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## Reciprocity, Utility, and the Law of Aggression

Anita Bernstein

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## Reciprocity, Utility, and the Law of Aggression

Anita Bernstein\*

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## INTRODUCTION

The themes of incursion and boundary-crossing unite disparate legal domains. Wherever human beings cross paths and share space, law or law-like traditions develop to regulate this terrain by distinguishing permitted from proscribed intrusion.<sup>1</sup> Crimes and torts, regulation and liability, claims and defenses to claims, private law and public law all use a variety of measures—punishments, administrative rules, equitable remedies, professional discipline, and informal or extralegal sanctions—to condemn undue aggression.<sup>2</sup> Concern about aggression may be found in the law of every jurisdiction in the United States.<sup>3</sup>

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1. See KNUD S. LARSEN, *AGGRESSION: MYTHS AND MODELS* 39 (1976) ("From the beginning of recorded history, scholars, researchers, and laymen alike have been concerned about human aggression."); see also AHMED M. RIFAAT, *INTERNATIONAL AGGRESSION: A STUDY OF THE LEGAL CONCEPT: ITS DEVELOPMENT AND DEFINITION IN INTERNATIONAL LAW* xiii (1979) (predicting that aggression will exist "as long as human beings with their egoistic interests survive"). One example of conduct condemned for millennia as too aggressive is usury. See, e.g., David J. Gerber, *Prometheus Born: The High Middle Ages and the Relationship Between Law and Economic Conduct*, 38 ST. LOUIS U. L.J. 673, 703 (1994) (contending that the prohibition of usury was "the single most important economic conduct norm" in the late Middle Ages). For the Biblical prohibitions, see *Exodus* 22:25; *Leviticus* 25:35-38; *Deuteronomy* 23:30.

2. Focusing primarily on formal control of, and redress for, aggression, this Article pays only passing attention to extralegal measures that achieve comparable effects. A leading authority on "order without law" points out several informal practices that limit aggressive behaviors. Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1178 & n.51 (1996) (noting norms limiting the

Within American law, an extra increment of aggression can amount to the only difference between condoned and condemned behavior. Panhandling, for instance, enjoys First Amendment protection,<sup>4</sup> but states may ban aggressive panhandling.<sup>5</sup> The crimes of harassment and stalking similarly identify aggression as that which makes tolerated conduct (call it courtship?) no longer tolerable.<sup>6</sup> Antitrust law exalts competition,<sup>7</sup> fully aware that human

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amount of time one may spend at a drinking fountain, a public telephone, and a playground basketball court, as well as "academic norms" that constrain students from "talking at excessive length in class" or "remaining for too many years in graduate study"; *id.* at 1184 (suggesting that scenic parks are "suitable for quick tourist stops and brief romantic strolls," not loitering and lingering).

3. The condemnation extends from local court rules to international law. Compare RIFAAT, *supra* note 1, at 223-80 (cataloguing international law stances against aggression), with John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 571-85 (2000) (noting efforts of local court rules to address over-aggressive discovery). Jurisdictions have responded in different ways in attempting to control overly aggressive attorneys. See, e.g., 28 U.S.C. § 1927 (1994) (providing for sanctions against an attorney who "unreasonably and vexatiously ... multiplies the proceedings in any case"); *Dondi Props. Corp. v. Commerce Sav. & Loan Ass'n*, 121 F.R.D. 284, 286-89 (N.D. Tex. 1988) (declaring a mandatory code of professionalism for the Northern District of Texas that would discourage unduly combative litigation styles); Proposed Standards for Professional Conduct within the Seventh Federal Judicial Circuit, reprinted in FINAL REPORT OF THE COMMITTEE ON CIVILITY OF THE SEVENTH FEDERAL JUDICIAL CIRCUIT, 143 F.R.D. 441 app. A at 448 (1992) (proposing rules that prohibit rude and belligerent behavior by attorneys); see also Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1343 n.9 (1997) (quoting president of Florida bar, who "defined professionalism as the opposite of 'eat or be eaten'"); Gary M. Farmer, *Civility and Professionalism in Legal Advocacy*, 23 NOVA L. REV. 809, 815-16 (1999) (commending understatement and "the whisper" to lawyers).

4. In *Loper v. New York City Police Dep't*, 999 F.2d 699, 702 (2d Cir. 1993), the Second Circuit invalidated a city-wide ban on begging, agreeing with the petitioners' First Amendment claim that the ban deprived beggars of all means to express their message. See also *Young v. New York City Transit Auth.*, 903 F.2d 146, 153-57 (2d Cir. 1990) (upholding ban on begging in public transit facilities, while conceding that begging involves "expressive conduct"); *Los Angeles Alliance for Survival v. City of Los Angeles*, 987 F. Supp. 819, 830-31 (C.D. Cal. 1997) (refusing to enjoin plaintiffs from their practice of solicitation), *aff'd*, 224 F.3d 1076, 1076 (9th Cir. 2000); *Blair v. Shanahan*, 775 F. Supp. 1315, 1322-25 (N.D. Cal. 1991) (declaring unconstitutional a statute that prohibited accosting for purposes of begging), *rev'd on other grounds*, 38 F.3d 1514 (9th Cir. 1994); cf. *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 633 (1980) (holding that charitable solicitation is protected speech under the First Amendment).

5. See *City of Seattle v. Webster*, 802 P.2d 1333, 1334-35 (Wash. 1990), *cert. denied*, 500 U.S. 908 (1991); Charles Mitchell, Note, *Aggressive Panhandling Legislation and Free Speech Claims: Begging for Trouble*, 39 N.Y.L. SCH. L. REV. 697, 698 (1994) (defending the distinction).

6. Seventeen states criminalize harassment on the street or in public areas. ALA. CODE § 13 A-11-8 (Supp. 1997); ALASKA STAT. § 11.61.120 (Michie 1996); ARIZ. REV. STAT. ANN. § 13-2921 (West Supp. 1999); ARK. CODE ANN. § 5-71-208 (Michie 1997); COLO. REV. STAT. § 18-9-111 (Supp. 1996); DEL. CODE ANN. tit. 11, § 1311 (Supp. 1996); HAW. REV. STAT. § 711-1106 (1993); IOWA CODE ANN. § 708.7 (West Supp. 1998); KY. REV. STAT. ANN. § 525.070 (Michie 1990); MD. ANN. CODE art. xxvii, § 121A (1996); MINN. STAT. ANN. § 609.749 (West Supp. 1998); N.J. STAT. ANN. § 2C:33-4 (West Supp. 1998); N.M. STAT. ANN. § 30-3A-2 (Michie Supp. 1998); N.Y. PENAL LAW § 240.25 (McKinney Supp. 1998); OR. REV. STAT. § 166.065 (1997); 18 PA. CONS. STAT. ANN. § 2709 (West Supp. 1998); S.C. CODE ANN. § 16-3-1700 (Law. Co-op Supp. 1997). All fifty states

beings will suffer, and firms fail, in its name, while deeming predation bad enough to warrant a treble-damages civil penalty.<sup>8</sup> Employment law rests on the premise that labor is bought and sold in a market;<sup>9</sup> in southern California, cradle of American trends, some municipalities set a national example by making it illegal for workers to solicit employment from motorists.<sup>10</sup> The United Nations charter, which presumes—without condemnation—that nations pursue agendas that conflict with what other nations pursue, also declares that a country violates international law when it commits an act of aggression.<sup>11</sup> Many localities prohibit “solicitation” of pros-

and the District of Columbia criminalize stalking, and interstate stalking is a federal offense. Jennifer L. Bradfield, *Anti-Stalking Laws: Do They Adequately Protect Stalking Victims?*, 21 HARV. WOMEN'S L.J. 229, 244 (1998).

7. See, e.g., *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972); *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951); see also Eugene V. Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. CHI. L. REV. 567, 570 (1947) (linking together “capitalism,” “competition,” and “the antitrust tradition”).

8. See Clayton Act, 15 U.S.C. § 15 (1994) (“[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained . . .”); *Utah Pie Co. v. Cont'l Baking Co.*, 386 U.S. 685, 702-03 (1967) (recognizing predatory pricing claim brought under the Robinson-Patman Act). An important article described predatory pricing as a device that violates the Sherman Act when it is used to achieve monopolization. Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 697 (1975). Of all the examples of legal condemnation of aggression addressed in this Article, which I offer to explore the line between accepted and unaccepted incursions, only the antitrust concept of predation has provoked a vigorous outcry—about definitions, policies, line-drawing, and the like—among specialists. See, e.g., ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 144, 149-55, *passim* (rev. ed. 1993) (maintaining that predatory pricing, as well as other types of predation, almost never exists); Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 265-76 (1981) (using microeconomic theory to contend that remedies for predation should be very limited); see also Roland H. Koller II, *The Myth of Predatory Pricing: An Empirical Study*, 4 ANTITRUST L. & ECON. REV. 105, 123 (1971) (calling predation a “popular myth”); Wesley J. Liebeler, *Whither Predatory Pricing? From Areeda and Turner to Matsushita*, 61 NOTRE DAME L. REV. 1052, 1054 (1986) (contending that almost no predatory pricing claim deserves to get past summary judgment). Below I try to explain how and why antitrust won this unique distinction.

9. See *Walsh v. Arrow Air, Inc.*, 629 So. 2d 144, 145-46 (Fla. Dist. Ct. App. 1993) (summarizing justifications of employment at will), *quashed and remanded*, 645 So.2d 422, 425 (Fla. 1994); Mark E. Van Der Weide, *Against Fiduciary Duties to Corporate Stakeholders*, 21 DEL. J. CORP. L. 27, 40-41 (1996) (defending employment at will with reference to the market for employment).

10. See Stephen R. Munzer, *Ellickson on “Chronic Misconduct” in Urban Spaces: Of Panhandlers, Bench Squatters, and Day Laborers*, 32 HARV. C.R.-C.L. L. REV. 1, 33-38 (1997); see also David Rosenzweig, *Federal Judge Voids Ban on Soliciting by Day Laborers*, L.A. TIMES, Sept. 15, 2000, at B1 (reporting judicial decision).

11. The Charter does not define this term, RIFAAT, *supra* note 1, at 117, but definitions have been attempted elsewhere, notably in a General Assembly resolution, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (1974) (defining aggression, rather opaquely, as “the use of armed force by a State against . . . another State, in any other manner inconsistent with the Charter of the United Nations”).

titution, while tolerating exchanges of sex for money that do not contain the element of approach to a passive recipient.<sup>12</sup> Lawyers are expected to work hard to garner new "business,"<sup>13</sup> but they must do so without explicit overtures to prospective clients: Professional authorities frown on advertising, and also discipline lawyers for solicitation,<sup>14</sup> which is said to be "fraught with the possibility of undue influence, intimidation, and overreaching."<sup>15</sup> Although attorney influence—some would go further and substitute "client dependency"—is a sine qua non of the lawyer-client relationship,<sup>16</sup> it must not reach a level that regulators will deem undue.

Elsewhere the same adjective separates permitted from proscribed conduct. In the name of undue influence, gratuitous transfers, especially wills, may be nullified;<sup>17</sup> courts deem contracts void-

12. See Marjorie E. Murphy, *A Question of Procurement, Not Prostitution*, 87 COLUM. L. REV. 1075, 1076 (1987) (book review) (contrasting state statutes that criminalize sex "for hire" with those that criminalize solicitation); see also Laura Reanda, *Prostitution as a Human Rights Question: Problems and Prospects of United Nations Action*, 13 HUM. RTS. Q. 202, 203 (1991) (noting that some countries, including Canada and Thailand, permit sex-for-money exchanges while prohibiting solicitation). In a recent decision, the Georgia Supreme Court held that the state could criminalize the "solicitation of sodomy," notwithstanding its 1998 holding that the state could not criminalize sodomy per se. Laura Brown, *Regulating Sex*, S. VOICE, Mar. 9, 2000, at 1.

13. See William H. Rehnquist, *Remarks of the Chief Justice: The Catholic University of America, Columbus School of Law Commencement*, 46 CATH. U. L. REV. 1, 2 (1996) (lamenting the transformation of law "from a profession to a business"); see also Marc Galanter & Thomas M. Palay, *Why the Big Get Bigger: The Promotion-to-Partner Tournament and the Growth of Large Law Firms*, 76 VA. L. REV. 747, 752 n.22 (1990) (noting that many law firms now employ "marketing directors," a job title "unknown even in 1980").

14. Hope Viner Samborn, *Cloudy Standards for Rainmaking*, A.B.A. J., Nov. 1998, at 30 (noting that only four United States jurisdictions permit in-person solicitation by lawyers); see also Fla. Bar v. Went For It, Inc., 515 U.S. 618, 624-34 (1995) (upholding limited ban on direct mail solicitation); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 454 (1978) (holding that a lawyer's free speech rights do not extend to in-person solicitation). Surveys show that most lawyers "oppose mass media advertising," while most nonlawyers find lawyer advertising both helpful and "professionally acceptable". GEOFFREY C. HAZARD, JR. & DEBORAH L. RHODE, *THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION* 392 (3d ed. 1994). Turn-of-the-twentieth-century ethical canons prohibited lawyers from advertising, but since 1977 courts have held that the First Amendment gives lawyers a qualified right to advertise. See generally NATHAN M. CRYSTAL, *PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION* 532-37 (1996) (summarizing regulatory traditions and Supreme Court case law).

15. MODEL RULES OF PROF'L CONDUCT R. 7.3 cmt. 1 (1983).

16. On client dependency, see Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2128-29 (1991). See generally Ivan Illich, *Disabling Professions*, in *DISABLING PROFESSIONS* 11 (1978) (exploring dependency thesis for all professions).

17. Undue influence as a basis for nullifying a will originated with *Mountain v. Bennet*, 29 Eng. Rep. 1200, 1211 (Ch. 1787), where the court entered judgment against Mrs. Bennet, widow of the testator, after a jury found that her influence over her husband amounted to coercion. Disinherited relatives and disappointed charities continue to benefit from this basis for nullifying a will. See *In re Estate of McCoy*, 844 P.2d 1131, 1134-37 (Alaska 1993); *Estate of Lakatos*,

able;<sup>18</sup> restitution becomes available to claimants.<sup>19</sup> A similar notion of too much aggression pervades the contract doctrine of unconscionability. You may drive a hard bargain if you like, judges tell potential aggressors,<sup>20</sup> but too hard a bargain might constitute what one court called "carrying a good joke too far."<sup>21</sup>

Undue influence has parallels in criminal law. Duress, for example, exculpates defendants whose mental state and conduct would otherwise fulfill the elements of many crimes.<sup>22</sup> Duress is a function of human aggression. Poverty, hunger, political fervor, romantic love, or strong family loyalties might generate a sense of compulsion that feels as strong as duress, but without a human aggressor to blame, the defendant who wants an excuse based on

656 A.2d 1378, 1385 (Pa. Super. Ct. 1995). For a discussion of the distinction between influence and undue influence, see Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 574 (1997).

18: Women who surrendered their children for adoption have been permitted to reclaim them when the relinquishment resulted from undue influence. See *In re Cheryl E.*, 207 Cal. Rptr. 728, 735-38 (Cal. Ct. App. 1984); *Caballero v. Robertson*, 737 So. 2d 1144, 1148 (Fla. Dist. Ct. App. 1999); *Sorrentino v. Family & Children's Soc'y*, 367 A.2d 1168, 1175 (N.J. 1976); *Methodist Mission Home of Tex. v. B.*, 451 S.W.2d 539, 543-53 (Tex. App. 1970). In *Odorizzi v. Bloomfield Sch. Dist.*, 54 Cal. Rptr. 533, 543 (Cal. Ct. App. 1966), a schoolteacher was arrested on criminal charges of homosexual activity. Agents of his employer came to his apartment after he was released and, when he was under acute stress and deprived of sleep, persuaded him to sign a resignation statement by telling him "there wasn't time to consult an attorney" and "if he didn't resign at once the school would . . . dismiss him from his position and publicize the proceedings." *Id.* at 543. The California Court of Appeals held that the resignation agreement was voidable, deeming the defendant school board "a dominant subject" and the plaintiff "a servient object." *Id.* at 540.

19. Several cases involve gifts to churches. See, e.g., *In re The Bible Speaks*, 869 F.2d 628, 642-43 (1st Cir. 1989) (holding that the plaintiff, a Dayton-Hudson heiress, stated a claim for restitution of more than a million dollars in gifts); *Molko v. Holy Spirit Ass'n for the Unification of World Christianity*, 46 Cal. 3d 1092, 1123-24 (1988) (upholding plaintiff's claim for restitution of a \$6000 gift made to the Unification Church). See also RESTATEMENT OF RESTITUTION § 70 (1937) (providing that restitution is one of the remedies available when contracts are made under undue influence).

20. See, e.g., *Batsakis v. Demotsis*, 226 S.W.2d 673, 675 (Tex. App. 1949) (enforcing a contract to sell \$25 worth of Greek currency for \$1000); *First Nat'l Bank v. Nennig*, 285 N.W.2d 614, 624 (Wis. 1979) (refusing to invalidate sale of a farm by a woman to her cousin for less than fair market value); see also WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 440 (asserting that even a peppercorn may be sufficient consideration for a lease).

21. *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 83 (3d Cir. 1948). See also *O'Neill v. DeLaney*, 415 N.E.2d 1260, 1266 (Ill. App. Ct. 1980) (refusing to enforce contract to buy a painting for \$10; the painting was either an "unauthenticated Rubens" worth \$100,000, or an authenticated Rubens worth several hundred thousand dollars); *Jackson v. Seymour*, 71 S.E.2d 181, 185-86 (Va. 1952) (permitting indigent widow to rescind sale of a parcel of land to her brother, who had kept silent about its true value). For a summary of contemporary cases in which courts found contract terms unconscionable, see ALAN WERTHEIMER, EXPLOITATION 44-50 (1996).

22. See MODEL PENAL CODE § 2.09 (1985).

compulsion is usually out of luck.<sup>23</sup> Human aggressors can matter to defendants in another context: When a government agent induces a person to commit an offense, that person is entitled to the defense of entrapment.<sup>24</sup> Although courts and scholars disagree on the question of which theory supports the entrapment defense, an element of undue aggression is prominent in both of the major rationales.<sup>25</sup>

The same theme of aggression and aggressors as distinguishing elements resurfaces in the crime of blackmail. Often it is perfectly lawful for a person, *D*, to possess embarrassing information about another, *V*; for *D* to share this information with the world, if he chooses; and for *V* to convey money to *D*, if he chooses. Nevertheless it is unlawful for *D* to propose a contract whereby *V* would convey money to *D* and in return *D* would refrain from telling the world what he knows about *V*.<sup>26</sup> Neither silence, nor disclosure,

23. When she can, the defendant might resort to "necessity," which dispenses with the requirement of an agent of aggression. The Model Penal Code provides that an actor may assert a defense of necessity when "the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged," provided that statutory law defining the offense does not address "the specific situation involved" and no "legislative purpose to exclude the justification" appears. *Id.* § 3.02. When a defendant experiences compulsion of the kind mentioned in the text—compulsion not linked to a human aggressor who coerces—necessity will seldom fit the facts. Although in principle necessity is stronger than duress (it is a justification, whereas duress is an excuse, and it applies to all crimes, even murder, whereas opinion is divided on whether duress ought to apply to serious crimes) it is so narrow as to be almost never available. See *United States v. Bailey*, 444 U.S. 394, 410-11 (1980) (ruling against defendants and noting in dictum that necessity seldom justifies acquittal); 2 PAUL H. ROBINSON, *CRIMINAL LAW DEFENSES* 143 (1984) (noting limited applicability of the defense); cf. Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1405 (1985) (contemplating, but not endorsing, the proposition that offers to extend credit to vulnerable individuals may be too seductive to refuse, and thus constitute a kind of duress).

24. See 2 ROBINSON, *supra* note 23, at 509-10.

25. The Supreme Court has stated that entrapment exists when a government official manipulates into criminal activity a defendant who had "no predisposition" to commit a crime. *Sorrells v. United States*, 287 U.S. 435, 458 (1932); see also *Jacobson v. United States*, 503 U.S. 540, 553 (1992) (determining that the defendant did not have an "independent" predisposition to commit the crime). In such a scenario, Professor Robinson explains, the defendant is passive in his interactions with officialdom; the defendant's criminal actions are "not fully his own," and entrapment becomes an excuse resembling duress. 2 ROBINSON, *supra* note 23, at 513. An alternative rationale condemns entrapment as police misconduct. Under this "objective" or "nonexculpatory" version of the defense, the defendant deserves condemnation, but government is more blameworthy because of its "overreaching," *Sherman v. United States*, 356 U.S. 369, 380 (1958) (Frankfurter, J., concurring), or because of "impermissible police conduct," *People v. Moran*, 463 P.2d 763, 768 (Cal. 1970) (Traynor, C.J., dissenting), notwithstanding rationalizations grounded in "sinister sophism," *People v. Barraza*, 591 P.2d 947, 955 (Cal. 1979). In short, the entrapment defense protects defendants from overly aggressive state actors.

26. A vast literature has expounded on the anomaly of criminalizing blackmail within a legal regime that applauds consensual transactions, even where one of the parties feels pressured, reluctant, or uneasy. The work of James Lindgren is especially significant. James Lindgren, *Blackmail: On Waste, Morals, and Ronald Coase*, 36 UCLA L. REV. 597, 598 (1989); James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670 *passim* (1984). Other reflec-



nor conveying money, nor possessing embarrassing information is criminal: The law proscribes an act of aggression.<sup>27</sup>

Alongside these condemnations of aggression, however, American law also reveals a contrary inclination to favor initiative and enterprise. When Oliver Wendell Holmes argued in 1881 that accident rules should tend to favor active defendants rather than passive plaintiffs because "the public generally profits from individual activity,"<sup>28</sup> he expressed a view that had by then long influenced American thought,<sup>29</sup> one that endures today.<sup>30</sup> Legal doctrine evinces an appreciation of the freedom to act, while also appreciating the freedom to be free from the acts of others; initiative is esteemed within the law as a source of social welfare.<sup>31</sup> Aggression conduces to wealth and so, for the sake of this gain, societies must condone its being used instrumentally.<sup>32</sup>

tions on the anomaly include RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 660-61 (5th ed. 1998); Ronald H. Coase, *Blackmail*, 74 VA. L. REV. 655, 665-76 (1988); Douglas H. Ginsburg & Paul Shechtman, *Blackmail: An Economic Analysis of the Law*, 141 U. PA. L. REV. 1849, 1865-74 (1993).

27. See Russell Hardin, *Blackmailing for Mutual Good*, 141 U. PA. L. REV. 1787, 1805 (1993) (concluding that both sides of a blackmail transaction might profit from the exchange).

28. OLIVER WENDELL HOLMES, *THE COMMON LAW* 83 (1881).

29. See ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 19 (1776) (praising entrepreneurial initiative); Doyne Dawson, *The Origins of War: Biological and Anthropological Theories*, 35 HIST. & THEORY 1, 3-13 (1996) (expounding the view of Malthus, shared to some degree by Hobbes, that groups and individuals can benefit from even the most destructive aggression, including murder and war). "Social Darwinism," associated with Herbert Spencer, celebrated aggressive individuals and associated their forcefulness with societal gain. See PETER GAY, *THE CULTIVATION OF HATRED* 41 (1993) (noting that it was Spencer, not Darwin, who coined the phrase "survival of the fittest"); Robert C. Whittemore, *The Philosophical Antecedents of American Ideology*, in *IDEOLOGY AND AMERICAN EXPERIENCE* 13, 22-26 (John K. Roth & Robert C. Whittemore eds., 1986) (tracing origins of "the freedom to do one's best").

30. See LINDA R. COHEN & ROGER G. NOLL, *THE TECHNOLOGY PORK BARREL* 378 (1991) (arguing that only individual initiative, not government-directed research and development, yields technological advances); MARK J. ROE, *STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE* 231-81 (1994) (advocating changes in the law that would permit institutional owners to engage in active management); Steven H. Hobbs, *Toward a Theory of Law and Entrepreneurship*, 26 CAP. U. L. REV. 241, 247 (1997) (recommending that law schools teach entrepreneurship, focusing on small businesses, to advance "social and economic justice").

31. See E. ALLAN FARNSWORTH, *CONTRACTS* 6-7 (2d ed. 1990) (noting tenet that "direct bilateral exchanges" initiated by individuals promote "the efficient use of economic resources," and that as a consequence of such exchanges, "society as a whole benefits").

32. See *Chicago, B. & Q.R. Co. v. Kraysenbuhl*, 91 N.W. 880, 882 (Neb. 1902) (shrugging off, in the name of progress, the fact that the use of dangerous machinery "occasionally results in the loss of life or limb"); *Losee v. Buchanan*, 51 N.Y. 476, 484 (1873) ("We must have factories, machinery, dams, canals, and railroads. They are demanded by the manifold wants of mankind, and lay at the basis of all our civilization.").

Thus markets line up against stasis,<sup>33</sup> risk against safety,<sup>34</sup> a "national anthem" of enterprise<sup>35</sup> against a jurisprudential tradition celebrating "the passive virtues,"<sup>36</sup> and nonconsensual engagement with others against a posited right (perhaps a constitutional right, no less) to be let alone.<sup>37</sup> Because each half of these dichotomies has a basis in traditions of justice, aggression occupies an ambiguous place in American legal doctrine. Entire doctrines of unlawful aggression, as was noted, condemn incursion ambivalently, without articulating fundamentals.<sup>38</sup> As projects for law and lawyers, both understanding the meaning of aggression and ranking the considerations relevant to its control remain puzzlingly obscure.

To highlight these difficulties of classification and description, Table 1 lists in columns most of the doctrines mentioned above to illustrate the role of aggression in distinguishing condoned (and sometimes even applauded) behavior from prohibited intrusions:

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33. Cf. ROBERT KUTTNER, *EVERYTHING FOR SALE: THE VIRTUES AND LIMITS OF MARKETS* 5 (1997) (claiming that dismay over 1970s "stagflation" helped to generate the current fashion, *laissez-faire* economic libertarianism).

34. See generally JULES L. COLEMAN, *RISKS AND WRONGS* (1992).

35. STUART M. SPEISER, *LAWYERS AND THE AMERICAN DREAM* 9 (1993) (quoting ELIZABETH LONG, *THE AMERICAN DREAM AND THE POPULAR NOVEL* (1985)).

36. Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 42-47 (1961) (contending that judges should avoid deciding cases that pose a danger of conflict among the branches of government); see also ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 116-21 (2d ed. 1962) (advocating judicial restraint).

37. The right to be let alone is asserted in *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Although judicial authors invoke it most often in dissents, the Brandeis phrase appears now and then on the winning side. See, e.g., *Winston v. Lee*, 470 U.S. 753, 758 (1985) (holding that the Fourth Amendment protects a defendant from being compelled to undergo surgery to extract a bullet from his body; prosecutors wanted the bullet as evidence).

38. See *supra* notes 4-27 and accompanying text. Here I do not mean to hold the concept of aggression to a standard that other pivotal legal nouns and adjectives—"intent," "reasonable," statutory or discriminatory "purpose," "notorious," "malice," and the like—cannot meet. Nor should one pick quantitative nits—how much is much? how undue, excessive, or intrusive is undue, excessive, or intrusive?—that refer to nothing worse than nuance or inevitable ambiguity from case to case. See Steven J. Johansen, *What Does Ambiguous Mean? Making Sense of Statutory Analysis in Oregon*, 34 WILLAMETTE L. REV. 219, 264-67 (1998); Ollivette E. Mencer, *Unclear Consequences: The Ambient Ambiguity*, 22 S.U. L. REV. 217, 221 (1995) (lamenting ambiguity in legal writing but deeming it ineradicable). The imprecision and obscurity about aggression in the law is more fundamental. See *infra* Part II (contrasting legal ambiguity with social-science clarity about what is at stake in defining aggression).

Table 1  
Examples of Aggression as a Distinction in Legal Categories

<i>Area of Law</i>	<i>Condoned Version</i>	<i>Condemned Version</i>
ANTITRUST	Competition	Predation
CONTRACTS	[absence of defense or] merely unequal bargaining power	undue influence
		duress
		unconscionability
	application for employment	solicitation of employment by day laborers
GRATUITOUS TRANSFERS	[absence of basis to nullify transfer]	undue influence
CRIMINAL LAW	[absence of defense]	duress
	banter, badinage, flattery, courtship	harassment
	courtship, friendly overtures	stalking
	contract	blackmail/extortion
	[absence of defense]	entrapment
	panhandling or charitable solicitation	aggressive panhandling
PROFESSIONAL RESPONSIBILITY	business development	solicitation
PUBLIC INTERNATIONAL LAW	national defense, self-defense	aggression

The division between behaviors that the law condones and those it condemns—the aggression boundary line—occupies this Article.<sup>39</sup> I make three claims. The first is that in order for the division to become intelligible, the law needs to understand aggression.

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39. The philosopher Alan Wertheimer explores a related interest in the division between condoned and condemned action, using the longstanding taboo against sexual relations between physician and patient as a way to understand exploitation in general. See WERTHEIMER, *supra* note 21, at 159-60. The Hippocratic oath forbids "sexual deeds upon bodies of females and males," *id.* at 159, causing Wertheimer to query why this profession (more than others) has proscribed sex with its clientele. Wertheimer concludes that the fine line between condoned and condemned behaviors of the physician's work day—between "professional palpation" and "improper fondling," *id.* at 160, for instance—heightens the need to define and proscribe. So too I argue that although aggression is of pervasive interest throughout the law, the divisions between condoned and condemned incursions generate the most acute definitional obligations.

Whereas other disciplines have expounded on this subject, the law<sup>40</sup> currently lacks even a working definition of the term. The second claim concerns which framework to use in building a theory of aggression in the law. Here I suggest that we find help from what may seem an unlikely source in legal doctrine. As elaborated in Part I, legal condemnation of aggression, most of which falls outside the confines of tort law,<sup>41</sup> becomes clearer and more consistent with the help of tort theory. The necessary concepts, which appear especially crucial within tort scholarship and case law, are "reciprocity"<sup>42</sup> and "utility."<sup>43</sup>

Though abundantly noted elsewhere,<sup>44</sup> reciprocity first gained fame in torts with the 1972 publication of *Fairness and Utility in Tort Theory* by George Fletcher.<sup>45</sup> In his celebrated article,

40. Here I use the word "law" in its broadest sense, and mean to include judicial opinions, statutes, stated judicial proclivities, legal scholarship, journalism, and popular discourse about the law.

41. Table 1 could have included a few torts examples—nuisance, outrage, consent, privacy, or punitive damages, for example, but torts comes only belatedly to mind when one thinks of aggression in the law.

42. Although my link between the concepts of aggression and reciprocity is novel in the legal literature, social scientists have posited various relations between the two. See, e.g., ASHLEY MONTAGU, *THE NATURE OF HUMAN AGGRESSION* 137-52 (1976) (suggesting that both aggression and reciprocity are necessary for human survival); Frans B.M. de Waal, *The Chimpanzee's Sense of Social Regularity and Its Relation to the Human Sense of Justice*, in *THE SENSE OF JUSTICE: BIOLOGICAL FOUNDATIONS OF LAW* 241, 248 (Roger D. Masters & Margaret Gruter eds., 1992) (explaining angry behaviors among apes as failures of reciprocity); William Michael Hall & Robert B. Cairns, *Aggressive Behavior in Children: An Outcome of Modeling or Social Reciprocity?*, 20 *DEVELOPMENTAL PSYCHOL.* 739, 741 (1984) (describing violent behaviors as reactions); Robert L. Trivers, *The Evolution of Reciprocal Altruism*, 46 *Q. REV. BIOLOGY* 35, 49-50 (1971) (noting adaptive value of reciprocity as a bulwark against aggression).

43. The meanings of "utility," "utilitarianism," and "consequentialism" remain debated in philosophy. See BERNARD WILLIAMS, *MORALITY: AN INTRODUCTION TO ETHICS* 89-90 (1972); see also *infra* note 113 and accompanying text.

44. Diverse literatures in philosophy, sociology, and anthropology yield not so much a definition of reciprocity as a flavor of what reciprocity might demand or encourage. See LAWRENCE C. BECKER, *RECIPROCITY* 73 (1986) (philosophy of obligation); ALLAN GIBBARD, *WISE CHOICES, APT FEELINGS* 261-69 (1990) (philosophy of moral sentiments); JOHN RAWLS, *POLITICAL LIBERALISM* 16 (1993) (political philosophy); GEORG SIMMEL, *THE SOCIOLOGY OF GEORG SIMMEL* 388-95 (Kurt H. Wolff ed. & trans., 1950) (arguing that moral obligations arise from indebtedness); Alvin W. Gouldner, *Reciprocity and Autonomy in Functional Theory*, in *SYMPOSIUM ON SOCIOLOGICAL THEORY* 241, 249 (Llewellyn Gross ed., 1959) (discussing reciprocity in functionalist perspective); see also CLAUDE LÉVI-STRAUSS, *THE PRINCIPLE OF RECIPROCITY*, reprinted in *SOCIOLOGICAL THEORY* 77 (Lewis A. Coser & Bernard Rosenberg eds., 1975); BRONISLAW MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* 46-49 (1926) (deeming reciprocity the center of social relationships); MARCEL MAUSS, *THE GIFT* 63 (1954) (describing indebtedness that results from the acceptance of a gift); Kenneth J. Arrow, *Gifts and Exchanges*, 1 *PHIL. & PUB. AFF.* 343, 348 (1972) (discussing reciprocity as part of welfare economics).

45. George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 *HARV. L. REV.* 537, 540-46 (1972) [hereinafter Fletcher, *Fairness*]. Fletcher's original title was "Non-Reciprocal Risk-Taking—A Synthesis and Critique of the Principles of Tort Liability." CHARLES FRIED, *AN*

Fletcher argued that what he called the "paradigm of reciprocity" explains and justifies the law of accidents better than its competitor, the more familiar-to-torts paradigm of "reasonableness" or "utility."<sup>46</sup> Standing in respectively for Kantian moral theory and utilitarianism or economic efficiency,<sup>47</sup> these two poles represent the two choices lawyers, judges, and scholars face when deciding how to approach accident cases. Fletcher reduces the dilemma to a sentence: "The conflict is whether judges should look solely at the claims and interests of the parties before the court, or resolve seemingly private disputes in a way that serves the interests of the community as a whole."<sup>48</sup>

This dilemma extends well beyond torts, and so I argue in Part I that the reciprocity-and-utility framework yields wider applications. But torts is a good place to start.<sup>49</sup> Among various legal doctrines it is tort law—charged with the task of mediating conflicts between strangers, invoked only when summoned by hurt plaintiffs, mindful that every repression connotes another person's freedom and every freedom entails repression<sup>50</sup>—that has best kept in focus the essential nature of aggression. Tort law insists that aggression is always a relational function. Like all behaviors that may be deemed "tortious conduct," aggression is costly to proscribe yet costly to leave undisturbed by regulation and proscription.<sup>51</sup>

ANATOMY OF VALUES: PROBLEMS OF PERSONAL AND SOCIAL CHOICE 257 (1970) (citing draft version of *Fairness and Utility*).

46. Fletcher, *Fairness*, *supra* note 45, at 539-43. Gregory Keating takes issue with Fletcher's treating "reasonableness" as synonymous with utilitarianism, arguing that Kantian precepts are equally reasonable. Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 313-14 (1996).

47. But see Leonard G. Ratner, *The Utilitarian Imperative: Autonomy, Reciprocity, and Evolution*, 12 HOFSTRA L. REV. 723, 726-27 (1984) (claiming that "utilitarianism reconciles autonomy and reciprocity").

48. Fletcher, *Fairness*, *supra* note 45, at 540.

49. See generally ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* (1999) (invoking reciprocity first to explain tort law, then later to explain criminal law and distributive justice).

50. See *Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co.*, 916 F.2d 1174, 1181 (7th Cir. 1990) (musing, in dicta, that perhaps the plaintiff could be required to get out of the defendant's way, rather than vice versa); *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 494 P.2d 700, 708 (Ariz. 1972) (en banc) (fashioning "compensated injunction" as a way to mediate between the competing, zero-sum rights of the plaintiff and defendant). Regarding individual liability for sexual harassment, a tort-like problem, Nancy Ehrenreich has written that the freedom to be free from harassment may be envisioned as a mirror of the freedom to harass. Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1222-25 (1990).

51. Judge Posner, the author of the *Indiana Harbor* decision, has made repeated reference to the relational nature of injury and freedom in tort law. See Chicago Council of Lawyers, *Evaluation of the United States Court of Appeals for the Seventh Circuit*, 43 DEPAUL L. REV. 673,

Although it is tort theory that gave legal thought its most generative (though perhaps also its most misleading) insight into aggression, the Coase theorem,<sup>52</sup> it is also tort theory—led by Fletcher's paradigms of reciprocity and utility—that best remedies the pervasive Coasean indifference to a key query: Who has done what to whom? Devotees of the theorem may continue to maintain, *pace* Coase, that noses are just as responsible as punches for punches in the nose;<sup>53</sup> the law values the contrary view, respecting limits—ends-in-themselves—as well as aggregate utility. For our purpose the stance is particularly evident in such concepts as “aggressive panhandling” and “undue influence,” which advert (in their noun) to gain and insist (in their adjective) that attention to aggregation will not supersede a concern with boundaries.

A study of aggression as it is understood outside of the law reveals the relevance and value of both the reciprocity and utility paradigms. Part II of this Article begins by juxtaposing extralegal insights into aggression with the particular needs of law. A lawyer can relate reciprocity and utility to social science as well as legal rules by culling and pruning the insights of psychology, anthropology, criminology, sociology and theology. Posing the query, “What is aggression?” Part II uses interdisciplinary insights to build a working definition, in aid of the law-centered framework that structures this Article.

Overlapping conceptions of aggression, in law and often outside it, yield three defining elements. Taken in what I contend is the correct sequence, they are: first, a perception or feeling of *wrongful invasion* on the part of the target, or class of likely tar-

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810-11 (1994) (noting Posner's oft-stated view that whereas the Constitution protects negative liberties only, tort law faults actors for sins of omission as well as commission).

52. Coase adverts to reciprocity, in aid of utility:

The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A?

R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2 (1960). Although George Fletcher has questioned whether the Coase theorem is really about torts or tort theory, *see generally* George P. Fletcher, *Corrective Justice for Moderns*, 106 HARV. L. REV. 1658 (1993) (book review), Coase's famous article is replete with examples from English and American nuisance law. Coase, *supra*, at 8-15, 24-26. Coase also quotes from the Prosser torts treatise at some length, *id.* at 19-20, and analyzes liability for “the actions of rabbits,” *id.* at 36.

53. I distort their point, but only a little. To investigate whether I am being unfair, *see supra* note 50; *see also* Mark F. Grady, *Common Law Control of Strategic Behavior: Railroad Sparks and the Farmer*, 17 J. LEGAL STUD. 15, 15-19 (1988) (describing negligence law as a proving ground for strategic behavior among both victims and injurers); Mark F. Grady, *Proximate Cause and the Law of Negligence*, 69 IOWA L. REV. 363, 414 (1984).

gets; second, a *trespass* by the initiator; and third, a judgment, reached by a society or community, that this combination of invasion and trespass *on balance* warrants condemnation.<sup>54</sup> The point may be made with reference to a relation among players: the recipient, who wants to be free of all unwelcome encroachment; the aggressor, who wants to pursue her own agenda unfettered;<sup>55</sup> and societies or communities, which try to take these competing desires into account by comparing them to each other. This commonsensical description comports with Fletcher's model. One can readily see the paradigm of fairness in the first two elements which advert to feelings or desires, or what I will call sentiments, while the third element suggests a complementary paradigm of aggregate utility.<sup>56</sup> Again, the vocabulary of torts will aid analysis, not only to define aggression but also to exclude some misconceptions about the subject. The tripartite scheme indicates, in a general way, where the law will condemn aggression and where it will refrain from condemnation.<sup>57</sup>

Having delineated reciprocity, utility, and aggression as elements of law and legal rules, the Article moves on to consider this analysis in aid of its third thesis: Understanding aggression yields descriptive and normative gains. Part III addresses aggression as taxonomy. A family relation, I argue, unites those legal categories that set up dichotomous contrasts between permitted and proscribed aggression. Conventional doctrinal categories do not take note of this relation. If my taxonomy is correct, and the family relations among disparate topics genuine,<sup>58</sup> then the jurisprudential

54. These elements are conjunctive, or more precisely cumulative, so that aggression emerges when all three are satisfied in turn.

55. Although the tripartite analysis yields a legal conclusion of aggression only when all three elements are fulfilled, *see infra* Part III, I refer to the entity suspected of aggression as "the aggressor," usually without hedging adjectives like "alleged" or "putative," for the sake of convenience and brevity. In the end, the law may applaud her conduct.

56. *Cf.* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 358-60 (1978) (claiming that the common law is most successful when it combines attention to reciprocity with a sense of what functions best as social practice).

57. On rare occasions, the law will condemn as aggressive certain behaviors that do not fulfill the three defining elements; but these exceptions usually indicate an underlying difficulty with the condemnation. *See infra* Part III.B.

58. Compare JOHN DOLLARD ET AL., *FRUSTRATION AND AGGRESSION* 1 (1939) ("The problem of aggression has many facets . . . This book represents an attempt to bring a degree of systematic order into such apparently chaotic phenomena."), with JOHN KLAMA, *AGGRESSION: THE MYTH OF THE BEAST WITHIN* 152 (1988) (contending that aggression "is not a single thing, nor yet a single class of things; it is not a single behaviour pattern, nor yet a single class of behaviour patterns; rather, it is a single term, with a great variety of possible uses and misuses"), and Robert Rosenstock, *The Forty-eighth Session of the International Law Commission*, 91 AM. J.

principle of treating like cases alike mandates attention to these associations.<sup>59</sup> The taxonomy can offer guidance to judges and scholars who address recurring questions of doctrine.

Part IV explores two radical applications for the reciprocity-and-utility paradigm—one of which George Fletcher himself has noted, albeit without much interest, in an essay about domination that revisits the themes of *Fairness and Utility*. “The kind of dominance I have in mind,” he writes,

is not class dominance of the sort asserted in the Marxist description of capitalism; nor is it akin to the alleged dominance of women by men, or blacks by whites. These instances of status-dominance are undoubtedly unjust and wrong. If the dominance exists, then surely those subordinated would wish to take democratic or even revolutionary measures in response.<sup>60</sup>

Whereupon Fletcher exits, leaving behind what I regard as an invitation to consider reciprocity-and-utility as an intellectual weapon to fight the subordination of groups.<sup>61</sup>

Accordingly, Part IV begins by examining certain achievements of the American civil rights movement using the vocabulary of aggression, reciprocity, and utility.<sup>62</sup> The work of Martin Luther King, Jr. and his colleagues, evoking “nonviolence” as a source of racial justice, expressed the relational nature of aggression. Having portrayed themselves as recipients of antecedent aggression—

INT’L L. 365, 366 (1997) (quoting United Nations rapporteur Jean Spiropoulos: aggression “is not susceptible of definition”).

59. See ARISTOTLE, NICOMACHEAN ETHICS 1131a-1131b (Terence Irwin trans., 1985) (stating this thesis as a crucial constituent of justice); H.L.A. HART, THE CONCEPT OF LAW 155 (1961) (deeming the phrase “[t]reat like cases like [and treat different cases differently]” a “leading precept” of justice). Cf. RONALD DWORKIN, LAW’S EMPIRE 165-66 (1986) (arguing that law must hew to “integrity”). I do not quarrel here with writers who find the principle indeterminate, even hollow. JOSEPH RAZ, THE MORALITY OF FREEDOM 239-44 (1986); Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 546-47 (1982). Rather, I presume that some recognition of entitlements or rights rooted in judgments of equality and inequality is a characteristic of stable legal systems. See Joshua D. Sarnoff, *Equality as Uncertainty*, 84 IOWA L. REV. 377, 382 (1999).

60. George P. Fletcher, *Domination in Wrongdoing*, 76 B.U. L. REV. 347, 347 (1996) [hereinafter Fletcher, *Domination*].

61. Elsewhere in *Domination in Wrongdoing*, Fletcher flinches from considering the radical implications of his ideas. The thesis of *Domination in Wrongdoing* is that contract, tort, and criminal law occupy points on a continuum of domination. Contract law follows a “failed collaboration” approach whereby the victim is deemed vigorous; for example, she must act to mitigate the damage attributed to a breached contract. *Id.* at 356-57. In criminal law, at the other end of the continuum, the victim has no such duty; by hypothesis she neither can nor should avoid the wrong. *Id.* at 356. Fletcher omits the next step, which is that in their outlook on domination, contract law and criminal law side with the powerful: the party with more assets can breach a contract without cause or excuse, knowing that the victim will be faulted for a less-than-vigorous response, while the passive-victim hypothesis of criminal law aids the state in convicting accused persons of crimes.

62. I use “civil rights” to refer to social movements that seek fuller protection under the law for groups that they claim suffer systemic invidious discrimination.



rather than belligerents who provoked conflict randomly, or with a desire simply to destroy—activists were able to pursue an expanded vision of social utility. I contrast their successes with other movements of the same era, notably feminism, that have been able to make only wavering reference to aggression. Successful activists in the civil rights arena, I argue, must start with reciprocity and then move to utility. When they cannot evoke something resembling Fletcher's paradigm of reciprocity, these activists have trouble reaching utility—that is, a plea to the broader public that their claim warrants societal approval.

Telling a success story of another kind, the second half of Part IV recounts the attack on predation in antitrust law. Starting in the late 1970s, influential scholars and jurists associated with the University of Chicago contended that because many types of predatory behavior in business do not in practice conduce to monopoly power—and indeed can often yield gains to the public—the law should not try to stop or redress predation, especially predatory pricing.<sup>63</sup> The courts have accepted some of this revisionist view of predation when siding with defendants.<sup>64</sup>

As an event in law reform, the predation battle, like the civil rights struggle, illuminates how aggression, reciprocity, and utility are political as well as legal concepts. The political conflicts of antitrust predation amount to one query: Can a word virtually synonymous with aggression be understood only in utilitarian terms? No, I argue; reciprocity is too central to variations on aggression like "predation." The persistence of predation in antitrust doctrine supports this view. Regardless of whether predation pricing should remain actionable—in the end, I take no position—"predation" or "predatory" has a plain sense of rapacity and plunder. Monopolistic behavior in restraint of trade can be regulated and redressed without attention to aggression, but predation is intelligible only with reference to sentiment. Embarrassed by these old-fashioned connotations of feeling, economists continue to insist that predation is a

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63. See *supra* note 8 and sources cited therein. Within antitrust, the "Chicago" label, according to one jurist often associated with it, refers to a stance in favor of using price theory as a principal source of antitrust policy. Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 928 (1979).

64. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589-94 (1986) (expressing skepticism that predatory pricing will ever result in harm); *Henry v. Chloride, Inc.*, 809 F.2d 1334, 1341 (8th Cir. 1987) (extending *Matsushita's* reasoning to the Robinson-Patman Act); *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 729 F.2d 1050, 1055-57 (6th Cir. 1984) (declaring that prices above average total cost are never predatory, regardless of the defendant's intent to eliminate its competition).

function of something else, like cost pricing; the word maintains its stubborn connotation of aggression.

Throughout public law, then, from civil rights to regulated capitalism and beyond, the law defines aggression with reference to rules of play. The idea of a "game," still working overtime in the law reviews and other academic periodicals, may serve to summarize my thesis. In a game, suffering a detriment (or "losing") is acceptable and accepted, provided the winner has played fair. Perhaps the most familiar fair-play rule, common to games generally, is the idea that a player should do "nothing personal" while trying to win. The law of aggression declares and enforces fair-play rules. What I have called the recipient's sentiment of aggression—his or her personal feeling of having been violated—may be expressed in terms of the voluntariness that characterizes a game: "I didn't consent to this." Whenever the complaint prevails within a community or society, this judgment about aggression states a conclusion that the initiator violated the rules of the game. The more "personal" the initiator's actions appear, the more likely they are to be castigated and sanctioned.<sup>65</sup> A contrary judgment overrides the victim's characterization of the experience—and installs acceptance, a kind of superimposed consent.

The existence of a game may be optimal in a Kaldor-Hicks sense, meaning in everyone's best interest overall,<sup>66</sup> but games regulated by law are played without universal agreement. This absence of full consent obliges the law to reflect soberly on the balance that it has struck between passive and assertive conceptions of freedom. The obligation is unique to the study of law: More than other disciplines, law and its mechanisms of enforcement themselves continually invade the boundaries of individuals. With its subpoenas, stays of execution, creditors' remedies, destruction of contraband, court orders to desegregate, military invasions, impeachments, entries of judgment, lethal injections, gavels banging down, and hundreds of other measures, law and its measures of enforcement mediate perpetually between the gains of incursion and

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65. See E-mail from Joseph Dodge, Visiting Professor, Florida State University College of Law, to Anita Bernstein, Visiting Professor, Emory University School of Law (Oct. 11, 1999) (on file with author) (noting that defamation and intentional infliction of emotional distress rely heavily on the conclusion that certain hurtful actions are wrong because they are personal). In the preceding paragraph I have followed closely Professor Dodge's paraphrase of the thesis of this Article. See *id.*; see also E-mail from Joseph Dodge, Visiting Professor, Florida State University College of Law, to Anita Bernstein, Visiting Professor, Emory University School of Law (Oct. 12, 1999) (on file with author). I elaborate on the game metaphor *infra* Part II.C.

66. See POSNER, *supra* note 26, at 14-17 (explaining Kaldor-Hicks efficiency).

the universal human wish to be free of unwanted encroachment. All persons, nations, and institutions can be agents and recipients of aggression; the law, obliged as it is to regulate the ensuing conflicts, needs to develop its own perspective on the phenomenon.

## I. THE PARADIGMS OF RECIPROCITY AND UTILITY

The concepts of reciprocity and utility, both of which are integral to aggression in the law, demand some elaboration, and reciprocity demands a greater share of this effort because of its relative obscurity. This Part begins with a brief look at reciprocity in the philosophy and political theory that underlie current legal thought. Reciprocity permeates ideals about behavior as well as law. Utility, I continue, both clarifies and limits the jurisprudential force of reciprocity.

### *A. Reciprocity as a Behavioral Ideal and Legal Principle*

#### 1. Philosophical Antecedents

Since antiquity, ethicists have described reciprocity as a constituent of ethics. Their teachings present variations on reciprocity that differ in emphasis but unite around a core of moral equality among persons. The Sermon on the Mount, for example, cast human relations as requiring reciprocity in the sense of mutual benevolence; each person, Jesus urged, should treat others as he would like to be treated, even to the point of embracing enemies with love.<sup>67</sup> Greek and Roman writers addressed reciprocity in terms of exchange—give what you get and get what you give.<sup>68</sup> Challenged by a heckler to state Judaic law while standing on one foot, the sage Hillel declared: "That which is hateful unto thee do not do unto thy neighbor. The rest is commentary. Now go and study."<sup>69</sup> A similar norm of reciprocity is attributed to Confucius: "What you do not want done to yourself, do not do to others."<sup>70</sup>

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67. *Matthew* 7:12; *Luke* 6:31.

68. See John Topel, *The Tarnished Golden Rule (Luke 6:31): The Inescapable Radicalness of Christian Ethics*, 59 *THEOLOGICAL STUD.* 475, 482 (1998) (quoting Xenophon, "[t]o pay a debt of gratitude, try to be to him what he has been to you," and Seneca, "[e]xpect from another what you have done to another").

69. Sheldon F. Gottlieb, *Why I Am a Humanist Skeptic—And Still a Jew*, *FREE INQUIRY*, Fall 1993, at 29.

70. See Topel, *supra* note 68, at 482-84.

Reciprocity is integral also to distinctions found in Aristotelian conceptions of justice, notably the distinction between distributive and corrective justice.<sup>71</sup> Distributive justice, to Aristotle, regards proportionality as alien to reciprocity: X is not necessarily obliged to render unto Y the equivalent of what Y renders unto X.<sup>72</sup> Corrective justice, however, seeks to nullify the gains and losses occasioned by episodes of wrongful encroachment.<sup>73</sup> Thus distributive justice eschews reciprocity while corrective justice extols it.<sup>74</sup> The reference to transactions links corrective justice with another Aristotelian ideal, obligations between parties to an exchange; Aristotle used the word reciprocity to describe them.<sup>75</sup>

## 2. The Philosophy of Reciprocity Meets Jurisprudence

Whereas the ancients situated reciprocity in justice and even perhaps in law, contemporary understandings of reciprocity in law supply the context of a familiar legal system. The writings of Immanuel Kant, which connect philosophy to legal principle generally, situate reciprocity in a modern, law-like framework. Kant writes that persons are situated in relation to one another, and the relation endows them with duties and freedoms that resemble the rules, penalties, principles, and entitlements of law.<sup>76</sup> According to Kant, individual liberty means freedom from forcible external actions that prohibit a person from engaging in activities, provided that these activities do not themselves forcibly hamper the freedom of other persons.<sup>77</sup> All consensual interactions are just; put another way, one cannot commit an injustice against oneself.<sup>78</sup>

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71. See A.T. Nuyen, *Just Modesty*, 35 AM. PHIL. Q. 101, 104 (1998) (noting that Greek word for justice, *dike*, implies quantitative measurements resembling checks and balances). Aristotle believed that reciprocity was essential to friendship as well as justice. Topel, *supra* note 68, at 483 n.38 (noting Aristotle's view that reciprocity is a constituent of friendship).

72. See Shridath Ramphal, *Beyond Mere Survival*, EPA J., Apr.-June 1993, at 10, 12 (invoking Aristotle to defend proposal of unequal sacrifices among industrial and developing nations).

73. See Fletcher, *Domination*, *supra* note 60, at 352-60.

74. But see RIPSTEIN, *supra* note 49, at 267 (relating reciprocity to distributive justice).

75. See ARISTOTLE, *supra* note 59, at 1132b, lines 24-26. Although scholars dispute whether Aristotle's reference to reciprocity is a subset of corrective justice or alternatively an independent precept, it is unquestionably prominent in Aristotelian justice. Jason W. Neyers, *The Inconsistencies of Aristotle's Theory of Corrective Justice*, 11 CAN. J.L. & JURISPRUDENCE 311, 319 (1998).

76. See ROGER J. SULLIVAN, AN INTRODUCTION TO KANT'S ETHICS 49-51 (1994).

77. See IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 231 (John Ladd trans., The Bobbs-Merrill Co. 1965) (1797). Similarly, it is unjust to deceive another person in a way that threatens her life or property. See *id.* at 238 & n.9.

78. See ALLEN D. ROSEN, KANT'S THEORY OF JUSTICE 17-18 (1993) (summarizing "Kant's Principle of Civil Freedom").

These tenets of justice presume, as does reciprocity generally, that human beings are both like and unlike one another. Persons are alike in their innate conception of human equality. Their distinctly human trait of reason situates them on a level plane.<sup>79</sup> Reason enables each person to make choices among alternative courses of conduct and to identify fellow human beings as agents with the same capacity. This understanding allows the individual to perceive the wrongfulness of force and fraud in transactions or encounters, and the wrongfulness of tyrannous compulsion in society.<sup>80</sup>

At the same time, however, human beings differ from one another, at least in the sense that each individual has a unique obligation to use her own facility of reason in order to perceive her unshared, one-of-a-kind endeavors and political commitments.<sup>81</sup> As many writers read him, Kant went further in his conception of divergence among human beings. Friedrich Hayek, for example, has extended Kant to maintain that because societies cannot identify their best "common ends," individuals must be free to answer their own questions about value.<sup>82</sup> Robert Nozick, also invoking Kant, extrapolates from human uniqueness the principle that the freedom to act without constraint is always desirable, apart from the uses human beings make of this freedom.<sup>83</sup> Regardless of whether modern libertarianism follows from Kant's conception of the individual, however, at a minimum this conception dictates a duty of ethical struggle and reflection—which no community, legislature, or sovereign can undertake on behalf of any person. At least in the sense of individual duties, human beings are all different from one another. The rigors of reciprocity demand that persons understand both distinctions and common ground between themselves and others.

The work of John Rawls makes clearer Kant's treatment of reciprocity as a source of universal duties and freedoms and of a conception of equality that can withstand many of the hard ques-

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79. The human monopoly on reason is claimed in IMMANUEL KANT, *Idea for a Universal History with Cosmopolitan Intent* (1784), reprinted in *THE PHILOSOPHY OF KANT: IMMANUEL KANT'S MORAL AND POLITICAL WRITINGS* 116, 118-19 (Carl J. Friedrich ed. & trans., 1949).

80. See HOWARD WILLIAMS, *KANT'S POLITICAL PHILOSOPHY* 198 (1983) (distinguishing the ability to discern and condemn tyranny, which Kant celebrates, from the right to engage in revolutionary violence, which Kant rejects).

81. Allen Rosen takes this relatively parsimonious view of the range of human behaviors that Kantian liberty commands. ROSEN, *supra* note 78, at 58-62.

82. FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 59-60 (1944).

83. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 33-34 (1974) (noting that human beings perceive their own lives as unique, and naturally object to command and conscription).

tions applied to that term. "Those who can give justice are owed justice," Rawls writes,<sup>84</sup> deeming this commutative relationship a "basis of equality."<sup>85</sup> The "veil of ignorance," made famous in *A Theory of Justice*, describes in Kantian metaphor the obligation to regard fellow persons as both like and unlike oneself.<sup>86</sup> Greatly esteemed by legal scholars, *A Theory of Justice* has begotten a generation of legal commentaries and prescriptions; dozens of judges have invoked the book in an array of reported decisions.<sup>87</sup>

Starting with the Kantian belief that persons are endowed with liberties consistent with a like degree of liberty for all, Rawls proposes that this principle of social freedom answers questions of substance as well as procedural justice, and tells a society how recurring disputes ought to be perceived and resolved. Gregory Keating has continued this argument, showing by analysis of classic torts cases that fairly precise rules, or what Keating calls "subordinate doctrines," derive from Kant and Rawls.<sup>88</sup> Commenting on reciprocity, Keating declares unhesitatingly that "mutual freedom" informs the content of accident law (and, he implies, all of law beyond accidents):

Reciprocal risks are risks that are equal in magnitude, equal in probability, and imposed for reasons that are both good enough to justify the perils they risk and equally good. Risk impositions that meet these criteria are fair because they are, ex ante, to the long run advantage of those they imperil.<sup>89</sup>

This application of reciprocity, though associated with social contract theory expounded in the 1970s, has an earlier pedigree, to which we now turn.

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84. JOHN RAWLS, *A THEORY OF JUSTICE* 510 (1971).

85. *Id.* at 504.

86. Behind Rawls's veil of ignorance each man does not know his place in society, his class position or social status . . . his fortune in the distribution of natural assets and abilities, his intelligence and strength, and the like. Nor, again, does anyone know his conception of the good, the particulars of his rational plan of life, or even the special features of his psychology such as his aversion to risk or liability to optimism or pessimism.

*Id.* at 137; see also Edward B. Foley, *Jurisprudence and Theology*, 66 *FORDHAM L. REV.* 1195, 1199 (1998) (revising Rawls slightly to build a "principle of reciprocity" that invites citizens to imagine trading places with one another while *not* ignorant of personal circumstances).

87. A search of the Mega library/Mega file of Lexis in November 6, 2000 counted 44 citations of *A Theory of Justice* in judicial opinions.

88. Gregory C. Keating, *Fairness and Two Fundamental Questions in the Tort Law of Accidents* 66-68 (Sept. 24, 2000) (unpublished manuscript, on file with author).

89. *Id.* at 72.

### 3. Reciprocity in Accident Law: Cases and Commentary Before *Fairness and Utility*

As we approach George Fletcher's contention that liability depends less on allocative efficiency than on relationships—either between injurers and victims or among the members of a community of risk takers,<sup>90</sup> the torts precedents for his view warrant notice. Reciprocity achieved explicit recognition in the English nuisance case of *Bamford v. Turnley*.<sup>91</sup> In *Bamford* the plaintiff objected to the smells and sounds generated by the defendant's brick-making business.<sup>92</sup> Ruling for the defendant, Baron Bramwell called the intrusion "common and ordinary," too minor to be actionable; Bramwell explained that "reciprocal nuisances are of a comparatively trifling character. The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live."<sup>93</sup> Although some prefer to describe the *Bamford* holding as a de minimis exception to nuisance law,<sup>94</sup> Bramwell's phrase casts its triviality rationale as subordinate to reciprocity.<sup>95</sup>

Whereas *Bamford's* treatment of reciprocity permits an allocative-efficiency gloss on the outcome—the plaintiff's injury was too cheap to take seriously, one might say—another important precursor to *Fairness and Utility* allows no such reading, situating itself firmly in a paradigm of reciprocity to the exclusion of utility. In *Aircraft Operator's Liability for Ground Damage and Passenger Injury*, a 1935 article not cited by Fletcher, Professor Lawrence Vold of the University of Nebraska College of Law and two second-year students agreed that "one-sidedness of the risk of the activity" justifies strict liability.<sup>96</sup> The authors deemed "mutuality of risk" a proper basis for the kinder-to-defendants negligence rule, and concluded that the aviation industry did not deserve such doctrinal

90. See COLEMAN, *supra* note 34, at 255.

91. *Bamford v. Turnley*, 122 Eng. Rep. 27 (Ex. 1862).

92. *Id.* at 32-33.

93. *Id.* The *Restatement (Second) of Torts* repeats the last seven words of this phrase with approval. RESTATEMENT (SECOND) OF TORTS § 822 cmt. g (1977).

94. See, e.g., Robert W. McGee & Walter E. Block, *Pollution Trading Permits as a Form of Market Socialism and the Search for a Real Market Solution to Environmental Pollution*, 6 FORDHAM ENVTL. L.J. 51, 61-62 (1994).

95. See Richard A. Epstein, *The Ubiquity of the Benefit Principle*, 67 S. CAL. L. REV. 1369, 1402 (1994) (stating that *Bamford* holds that "each person is compensated for the harm inflicted by the like power to inflict harms on others").

96. Lawrence Vold et al., *Aircraft Operator's Liability for Ground Damage and Passenger Injury*, 13 NEB. L. BULL. 373, 380 (1935).

favor.<sup>97</sup> Published at the height of the Depression (with no wartime procurement money in sight), and aware of the vulnerability of the youthful industry it was addressing, *Aircraft Operator's Liability* is noteworthy for its cool treatment of an enterprise that wanted judicial indulgence, if not subsidy.<sup>98</sup> The authors barely support their assertion that the aviation industry can internalize the costs of its accidents, and in general make no efficiency arguments when deeming ground damage a betrayal of reciprocity:

[T]he benefit of the activity accrues directly to the aviator and to him only. The aeronaut flies over the land of the ground owner without the permission of the latter. He is not in the position of the railroad which may have paid adjoining land-owners an exorbitant price for the use of the right of way. He is not in the position of the motorist who uses the road constructed for the benefit of the property owner as well as the motorist and which adds materially to the value of the adjoining property . . . As between those who benefit from aeronautics and those who do not, who should pay the bills of the industry?<sup>99</sup>

Both *Bamford* and *Aircraft Operator's Liability* support the proposition that imbalances between the circumstances of a plaintiff and a defendant justify doctrinal distinctions. At this point, having reviewed reciprocity as a philosophical concept, its connection to jurisprudence, and themes of reciprocity in tort case law and commentary, we may move to the work that brings these three preceding elements together.

#### 4. Fletcher's Paradigm of Reciprocity

*Fairness and Utility in Tort Theory* occupies a peculiar place in the torts canon. One scholar sees it as an oddly barren ancestral figure, venerated yet without "offspring"; efficiency analysis, its competitor, has by contrast been fruitful and multiplied.<sup>100</sup> Another critic has paid *Fairness and Utility* the strange tribute of steady attacks for more than twenty years.<sup>101</sup> Other disagreements are

97. *Id.* at 380-82. Deftly, Vold, West, and Wolf burden the aviation industry with an earlier stance it had taken: the industry had claimed that the doctrine of *res ipsa loquitur* did not apply to airplane crashes because such an occurrence is not unusual enough to bespeak negligence. Too bad, the authors write. "Either the doctrine of *res ipsa loquitur* applies to flying or else flying is extra-hazardous." *Id.* at 380 n.19.

98. *Id.* at 384 (scoffing at "what has been euphemistically termed a young and growing industry which should be relieved of the burdens of paying its bills").

99. *Id.* at 382.

100. See Keating, *supra* note 46, at 313-14.

101. See COLEMAN, *supra* note 34, at 253-69; Jules L. Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421, 432-36 (1982); Jules L. Coleman, *Justice and Reciprocity in Tort Theory*, 14 W. ONT. L. REV. 105, 106-15 (1975); Jules L. Coleman, *Legal Theory and Practice*, 83 GEO. L.J. 2579, 2610 (1995).



continually published.<sup>102</sup> If Fletcher is right, why are there so many attacks? If Fletcher is wrong, why do so many scholars hold *Fairness and Utility* in such high esteem?

The explanation, I believe, lies in the tendency of torts scholars to sort the world of accident law into two camps, in rough terms Kantianism and utilitarianism; writers identify themselves in favor of one and against the other. *Fairness and Utility* was an early player in this game: By the early 1970s some philosophy-of-torts scholars, Fletcher included, had seen the future, and to their dismay it looked like law and economics.<sup>103</sup> The stance seems to affront both sides. One set of objections to Fletcher says that reciprocity does not comport with tort rules, while another says that it is utility that fails, at both normative and descriptive levels.<sup>104</sup>

This quarrel misses the enduring insight of the article, which is that philosophical division between fairness and utility (or Kantian moral theory and utilitarianism, or Fletcher's "reciprocity" and "reasonableness," or, as a recent article would have it, fairness and welfare economics<sup>105</sup>) illuminates case outcomes and patterns of doctrine in the law of accidents. Dialectic between two elements, rather than one dominating paradigm, is the point. Thus, rather than compete in a doctrinal or philosophical boxing-ring where only one can triumph, as some implicitly contend, fairness and utility fit together in a working relationship. Moreover, torts scholars who point out that either the reciprocity or the utility paradigm com-

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102. See, e.g., RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 672 (6th ed. 1995) (faulting Fletcher's paradigms for not answering many questions of how cases ought to come out); RICHARD A. EPSTEIN, TORTS 338 (1999) (differing with Fletcher on the question of whether "deviation from the accepted balance" of risks justifies different doctrinal treatment); Keating, *supra* note 46, at 313-14; Martin A. Kotler, *Utility, Autonomy and Motive: A Descriptive Model of the Development of Tort Doctrine*, 58 U. CIN. L. REV. 1231, 1243 (1990) (suggesting that Fletcher overstates the normative appeal of reciprocity); Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963, 985-86 (1981) (critiquing Fletcher for indeterminacy of the paradigms).

103. Fletcher, *Fairness*, *supra* note 45, at 572-73.

104. Compare Keith N. Hylton, *A Missing Markets Theory of Tort Law*, 90 NW. U. L. REV. 977, 1007 (1996) (noting that the paradigm of reciprocity conflicts with the law of defamation, medical malpractice, employer liability to employees, and intentional infliction of emotional distress), with Richard W. Wright, *Principled Adjudication: Tort Law and Beyond*, 7 CANTERBURY L. REV. 265, 280-81, 286-89 (1999) (noting "unreasonable" or anti-utilitarian stances of tort law, including consent doctrine and the distinction between intentional and accidental harm). One author has attempted to bridge the gap between fairness and utility priorities in tort law. William E. Nelson, *From Fairness to Efficiency: The Transformation of Tort Law in New York, 1920-1980*, 47 BUFF. L. REV. 117, 225-26 (1999) (arguing that efficiency concerns influence beliefs about what is fair).

105. Louis Kaplow & Steven Shavell, *Fairness Versus Welfare Economics in Normative Analysis of Law* (1998) (unpublished manuscript, on file with author).

mends outcomes that are contrary to actual tort rules demonstrate collectively that most tort rules also *comport* with one of the two paradigms.

Furthermore, if tort law partakes of both fairness and utility, then one may surmise that other areas of the law are influenced by the same two sources. Internecine partisanship in one subject should not continue to obscure the value of an important commentary on all of American law: it is ironic and unfortunate that *Fairness and Utility*, despite Fletcher's renown as a scholar of criminal law and comparative law, seems to have found readers (or at any rate citations) almost exclusively in torts. Although the acclaim for *Fairness and Utility* in the torts literature gives Fletcher credit for illustrating the relation between Kantian ethics and utilitarianism in torts, a wider audience—less confined to poles of a dichotomy—would extend this recognition into all of legal doctrine.<sup>106</sup>

My survey thus far has suggested that doctrine and scholarship in torts sketch a division between condoned and condemned encounters. As Fletcher puts the point, all persons are subject to harm from "background risks," and are not entitled to compensation for resultant injuries; but "no one may suffer harm from additional risks without recourse for damages against the risk creator."<sup>107</sup> Regardless of whether Fletcher's recitation of tort rules in *Fairness and Utility* is doctrinally correct,<sup>108</sup> his choice of subject matter is inspired. How legal systems regard the harms occasioned by persons butting up against one another in society reveals their conception of the law of human relationships. Persons are expected to "live and let live" in society, as Baron Bramwell would say, and tolerate many incursions; of all the accounts of human collisions experienced in the United States, few reach the courts. This condoned-condemned division rests on a concept of reciprocity.

Reciprocity is not a complete paradigm—neither for accidents, nor aggression, nor any other category of encounters between human beings. Instead it presents a partial account of society and community, emphasizing what human beings do to and for one another. This account does not ignore concerns of efficiency or welfare,

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106. John Goldberg describes a related endeavor: for Goldberg, the private law of wrongs illuminates the law of rights, notwithstanding the contentions of activists since the 1970s that rights are progressive or egalitarian, and that tort law (or the law of wrongs) is hostile to this progress. John C.P. Goldberg, *Rights and Wrongs*, 97 MICH. L. REV. 1828, 1830-31 (1999).

107. Fletcher, *Fairness*, *supra* note 45, at 550.

108. See *supra* note 102 and accompanying text (noting criticisms). Fletcher concedes the validity of some of this critique in Fletcher, *Domination*, *supra* note 60, at 347-48.

but rather emphasizes its concerns about freedom and intrusion.<sup>109</sup> It pays little heed to fault, a concept often understood in terms of allocative efficiency.<sup>110</sup> It neglects incentives, market solutions, market failures, and general deterrence. We turn now to some of these countervailing concerns, which are associated with "utility."

### *B. Utility Moderates Reciprocity*

The society envisioned in an absolutist version of the paradigm of reciprocity—one with zero tolerance for unwelcome encroachment—would fail utterly to provide its members with a level of welfare otherwise attainable from its resources.<sup>111</sup> It would grind to the proverbial halt.<sup>112</sup> In recognition of this fact, law mediates between the paradigms of reciprocity and utility.

No canonical definition of utilitarianism being available, we may think of it for present purposes simply as consequentialism: a doctrine that "the rightness or wrongness of actions is determined by the goodness or badness of their consequences."<sup>113</sup> Beginning with Jeremy Bentham, legal thought has found utilitarianism congenial: As one philosopher puts it, utilitarianism is "the test of legal institutions, so that a legal system will be adjudged desirable if it will produce (or probably produce) maximal happiness."<sup>114</sup> As the better-known of Fletcher's two paradigms, "utility" is so fixed in American jurisprudence as to require little elaboration here. What may demand a few words is my contention that in its treatment of aggression, American law begins—and should begin—with the first paradigm. This ordinal decision is not a claim that reciprocity is

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109. In his analysis of *Bamford*, Gregory Keating distinguishes between reciprocity of risk, which holds little interest for him, and reciprocity of harm. Keating, *supra* note 88, at 15-16. For Keating nuisance and negligence are critically different. Nuisance amounts to a buzz, a chronic inconvenience that does not always reach the heights of "substantial"; the types of injuries remedied by negligence law tend to be severe. *Id.* at 15. "Live and let live," to Keating, means that we must live with "risk whose reduction is not consistent with the flourishing of valuable activities; it is the price of freedom to act." *Id.* at 16.

110. Jules Coleman discusses this "surprising conclusion" in COLEMAN, *supra* note 34, at 229.

111. See Kaplow & Shavell, *supra* note 105, at 12 (adverting to absurdity of paying infinite sums to redress small-stakes "fairness" claims).

112. See *supra* notes 28-32 and accompanying text.

113. J.J.C. Smart, *Utilitarianism*, in 8 ENCYCLOPEDIA OF PHILOSOPHY 206 (Paul Edwards ed., 1967). But see WILLIAMS, *supra* note 43, at 89-90 (objecting that the distinction between utilitarianism and consequentialism is significant).

114. RICHARD B. BRANDT, MORALITY, UTILITARIANISM, AND RIGHTS 197 (1992); cf. Hardin, *supra* note 27, at 1792 ("To argue coherently, legal philosophers must be institutionalist.").

more important than utility, but rather an attempt to be faithful to the premises of each paradigm.

In making happiness the reason for an act, or a rule, or a social system,<sup>115</sup> utilitarianism presumes that human feelings precede choices—about which action to take, which rule to write, what institution to create.<sup>116</sup> For purposes of thinking about aggression in the law, accordingly, the struggle over happiness between aggression and target—is A entitled to operate her noisome factory, or is B entitled to the unimpeded enjoyment of his nearby house?<sup>117</sup>—must be considered before the utility of an act or rule about the factory will emerge. I do not deny that utilitarianism can precede, and also influence, the creation of tastes and inclinations that affect the sum of human happiness.<sup>118</sup> At the level of act-category, however, a legal system must know the preexisting stakes for human happiness before it can decide whether to condone or condemn.

A related sense in which reciprocity precedes utility, even more pertinent to the creation and understanding of legal rules and principles, lies in the emergence of welfare from the aggregation of individual wants, one person at a time. Any legal conception of aggression must begin with the small unit—one act, one category of behavior, one legal rule—before contemplating the optimal balance between freedom to aggress and freedom from aggression. Rawls points out that the “most natural way” to implement utilitarianism is to adopt for all of society the principle of rational choice for one individual.<sup>119</sup> This implementation does pose difficulties—as Rawls puts it tersely, it “does not take seriously the distinction between persons”<sup>120</sup>—but these difficulties are inherent in utilitarianism itself rather than in the technique of beginning with one person and moving to all of society.

Within human cognition, moreover, the concept of intrusion or violation develops earlier than the subtler notions of waste, lost opportunity, deterioration, and other variations on reduced utility.<sup>121</sup> The sequence of reciprocity first, utility second, thus fol-

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115. See HENRY SIDGWICK, *THE METHODS OF ETHICS* 8-11 (7th ed. 1907).

116. See JEREMY BENTHAM, *PRINCIPLES OF MORALS AND LEGISLATION* 3 (1780) (adverting to “happiness”).

117. See *supra* notes 90-95 and accompanying text.

118. See BRANDT, *supra* note 114, at 203-04 (suggesting that a utilitarian would favor educating children to find certain behaviors “aversive” and to encourage the development of conscience).

119. RAWLS, *supra* note 84, at 26-27.

120. John Rawls, *Classical Utilitarianism*, in *CONSEQUENTIALISM AND ITS CRITICS* 14, 19 (Samuel Scheffler ed., 1988).

121. I elaborate at *infra* notes 206-09 and accompanying text.

lows the same cognitive stance that treats affirmative misfeasance as worse than failures to act, even when the consequences of omission are equally dire.<sup>122</sup> Philosopher Bernard Williams faults utilitarianism for concerning itself with "the state of affairs," a concern Williams thinks is simply contrary to the human inclination to care more about direct actions than about general conditions including omissions.<sup>123</sup> Although sentient adults recognize that omissions, states of affairs, and rejected alternatives contain moral significance, this recognition comes to them only *after* they understand the immediacy of contact. For this reason utility moderates reciprocity, rather than the reverse.

In a system of legal control, this moderation occurs by means of a decision to condone most of those encroachments that conduce to overall welfare. The apparent paradox of encroachment and welfare—whereby American law both celebrates entrepreneurial intrusion yet asserts a right to be let alone<sup>124</sup>—becomes intelligible upon recognition of both reciprocity and utility. Tort law is not internally inconsistent for rendering this recognition, and, as we shall see,<sup>125</sup> other doctrines also partake of the Fletcher division: They start with "solely . . . the claims and interests of the parties before the court," and then seek "a way that serves the interests of the community as a whole."<sup>126</sup>

The fault rule—which establishes blameworthy conduct as a prerequisite to liability—illustrates this function of utility moderating reciprocity. Following Learned Hand, tort law equates fault with squandering: It is wasteful, and therefore blameworthy, to leave a barge unattended during daylight hours in the heavy wartime traffic of New York harbor because the expected costs of injury, or what Hand called PL, are greater than the costs of precaution, or B.<sup>127</sup> Comparing the two sides of this algebraic variable be-

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122. One philosopher claims plausibly that most people agree with her statement that "killing is surely worse than letting die." Judith Jarvis Thompson, *The Trolley Problem*, 94 YALE L.J. 1395, 1396 (1985). In English legal history, the writ for trespass came before the "case" writ; the latter provided for trespass liability based on indirect application of force, suggesting that the English legal system evinced its maturity with this more sophisticated recognition of responsibility for harm. J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 73-75 (3d ed. 1990).

123. Bernard Williams, *Consequentialism and Integrity*, in *CONSEQUENTIALISM AND ITS CRITICS*, *supra* note 120, at 20, 31.

124. *See supra* notes 33-38 and accompanying text.

125. *See infra* Part III.

126. Fletcher, *Fairness*, *supra* note 45, at 540.

127. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947); *see also* Nelson, *supra* note 104, at 175-78 (noting earlier, less famous judicial opinions by Learned Hand that discuss negligence in terms of utility).

gins with something like a reciprocity analysis. The fault rule invites the actor to contemplate the cost of his action and inaction—what it would be like to get your boat hit, how burdensome it is for me to incur precaution costs. Here I do not mean to site *homo economicus* in the “fairness” camp, only to say that moral and legal conclusions about utility work in partnership with such conclusions about reciprocity.<sup>128</sup> Requiring the plaintiff to prove fault does not begin with waste, but rather adds a criterion of disutility to the sense of wrongful encroachment that precedes it.

The utility-moderates-reciprocity sequencing inverts the standard inclination of a legal system to begin with institutions and allocative concerns.<sup>129</sup> Although it may seem more orderly to start with macro-level policy-making, protests about aggression start instead at the level of human collisions, and thus the law of aggression always begins at the same point. The legislative and executive branches of government continue to make utilitarianism an operating principle<sup>130</sup>—and the judiciary often does the same; much of adjudication aspires to guide the future, as well as depict and resolve conflicts of the past.<sup>131</sup> Yet affronts to reciprocity are necessary before the law of aggression can contemplate an outcome that maximizes social welfare.<sup>132</sup>

## II. WHAT IS AGGRESSION?

Those who seek to write new definitions of familiar term generally begin by consulting existing definitions, and statements about the nature of aggression certainly abound. Few of these definitions, however, comport with the central task of legal policy-

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128. Cf. Heidi M. Hurd, *The Deontology of Negligence*, 76 B.U. L. REV. 249, 251-52 (1996) (arguing that despite its emphasis on consequences, the Hand formula is congruent with rights-based or Kantian analysis as well as utilitarianism).

129. As Bernard Williams point out, utilitarianism appeals to architects of a legal system because utilitarianism regards questions about the good as empirical, “a matter of social science.” WILLIAMS, *supra* note 43, at 92. This analytic stance makes good use of existing institutions and suggests the possibility of measurement, valuable to the politically accountable.

130. See BRANDT, *supra* note 114, at 239.

131. Oliver Wendell Holmes is noted for his conception of judge-made law as forward-looking. In *The Path of the Law*, Holmes urged judges to consider “competing legislative grounds” before favoring one outcome over another, and wrote that they have a duty to weigh costs and benefits to determine “social advantage.” O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460, 471 (1897).

132. Cf. Note, *A Remedial Approach to Harassment*, 70 VA. L. REV. 507, 513, 522 (1984) (arguing that the law of harassment and stalking must meet the safety needs of the victim foremost and the treatment needs of stalker secondarily, rather than continue its emphasis on criminal prohibitions that “range from slightly to grossly inadequate”).

makers: to present a defensible structure of state-sponsored coercion.<sup>133</sup> For purposes of defining aggression in the law, we definition-writers should not condemn an encroachment unless it merits systemic disapproval. Moreover, we should like to avoid hypocrisy: Because law must intrude, and compel, and insert itself unbidden into human lives, definitions of aggression that prevail in other disciplines are too broad for law when they condemn intrusion, compulsion, or insertion *per se*. Here we endeavor to find those behaviors that are harmful enough—that is, encroaching enough—to warrant the powerful and expensive suppressants of the state.

### *A. Culling Among the Social Sciences and Humanities*

Criminology, theology, anthropology, and various schools of psychology have taken on the task of preparing, testing, and explaining rival definitions of aggression. Such contributions, though invaluable to the definitional task, can be both too narrow and too broad for law. Definitions of aggression are too narrow when they demand to see physical blows (for instance, the law happens to take an interest in aggression on paper, and aggression that taints agreements<sup>134</sup>) and they can be too broad because of their wider swath: For example, animal behavior and biological bases of aggression do not concern the law. Theological contributions can fit better in those respects, but they aspire to different ends, and begin with different understandings of their own competence to define. Consider some points of departure from the social sciences and theology.

#### 1. Aggression as Originating Within the Aggressor

One strong tradition in psychology—following Freud, perhaps—deems aggression to begin in the person whose behaviors are under its scrutiny. Freud wrote often about aggression as “instinct,”<sup>135</sup> sending followers and successors scrambling to locate the origin of the impulse to aggress. Thus aggression is said to start

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133. See DWORKIN, *supra* note 59, *passim*. I elaborate on the centrality of state-sponsored coercion in Anita Bernstein, *The Representational Dialectic (With Illustrations From Obscenity, Forfeiture, and Accident Law)*, 87 CAL. L. REV. 305, 310-12 (1999).

134. See *supra* notes 17-27 and accompanying text.

135. See SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS 86 (1930); LARSEN, *supra* note 1, at 41-47 (summarizing Freudian and neo-Freudian views on aggression).

in the half-purposeful mutations of biology,<sup>136</sup> or in the Darwinian notion that organisms must compete in order to survive.<sup>137</sup> From there one may gradually relax the search for a direct, independent physiological basis,<sup>138</sup> and speculate that aggression starts with parental rejection, perhaps.<sup>139</sup> In trauma, sometimes.<sup>140</sup> In sex hormones, of course.<sup>141</sup>

This search for origins and antecedents that operate on the person of the aggressor extends beyond anatomy and physiology. One famous work, completed at Yale during the Depression, identified "frustration" as the source of aggression;<sup>142</sup> with a confidence seldom seen in contemporary social science, the authors contended that aggressive behavior always indicates the presence of frustration, and frustration, in turn, always leads to aggressive behavior.<sup>143</sup> Psychologists continue the search for root causes,<sup>144</sup> while critics within psychology condemn the search for antecedents of aggression as ill-conceived.<sup>145</sup>

136. See generally, e.g., ERICH FROMM, *THE ANATOMY OF HUMAN DESTRUCTIVENESS* (1973) (dichotomizing between adaptive and "malignant" biologies of aggression).

137. See MONTAGU, *supra* note 42, at 38-39 (describing this view as a vulgar misreading of Darwin).

138. See John Burton, *The Nature of Aggression as Revealed in the Atomic Age*, in *THE NATURAL HISTORY OF AGGRESSION* 145, 147 (J.D. Carthy & F.J. Ebling eds., 1964) (contending that no such physiological basis exists).

139. See generally KAREN HORNEY, *OUR INNER CONFLICTS* (1945).

140. See Leonard Berkowitz, *On the Formation and Regulation of Anger and Aggression: A Cognitive-Neoassociationistic Analysis*, 45 *AM. PSYCHOLOGIST* 495, 498 (1990).

141. A good treatment appears in John Archer, *The Influence of Testosterone on Human Aggression*, 82 *BRIT. J. PSYCHOL.* 1, 3 (1991). See generally KATHLEEN J. GREIDER, *RECKONING WITH AGGRESSION: THEOLOGY, VIOLENCE, AND VITALITY* 25-26 (1997) (citing ELEANOR E. MACCOBY & CAROL N. JACKLIN, *THE PSYCHOLOGY OF SEX DIFFERENCES* 243-46 (1974)). As Greider points out, researchers who study sex hormones as sources of aggression find much more than the "testosterone poisoning" notion beloved in popular culture: deficiencies as well as excesses in testosterone contribute to aggressive behaviors, and estrogen too can be a source of aggression. GREIDER, *supra*, at 25. See generally NATALIE ANGIER, *WOMAN: AN INTIMATE GEOGRAPHY* 243-57 (1999) (summarizing works that describe the uncertain causal relation between hormones and aggression).

142. DOLLARD, *supra* note 58, at 1.

143. See *id.* at 1-2.

144. See, e.g., ROBERT A. BARON & DEBORAH R. RICHARDSON, *HUMAN AGGRESSION* 26-28 (2d ed. 1994) (summarizing work of Leonard Berkowitz about "aversive stimuli" that meet "aggressive cues"); ARNOLD H. BUSS, *THE PSYCHOLOGY OF AGGRESSION* 17-32 (1961) (describing "noxious stimuli").

145. See BARON & RICHARDSON, *supra* note 144, at 20; GREIDER, *supra* note 141, at 26 (complaining that "some of these methods seek to study the body extrapolated from its environment and thus study an artificial body, not the profound mutual interaction of biology, relationship and culture that together give form to actual human embodiment"). See generally J.T. Tedeschi et al., *A Reinterpretation of Research on Aggression*, 81 *PSYCH. BULL.* 540 (1974) (contending that aggression is a conclusion indicating little more than the disapproval of the observer).



Sound or not, the attempt to originate aggression in either the body or experience of an individual cannot contribute much to the account of aggression in law. As far as law is concerned, social evils originate wherever they can respond to the force of deterrence and redress. Hence legal causes, for instance, must be "proximate" rather than ultimate: The carelessness or malfeasance of a wrongdoer and its effects, not the courtship of her grandparents, becomes the basis of civil or criminal liability, even if the tort or crime would never have happened but for the courtship.<sup>146</sup> Tort law divides responsibility for accidents between "negligence" and "strict liability," revealing—at least to economic analysts—its limited interest in the origins of accidents beyond its initial query: "For this activity, which strategy would be better to reduce risks—reduction in the activity level (which commends strict liability) or increased care (which commends negligence)?"<sup>147</sup>

Taking a similar approach to behavioral origins, criminal law pays little heed to excuses grounded in determinism. "I'm depraved on accounta I'm deprived!" wailed Stephen Sondheim's juvenile delinquent in *West Side Story*,<sup>148</sup> but he was joking: Despite what the public may think, few defendants successfully ascribe their crimes to Twinkies, or "black rage," or parental neglect, or premenstrual syndrome.<sup>149</sup> In the battle between psychology and sociology over whether pathologies originate in the individual or society, law tends to side with the latter, out of pragmatism rather than principle. Responsibility, as far as law knows or cares, must begin and end where the community or government can call it into effect. Legal policy-makers do not especially want to know the root

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146. See JOHN W. WADE ET AL., *CASES AND MATERIALS ON TORTS* 284-85 (9th ed. 1994) (citing sources, including the 1630 *Maxims* of Francis Bacon); William L. Prosser, *Proximate Cause in California*, 38 CAL. L. REV. 369, 375 (1950) (worrying about "infinite liability").

147. See RICHARD A. POSNER, *TORT LAW: CASES AND ECONOMIC ANALYSIS* 476-78 (1982).

148. The song line comes from *Gee*, *Officer Krupke*, in LEONARD BERNSTEIN ET AL., *WEST SIDE STORY* 116 (1956) (lyrics by Stephen Sondheim).

149. See ALAN DERSHOWITZ, *THE ABUSE EXCUSE* 18-19 (1994) (enumerating 40 syndromes and conditions that have been suggested as excuses for crime). *The Abuse Excuse* proclaims in its first sentence that "[t]he abuse excuse—the legal tactic by which criminal defendants claim a history of abuse as an excuse for violent retaliation—is quickly becoming a license to kill and maim." *Id.* at 3. Two paragraphs later, Professor Dershowitz retreats: only a "few" defendants raise such claims. *Id.* at 4. "But at a deeper level," it is all terribly disturbing. *Id.* Half the book has nothing to do with abuse excuses; Dershowitz simply reprints old essays on his favorite crusades. *E.g., id.* at 217-20 (protesting the long prison sentence of Jonathan Pollard); *id.* at 243-314 (attacking feminists and various feminist causes, none of them pertaining to "the abuse excuse"). At the end of the book, Dershowitz provides a glossary of abuse excuses, which concedes that almost none of them has ever succeeded in the courts, not even once. *Id.* at 321-41.

causes of aggression; their focus is on the point where aggression will respond to cues from the state.

## 2. "Violence" and "Harm"

Many social scientists take a professional interest in visible disorder. It is often analytically convenient to assume that violence or harm is the unproblematic concept, the fixed condition, and then to experiment with hypotheses about causes or preventatives. Some definitions of aggression reflect this ordering. "Aggression is any form of behavior directed toward the goal of harassing or injuring another living being who is motivated to avoid such treatment," claims a psychology textbook.<sup>150</sup> Like harm, "violence" is often invoked in defining aggression.<sup>151</sup>

In law's lexicon, however, "violence" and "harm" are as much conclusions about the effects of behavior as they are strict defining criteria. Writers outside law agree. Kathleen Greider, for example, sees no reason to exclude from "violence" behaviors such as "psychospiritual maltreatment"<sup>152</sup> and "microaggressions";<sup>153</sup> she also includes social conditions like "economic violence,"<sup>154</sup> and quotes one theologian's definition with approval: "[V]iolence is the destruction of well-being."<sup>155</sup> These sweeping understandings of "violence" are not restricted by legal meanings of the word, and even enjoy some support in the law.<sup>156</sup>

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150. BARON & RICHARDSON, *supra* note 144, at 7; see also J.D. Carthy & F.J. Ebling, *Preface and Epilogue*, in *THE NATURAL HISTORY OF AGGRESSION*, *supra* note 138, at 3 (An organism "acts aggressively when it inflicts, attempts to inflict, or threatens to inflict damage on another animal").

151. See GAY, *supra* note 29, at 532-36 (surveying psychoanalytic themes of aggression that emphasize destructiveness); see also ROLLO MAY, *POWER AND INNOCENCE: A SEARCH FOR THE SOURCES OF VIOLENCE passim* (1972); cf. Carl Iver Hovland & Robert R. Sears, *Minor Studies of Aggression: Correlation of Lynchings with Economic Indices*, 9 J. PSYCH. 301, 310 (1940) (linking, in a study of aggression, lynchings of African-Americans with drops in the price of cotton).

152. GREIDER, *supra* note 141, at 62.

153. An example of a microaggression is giving preference to a white customer in a store over a black one. *Id.*

154. Greider writes that "[w]hite aggressiveness in the marketplace greedily eats up more than a fair share of profit," supporting this assertion with 1993 Census statistics to the effect that "the median net worth of whites was \$45,740, of blacks, \$4,418." *Id.* at 89.

155. *Id.* at 9 (quoting MARJORIE HEWITT SUCHOCKI, *THE FALL TO VIOLENCE: ORIGINAL SIN IN RELATIONAL THEOLOGY* 85 (1994)).

156. Not much in American statutes, admittedly, but foreign law and commentary by legal scholars embrace the concept. The European Parliament has promulgated a resolution denouncing violence against women, using "violence" to cover a wide range of harms. 1986 O.J. (C176) 73-83; see also WILLIAM IAN MILLER, *HUMILIATION AND OTHER ESSAYS ON HONOR, SOCIAL DISCOMFORT, AND VIOLENCE* 60-65 (1993) (suggesting that violence equals "boundary-breaking"); Elizabeth Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII*

By contrast "harm" is a legal term with more specific content, but even harm (also known as "damages," "clear and present danger," "irreparable injury," and so on) covers much more terrain in law than in most psychology labs. Protected interests that the law will honor include economic holdings, emotional tranquility, artistic integrity, and the exercise of numerous rights: to travel, to terminate a pregnancy, to worship, to confront accusing witnesses, to choose one's associates, to gain access to public accommodations, and many more.<sup>157</sup> Accordingly, it becomes impossible to speak in the vocabulary of legal rules about the infliction of "harm" or "violence" until one knows the context and the stakes; these terms too are variables.

### 3. The Element of Emotion

Pastoral psychologist David Augsberger describes aggression as "loveless power,"<sup>158</sup> offering legal emulators the shortest definition available in the literature but covering too many behaviors that the law would not wish to condemn. For good reasons, the law is generally indifferent to the presence or absence of love.<sup>159</sup> The law requires individuals to support their spouses and children, even if a spouse or child means nothing to the individual.<sup>160</sup> It generally denies a tort cause of action to relatives or intimate friends of physically injured persons who suffer severe emotional distress as a

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and the NLRA: *Not!*, 28 HARV. C.R.-C.L. REV. 395, 396 n.9 (1993) (claiming that "structural violence" refers to the practices of "dominant systems of a society" that "suppress the avenues of internal transformation and repress the agency of those whom the society subordinates and exploits").

157. See generally LAURENCE A. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1 (2d ed. 1988).

158. GREIDER, *supra* note 141, at 26 (quoting David W. Augsberger, *Anger and Aggression*, in 1 CLINICAL HANDBOOK OF PASTORAL COUNSELING 482, 494 (Robert J. Wicks ed., 1993)). Greider also quotes the *Dictionary of Pastoral Care and Counseling*, which defines aggression as "a form of behavior in which persons express their rights, thoughts, and feelings without regard for the rights, thoughts, and feelings of other persons." *Id.* at 126 n.59 (quoting R.K. Sanders, *Aggression and Assertion*, in *DICTIONARY OF PASTORAL CARE AND COUNSELING* 14 (Rodney J. Hunter ed., 1990)). The First Amendment has been held to protect speech suffused even with hatred and malice, let alone disregard for other persons and their "rights, thoughts, and feelings."

159. See generally Gretchen C. Rubin & Jamie G. Heller, *Restatement of Love*, 104 YALE L.J. 707 (1994) (exploring this point satirically).

160. See, e.g., Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415, 1437-40 (1991) (noting that courts do not try to compel parental visitation); Judith Seltzer, *Relationships Between Fathers and Children Who Live Apart: The Father's Role After Separation*, 53 MARRIAGE & FAM. 79 *passim* (1991) (noting low rate of paternal involvement when fathers and young children live separately).

result of what happened to their loved one.<sup>161</sup> A marriage that feels dead to one or both spouses remains alive in the law.<sup>162</sup> Ardor, as I mentioned, is not an excuse like duress, even if it generates an equivalent feeling of compulsion.<sup>163</sup> Quaint causes of action like seduction and breach of promise of marriage have been on the wane for decades, and love never had much to do with them anyway.<sup>164</sup>

Law itself enjoys and uses loveless power, and many Americans would have it no other way. A powerful Western tradition fears the coupling of official authority with supposed benevolence, as exists for example in Japanese society and government.<sup>165</sup> Dichotomies entrenched in American law between "public and private," or "law and morals,"<sup>166</sup> favor a separation between love and power. Procedural justice in the United States demands disinterestedness and never love.<sup>167</sup> As we shall presently see, however, emotions do play an important role in the law of aggression.

### *B. Reciprocity: The Sentiments of Aggression*

In relational terms, aggression contains two types of feelings: a sense of having been wrongfully invaded and an intentional trespass into the domain or space of another. Instead of using "feelings," however, I will follow a jurisprudential tradition associated with Adam Smith and refer to sentiments.<sup>168</sup> In *The Theory of Moral Sentiments*, Smith argued that sentimental responses to situations that affect or involve other people—grief, joy, anger—help to build effective ethical judgment.<sup>169</sup> Here sentiment means

161. See Benjamin Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 28 (1998).

162. See *Keck v. Keck*, 309 N.E.2d 217, 221 (Ill. 1974) (refusing to award divorce on this ground); *Matthews v. Matthews*, 661 N.Y.S.2d 115, 115 (N.Y. App. 1997); *Gerwe v. Gerwe*, 1996 Va. App. LEXIS 21, at \*3 (Jan. 16, 1996) ("A legally recognizable event is necessary to dissolve a marriage," notwithstanding husband's protest that his marriage was "dead.").

163. See *supra* note 23 and accompanying text.

164. See Rebecca Tushnet, Note, *Rules of Engagement*, 107 YALE L.J. 2583, 2586 (1998); see also Lea VanderVelde, *The Legal Ways of Seduction*, 48 STAN. L. REV. 817, 819-20 (1996).

165. See generally Anita Bernstein & Paul Fanning, "Weightier Than a Mountain": *Duty, Hierarchy, and the Consumer in Japan*, 29 VAND. J. TRANSNAT'L L. 45, 62-63 (1996) (citing sources).

166. See generally James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1908).

167. See DALE A. NANCE, *LAW AND JUSTICE: CASES AND READINGS ON THE AMERICAN LEGAL SYSTEM* 239-41 (2d ed. 1999) (proposing hypotheticals to explore the concept of judicial impartiality).

168. On this jurisprudential tradition, see generally MARTHA C. NUSSBAUM, *LOVE'S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE* (1990).

169. ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 49-52 (Liberty Classics ed. 1976) (1759).

something like "feeling, with a normative component" or "feeling consonant with cognition and conducive to justice." Human beings ought to cultivate their abilities with respect to sentiments; actions that violate the principle of mutual sympathy are unethical.<sup>170</sup>

As with our discussion of reciprocity-first utility-second, the order of the two sentimental elements warrants a short explanation. Why put "feeling of violation" first and "intentional trespass" second? As a matter of chronology, "making the first move" always precedes a sentiment of invasion. I have rejected chronological ordering here, however, in favor of the torts-rooted premise that the legal recognition of injury begins in a complaint.<sup>171</sup> Unless a person has declared herself wrongfully invaded, or unless a legal system can reasonably suppose that it ought to be concerned about a wrongful invasion, there is no need to engage the apparatus of legal condemnation. As I have suggested elsewhere, *volenti non fit injuria*—the maxim that consent and assumption of risk destroy claims for redress—is less problematic away from the strict confines of tort law than in the torts cases where it is invoked.<sup>172</sup> A legal definition of aggression should limit itself to behaviors that their target would want to stop.

The two sentiments of wrongful encroachment and intentional trespass are related to, and depend on, each other: A crime of trespass is also a boundary violation.<sup>173</sup> The feeling of violation derives from a perception of having received the aggression of an agent. Rainwater leaking through a torn roof or past a foundation into a basement, therefore, cannot be a source of this sentiment even though the rainwater invades one's home.<sup>174</sup> To differ again with some definitions of aggression associated with psychologists, the sentiments of aggression must be attributed to human aggressors; houses invaded by vermin or stray cats do not give rise to a claim of aggression in the law. Because the law concerns itself with

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170. See Mark K. Moller, Comment, *Sympathy, Community, and Promising: Adam Smith's Case for Reviving Moral Consideration*, 66 U. CHI. L. REV. 213, 219 (1999).

171. See generally Anita Bernstein, *Complaints*, 31 MCGEORGE L. REV. 37 (2000).

172. Anita Bernstein, *Treating Sexual Harassment With Respect*, 111 HARV. L. REV. 445, 502 (1997).

173. See Jacqueline St. Joan, *Sex, Sense, and Sensibility: Trespassing into the Culture of Domestic Abuse*, 20 HARV. WOMEN'S L.J. 263, 293-94 (1997) (exploring literary and feminist implications of trespass across the boundaries of others).

174. Cf. COLEMAN, *supra* note 34, at 306 (arguing that corrective justice requires a human agent of wrongdoing).

relations among persons, its interest in the sentiments of aggression stays confined to human responses to human provocations.<sup>175</sup>

### 1. A Feeling of Violation

In his classic *Asylums*, Erving Goffman describes "total institutions," such as mental hospitals, where occupants are forbidden to maintain a zone of themselves that excludes "alien and contaminating things."<sup>176</sup> Whereas most people are privileged to separate themselves from their larger environment, these inmates are denied such a boundary. Goffman's geographic landscape provides a beginning description of the zone invaded by aggression. The sentiment of wrongful encroachment implicitly recognizes a physical separation that is denied to Goffman's unfortunates.

Consistent with boundaries according to Goffman, claims of aggression posit a zone that begins somewhere around the body. Following John Locke, theorists have worked from the starting point that human beings have something like an ownership interest or stake in their bodies.<sup>177</sup> Without contending that people own their bodies just as they own commodities—an overstatement that is neither descriptively true nor normatively appealing<sup>178</sup>—I posit that the feeling of personal violation refers to space located around or near the body.<sup>179</sup> For legal treatment of aggression, this terrain covers the space subject to a feeling of wrongful invasion. This space has been a locus of significant contemporary political theory; despite the particular and local nature of a human body, the stakes of its boundaries are high for social institutions like law. Accordingly, the body is not too local or trivial to begin an account of aggression in the law.<sup>180</sup>

175. Cf. ARISTOTLE, *supra* note 59, at 1097b, lines 8-15 (situating discussion of justice and human nature among "friends and fellow citizens").

176. ERVING GOFFMAN, *ASYLUMS* 23 (1961).

177. See, e.g., WILLIAMS, *supra* note 43, at 83 (stating Lockean view about ownership of one's body). For a critical summary of this literature, see Peter Halewood, *Law's Bodies: Disembodiment and the Structure of Liberal Property Rights*, 81 IOWA L. REV. 1331, 1335-42 (1996).

178. See J.S. MILL, *PRINCIPLES OF POLITICAL ECONOMY*, bk. II, ch. XI, at 218 (W. Ashley ed., 1909) (1871) (protesting the view that all things are property). Peter Halewood argues that "liberal property theory" and various practices of commodification—genetic technology, international trafficking in human organs, and "cyberporn"—support and nurture each other. Halewood, *supra* note 177, at 1332-35.

179. Jeremy Waldron, hewing fairly closely to Locke, situates personhood in the body and nearby objects appropriated by the person. JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 183 (1988).

180. See generally ALAN HYDE, *BODIES OF LAW* (1997) (exploring significance of the human body in a range of private- and public-law settings). Feminists have identified the boundaries around persons as an issue of particular import for women and the study of gender. In her book

## 2. Intentional Trespass

Here is the right place in our discussion to consider the etymology of the word aggression. The Latin *aggredi* means to go forward, or to approach an object.<sup>181</sup> Although some speakers of English deliberately avoid "to aggress" because it sounds like a vulgar newcomer (like "to parent" or "to opine"), the verb is older than the noun.<sup>182</sup> In its etymology, then, aggression contemplates a person, or at least a living agent, who goes forward or approaches. Consistent with the irrelevance of violence and harm noted in the preceding discussion, "to aggress" does not necessarily mean to inflict damage, or to execute an agenda of destruction.<sup>183</sup>

At the same time, however, aggression cannot encompass all forms of purposeful or intentional behavior. Mere going-forward is not enough to warrant the disapproval, and thus the coercive measures, of law. Once again, tort theory and doctrine aid the task of locating a feasible central point.<sup>184</sup> The mental state necessary for an intentional tort is equivalent to the mental state needed for aggression in the law.<sup>185</sup> For purposes of identifying the second sentiment of aggression, "trespass"—a flexible locution that has done similar definitional duty for centuries within tort law<sup>186</sup>—can cover the mental state of the aggressor.

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on aggression, Kathleen Greider speculates that many women in the United States have not been taught to insist on the inviolability of the boundaries around them, and may therefore be less inclined to protest incursions that look wrongful to observers. GREIDER, *supra* note 141, at 85-86. For Jennifer Nedelsky, feminist thought suggests that human autonomy demands boundary merger or "constructive relationship" at least as much as "protection against intrusion." Jennifer Nedelsky, *Law, Boundaries, and the Bounded Self*, in LAW AND THE ORDER OF CULTURE 163, 168 (Robert L. Post ed., 1991). Catharine MacKinnon has claimed that violability starkly defines the female gender. CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 160-61 (1989). Andrea Dworkin writes that during intercourse a woman is "entered and occupied," the boundary surrounding her "violated." ANDREA DWORKIN, INTERCOURSE 137 (1987). Carol Gilligan associates the blurred or permeable boundaries around a woman's body with an "ethic of care," suggesting that separation from others per se is not better than, or preemptive of, a countervailing obligation to recognize and validate the particulars of human relationships. CAROL GILLIGAN, IN A DIFFERENT VOICE 10-12 (1982).

181. OXFORD ENGLISH DICTIONARY 182 (2d ed. 1991).

182. "Aggress" has been in general use for four hundred years. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 34 (3d ed. 1996) (stating that "to aggress" has been "unjustly maligned as a back-formation").

183. See *supra* notes 150-67 and accompanying text.

184. Cf. Fletcher, *Domination*, *supra* note 60, at 357-58 (arguing that in its treatment of domination, tort is located midway between contract and criminal law).

185. See GERDA SIANN, ACCOUNTING FOR AGGRESSION: PERSPECTIVES ON AGGRESSION AND VIOLENCE 4-5 (1985) (concluding that aggression cannot occur by accident).

186. See Anita Bernstein, *The New-Tort Centrifuge*, 49 DEPAUL L. REV. 413, 416 (1999).

According to blackletter tort law, an actor intends to cause harm when the actor either desires to bring about that harm or believes that harm is "substantially certain to result" from his or her actions.<sup>187</sup> This definition implies an understanding of probable consequences, so that legal responsibility for the intentional causation of consequences (such as harmful bodily contact, or invasion of land, or severe emotional distress) depends on the actor's awareness of the boundary that is crossed.<sup>188</sup> Similarly, aggression requires the actor to know that her chosen behavior invades the terrain of another. She may believe that the target would welcome the initiative. She may desire benefit for the target, or for other persons, or for society. None of these motives precludes liability for an intentional tort,<sup>189</sup> and all of them are consistent with (although not themselves sufficient to support) a finding of aggression as the law understands that term.

Like tort doctrine, psychology makes use of the idea of intentional trespass in some of its definitions of aggression. When Arnold Buss defines aggression as "a response that delves noxious stimuli to another organism,"<sup>190</sup> he evokes the central elements of intentional torts while expressly disavowing from his definition hostility, anger, and intent to do harm.<sup>191</sup> It is the delivery to another locus that defines aggression for Buss; as another psychologist puts his point, non-delivery of a hostile response makes that response not aggressive.<sup>192</sup> Intentional trespass, as I use the term here, corresponds to the stated and implicit definitions of aggression found elsewhere in psychology.<sup>193</sup>

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187. RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 1 (2000).

188. "When an actor fires a gun in the midst of the Mojave Desert, he intends to pull the trigger; but when the bullet hits a person who is present in the desert without the actor's knowledge, he does not intend that result." RESTATEMENT (SECOND) OF TORTS § 8A cmt. a (1965).

189. Mistake is insufficient to vitiate intent. See *Ranson v. Kitner*, 31 Ill. App. 241, 241 (1889) (holding defendant hunters liable for shooting the plaintiff's dog, which they believed to be a wolf); *Hayes v. Bushey*, 196 A.2d 823, 825 (Me. 1964) (noting that "a mistake does not avoid . . . liability for trespass. It is only the intention to enter the land of another that is an essential element of trespass . . . ." (emphasis in original)). Good intentions are also irrelevant. See *In re A.C.*, 573 A.2d 1235, 1253 (D.C. App. 1990) (refusing to approve court-ordered cesarean operation where hospital had hoped to save fetus); *Clayton v. New Dreamland Roller Skating Rink, Inc.*, 82 A.2d 458, 462-63 (N.J. 1951) (imposing liability on skating rink for efforts to set the plaintiff's broken arm, which efforts she had protested).

190. BUSS, *supra* note 144, at 1.

191. See *id.* at 3-12.

192. See Thelma Veness, *Introduction to Hostility in Small Groups*, in *THE NATURAL HISTORY OF AGGRESSION*, *supra* note 138, at 77, 78; see also *BARON & RICHARDSON*, *supra* note 144, at 7 (stipulating that aggression is a form of behavior).

193. Contrary to the views expressed elsewhere in psychology that a desire for "violence," "hurt," or "harm" is a defining element in aggression, see *supra* notes 136-41 and accompanying



*C. Utility: Societal Condemnation*

We have proceeded in sequence, following the torts convention of starting with the victim's stated or supposed account of having experienced a feeling of violation, and then considering the actions of the putative aggressor. In order to bring the utility paradigm into play, we assume that the sentiments of aggression—the reciprocity elements—are satisfied. A victim has felt violation; an aggressor has trespassed. Continuing the metaphor of "into play," one may next think of a referee's whistle. Not all infractions on a basketball court or hockey rink receive condemnation, nor should they: Refereed sports tolerate a certain amount of pushing at the edge of the rulebook. Law goes further than sports in the direction of condoning aggression, in part because so much more social welfare is at stake.

Even outside law, those who define aggression recognize the costs of too much condemnation. Psychologists understand the desirability of including a reference to societal gain in their understanding of aggression, notwithstanding the absence of these references in psychological definitions of the term. Gerda Siann, for instance, laments the gap between "social psychologists" who condemn aggression as harmful, on the one hand, and "novelists, psychiatrists, psychoanalysts" and "many members of the public," on the other hand, who will approve of aggression in certain instances.<sup>194</sup> Siann's point about social psychology is of much more acute importance to law. Law does, must, and should condone some encroachments, even when targets experience them as wrongful invasions.

Which invasions are wrongful within the law of aggression? The law generally confines—and in my view should confine—its condemnations to those invasions that are wasteful or otherwise destructive of social welfare, broadly understood. Those last words are critical. As the utilitarians Louis Kaplow and Steven Shavell point out, "welfare" can, depending on how it is interpreted, cast its net widely enough to include "not merely individuals' levels of ma-

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text, many psychologists conscientiously avoid this defining element. See, e.g., SIANN, *supra* note 185, at 14 (deriving a broad definition of aggression distinct from "violence"); *id.* at 187-88 (reviewing the implicit definition of aggression in the work of D.J. West and D.P. Farrington); see also BARON & RICHARDSON, *supra* note 144, at 9 (making desire to "harm" a defining element, but only for the purpose of excluding accidental infliction of injury and beneficent pain, such as that inflicted by dentists).

194. SIANN, *supra* note 185, at 5-6.

terial comfort but also their degree of aesthetic fulfillment, their feelings for others, and anything else they might value, however intangible."<sup>195</sup>

Implicit in this Article is a venture at compromise slightly different from the Kaplow-Shavell attempt to co-opt concerns associated with "fairness" into utility. Rather than merge everything worth having into "welfare"—in Kaplow and Shavell's lampoon-lexicon, "fairness" means frivolous and wasteful postures, such as a demand to spend the entire gross domestic product of a nation on a traffic ticket—I instead see fairness or reciprocity as the beginning of a claim of aggression, and welfare or utility the end. Unwelcome incursions cause pain that ought to be honored with attention. But these measures can also yield happiness and wealth, and every other synonym for utility.

The gains to society that derive from tolerating or applauding aggression are varied. We have noted the ideal that celebrates industrial expansion as progress, and the tort rules that consequently insulate defendants from liability when their bold activities cause harm.<sup>196</sup> A similar consideration extends past accident law. "Freedom of contract," for instance, has enriched individual over-reachers and also contributed to prosperity; even usurious or unconscionable agreements create classes of opportunities for poor or oppressed people that would otherwise not exist.<sup>197</sup> Sexual overtures renew human life. Blasting builds tunnels below the earth and skyscrapers above. New assertions expand rights, invert intellectual orthodoxy, divert assets away from stagnation, and move capital where it is needed to build more wealth.

These gains materialize at an aggregative level. Yet even at the level of one-on-one encounters, each individual would if rational oppose a total ban on all forms of aggression.<sup>198</sup> The utilitarian as-

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195. Kaplow & Shavell, *supra* note 105, at 1-2. For an illustration, consider the tort doctrine of consent, which Kantian scholar Richard Wright deems an embarrassment to utilitarianism: the law permits an individual to choose "a medically risky cosmetic operation" even though the expected benefits of this decision "may well not outweigh the expected losses to those financially and emotionally dependent on her." Wright, *supra* note 104, at 283. Wright's argument does not dispose of utilitarian rationales for positive law. Rather, it shifts the inquiry to whether utilitarianism can take into account intangibles that bear on the decision of Wright's obstinate patient, and other citizens whose wishes and preferences affront welfare analyses.

196. See *supra* note 32 and accompanying text; see also Keating, *supra* note 46, at 359-60 (discussing *Marshall v. Gotham Co.*, an English case holding that a rare, undetectable risk must be borne by gypsum miners rather than their entrepreneurial employer, because the only alternative is to shut down the enterprise).

197. See FARNSWORTH, *supra* note 31, at 21-23.

198. Not only because he wishes to achieve directly the fruits of his aggression, but because aggression holds strategic value for him. As game theorists have demonstrated, the decision to

assessment of various categories of aggression could not attempt to honor the wishes of individual targets as preemptive of social gains and losses, even if it wanted to, because individual wishes about aggression are always conditional.

In sum, the law's decision to condemn or condone categories of aggression begins with two sentiments—violation and trespass—and moves to a judgment about aggregative welfare that takes into account, but is not limited to, an evaluation of the effects of these sentiments. Reciprocity and utility combine to form categorical legal rules about aggression. In the next two Parts, I elaborate on this function. Part III presents a taxonomy; Part IV details how law reformers use reciprocity and utility, changing the law of aggression as part of making social policy.

### III. COMMENTS ON A TAXONOMY OF AGGRESSION IN THE LAW

Consider the chart presented above in the Introduction, now modified to reflect the application of these three terms.

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engage in "outright pugnacity" can be either sensible or foolish depending on an array of variables, especially the behavior of other actors. RICHARD DAWKINS, *THE SELFISH GENE* 68-74 (1982) (discussing work of J. Maynard Smith and others on evolutionarily stable strategies).

Table 2  
Condemnation of Aggression in the Law

<i>Area of Law</i>	<i>Condemned Behavior</i>	<i>Utilitarian Concerns About a Ban</i>
ANTITRUST	predation	competition, customer welfare
CONTRACTS	undue influence	consistency
	duress	consistency
	unconscionability	lost mutual gains
GRATUITOUS TRANSFERS	undue influence	consistency
CRIMINAL LAW	solicitation of employment by day laborers, panhandling	class bias
	duress	deterrence, (occasional) gender bias
	harassment	gender bias
	stalking	gender bias
	blackmail/extortion	lost mutual gains
	entrapment	deterrence
	aggressive panhandling	class bias
PROFESSIONAL RESPONSIBILITY	solicitation	class bias
PUBLIC INTERNATIONAL LAW	aggression	definitional uncertainty, problems of remedies and enforcement

Table 2 preserves two of the three original columns, "Area of Law" and "Condemned Version," renaming the latter "Condemned Behavior."<sup>199</sup> The eliminated column, "Condoned Version," is reabsorbed into a new column, "Utilitarian Concerns." This column casts the idea of benefits of aggression to society—such as competition or courtship—into an expressly utilitarian form.<sup>200</sup>

199. To conserve space on the chart while covering the same concepts, Table 2 puts day-laborer solicitation in the same box as panhandling.

200. A reasonable case could be made that "class bias" and "gender bias" are fairness objections, rather than utilitarian concerns. The reason for including them in Utilitarian Concerns is to note the costs to society of impeding civic participation for members of minority groups. See John J. Donohue III, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411, 1430-31 (1986) (contending that anti-discrimination laws might increase efficiency).

The distinctions noted in Table 2 refine the larger claim of this Article that aggression is a legal concept that unifies divergent categories of doctrine. The notion of aggression certainly unifies but, as we see, it also points out fissures and fault lines obscured in a previous aggregation.<sup>201</sup> In duress, for example, we find differences depending on whether we are in criminal law or contracts. Furthermore, now that we have identified two aspects of the reciprocity paradigm—violation and trespass—we are able to classify doctrinal concepts based on whether the “violation” or “trespass” element predominates. I would contend that in contract law duress is predominantly a trespass, whereas in criminal law its force as a violation appears stronger. Another set of fault lines within a previously unified whole is in the criminal law category. Criminal law prefers to site itself inside the mind of the defendant, emphasizing mens rea as necessary for all traditional crimes.<sup>202</sup> If we think about some of the listed crimes, however, we find that the recipient’s feelings of violation are more central to our disapproval than the trespass sentiment. If this relative ranking is accurate, then mens rea may be a more divided and divisive concept than hornbook criminal law takes it to be. Pedagogical consequences follow.<sup>203</sup>

In addition to dividing previously unified doctrinal labels like duress and criminal law, a legal concept of aggression yields conclusions about the direction that legal rules ought to take, which include new unifications. Below I propose three inferences to be extracted from Table 2.

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201. When I presented this work-in-progress at a University of Michigan colloquium, the political philosopher Don Herzog said that taxonomical analysts are either “lumpers” or “splitters,” and that this Article puts me in the former category. The claim that there is something called aggression anywhere, in law or out, certainly bespeaks a lumper. A splitter objection to that stance appears in the pseudonymously published *Aggression: The Myth of the Beast Within*. See KLAMA, *supra* note 58, at 11-32. But now I have reason to call myself a splitter.

202. See Hamish Stewart, *Legality and Morality in H.L.A. Hart's Theory of Criminal Law*, 52 SMU L. REV. 201, 205-06 (1999). By “traditional” I mean to exclude hundreds of thousands of statutes and regulations that provide for criminal penalties, often on a strict-liability basis.

203. For example, instructors who teach criminal law face perennial difficulty with the law of rape or sexual assault. In a case where the defendant and the complainant credibly dispute consent, traditional analysis commends a mistake-of-fact approach that would tend to resolve ambiguity in favor of the defendant. Dana Berliner, Note, *Rethinking the Reasonable Belief Defense to Rape*, 100 YALE L.J. 2687, 2693-94 (1991) (noting bias). Such use of mens rea, though consistent with the hornbook line in criminal law, pays insufficient heed to the violative nature of the defendant’s act. Students may be outraged either by the pro-complainant deviation from tradition on one hand, or the neglect of violation on the other. Yet if criminal law does pay doctrinal heed to the feeling of violation with respect to other crimes, then presenting violation in rape cases makes no special accommodation in behalf of complainants.

### A. Putting Violation First

Recall that in Part II, a claim of aggression was said to originate in the target's feeling of wrongful invasion. Public law, which dominates Table 2, typically will try to find beginnings elsewhere—usually within the perpetrator, rather than the recipient of action. Criminal law begins with the mental state of the defendant. Statutes and regulatory law, however, begin at a “macro” level, focusing on public good.

Differing with this prevailing priority, I contend that in its treatment of aggression public law does and should follow the private-law chronology of starting with either a claim for redress, or an attempt to imagine sympathetically how the target would regard the defendant's act.<sup>204</sup> The other elements necessary to reach a just conclusion—a hearing for the putative aggressor and a societal judgment about whether to spend resources condemning the intrusion—will follow later.<sup>205</sup> Although listening to, or trying to construct, another person's complaint can be most burdensome, regulation of aggression needs to take this step in order to delineate its territory.

The initial focus on violation comports with the jurisprudential concern with the human sense of *injustice*, as contracted to the sense of justice.<sup>206</sup> In *The Sense of Injustice*, a Realist-era work that anticipated Critical Legal Studies, Edmond Cahn contended that appeals to the sense of injustice are more compelling than appeals to justice.<sup>207</sup> Sources ranging from developmental psychology to international law emphasize the primacy of the sense of injustice.<sup>208</sup>

204. On this task of sympathetic engagement, see *supra* notes 170-72 and accompanying text.

205. Depending on how much time and money it costs to air the target's perception of wrongful invasion, this exercise could be costly, in the sense of prejudice to the putative aggressor and wasting societal resources. I do not mean to trivialize this concern, and would not recommend that the legal rule guarantee any particular quantity of attention to complainants. My point is only that if one is willing to accept the tripartite division—that is, (1) wrongful invasion, (2) intentional trespass, and (3) societal condemnation—then the effective way to give each part its due is to take them up in the order provided here.

206. See JUDITH N. SHKLAR, *THE FACES OF INJUSTICE* 14 (1990) (“[I]t is both unfair to ignore personal resentment and imprudent to overlook the political anger in which it finds its expression.”).

207. See EDMOND N. CAHN, *THE SENSE OF INJUSTICE: AN ANTHROPOCENTRIC VIEW OF LAW* 24-25 (1949).

208. Compare LAWRENCE KOHLBERG, *THE PSYCHOLOGY OF MORAL DEVELOPMENT* 636-38 (1984) (marking six stages of moral development, each showing a greater grasp of principles of justice than the preceding stages), with Ruti Teitel, *Transnational Jurisprudence: The Role of Law in Political Transformation*, 106 *YALE L.J.* 2009, 2080 (1997) (claiming that the sense of injustice is necessary to inform “situated” justice).

This fundamental starting point provides both moral clarity and the basis for an informed conclusion about welfare.<sup>209</sup>

With the phrase "putting violation first," I mean to suggest that of the two sentiments of aggression, violation is more central and fundamental than intentional trespass. This status requires an extra measure of attention from legal policy-makers. Such measure is achieved by "putting violation first," in the sense of logical and chronological primacy: "no harm, no foul."<sup>210</sup> Invasions that do not provoke actual or constructive complaints require no condemnation. This stance conserves two sets of resources. The aggressor need not defend herself; society need not determine whether to blow the referee's whistle.

### B. Class Bias

For five of the legal categories in Table 2, I have noted "class bias" or "gender bias" in the Utilitarian Concerns column. Class or gender bias can certainly arise in other areas of law on the chart and elsewhere,<sup>211</sup> but commentators have built an especially detailed literature about these five doctrinal responses to aggression.<sup>212</sup> Solicitation of employment by day laborers, harassment, stalking, aggressive panhandling, and solicitation of potential clients by attorneys all implicate identified political groups.

Looming over the condemnation of solicitation and aggressive panhandling is the idea that it is wrong for certain people—women, the poor, ethnic and racial minorities, and (in the legal profession) working-class newcomers—to take the initiative vis-à-vis

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209. See Louis Henkin, *An Immigration Policy for a Just Society?*, 31 SAN DIEGO L. REV. 1017, 1018 (1994) (suggesting that international injustice is easier to identify than international justice).

210. See BECKER, *supra* note 44, at 293 ("The obligations of reciprocity imply something like a 'no harm, no foul' rule.").

211. See, e.g., Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225, 227 (1981) (describing heightened judicial scrutiny of wills made by gay men).

212. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 468 (1978) (Marshall, J., concurring in the judgment); Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517, 573-74 (1993) (arguing that gender bias has prevented street harassment from being recognized as activity worthy of legal action); Bradfield, *supra* note 6, at 261-63 (describing gender bias persistent in construction of anti-stalking laws); Allan C. Hutchinson, *Les Misérables Redux: Law and the Poor*, 2 S. CAL. INTERDISC. L.J. 199, 215 (1993) (proposing to excuse aggressive panhandling on the grounds of poverty and distress, where circumstances warrant); Munzer, *supra* note 10, at 8 (arguing that for many homeless, panhandling is a matter of fundamental freedom); Deborah L. Rhode, *Solicitation*, 36 J. LEGAL EDUC. 317, 318-20 (1986) (describing controversy surrounding solicitation of clients by lawyers).

members of a dominant caste.<sup>213</sup> Writing about attorney solicitation, Deborah Rhode argues that the bar maintains "traditional courtship rituals" that keep lawyers in "demure, discrete, and decorous roles."<sup>214</sup> Professor Rhode goes on to conclude that the ban is defensible, but only as a means to ends that have nothing to do with phony gentility: If not for the prohibition, Rhode concedes, lawyers with large numbers of roped-in clients might tend to neglect them, leaving vulnerable people underrepresented as a result of attorney overreaching.<sup>215</sup> This conclusion is incongruous, especially because it comes after a detailed account of all the benefits that society has derived from attorney solicitation.<sup>216</sup>

"Class bias" in the utilitarian box should give the law of aggression pause. When legal rules thwart behaviors among groups that have been shut out of full citizenship (usually with law-based constraint) in the past, one has reason to question the fairness as well as the utility of these rules. I do not mean to suggest that past victimization constitutes a license to aggress in perpetuity, nor to overlook the conflicts between two subordinated groups that exist concerning the aggressive behaviors of one.<sup>217</sup> The proposal is rather that "class bias" should alert policy-makers to review the three elements of aggression, especially the first, the reference to violation. Is this putatively aggressive behavior hurting anyone? If the answer to that question is ambiguous, move to the third: What is gained and lost by this instance of legal condemnation?

The first question requires a bit of effort to answer. Public law does not demand signed complaints the way torts does; sympathetic imagination must suffice. Such an exercise can reverse long-held conceptions. Consider the decision of various national laws, including that of Britain, to condone the exchange of sex for money

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213. Some women contend that passivity becomes a woman in her sexual or romantic dealings with men. See generally ELLEN FEIN & SHERRIE SCHNEIDER, *THE RULES* (1997); WENDY SHALIT, *A RETURN TO MODESTY: DISCOVERING THE LOST VIRTUE* (1999).

214. Rhode, *supra* note 212, at 318.

215. *Id.* at 319, 329-30.

216. Rhode's article was written as part of a symposium on the Bhopal disaster of 1984, and Rhode praises aggressive lawyers for expanding representation to benefit indigent persons in India as well as the United States. She notes that tort liability doctrine is fairer as a result of "global ambulance chasing;" she believes that civil rights law would have been hobbled without solicitation; and she points out that overreaching and other misconduct are hardly unique to those sectors of practice associated with solicitation. *Id.* at 324-25.

217. Robert Ellickson is amused to report that the *Harvard Law Review* published within two years one article asserting a First Amendment right to beg, and another article seeking to protect women from street harassment. He sees this incongruity as proof of absurd political correctness. Ellickson, *supra* note 2, at 1170 n.15.



but prohibit solicitation.<sup>218</sup> H.L.A. Hart tried to say why. Using passive-voice constructions, Hart noted the British decision to criminalize the "manifestation" of street solicitation by prostitutes, to spare "the ordinary citizen."<sup>219</sup> Feminist commentator Karen Busby challenges this rationale. As Busby points out, Hart's explanation, which is intelligible only after the reader gets past its coy pronouns, reserves all of its sympathy for the affronted male citizen and spares none for the woman (both Hart and Busby assume the prostitute is a woman), who may not have intended to offend.<sup>220</sup> Given the relative status of these parties, such a condemnation of aggression deserves to be questioned. Even if analysis ultimately suggests that the ban on an aggressive behavior ought to be retained, class bias is an important utilitarian theme that can get neglected in a political culture that tends to discount the interests of minorities and subordinated groups.

### *C. The Opacity of Entities*

A final point that emerges from Table 2 is the difficulty of ascribing aggression to an entity comprised of numerous human constituents. The volume of literature on antitrust predation and aggression in international law testifies obliquely to the problem. In antitrust scholarship, a confident plurality seeks to expunge any reference to predatory sentiment from the law, while another cohort would go further and, on the theory that predation does not invade a protected interest of targeted competitors, preclude competitors from bringing predatory pricing actions in the courts.<sup>221</sup> One does not find the same consensus—that aggression as a sentiment is meaningless—among specialists in international law, but the definitional challenge has filled countless books, papers, and articles.<sup>222</sup>

Given this voluminous debate and strife among specialists, an outsider hesitates to offer doctrinal suggestions for the improvement of antitrust law and international law. Whether the formal concepts of predation and aggression in these fields can co-

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218. See *supra* note 12 and accompanying text.

219. See H.L.A. HART, LAW, LIBERTY, AND MORALITY 45 (1963), quoted in Karen Busby, *The Maleness of Legal Language*, 18 MAN. L.J. 191, 197 (1989).

220. Busby, *supra* note 219, at 197-98.

221. See *supra* note 8; see also *infra* Part IV.B.

222. E.g., RIFAAT, *supra* note 1, at 223-81; ANN VAN WYNEN THOMAS & A.J. THOMAS JR., THE CONCEPT OF AGGRESSION IN INTERNATIONAL LAW 1 *passim* (1972); Anthony Clark Arend, *Do Legal Rules Matter?* *International Law and International Politics*, 38 VA. J. INT'L L. 107, 142 (1998).

here and survive is a question that even learned experts are ill-qualified to answer. I have, however, offered the contribution of conjoining two subjects that normally live apart. The conjunction of antitrust and international law demands an explanation of where these apparently divergent subjects have significant ground in common.

Can a firm or a nation experience either of the sentiments of aggression? As stated, the question is unanswerable. Domestic law in the United States equivocates on the subject of whether a corporation is entitled to all of the status-privileges of a person,<sup>223</sup> and international law is increasingly confounded by the status of quasi-national entities: nongovernmental organizations, semi-recognized nations of people within hostile borders (such as the Kurds), revived once-and-future countries (like those that used to comprise Yugoslavia), and popular, well-organized separatist groups united around culture or language (as exists in Québec). Without agreement on what it means to be a firm or a nation, one cannot say whether these entities are capable of transmitting or receiving the sentiments of aggression.

We may modify the question in a pragmatic direction: Is it good or bad, from the vantage point of social welfare, for a legal system to proceed *as if* a firm or a nation could be the agent or recipient of aggression? Bad, according to many writers. Take for example the cliché that antitrust law protects only competition rather than competitors.<sup>224</sup> Mere suffering inflicted by a strong competitor will never suffice for a damages action. Given that lower prices by competitors do not themselves bespeak wrongdoing, the judicial determinant must be something more than low prices—either “predatory intent,” if one focuses on sentiment, or some market-related indicator of anticompetitive design that will lend a veneer of objectivity to the inquiry. I wish to postpone an explicit discussion of these two rival approaches,<sup>225</sup> but can say now that the advantages of the latter method are manifest when one considers the problem of ascertaining the sentiments of putative victims and predators

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223. See Linda Sugin, *Theories of the Corporation and the Tax Treatment of Corporate Philanthropy*, 41 N.Y.L. SCH. L. REV. 835, 839-43 (1997).

224. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* 429 U.S. 477, 488 (1977). A November 6, 2000 search found 199 documents containing the phrase “competition, not competitors” in the Lexis Lawrev file and 592 in the Lexis Mega file.

225. See *infra* part IV.B.

when both are business entities. Market-based indicators of predation may be hard to administer;<sup>226</sup> intent tests are harder still.

Regarding international law, John Burton argues that it is not only false but also harmful to say that "nations each have the attributes of persons within a community."<sup>227</sup> This ascription of aggression leads to panicky foreign policy: Believing that other nations are capable of aggression causes state actors to respond in a way that itself seems aggressive. Burton goes so far as to imply that retreat from the premise that states can be aggressive would amount to "a scientific approach to peace."<sup>228</sup> Although this wishful bit of thinking goes beyond the evidence, Burton is justified to question the value of aggression as a label for the actions of nation-states or national governments.<sup>229</sup> The relevant sentiments will often be hard to find because neither violation nor trespass emerges clearly from the actions countries take vis-à-vis one another.

Here one can see how the three elements of aggression are interrelated with some strife, or at least indeterminacy. Nations penetrate other nations through trade, immigration, tourism, and cultural influence much more often than through military hostilities; and not every feeling of violation that results from this intercourse ought to be taken seriously.<sup>230</sup> A boundary is a metaphor even in international relations—no map can tell the whole story about putative invasions—and so the task of identifying violation and trespass requires some defining of the lines that are said to be crossed.<sup>231</sup> Regarding trespass, powerful nations do not hesitate to export economic pressure and ideological influence; and the law of

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226. See Jessica L. Goldstein, Note, *Single Firm Predatory Pricing in Antitrust Law: The Rose Acre Recoupment Test and the Search for An Appropriate Judicial Standard*, 91 COLUM. L. REV. 1757, 1780-82 (1991) (pointing out difficulties in objective, non-intent-based tests for predation).

227. Burton, *supra* note 138, at 148; *supra* note 65 and accompanying text (noting centrality of the "nothing personal" conclusion as a basis for deciding that aggression should be tolerated).

228. Burton, *supra* note 138, at 152. In a question-and-answer session transcribed in *The Natural History of Aggression*, Burton held fast, refusing to agree that Hitler's aggressiveness caused war to break out in Germany in 1939. *Id.* at 158.

229. One of many vexing questions is whether pro-democracy interventions violate the prohibitions. See Karsten Nowrot & Emily W. Schabacker, *The Use of Force to Restore Democracy*, 14 AM. U. INT'L L. REV. 321, 336-38 (1998).

230. I say so having once spent a year living in Florence, a city with a permanent population of 200,000 and seven million tourists each year. The sense of siege would press powerfully against us locals—I used to include myself in that group—during every month except November. Narrow sidewalks would become impassable. Museumgoers would pile eight deep in front of paintings. To the real locals, of course, I was one of the trespassers, despite my authentic feeling of violation.

231. Cf. Fletcher, *Fairness*, *supra* note 45, at 573 (noting that the paradigm of reciprocity engages "metaphors and . . . imagery").

international aggression has never known quite how to treat such less-than-warlike measures.<sup>232</sup> Because the sentiments of aggression are so opaque within the international-law concept, the aggression label adds very little to understanding conflict between nations.<sup>233</sup> Like some other writers, but for somewhat different reasons, I tentatively conclude that it should be dropped.

#### IV. CHANGING THE LAW OF AGGRESSION: TWO APPLICATIONS

Two applications have been chosen to share space in this Part chiefly because they are so different from each other. Civil rights initiatives are associated with the political left; obstacles to claims of predation come from the right. Few individuals have spent time working on both crusades. Few readers, I daresay, would rate both topics as equally important or interesting.

The odd coupling nevertheless sheds light on the subject of law reform generally and in particular on the function of reciprocity, utility and aggression as concepts available for deployment by law reformers. The contention of this Part is that persons who seek to change the public law of aggression, which is characterized by the "violation" and "trespass" signature criteria described in Parts II and III, must reckon with reciprocity and utility. To separate this analysis of aggression from familiar categories and broaden it to the level of general theory, I have deliberately eschewed examples from torts (where the paradigms of George Fletcher hold sway, well-known as they are to policy-makers and law reformers) as well as from criminal law and international law, the two areas in law where the concept of aggression is similarly famous and oft-mentioned.<sup>234</sup> Civil rights efforts and proposals to revise predation both manipulate reciprocity and utility, and urge reinterpretation of earlier understandings of aggression in the law.

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232. See RIFAAT, *supra* note 1, at 313-14.

233. See *supra* notes 176-80 (suggesting that the concept of the human body is a reasonable place to delineate aggression in the law).

234. Numerous Lexis and Westlaw searches undertaken in research for this Article showed that international law is the area of legal doctrine that contains the most references to aggression. Criminal law is a distant doctrinal second. No clear third emerged.

*A. Inversions of Aggression: The Civil Rights Initiative  
and Its "Nonviolence"*

Inversions of aggression abound in popular discourse and legal commentary. Injuries that befall women, for instance, have been said to derive from women's choices, if not from feminism itself.<sup>235</sup> Feminist scholarship is still compelled to defend complainants when their protests about rape, domestic violence, and sexual harassment provoke rejoinders to the effect that victims as well as perpetrators perpetrate. Objects are said to be agents, and agents objects.<sup>236</sup> "Why didn't she leave?"<sup>237</sup> not "what motivated him to hit her, and "why did he get away with that behavior?" Regarding rape or domestic beatings or harassment, "did she ask for it?"<sup>238</sup>

But rearguard opponents of feminism are hardly the first to invert aggression. Civil rights movements routinely do so. One claim found universally in a variety of civil rights movements is that what outsiders deem aggression must be understood as *reaction*. According to this characterization, unjust aggression precedes the anti-subordination endeavor; protests from oppressed groups or persons are necessary responses to tyrannous conditions. Legal doctrines protecting civil rights have formed by these means, after representatives of subordinated groups contend plausibly that the paradigm of aggression-as-failure-of-reciprocity, recognized throughout American law, justifies various measures of protest and redress.

The twentieth-century activist best known for leading subordinated persons to struggle effectively against oppression is Mohandas Gandhi, whose philosophy, misleadingly called "passive resistance" or "nonviolence" in the West, details an exquisite variation on aggression. Gandhi described *satyagraha* in vehement terms—"an all-sided sword,"<sup>239</sup> "soul-force,"<sup>240</sup> "a force definitely

235. See DANIELLE CRITTENDEN, *WHAT OUR MOTHERS DIDN'T TELL US: WHY HAPPINESS ELUDES THE MODERN WOMAN* (1998); KATIE ROIPHE, *THE MORNING AFTER: SEX, FEAR, AND FEMINISM ON CAMPUS* 6-7 (1993); SHALIT, *supra* note 213, at 1-12.

236. See generally Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 832-35 (1999) (noting illustrations where women are faulted for insufficient "resistant self-direction").

237. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 5 (1991); see also DERSHOWITZ, *supra* note 149, at 94 (wondering why Lorena Bobbitt simply did not leave her abusive husband).

238. Ann C. Juliano, Note, *Did She Ask for It? The "Unwelcome" Requirement in Sexual Harassment Cases*, 77 CORNELL L. REV. 1558, 1576-77 (1992).

239. M. K. GANDHI, *THE SCIENCE OF SATYAGRAHA* 8 (1957).

240. *Id.* at 3.

more active than the resistance that an armed man can devise."<sup>241</sup> If Gandhi was right to claim ferocity, then "passive resistance" incorrectly describes his precepts.<sup>242</sup>

Passivity and force also came together in the twentieth century with the rise of liberation theology, which pursues economic and racial justice with reference to religious teachings.<sup>243</sup> The theology most often associated with liberation theology comes from Roman Catholic sources, but other believers have inverted aggression in several societies. Activists cast oppression as violence rather than the simple status quo, and insist on the power, as well as the victimhood, of subordinated peoples.<sup>244</sup> In the United States, civil rights movements also invert aggression. Their use or non-use of the "nonviolence" label is revealing.

As the experiences of Gandhi and liberation theology attest, nonviolence is certainly not a trait of mere negation or absence; if nonviolent simply means "not violent," then pet rocks and potted plants would warrant the label. Nonviolence instead sends a message combining threat and hope:

We could destroy you. If we chose, we'd send your blood pouring through the streets. We'd detonate everything you have built and possess. But we choose a constructive rather than a destructive course, to hold you, Oppressor, to your noblest assertions. We evaluate your aggression against us by the exalted standards you profess. We appeal not only to your sense of justice and injustice, but also to your practical estimation of how much well-deserved conflagration and chaos you can tolerate.<sup>245</sup>

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241. *Id.* at 23.

242. *Id.* at 25 ("Satyagraha differs from Passive Resistance as the North Pole differs from the South"); *id.* at 22-23 (distinguishing satyagraha from Christian nonresistance as propounded by Tolstoy); *id.* at 38-39 (noting forceful practices of Buddha and Christ); *id.* at 121 (calling Jesus "the most active resister known perhaps to history").

243. The classic statement of liberation theology is GUSTAVO GUTIERREZ, *A THEOLOGY OF LIBERATION: HISTORY, POLITICS, AND SALVATION* (Sister Caridad Inda & John Eagleson trans., 1973). Antecedents extend back well beyond the twentieth century. See generally JAMES H. CONE, *THE SPIRITUALS AND THE BLUES: AN INTERPRETATION* 32-56 (1991) (arguing that African-American spirituals, which refer to ancient accounts like the Book of Exodus, are a type of liberation theology).

244. See, e.g., ASGHAR ALI ENGINEER, *ISLAM AND LIBERATION THEOLOGY: ESSAYS ON LIBERATIVE ELEMENTS IN ISLAM* 38-49 (1990) (discussing "liberative violence" in the Qur'an and other Muslim sources); MANUEL A. VASQUEZ, *THE BRAZILIAN POPULAR CHURCH AND THE CRISIS OF MODERNITY* 13 (1998) (analyzing liberation theology in contemporary Brazil); Andrew S. Levin, *Civil Society and Democratization in Haiti*, 9 EMORY INT'L L. REV. 389, 423 (1995) (referring to "ti legliz," or "little church" in the Haitian language, as a liberation theology); Tamara Rice Lave, Note, *A Nation at Prayer, a Nation in Hate: Apartheid in South Africa*, 20 STAN. J. INT'L L. 483, 512-23 (1994) (describing role of liberation theology in anti-apartheid struggle).

245. "[Y]ou have a truly explosive situation," according to a posthumously published essay by Martin Luther King, Jr. "Any night on any street corner in any Negro ghetto of the country, a nervous policeman can start a riot simply by being impolite or by expressing racial prejudice.

Nonviolence refers to renunciation, not absence, of the aggression in which the law, as we have seen, takes a keen interest. For this reason nonviolence, closely associated with aggression in the legal sense that I have detailed, has an extensive legal history.<sup>246</sup>

Looking at civil rights movements that have achieved legal change in the United States, one is struck by the relative success of efforts by and in behalf of African-Americans, compared to efforts in behalf of other groups. The triumph is—to put it mildly—incomplete. But what remains to be done in behalf of African-Americans lies mostly outside law, whereas other subordinated groups have not achieved as full a measure of formal legal gains. Other groups lack comparable amendments to the Constitution, major statutes such as the Reconstruction laws and the Voting Rights Act, and judicial formulations like “strict scrutiny.” It appears that successes in changing American civil rights law are related to the use of nonviolence—a rhetorical move that, as I mentioned, has little to do with that absence of physical expression. Aren’t women pacific? Gay and lesbian leaders, disability-rights activists, and proponents of age-discrimination reforms seldom take up incendiary weapons. These activists are not called nonviolent, however. The reason they have not earned this adjective is that they have not made a full case about aggression—a project still undone in the sense of both expressing the incursions they suffer and declaring their own power to act forcefully.<sup>247</sup>

Begin with the sentiments of reciprocity. Elements that state the reciprocity elements of aggression—violation and trespass—cannot emerge if activists describe their antagonist as an omnipotent force and themselves as passive victims. Reciprocity requires parity among persons; no one is obliged to treat a worm like a king.<sup>248</sup> Claims for full citizenship under the law, then, are most

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And white people are sadly unaware how routinely and frequently this occurs.” MARTIN LUTHER KING, JR., *A Testament of Hope*, in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.* 313, 324 (James Melvin Washington ed., 1986).

246. See generally *NONVIOLENCE IN AMERICA: A DOCUMENTARY HISTORY* (Staughton Lynd ed., 1966) (exploring varied crusades organized to oppose statutes and other types of law).

247. “I never understood why we didn’t have gay terrorists,” mused film director John Waters in an interview. “Every other movement did, and it works . . . I am not against gay riots. I think all of it works. It worked for the Black Panthers, for all minorities it has worked.” *Quote/Unquote*, S. VOICE, July 20, 2000, at 11.

248. See *supra* notes 76-89 (relating the ethics of reciprocity to Kantian understandings of respect among persons). It is no disparagement of the wrongs victims suffer to note that they too are agents. Consider common remarks in adult conversation: “I was bullied as a kid because I was fat,” “Other kids teased me because I wore glasses,” “I got picked on because I was a bad athlete,” and the like. One might find these comments whiny, but they contain some assertive

likely to succeed when they eschew pity in favor of evaluative sympathy, and invite the dominant actor to put itself in the place of the claimant.<sup>249</sup> The feeling of violation gains legitimacy from symmetries between the two persons or entities.

In civil rights causes, activists continue their task by pointing out an intentional trespass. Typically the putative aggressor will deny or overlook this complaint. Part of the delay between outrage among victims and legal change to redress the problem elapses during the slow education of aggressors about the nature of their own behavior. For instance familiarity (such as addressing an adult stranger as "girl" or "boy" or "dear"), even if it is well-intentioned, bespeaks contempt as soon as its recipients have protested. Disability activists have started to convey that human planning, not prepolitical Nature, builds many of the barriers in their way: uncut high curbs, steps instead of ramps, narrow doorways, and criteria unrelated to actual job qualifications.<sup>250</sup> Presumptions of heterosexuality (or monosexuality that limits persons to one sexual preference) aggressively plant boulders in the path of those who prefer not to accept, explain, or argue with that default setting.<sup>251</sup> When arguments like these gain acceptance, the reciprocity dialogue has fulfilled part of the civil rights agenda.

The final element of aggression in the law challenges reformers to present the favorable consequences of change and the unfavorable consequences of stasis. "There'll be hell to pay if you don't" is a message strangely absent from feminism and most of the other civil rights initiatives that have failed to maximize their gains in the law. Racial justice enjoyed a couple of contrasting advantages, notably a stronger textual basis in the Constitution and elsewhere for its claims, and a near consensus that the concept of race does not signify much in measures of human identity or worth. Without denying these differences, I would emphasize the careful

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spunk. They are causal propositions, imputing personhood to the speaker. *See generally* BULLYING: AN INTERNATIONAL PERSPECTIVE (Elaine Munthe & Erling Roland eds., 1989) (arguing that both the agency and the helplessness of victimized schoolchildren need to be addressed).

249. *See* Moller, *supra* note 170, at 217-18 (describing the proper way to evaluate whether weeping, for instance, is improper in a given situation).

250. *Cf.* JOSEPH P. SHAPIRO, NO PITY! PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 112 (1994) (claiming that "other people's attitudes" are "the biggest barrier").

251. *See* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY x (1990) (adverting to "presumptive heterosexuality"); Leigh M. Leonard, *A Missing Voice in Feminist Legal Theory: The Heterosexual Presumption*, 12 WOMEN'S RTS. L. REP. 39, 45 (1990) (describing obstacles for lesbians); Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 358 (2000) (noting existence of a "presumption of monosexuality" that classifies persons as either heterosexual or homosexual, never bisexual).



case about consequences that racial-justice activists built, alongside the evidence they presented to show violence and trespass. A different way to put the same point is to note how cheap it is to abolish *de jure* segregation and poll taxes, and how expensive to educate school children, retrain displaced workers, allocate equal measures of health care, and fulfill other non-legal imperatives of racial equality, a task that is still sadly unfinished. Winning a favorable law of aggression amounts only to an early step, one that should not be mistaken for complete progress. Yet if social change can follow from legal change, then proponents of new laws ought to document the bargain to society that these reforms would offer.

### *B. Antitrust Predation*

The principal antitrust statutes either expressly prohibit, or else have been interpreted to prohibit, predatory behaviors. Of the many types of predation strategies—one ABA report has listed sixteen of the nonprice variety<sup>252</sup>—predatory pricing has achieved the most attention from critics, and so predatory pricing case law and scholarship provide a good basis to discuss predation generally. As with the civil rights case study, observers can see here that reciprocity and utility are manipulable toward revision of a law of aggression. Whereas civil rights movements emphasized reciprocity to show an underlying equality among persons—which equality includes the power of the downtrodden to assert themselves, and the prospect that aggressors might experience boundary-crossing from the receiving end—the attack on predation denies the centrality of reciprocity.

#### 1. "The Antitrust Offense of Predation Should Be Forgotten"<sup>253</sup>

Beginning in the early 1970s, an argument emerged that the law should abandon its condemnation of many kinds of predation; and in its various forms this view has won significant support, if not quite a consensus, among the federal judiciary and antitrust scholars. The gist is that capitalism owes no firm or individual a living. Aggressive behaviors aimed at business competitors are the point of business—that which commerce does, and should, reward—

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252. ABA ANTITRUST SECTION, NONPRICE PREDATION UNDER SECTION 2 OF THE SHERMAN ACT 4 (1991) (ranging from innocuous-seeming strategies as "innovation" and "product promotion" to "burning down a rival's plant").

253. Easterbrook, *supra* note 8, at 337.

rather than a deviation warranting metaphoric reference to carnivorous animals and cold-blooded serial killers.<sup>254</sup>

Even if rapacity deserves disapproval, which it does not, the argument continues, judges have no remedies available that work so well as the self-cleansing process of microeconomics in the market. A rational actor who already enjoys dominance in a market would not engage in predatory pricing. He faces immediate losses in revenue by lowering his prices<sup>255</sup>—and the greater his market share, the greater his revenue losses will be<sup>256</sup>—and thus he has to hope that hurting competition will allow him to recoup those losses in the future. He must discount these future recoupments by the probability that he will not achieve monopoly power, and then discount them again to present value, because these gains are tomorrow's dollars rather than today's.<sup>257</sup> In the meantime, customers get the benefit of his lowered prices.<sup>258</sup> There is accordingly no reason for the law to prohibit or remedy predatory pricing; the disease contains its own cure.

Antitrust scholars have criticized this claim about self-cleansing.<sup>259</sup> Staying within economic analysis of law, some writers contend that although predatory pricing is irrational in a single market, it can pay in multiple markets where a reputation for predation can bolster anticompetitive behavior.<sup>260</sup> Writers interested in psychology note the heuristics of "decision-making under uncertainty," relating to perceptions about future gains and losses, that

254. See generally *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir. 1986) (Posner, J.) ("Most businessmen don't like their competitors, or for that matter competition. They want to make as much money as possible and getting a monopoly is one way of making a lot of money. That is fine, however, so long as they do not use methods calculated to make consumers worse off in the long run.").

255. See Kenneth G. Elzinga & David E. Mills, *Trumping the Areeda-Turner Test: The Recoupment Standard in Brooke-Group*, 62 ANTITRUST L.J. 559, 559-60 (1994) (noting that "short-term losses" result from the initial stage of predatory pricing).

256. See John S. McGee, *Predatory Pricing Revisited*, 23 J.L. & ECON. 289, 295-97 (1980) (noting that losses initially sustained with predatory pricing vary according to market share).

257. Easterbrook, *supra* note 8, at 272.

258. See Thomas C. Arthur, *The Costly Quest for Perfect Competition: Kodak and Nonstructural Market Power*, 69 N.Y.U. L. REV. 1, 42 (1994).

259. See, e.g., Walter Adams & James W. Brock, *Predation, "Rationality," and Judicial Sombulance*, 64 U. CIN. L. REV. 811, 856 (1996) (arguing that predatory pricing is "far more rational and likely to occur" than the argument against legal prohibition or remedy assumes); Robert Prentice, *Vaporware: Imaginary High-Tech Products and Real Antitrust Liability in a Post-Chicago World*, 57 OHIO ST. L.J. 1163, 1193 & n.138 (1996) (listing various articles and studies supporting the existence of predatory pricing).

260. See Timothy J. Trujillo, Note, *Predatory Pricing Standards Under Recent Supreme Court Decisions and Their Failure to Recognize Strategic Behavior as a Barrier to Entry*, 19 J. CORP. L. 809, 822-25 (1994) (summarizing this view as stated extensively in antitrust writings).

can explain the decision to engage in predatory behavior.<sup>261</sup> Case studies suggest that predators have occasionally succeeded in recouping their losses.<sup>262</sup>

Cost-based or "objective" tests for predation split the difference between the Chicago school and traditionalist defenders of predation claims, allowing the cause of action to survive in principle but establishing alternatives to "predatory intent"—usually showings about the defendant's cost, without which plaintiffs cannot survive summary judgment. Phillip Areeda pioneered this project, publishing with his co-authors a series of tests, all focusing on short-run costs to defendants. The Areeda formulations varied, but their common theme was that if you price your goods higher than what you paid for them, your behavior is legal.<sup>263</sup> Herbert Hovenkamp, heir to the Areeda treatise, favors below-cost pricing and reasonable chance of recoupment, with intent mostly eliminated from analysis.<sup>264</sup> Judge Easterbrook has emphasized the value of recoupment as an indicator for the viability of predatory strategies, and several of his colleagues on the federal bench agree that reasonable prospects of recoupment are necessary to a claim of predation.<sup>265</sup>

Both the Chicago school attack on predation and the tests for it initiated by Areeda and Turner are noteworthy for their exclusion of reciprocity in a context of aggression regulation. Antitrust law is urged not to care about the deliberate decision to hurt a rival through monopoly-minded price strategies, nor about the feeling of violation reported to the courts through litigation. Such sentiments arguably do exist, even within corporations.<sup>266</sup> Utility, though not

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261. Harry S. Gerla, *The Psychology of Predatory Pricing: Why Predatory Pricing Pays*, 39 SW. L.J. 755, 760-76 (1985) (noting that one's attitude about risk-taking frequently depends on one's view of the potential for gain or loss in a particular situation).

262. See Adams & Brock, *supra* note 259, at 847-52 (documenting the predatory successes of cigarette manufacturer Brown & Williamson, as presented by plaintiff Liggett & Myers).

263. In formulating a standard to determine defendants' costs, Areeda tried average cost and marginal cost variations, and also changed his mind about whether presumptions worked better than per se rules. Cf. PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶ 724-724d (rev. ed. 1996) (discussing the Areeda-Turner test and judicial variations of that test).

264. PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 711.2a (Supp. 1993). The "objective" theme surfaces also in discussions of remedies, as well as tests, for predation. William Baumol, *Quasi-Permanence of Price Reduction: A Policy for Prevention of Predatory Pricing*, 89 YALE L.J. 1, 4 (1979) (proposing that predators should not be allowed to raise prices after competitors exit); Oliver Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 YALE L.J. 284, 290 (1977) (contending that temporary price cuts have negligible benefits and that long-term problems result when a predator raises prices when competitors exit).

265. See generally Elzinga & Mills, *supra* note 255 (elaborating on "recoupment" standard).

266. See Adams & Brock, *supra* note 259, *passim*.

shrugged off, is assumed rather than discussed. One may agree that any futility—such as silly tasks like prohibiting behavior that the market would prohibit anyway or establishing “predatory intent” tests that attempt to prove unknowable mental states—wastes societal resources.<sup>267</sup> But radical reform would ordinarily demand a better consequentialist case than appears in most predation scholarship.

The problem is professional and occupational.<sup>268</sup> To say that “the antitrust offense of predation should be forgotten” or, more moderately, “the antitrust offense of predatory pricing should be perceived as a function of costs and recoupment” is to deny that reciprocity is fundamental to aggression as it is experienced, understood, remedied, discouraged, and alleviated. Economic analysts regularly practice such denial, and while the recent state of law and economics literature shows a retreat from the old tenet that individuals are impelled by financial calculation and nothing more,<sup>269</sup> the law of economic regulation, because it is of less interest than other doctrines to law-and-economics antagonists, still stands as a fortress, or perhaps a clubhouse, where reciprocity does not enter.

The consequence is an impasse where predatory pricing, and predation doctrine more generally, is slain and yet not dead. Reformers have achieved great successes at persuading judges and scholars, but their two reforms—denial of predation, and preemptive objective criteria that take reciprocity out of analysis—cannot achieve total control over predation doctrine because they deny an enduring perspective. Human beings believe that rapacity exists. Given the half-chance that antitrust law presents to them—the partial recognition of predation as actionable conduct—they will affirm the reality of the phenomenon.<sup>270</sup> An example of this point comes from the leading pre-Chicago, traditional antitrust treatise: Lawrence Anthony Sullivan proposes that predatory behavior may be

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267. See *supra* notes 221-23 and accompanying text (describing opacity of the intent of a firm); cf. Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L. REV. 972, 975 (1986) (suggesting that businessmen do not know their own minds, and certainly cannot articulate reasons for their behavior to lawyers or juries).

268. Both lawyers and economic analysts, according to George Fletcher, tend to like the paradigm of utility better than the paradigm of reciprocity. Fletcher, *Fairness*, *supra* note 45, at 573 (speculating that utility offers “misplaced concreteness,” as well as the appeal of a multistep analysis that flatters nonscientists by making them think of laboratory procedures).

269. This footnote could go on for days. Moderations in the last two decades among economic analysts include such buzzwords as “reciprocal altruism,” “path dependence,” “behavioral psychology,” “norms,” and “social meaning.”

270. See *supra* notes 123 and 206-07 and accompanying text (noting the durability of distinctions between acts and omissions, even when both yield the same “state of affairs,” and of “the sense of injustice”).

identified by two non-cost criteria—it looks odd or deviant, or “jarring or unnatural”; and it is aimed at a particular target rather than an abstraction like market share.<sup>271</sup> These homely indicators, long out of fashion in case law and scholarship, identify an essence to predation that the Chicago school and cost-based tests are ultimately ill-equipped to deny.

To see the phenomenon at work, page through a famous denunciation of predation liability.<sup>272</sup> *The Antitrust Paradox* was the first book-length treatment of the proposition that because predatory pricing is not sustainable as a means to achieve monopoly gains, and because it incidentally benefits the public, legal remedies for predatory pricing have created social losses.<sup>273</sup> Robert Bork wrote *The Antitrust Paradox* as a jeremiad, and published his 1993 revision mainly to say that fifteen years later he was satisfied with the judicial response to his lament. What is interesting today about this book is not its thesis about predatory pricing (which has become conventional wisdom) but its recurring *Credo* in a another key: Bork believes with a perfect faith in predation, even if predatory pricing is what others have called “a unicorn,”<sup>274</sup> a “myth,”<sup>275</sup> or the modern equivalent of alchemy.<sup>276</sup> Citing no data, Bork confidently asserts that predation through litigation is a successful strategy, and that plaintiffs’ abuse of government processes brings ruin on competitors.<sup>277</sup> Bork also believes in predation through “disruption of distribution patterns,” which involves interference with contractual agreements such as retail exclusivity.<sup>278</sup> One sees in *The Antitrust Paradox* a kind of conservation of predation. An economic analyst expunges predation from his description of how firms and their agents behave, but the phenomenon survives elsewhere in the same book; predation can be moved but not quite eliminated.

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271. LAWRENCE ANTHONY SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 112 (1977).

272. See BORK, *supra* note 8.

273. *Id.* at 149-55.

274. E-mail from Adam Pritchard, Assistant Professor, University of Michigan Law School, to Anita Bernstein, Visiting Professor, University of Michigan Law School, (Feb. 12, 1999) (on file with author).

275. Koller, *supra* note 8, at 123.

276. Liebeler, *supra* note 8, at 1076.

277. BORK, *supra* note 8, at 347-49.

278. *Id.* at 358.

## 2. Stopping Short of "Forgotten": A Mixed Judgment

What conclusions about the substantive law of predatory pricing, and predation generally, follow from casting the topic as a part of legal regulation of aggression, and from putting it into a framework of reciprocity and utility? Judge Easterbrook's suggestion that we forget the whole thing has considerable appeal,<sup>279</sup> but I have argued that predation will continue to be hard to kill. The "offense" will not soon "be forgotten" because it resonates with the way human beings, even former Judge Bork, see the world.<sup>280</sup> Like Professor Sullivan, observers can approve of capitalism yet still be jarred by a particular business practice because it appears both pointed (at a particular competitor) and dangerous (that is, likely to succeed in some aim, particularly monopolization).<sup>281</sup> This two-part conclusion lines up approximately with reciprocity first, utility second. Journalists covering the Justice Department prosecution of Microsoft told a rapacity story rather than a microeconomics story not only because their readers are ignorant and editors lazy,<sup>282</sup> but because reciprocity is prior to utility. Even if these journalists were indeed looking for the lowest common denominator, as their critics say they are wont to do, they started at the right point of origin: the rapacious monopolist and his targets is the beginning of the account—not costs, pricing structures, or the way goods are packaged.

I argue, accordingly, that because any effort to expunge reciprocity from aggression law must fail, the reform of predation law must live with reciprocity rather than deny its persistence.<sup>283</sup> Judicial authors like Easterbrook and Posner are right, I believe, to include in their published opinions dicta reminding lawyers that most behavior that competitors dislike is not predation under the anti-trust laws;<sup>284</sup> other judges should follow their example. Scholars should continue the task of unpacking predation into its constitu-

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279. See Peter C. Carstensen, *Predatory Pricing in the Courts: Reflection on Two Decisions*, 61 NOTRE DAME L. REV. 928, 930-31 (1986) (pointing out that predatory pricing, as well as most forms of predation, is not specifically condemned by statute).

280. BORK, *supra* note 8, at 347-49, 358.

281. See *supra* note 266 and accompanying text.

282. See generally James Warren, *On Ted Turner, Peggy Lee, and a Certain Retired Bull*, CHI. TRIB., Jan. 15, 1999, (Tempo section), at 2 (charging journalists with having described the Microsoft prosecution as a "trial of the century" with focus on celebrity characters).

283. On efforts to deny the embarrassing persistence of irrational stances in the law, see generally Bernstein, *supra* note 133.

284. See *supra* note 254 (quoting Posner); *A.A. Poultry Farms, Inc., v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401-02 (7th Cir. 1989) (Easterbrook, J.) (stating that business "[r]ivalry is harsh" and "price reductions are carried out in pursuit of sales, at others' expense" but these acts are not necessarily predatory).

ents, distinguishing categories of behavior that are part of the bargain for firms and entrepreneurs, on the one hand, from categories that overstep boundaries, on the other.<sup>285</sup> This educational task is a converse of what civil rights activists accomplished, and a more difficult project. Whereas civil rights leaders worked to show the public old violations and trespasses that had been invisible, antitrust reformers ought to work to show the differences between competitors' resentments and a good claim.

The utility element of this type of legally regulated aggression also cries out for more information. Although decades of scholarly debate have not resolved the question of what the antitrust statutes are supposed to do (enhance consumer welfare? protect small business? discourage concentrations of wealth?),<sup>286</sup> it is clear that the equating of social utility with lowering prices in the short term is unfounded, and also unsupported by any reasonable reading of the antitrust statutes. Herbert Hovenkamp has denounced the Chicago-school effort to minimize the reach of the antitrust laws as a covert attempt to repeal the Sherman Act based on arguments unknown to its framers, and unconvincing to subsequent Congresses: after all, Congress could abandon all legislative proscription of attempted monopolization if it were to become fond enough of certain price theories.<sup>287</sup> Such information should be sought evenhandedly; not all of it will favor retaining liability.<sup>288</sup>

In summary, antitrust predation is a challenging species of aggression in the law. Like aggression among nation-states, it ascribes a feeling of violation and intentional trespass to entities.<sup>289</sup> Popular treatments of antitrust demonize Bill Gates instead of focusing on Microsoft and the Justice Department because these feelings are so difficult to attribute to entities; yet these feelings are too integral to understanding predation to be abandoned altogether. Unlike aggression among nation-states, however, antitrust preda-

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285. See, e.g., Prentice, *supra* note 259, at 1175-78 (discussing predation liability for fraudulent announcements about products that a manufacturer knows will never come to market); Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551, 561-63 (1991) (summarizing literature on "raising rivals' costs," a category of predation).

286. See Kenneth G. Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191, 1191-94 (1977) (assessing "fairness").

287. See Prentice, *supra* note 259, at 1167 n.13 (citing Herbert Hovenkamp, *Rhetoric and Skepticism in Antitrust Argument*, 84 MICH. L. REV. 1721, 1728 (1986)).

288. Judge Easterbrook is certainly right, for instance, to worry about social losses resulting from decisions that firms might make to reduce the risk of being sued for predation. Frank Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 15 (1984).

289. See *supra* Part III.C.

tion presents a very ambiguous condemnation, because it so closely resembles behaviors that a capitalist economy regards as necessary to welfare. The analytic sequence of utility-moderates-reciprocity suggests that while observers might share their evaluative sympathy with (even) a cigarette manufacturer that a competitor decided to destroy for the purpose of maintaining an oligopoly,<sup>290</sup> the rendering of that sympathy does not answer the question of whether the law ought to condemn predation.

### CONCLUSION

Incursion and boundary-crossing preoccupy all of public law. Crimes, regulation, and international law present most of the settings where aggression emerges explicitly as a problem to be remedied through legal doctrine. In this Article, I have proposed to apply stances and insights from a branch of private law—tort doctrine and theory, particularly a taxonomy offered by George Fletcher—to these important realms of public law. Like torts, aggression is a relational subject; it works with the dyad of subject-and-object. Although regulations, statutes, and criminal law begin at the level of public policy rather than this simpler bipolar relation, in their treatment of aggression they must grapple with the basic dealings that unite an initiator with a target.

Both in its broad, familiar doctrinal concepts—duty, proximate cause, injury—and the very idea of a plaintiff, tort law expresses a need to figure out what a victim or class of likely victims would think about the events it presents in story-form to a court. This retelling relates to the concept of moral sympathies presented to jurisprudence in the work of Adam Smith. Similarly, I have argued, the law of aggression starts with a first step, an attempt to identify a feeling of violation.<sup>291</sup> Its second step is to determine whether the putative aggressor has committed an intentional trespass. Once these two elements, which are the sentiments of aggression, are educed, the law moves to its pivotal inquiry about welfare, or what Fletcher (along with others) labels “reasonableness” or “utility.”<sup>292</sup> Three perspectives emerge. A recipient wants to be free of all unwanted encroachment. An aggressor wants to pursue her

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290. The reference is to *Brooke Group, Ltd. v. Brown & Williamson Corp.*, 509 U.S. 209, 230-43 (1993).

291. This focus in the law is parallel to the view of one psychologist that understanding aggression is a problem of determining how potential initiators and targets regard an interaction. MICHAEL GURIAN, *A FINE YOUNG MAN* 143 (1998).

292. Fletcher, *Fairness*, *supra* note 45, at 540.



own agenda. And society or community, taking into account these competing desires, determines which of these two interests warrants its support.

Regarding the social or communal element of this balance, I would mention a year I spent living in Europe.<sup>293</sup> During that academic year, which began in the fall of 1992, Europeans repeatedly started conversations with me and many other Americans about sexual harassment, as presented to the world in the confirmation hearings of Clarence Thomas. A straw man, or woman perhaps, began to emerge. The Straw Person, an American/puritan/feminist figure of wrath, opposes penetration, not only literally but figuratively. He or she wants to stop everyone else from having sex but doesn't stop there: Straw Person would destroy flirtation, banter, and the sparks of joy that animate a deadening workplace.

"Oh please," runs one American response. Women, it is said, don't sue over trivial, pleasurable *frissons* in their workplace.<sup>294</sup> In writing about the European law and policies of sexual harassment, I noted the element of caricature in this supposed struggle between the sophisticated Old World and the puritanical New, contending that the stereotypes hold value for American conservatives who want to deny recourse for harassment, as part of their endeavor to halt equality in the workplace.<sup>295</sup> But there are nevertheless genuine differences between European and American approaches to sexual harassment law.<sup>296</sup> That difference, I believe, can be expressed as a conclusion about what remains after utility moderates reciprocity. Sexual harassment begins with a feeling of violation and a trespass. But is the third element of aggression wrong enough to warrant sanction? All may agree that at some point, harassment becomes a social evil, though they disagree about the location of that point. These disagreements are situated in societies. The third and final element of aggression—societal condemnation of encroachments that it deems not worth the price—will yield different conclusions, depending on what a society chooses to favor and what to slight.

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293. See *supra* note 230.

294. See Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1196-98 (1998) (providing an account of the workplace and the origins of both harassment and litigation).

295. Anita Bernstein, *Law, Culture, and Harassment*, 142 U. PA. L. REV. 1227, 1306-07 (1994).

296. *Id.* at 1232-34 (contrasting American and European attitudes towards implementation of sexual harassment law).

Once it is understood that choices about doctrine reflect societal views of aggression, the law of aggression becomes more intelligible, and thus easier both to reform and to preserve from reform proposals. This project of improving the law takes several facets. I have suggested that improvements include conceptual and taxonomical clarity: Perhaps *mens rea* is not really the center of criminal responsibility, for instance, and duress may not be the same in crimes as in contracts.<sup>297</sup>

When taxonomy is improved, law reform becomes clearer. Consider, in addition to civil rights law and antitrust predation,<sup>298</sup> a topic treated only briefly in this Article: solicitation of clients by attorneys. Published defenses of the ban make hollow references to prestige and overreaching, or the appearance of overreaching.<sup>299</sup> Seen as a problem of aggression, however, the trouble with banning solicitation becomes clearer. Many solicitations do not engender a feeling of violation in the target.<sup>300</sup> The initiator may commit a trespass, but this approach closely resembles the underregulated encroachments he faces from the other side, such as the waivers that insurance companies occasionally press on accident victims. Class bias, one of the important utilitarian questions that I have noted, permeates the ban.<sup>301</sup> Both of the sentiments of aggression, as well as utility, seem attenuated here, if not completely unavailable in support of prohibition. Some kind of reassessment, such as the one undertaken in the District of Columbia ethics rules, becomes more warranted after the elements of aggression are applied to this problem of policy.<sup>302</sup>

Such attention keeps the law honest by forcing analysts and reformers to talk about the stakes of their actions and inactions. When a legal rule proscribes aggression without identifying the sentiments of the initiator and the target, this incoherence is likely to endure until reformers ask tough questions: "What is this law

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297. See *supra* notes 201-03 and accompanying text.

298. See *supra* Part IV.

299. See, e.g., CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 787-88 (1986) (conceding weakness of traditional arguments).

300. See HAZARD & RHODE, *supra* note 14, at 391-92 (describing potential clients' desire to receive information about legal rights and legal services). But see *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 626 (1995) (describing outrage expressed by recipients of written solicitations).

301. See *supra* Table 2.

302. See D.C. MODEL RULES OF PROF'L CONDUCT R. 7.1 cmt. 2 (stating "[t]he interest in expanding public information about legal services ought to prevail over considerations of tradition"); *id.* cmt. 5 (contending that there is "no significant difference" between advertising and solicitation; the Rules therefore prohibit only "in-person solicitation in circumstances or through means that are not conducive to intelligent, rational deliberation").

trying to do? Is anyone getting hurt? Which lines, if any, are being crossed? Are we paying too much for protections we don't need?" Judge Easterbrook demands to know the price of a vague ban on predatory pricing.<sup>303</sup> International lawyers question whether United Nations denunciations of aggression improve the behavior of national governments.<sup>304</sup> Although such projects have been improving the law for many years, this process of critical examination would be refined by the application of distinct, defining elements of aggression.

Another boon of building theory of aggression in the law is the facilitation of new partnerships with the social sciences. For example, psychology and law share a concern with prevention of harm. From their premise that aggression equals fisticuffs and direct impact on human bodies—which this Article has deemed unshared by the law<sup>305</sup>—psychologists, asking *What is to be done?*, have tested hypotheses about prevention. Several of their findings pertain to the treatment of aggression within the law. For instance, psychological studies have determined that among the techniques that have been tested to limit the effect of aggression-as-bodily-harm, "cognitive cures" such as exposure to nonaggressive models were especially effective.<sup>306</sup> The law of remedies, as well as the criminal law, might use cognitive responses to certain aggressions under the still-expanding aegis of equitable relief. Without endorsing any particular finding or conclusion, I commend generally an attention to what psychologists continue to learn about the prevention of aggression. Potential gains to doctrine are vast.<sup>307</sup>

Policy-makers who challenge and revise the legal rules of aggression shape almost all of the law. Almost every area of the law participates in this influence. Civil rights law is a function of aggression re-perceived.<sup>308</sup> Legal concepts of privacy and property, understood as incursions and safe harbors, can enhance feminist

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303. See *supra* note 288 and accompanying text.

304. See THOMAS & THOMAS, *supra* note 222, at 4-13 (presenting the case for, and the case against, clear definitions of international aggression).

305. See *supra* notes 156-57 and accompanying text.

306. See BARON & RICHARDSON, *supra* note 144, at 329-57.

307. Imagine trusts-and-estates lawyers skilled in spotting undue influence before it manifests itself in gratuitous transfers; judicial application of the Sixth Amendment right to confront adverse witnesses with some understanding of what confrontation can achieve and how not to make it conduce to more rage; urban police instructed in the psychology of panhandling; and form contracts that steer clear of provoking feelings of violation.

308. See *supra* Part IV.A.

needs.<sup>309</sup> Some scholars of aggression even aspire to replace ideologies that foment war with ideologies of peace.<sup>310</sup> The law of aggression is a fluid instrument. Once-fixed beliefs about reciprocity and utility yield over time to new judgments about what behaviors the law ought to redress, prevent, and foster.

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309. See Katharine K. Baker, *Property Rules Meet Feminist Needs: Respecting Autonomy by Valuing Connection*, 59 OHIO ST. L.J. 1523, 1596 (1998).

310. See LARSEN, *supra* note 1, at 231. For my response, see *supra* notes 230-33 and accompanying text.

