SLAVERY & LAW* 43, 44-45 (Paul Finkelman ed., 1997) (arguing that a fundamental tension in slavery law was the tension between the treatment of slaves as objects and as persons).

<sup>67</sup> *Id.* at 57.

<sup>68</sup> See generally Gary L. Francione, *Animal Rights and Animal Welfare*, 48 *RUTGERS L. REV.* 397 (1996).

<sup>69</sup> 535 F.3d 1058 (9th Cir. 2008).

ski resort did not violate the First Amendment rights of Navajo, Hopi, and other tribes to practice their religion freely. According to the majority, the Religious Freedom Restoration Act (RFRA) protects religious exercise from government action that either “coerce[s an individual] to act contrary to their religious beliefs under threat of sanctions, or condition[s] a governmental benefit upon conduct that would violate [an individual’s] religious beliefs.”<sup>70</sup> The court found that using treated sewage effluent on Humphrey’s Peak did not coerce the tribes to do anything contrary to their beliefs, and there was thus no RFRA violation; the sole harm was to the Indians’ “subjective spiritual experience.”<sup>71</sup>

The majority opinion can be criticized on a number of grounds.<sup>72</sup> But one of its powerful emotional effects has to do with its implicit reliance on property law. For the Hopi, the Peaks are the primary home of powerful spiritual beings called Katsinam.<sup>73</sup> For

---

<sup>70</sup> *Id.* at 1067.

<sup>71</sup> *Id.* at 1063.

<sup>72</sup> For instance, Judge William Fletcher, dissenting, asserted that “subjective spiritual experience” is at the heart of religious experience. Moreover, he suggested that the majority had failed to take that religious experience seriously. Judge Fletcher noted dryly, “I do not think that the majority would accept that the burden on a Christian’s exercise of religion would be insubstantial if the government permitted only treated sewage effluent for use as baptismal water, based on an argument that no physical harm would result and any adverse effect would merely be on the Christian’s ‘subjective spiritual experience.’” *Id.* at 1097 (Fletcher, J., dissenting). Scholars have argued that the jurisprudence of the free exercise clause privileges religious behavior that looks like Christian behavior—religious ritual that is theistic, takes place in the built environment, involves an elaborate belief system, and sharply distinguishes belief from practice. Spiritual practices that fail to meet these standards are frequently not recognized as “religious” or as worthy of protection at all. To this extent, free exercise doctrine retains the print of colonialism and the old distinction between savage and Christian that helped constitute “the human” centuries ago.

<sup>73</sup> According to the dissent, “Hundreds of specific Katsinam personify the spirits of plants, animals, people, tribes, and forces of nature . . . . Appearing in the form of clouds, the Katsinam are responsible for bringing rain to the Hopi villages from the Peaks. The Katsinam must be treated with respect, lest they refuse to bring the rains from the Peaks to nourish the corn crop. In preparation for the Katsinam’s arrival, prayer sticks and feathers are delivered to every member of the village, which they then deposit in traditional locations, praying for the spiritual purity necessary to receive the Katsinam. The Katsinam will not arrive until the peoples’ hearts are in the right place, a state they attempt to reach through prayers directed at the spirits on the Peaks.” *Id.* at 1099.

the Navajo, Humphrey's Peak is "like family."<sup>74</sup> For the Hualapai and the Havasupai, "the whole mountain is regarded as a single, living entity."<sup>75</sup> Judge Fletcher summarized some of the testimony in the case:

Foster, Nez, and Navajo practitioner Steven Begay testified that because they believe the mountain is an indivisible living entity, the entire mountain would be contaminated even if the millions of gallons of treated sewage effluent are put onto only one area of the Peaks . . . [T]he contamination represents the poisoning of a living being. In Foster's words, "[I]f someone were to get a prick or whatever from a contaminated needle, it doesn't matter what the percentage is, your whole body would then become contaminated. And that's what would happen to the mountain." In Nez's words, "All of it is holy. It is like a body. It is like our body. Every part of it is holy and sacred." In Begay's words, "All things that occur on the mountain are a part of the mountain, and so they will have connection to it. We don't separate the mountain."<sup>76</sup>

From the perspective of the Navajo and the Hopi, the lines drawn by western law to distinguish subjects from objects make the suffering of the mountain invisible. Property law also renders unintelligible the relationship between the nations and the mountain. Caring about and for an object, something over which one has absolute power, is different from caring about and for an entity with whom one is in relationship. This is not to say that formal equality rights create actual equality: horrific violence may occur between equal citizens. Nor is it to say that formal inequality precludes mutually respectful relationships of interdependence; pet owners

---

<sup>74</sup> As Judge Fletcher describes the relationship, "[T]he Navajo greet the Peaks daily with prayer songs, of which there are more than one hundred relating to the four mountains sacred to the Navajo. Witnesses described the Peaks as 'our leader' and 'very much an integral part of our life, our daily lives' . . . The Navajo believe their role on earth is to take care of the land. They refer to themselves as *nochoka dine*, which one witness translated as 'people of the earth' or 'people put on the surface of the earth to take care of the lands.' They believe that the Creator put them between four sacred mountains of which the westernmost is the Peaks, or *Do'ok'oos-liid* ('shining on top,' referring to its snow), and that the Creator instructed them never to leave this homeland. Although the whole reservation is sacred to the Navajo, the mountains are the most sacred part." *Id.* at 1100.

<sup>75</sup> *Id.* at 1103.

<sup>76</sup> *Id.* at 1104.

and parents know that to be false. But legal ontology does make a difference. At a material level, the decision in *Navajo Nation* elevates the economic interests of ski resort owners over persons who love and care for Humphrey's peak as family. At a symbolic level, it not only trivializes indigenous practices and beliefs, but also erases a series of complex relationships by making them unintelligible.

How do critical theorists intervene in these complicated and many-layered conversations about property, animality, humanity, and race? The intellectual aspect of the critical theory project is to argue that these terms are all ideological: they present a particular distribution of power as natural, normal, and necessary. The emotional aspect of the critical theory project is multi-layered. Getting people to "feel right" first means getting them to empathize with animals, torture victims, slaves, or Hopi and Navajo, as the case may be. Even this first task may be more difficult than it initially looks. As Peter Singer has observed, for example, scientists often have made the claim that some or all animals do not feel pain the way "we" do.<sup>77</sup> If animals do not suffer, there is no basis on which we should feel compassion for them.<sup>78</sup>

However, even caring by itself is not enough. One may wish individual animals well and still feel no need to stop eating them. A similar problem confronted abolitionists: it is perfectly possible to abhor cruelty to slaves and yet accept slavery as a system. Against this conclusion, critical theory asks its reader to follow a path of "naming, blaming, and claiming" similar to the path traveled by people who bring anti-discrimination lawsuits.<sup>79</sup> The recognition that others suffer is not enough; the suffering must be registered as unjust and amenable to change. Critical theorists thus must evoke outrage against the ideology itself and the desire to dismantle it.

Contemporary critical race theorists face yet another problem of emotion management. On the one hand, in order to promote empathy for the subordinated, telling stories about how it feels to be the target of racism is a useful and appropriate tool.<sup>80</sup> On

---

<sup>77</sup> See PETER SINGER, *ANIMAL LIBERATION* 1 (3d ed. 2002).

<sup>78</sup> In the antebellum period, it was similarly said that people of African descent were impervious to pain. See Mark M. Smith, *Getting in Touch With Slavery and Freedom*, 95 J. AM. HIST. 381, 385-86 (2008).

<sup>79</sup> See William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 LAW & SOC'Y REV. 631 (1980-81).

<sup>80</sup> See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413 (1989) ("Stories, parables, chronicles, and narratives are powerful means for destroying mindset—the bundle of

the other hand, such “victim stories” can easily become pure “sorrow songs,” enjoyed primarily for their aesthetic value or as occasions for sentimentality.<sup>81</sup> The story of Humphrey’s Peak, for instance, might be enjoyed as a glimpse of quaint and exotic native customs. Victim stories can also promote the assumption that people of color are the experts on race whereas white people know nothing about it, thus exploring subordination at the expense of ignoring privilege. At worst, victim stories reinforce a politics in which groups bid for political recognition by showing how downtrodden they are. Such a politics of victimization promotes destructive inter-group competition, perversely awards groups for their dysfunctions, and subtly shifts the aim of anti-subordination work from the reconstruction of social relations to symbolic “recognition” by, and sympathy from, the majority.<sup>82</sup> This dilemma can only be avoided by refusing the lure of “reform” and seeking “revolution.”<sup>83</sup> Third, critical race theorists must walk a fine line between promoting a hermeneutics of skepticism under which racism is inevitable and everywhere, and insisting that racism can be eliminated—that “the arc of history is long, but it bends toward justice.”<sup>84</sup> Accepting the latter notion implies accepting a kind of racial idealism, a sunny view that our country is—or at least can

---

presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place.”).

<sup>81</sup> I have described sentimentality elsewhere as a self-regarding emotion in which one feels proud of one’s sensitivity. See Harris, *Animal Rights*, *supra* note 52.

<sup>82</sup> For an especially thoughtful version of this criticism, see, e.g., WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* (2002). Mary Louise Fellows and Sherene Razack make the related argument that relationships among white women and women of color are frequently marked by a “race to innocence” in which emphasizing one’s political victimization establishes one’s claim to authority and dignity. Mary Louise Fellows & Sherene Razack, *The Race to Innocence*, 1 J. GENDER RACE & JUST. 335 (1998); see also Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (Or Other Isms)*, in PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA 85 (Stephanie M. Wildman ed., 1996).

<sup>83</sup> See Crenshaw, *supra* note 10.

<sup>84</sup> This quotation is customarily attributed to Martin Luther King. See, e.g., MARTIN LUTHER KING, JR., *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.* 141, 207, 230, 277, 438 (James Washington ed., 1986). Dr. King, in turn, drew the phrase from a remark made by the abolitionist Theodore Parker. See THEODORE PARKER & FRANCES POWER COBB, *THE COLLECTED WORKS OF THEODORE PARKER: SERMONS, PRAYERS, VOL. II* 48 (Frances Power Cobb ed., 1867) (referring to the arc of the “moral universe”).

be—on an upward trajectory from racism to the end of racism.<sup>85</sup> Not all theorists have been willing to accept this view; the critical race theorist Derrick Bell, for example, has argued that racism is “permanent.”<sup>86</sup> This position, however, has confounded and dismayed some of his readers, who feel Bell has consigned anti-racists to despair and paralysis.<sup>87</sup> Bell’s insistence that spiritual redemption requires that we fight even if we must lose has been of no comfort to these readers.<sup>88</sup> I have argued elsewhere that critical race theory should attempt to live within, rather than dissolve, this tension between optimism and pessimism.<sup>89</sup> The goal is what Rebecca Solnit calls “hope in the dark”: gambling on “the possibility that an open heart and uncertainty are better than gloom and safety.”<sup>90</sup> This path, however, is a tricky one to negotiate.

#### IV. CONCLUSION

In this Essay, I have suggested that ideology critique has an emotional dimension, in part because ideology itself is a strategy of emotion management. Maintaining hierarchical relations requires that we manage our emotions in certain ways, that we not care. Ideological critique seeks to spark caring and to build from it compassion, outrage, and the courage to make change.

Critical theory, including critical legal theory, can be intimidating to the reader. It lends itself to long and ponderous philosophical disquisitions, Latinate constructions, and complicated terminology full of specialized meanings. It is important to

---

<sup>85</sup> For an examination of politically conservative and politically liberal variations on this narrative of uplift, see generally Ariela Gross, *When Is the Time of Slavery?*, 96 CALIF. L. REV. 283 (2008).

<sup>86</sup> DERRICK A. BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1993).

<sup>87</sup> See, e.g., Leroy D. Clark, *A Critique of Professor Derrick A. Bell's Thesis of the Permanence of Racism and His Strategy of Confrontation*, 73 DENV. U. L. REV. 23, 24 (1995) (describing Bell as propagating a “damaging and dampening message”); John A. Powell, *Racial Realism or Racial Despair?*, 24 CONN. L. REV. 533, 550 (1992) (arguing that Bell is “unsuccessful in avoiding despair”).

<sup>88</sup> For a defense of Bell’s position drawing on the work of Reinhold Niebuhr, see George H. Taylor, *Racism as “The Nation’s Crucial Sin”*: *Theology and Derrick Bell*, 9 MICH. J. RACE & L. 269 (2004).

<sup>89</sup> See Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 744 (1994) (arguing that “sophistication” and “disenchantment” are the possible fruits of living within this tension).

<sup>90</sup> REBECCA SOLNIT, *HOPE IN THE DARK: UNTOLD HISTORIES, WILD POSSIBILITIES* 4 (2005).

recognize that intertwined with its intellectual rigor is a commitment to caring. Just as we find suffering beneath the smooth surface of ideology, beneath the sometimes offputting texts of ideological critique there is Stowe's injunction to "feel right." We must not miss, or lose, or dismiss as trivial, the impulse to care.

Caring happens no matter what; in Kathleen Stewart's words, it is an ordinary affect, an everyday occurrence in individual lives that occasionally leaps like flame from being to being, reassembling and realigning.<sup>91</sup> Caring is occasionally a force for large-scale change; more often, it is a weapon of the weak, a small rebellion or an enlivening. Caring makes things possible; it also makes them meaningful. Perhaps most important from the standpoint of large and complex social projects, caring, when turned into compassion, has the potential to subvert the lines that ideologies of subordination draw between self and other.

Roberto Unger sees caring as an opening to the other and, in that way, a transformation of the self, or a rearticulation of the self, anyway, as wider and more mysterious being than one thought.<sup>92</sup> Caring is conventionally understood as purely subjective, internal to an individual. But caring takes place in culture and in political economy, and the opening that Unger extols can happen at collective as well as individual levels. Ideological critique cannot mandate these quicksilver transfigurations, but it can encourage or retard them. In these moments of rearticulation, new identities may form, or transform, and new affects may be explicitly central to the change (as when "pride" became central to the public affect of homosexuality). As critical theorists, we might begin to acknowledge and trace the structures of feeling that channel our own work, from the hope that theorizing can, by revealing contingency, spark the desire to change the world, to the hermeneutics of despair that pervade most left-progressive readings

---

<sup>91</sup> STEWART, *supra* note 1.

<sup>92</sup> Unger writes, "You lose the world that you hoped vainly to control, the world in which you would be invulnerable to hurt, misfortune, and loss of identity, and you regain it as the world the mind and the will can grasp because they have stopped trying to hold it still or to hold it away. The world you can make a home in is a world that you no longer hope to control from the distance of immunity, and the character you can accept as your own is a character that you can at last see as but a partial, provisional, and pliable version of your own self. Renunciation and loss, risk and endurance, renewal and reconciliation: these are the ancient incidents in the search to make yourself into a person during the course of a life." UNGER, *supra* note 35, at 11.

of texts. The goal is not to control or direct fugitive currents of affect, but to watch where they go, and watch out.