

Towards the Anti-Genocide Community: The Role of Law

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*"Will you kill people, Henri?"
I dropped down beside her. "Not people, Louise, just the enemy."
"What is enemy?"¹*

Introduction

The role of law in the prevention of 'that odious scourge', genocide, is an intriguing and desperately pertinent question. As law becomes more involved in regulation and discussion of areas formerly seen as out of its area of control — notably hate speech and discrimination — the question arises again: but what of genocide? Indeed, it is proudly heralded that we do have an international United Nations convention on genocide, and one on human rights, and on racism and even on the nature of aggression. We have convened war crimes trials in the past² and are doing so again.³ Genocide is a crime, it is abhorred, it has been put on the universal list of Bad Things: yet it is still happening. We may cry in despair that we have learnt nothing, that it is part of human nature, that it is out of our control, that surely a symbolic effort is better than none at all. Yet we can do better than this.

Doing better entails an examination of the nature of genocide. It involves a commitment to the reality, not the sanitized version, of genocide. It demands that we look very closely at the nature of the society that produces and condones and perpetrates genocide: again and again.

Genocide is integral to modernity. We see genocide occurring in modern Western societies as well as in societies in the process of modernization. There are particular dynamics at work within modernity which shape genocide and that must then enter into any equation of prevention. In its rational, efficient, process-oriented pursuit devoid of any ethical or moral considerations, genocide can be seen as the essence of modern Western civilization. The lack of moral space within the modern construct combined with the explosion of technology and bureaucracy, of 'organisation', has meant that no checks or brakes exist within

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1 J Winterson *The Passion* (1987) Bloomsbury Publishing Ltd London.

2 The International Military Tribunals held at Nuremberg and Tokyo.

3 The United Nations War Crimes Tribunal for the former Yugoslavia, for trials of persons accused of war crimes, is currently being conducted. A similar War Crimes Tribunal for Rwanda has recently been established at the United Nations.

modern society against genocide. Emil Hammacher termed it an “antagonism between rationalism and life”.⁴

Law was particularly crucial in the perpetration of the Holocaust. Law is the institution we would hope would deter genocide and genocidal behaviour. Yet it was law which was subsumed under the rubric of the State; it was law which provided the genocide with its order, it was law which ‘legitimated’ it. How does the ultimate product of reason, law, come to be an instrument of genocide?

The American judge, Justice Felix Frankfurter, when confronted in 1942 by the young Pole Jan Karski with the news of the extermination of the Jews in Europe, replied, “I am unable to believe what you say”. Not that he thought Karski was lying, or that it was not happening, but that he could not believe him. Such things did not happen. They did not happen in civilized countries, they were not part of the ‘Rechtsstaat’.

Yet law was at the heart of the Third Reich: legislation was a key tool. Legislation defined the Jew and removed the Jew from the common world.

Law has been instrumental in what Richard Albrecht calls a “taking lives policy”.⁵ Can it be core in a ‘saving lives policy’? Can law regenerate our moral disengagement? Law has provided tools for the framework of civil society: instruments of human rights and vilification have constructed boundaries. What I am interested in exploring is the essence of this framework. I argue that formal rights and equality law is not enough to prevent genocide; that such legislation may be enough in ‘normal’ situations of daily living, but that in situations of potential genocide, in ‘abnormal’ situations, this law is not enough. Rights and equality law has limits. It may provide the foundations, but not the necessary essence to counter, for example, the creation of the new morality and the new reality of the Third Reich.

Genocide is not relative, it is not inevitable, and it is not natural. The desire for prevention of this ultimate invisible crime must permeate our institutions and our lives. What conditions must law foster in order to prevent genocide and foster an anti-genocide community? How can law mobilize other sources within society to generate the anti-genocide community, to strike at the essence of relations between people? How do we prevent genocide? How do we create societies which reject genocide, which engage with the Other? Can we institutionalise engagement?

The aim is the anti-genocide community. It is a strong concept and a powerful thought. I propose boundaries: a society in which genocide has no place, in which voices of the victims are heard, in which the ethical is integral to the social. I urge the integration of the Holocaust and the phenomenon of

4 E Hammacher ‘Main Questions of Modern Culture’ in A Arato and E Gebhardt (eds) *The Essential Frankfurt School Reader* (1982) Continuum Publishing Company New York.

5 R Albrecht ‘Die Politische Ideologie Des Objektiven Gegners Und Die Ideologische Politik Des Völkermords Im 20. Jahrhundert’ (1989) 27 *Sociologia Internationalis* 1.

genocide into our world. I also urge that we question and challenge the ethically empty institutions and norms that tolerate and perpetrate genocide. Emil Fackenheim writes:

We hear these words across the abyss and weep. . . . We all must weep not only for them but also for ourselves, for we cannot mystically either fly above history or leap forward to its eschatological End. The screams of the children and the silence of the Muselmänner are in *our* world. We dare not forget them; we cannot surpass or overcome them: and they are unredeemed. . . . [W]e are *situated* in the post-Holocaust world. We must accept our situatedness. We must live with it.⁶

And we must ask why. This study is a beginning. It is a search for the core of genocide and thereby its prevention, and it contemplates whether a framework for prevention may be found within the institution of law.

Genocide Prevention

The literature on genocide prevention is growing. A few centres of comparative genocide exist.⁷ Systems have been established to predict and monitor its occurrence.⁸ I wonder however whether the core of prevention is being addressed. For research on genocide prevention has focused not on prevention but on prediction, detection and punishment. The focus has been on:

- developing early warning systems;
- the interpretation of the *United Nations Convention on the Prevention and Punishment of the Crime of Genocide (1948)*;
- punishment as prevention;
- reparations.

Commentary on the bases of genocide prevention is absent and conditions in which genocide is least likely to occur are not being addressed or explored.⁹ Leo Kuper begins a sketch of the 'non-genocidal society',¹⁰ yet it does not appear that this has been developed further. After an in-depth analysis of the nature of

6 EL Fackenheim *To Mend The World: Foundations of Post-Holocaust Jewish Thought* (1982) Schocken Books New York, 256.

7 The Institute of the International Conference on Holocaust and Genocide (Jerusalem: Israel Charny), the Montreal Institute for Genocide Studies (Frank Chalk and Kurt Jonassohn), the Institute for the Study of Genocide (New York: Helen Fein), Centre for Comparative Genocide Studies (Macquarie University: Colin Tatz).

8 International Alert (Leo Kuper), the Genocide Early Warning System (Israel Charny and Chanan Rappaport), International Genocide Bureau, or Committee (called for by the Baha'i International Community).

9 Indeed, the literature on discrimination and prejudice abounds: multiculturalism is heralded, and educational strategies regarding racism are flourishing. Yet genocide is not 'racism plus'. Leo Kuper remarks: "Genocide is not an inevitable consequence of certain social conditions within a society. There may be extreme pluralism in a society, with highly antagonistic, polarizing ideologies, division expressed in religion, segregation, employment, social networks, and political party affiliation, a long history of reciprocal violence, and periods of highly escalated conflict. Yet the struggle may stop short of genocide. Northern Ireland is an example of such a society": L Kuper *Genocide: Its Political Use in the Twentieth Century* (1981) Yale University Press New Haven and London, 56.

10 Kuper, 186-209: he focuses on Northern Ireland and South Africa.

genocide, Helen Fein concludes that the forces “leading in the other direction” (to destruction) need to be understood and nurtured,¹¹ but leaves it at that. We have our typical societies but what of our ‘ideal communities’? These are communities which are inclusive rather than exclusive, communities whose notion of the ideal need not be that of the dominant group, that are not characterised by attitudes of ‘weeding out the asocials’.

Are we searching for a cure or a bandaid? If a cure is on the agenda, then surely we should be applying that which we discover in our examination of genocide to its prevention. To find this “cure” we need to start with the notion of community, with people's relations with one another, with a vision of a genocide-free world.

I argue that *community* is at the core of a move towards *genocide prevention*. It is our conception of community — its nature, its responsibilities, its essence — that can prevent genocide. If we ask, how can law prevent genocide, then the creation of a particular type of community — a reflexive community — is how.¹²

Outside the ‘Universe of Obligation’

Genocide is the result of many factors. The Holocaust can be seen as the result of a series of ‘building blocks’: Christian antisemitism, scientific racism, nationalism, the Depression and World War One and fascism. Saul Friedlander talks of ‘transmission belts’ of obedience, dehumanization, crushing conformity and True Belief, intersecting and working together. Yehuda Bauer mentions five prerequisites for genocide: an ancient hatred, an ideology or motive, organisation (technology/bureaucracy), a context of war and a brutal dictatorship. Genocide cannot be prevented through addressing just one of these. And not all ‘ingredients’ will be present in all genocides. A common denominator, however, does appear to be citizenry: the presence and participation of those other than the targeted victim group or ‘hostage’ people¹³ and main perpetrator group.

A reconceptualisation of community cannot undo centuries of persecution (in the case of the Jews or Armenians for example) yet it can potentially unravel them.

Ervin Staub reminds us that the progression along the continuum of destruction is not inevitable, that the potential power of bystanders is great.¹⁴ Certainly, there are a number of stages to genocide: quite broadly, from idea to

11 H Fein ‘Genocide: A Sociological Perspective’ (1990) 38 *Current Sociology* 104.

12 It is important to note that genocide is not any mass murder, it is not ‘racism plus’, ‘discrimination plus’, it does not automatically lead to genocide. The point of this section on community is to address the ideological genocide impetus of the victim as ‘other’, dehumanized: the community needs to revolt against that, it has to be not within their ‘nature’, their structures: ‘neutralization’ of the moral drive must to be fought against.

13 Leo Kuper’s term, directing analysis away from the qualities of the victims to those of the victimizers, and emphasizing the arbitrary nature of their fate: Kuper, 41.

14 E Staub ‘Moral Exclusion, Personal Goal Theory, and Extreme Destructiveness’ (1990) 46 *Journal of Social Sciences* 1, 59.

ideology or motivation to intent to implementation to action. Often genocide may not have been planned from the beginning of the oppression of the victim group.¹⁵ More frequently, persecution and segregation of one group does not lead to genocide.¹⁶ The issue I wish to address is the 'pre-bystander' community, the community pre-genocide.

How could the community have been differently constituted in order for genocide to have been prevented?

The importance of examining 'bystanderism' is that it illustrates the power people do have and what can be achieved.¹⁷

By focusing on community we focus on people, on citizens and their role in genocide. We confront the perpetrators of the Holocaust who were, by all accounts, 'ordinary men'.¹⁸ The German perpetrator was not a special kind of German.¹⁹ Nor were their leaders: "the Nazi leaders were not spectacular types, not personalities such as appear only once in a century."²⁰ The conventional view of the SS man (and most were men) as an ogre, as a fundamentalist maniac driven by fanatical zeal, is a myth. We are dealing with ordinary people.²¹ This brought Father Thomas Merton to comment that "we can no longer assume that because a

15 Note the Intentionalist vs Functionalist argument re the Holocaust: when can one pinpoint intent? It is widely argued that extermination of the Jews was not always the intent of the Third Reich. Hitler never spoke of annihilation prior to 1938-39. The 'Final Solution' (Endlösung) was only mentioned in July 1941, in a communication from Goering to Heydrich. The Wannsee Conference, in which the details of extermination were discussed, was only held in January 1942. There were a number of stages: from the economic boycott of 1933, to the Nuremberg Laws of 1935, to the 1938 'Kristallnacht', to the aborted plans of deportation to the island of Madagascar, to October 1941 when Jews within the control of German occupation were no longer allowed to emigrate.

16 Note apartheid in South Africa for example.

17 Indeed, Israel Charny has suggested a new category in the international law definition of genocide, that of 'Accomplices to Genocide': see IW Charny 'Toward a generic definition of genocide' in G Andreopoulos (ed) *Genocide: Conceptual and Historical Dimensions* (forthcoming 1994) University of Pennsylvania Press Philadelphia. We can identify four categories of the bystander: the accessory (before, during and after), the co-operator, the collaborator and the companion to the crime.

18 See Christopher Browning's account of Police Reserve Battalion 101. His dismaying conclusion is that in most circumstances, most people will become killers. Rather than searching for why people become killers, he believes that we should ask what makes people resist and not become killers: C Browning 'One Day in Jozefow: Initiation to Mass Murder' in P Hayes (ed) *Lessons and Legacies: The Meaning of the Holocaust in a Changing World* (1991) Northwestern University Press Illinois, 196-209. See also S Milgram's research discussed in D Mixon *Obedience and Civilisation* (1989) Pluto Press London.

19 R Hilberg *The Destruction of the European Jews* Revised and Definitive Edition Vol 1 (1985) Holmes & Meier New York and London, 1011.

20 DM Kelley in IW Charny *How Can We Commit The Unthinkable? Genocide: The Human Cancer* (1982) Westview Press Boulder Colorado, 11.

21 And at crucial times, "more than ordinary people": of the men attending the Wannsee Conference in Berlin in January 1942, at which the scope and detail of the 'Final Solution' was planned, eight out of fourteen present held Doctorates. Among the members of the Einsatzgruppen, the mobile killing units sent into the Soviet Union in 1941 specifically to kill Jews, were an opera singer, an architect, a historian, a dentist, a Protestant Minister, high-level officials, intellectuals and lawyers. Physicians and doctors played crucial roles in both the Holocaust and the Armenian genocide.

man is 'sane' he is therefore in his 'right mind'"²² Which brings us again to the separation between reason and morality.

Violence was legitimated against both Armenian and Jew because both had been defined outside the "sanctified universe of obligation".²³ The Jew became 'vermin', a bacillus that had to be exterminated, a cancer eating at the heart of Aryan society. To kill was to cure. Fritz Klein claimed that he was a good doctor, obeying his Hippocratic oath. As a doctor, he said, if he found a gangrenous appendix in a body, he would remove it; he found Jews a gangrenous excrescence on the German body politic, so he removed them.²⁴ Mehmed Resid, Governor of Diyarbekir and a physician stated:

Even though I am a physician, I cannot ignore my nationhood. I came into this world a Turk. My national identification takes precedence over everything else. . . . Armenian traitors had found a niche for themselves in the bosom of the fatherland; they were dangerous microbes. Isn't it the duty of a doctor to destroy these microbes?²⁵

The Nazi *Weltanschauung* demanded that the Jews be seen as Other, that they be dehumanized. For the Rights of Man were also the rights of Jews, as long as Jews were regarded as men and women. This is where the logic of the situation demanded that the Jews be dehumanized.²⁶

Like the Armenian, the Jew was 'other than human'. The Jew was subhuman, the Jew was less than whatever other consideration s/he was weighed against: your dog was more important than the Jew, your paper was more important than the Jew. Yet paradoxically the Jew was also more. The Jew was the Devil, Satan, the anti-person. The Jew was the epitome of Otherness. Unlike the 'witches' of the sixteenth and seventeenth centuries, there could be no salvation for the Jew: the Jew was irredeemably evil.²⁷ The Jew was simultaneously 'supermensch' and 'untermensch', crafty, Shakespeare's Shylock, the ruler of the world. As both less and more the Jew had to be removed.

The phenomenon of dehumanization can be seen in other genocides: the Hereros of South-West Africa (now Namibia) were able to be killed by the German settlers in 1907 due to the perpetrators' definition of them as "economically useless and hopelessly primitive", thereby reinforcing their exclusion from the

22 Father T Merton, cited in Charny (1982), 17-18.

23 H Fein 'A Formula for Genocide: Comparison of the Turkish Genocide (1915) and the German Holocaust (1939-1945)' in RF Tomasson (ed) *Comparative Studies in Sociology. An Annual Compilation of Research* Vol 1 (1978) Jai Press Inc Connecticut, 272.

24 Cited in C Tatz 'Moral, Philosophical and Religious Responses to the Holocaust' (lecture) Yad Vashem Winter Course: 'Teaching the Holocaust and Antisemitism' Jerusalem 18 January 1991.

25 Cited in VN Dadrian 'The Role of Turkish Physicians in the World War I Genocide of Ottoman Armenians' (1986) *1 Holocaust and Genocide Studies* 2, 175.

26 E Weber 'Jews, Antisemitism, and the Origins of the Holocaust' in MR Marrus (ed) *The Nazi Holocaust. Historical Articles on the Destruction of European Jews Vol 1: Perspectives on the Holocaust* (1989) Meckler Corporation London, 176.

27 S Friedlander 'Some Aspects of the Historical Significance of the Holocaust' (1977) *The Jerusalem Quarterly* (reprint) The Middle East Institute Jerusalem, 5.

universe of human obligation.²⁸ Like the Jews, the Gypsies were seen as strangers.²⁹ The Australian Aborigines were considered 'wild animals', 'vermin', 'scarcely human', 'hideous to humanity', and a 'nuisance'.³⁰ In the eyes of their persecutors the Ache Indians were 'rabid rats'.³¹ The Khmer Rouge divided the Khmer into 'the people' and 'enemies of the people'.³²

Placing the victim group outside the realm of responsibility of a defined society is indeed a prerequisite for genocide. For if the group is seen as integral to the community, on all levels, genocide has less likelihood of occurring.³³ This does not mean that the potential victim group need be the *same* as others in the community, but that it, as much as any other group or individual, must be integral to the functioning and process — the "life" — of the community. It is important to differentiate between being different and being 'Other'.³⁴

We know that in Germany the reactions of the population and particularly of church officials particularly to the T4 'euthanasia' killings of 'genetically deficient' Germans led to the official discontinuation of the program.³⁵ We know that the killing of selected groups of Poles aroused persisting protests among army leaders, inducing Hitler to reconsider and to countermand earlier orders.³⁶ Why not the same with Jews, or Gypsies, or homosexuals? The attitude towards Jews by non-Jews during the Holocaust was often a key determinant as to whether they would survive. Protection given to Jews by those under Nazi occupation was in many cases life-saving.³⁷ Yehuda Bauer suggests that we are dealing not with a historical footnote, but with a central historical problem which in the end boils down to a moral challenge: were the Gentiles their Jewish brothers' keepers?³⁸ And if not, why not? What defines people within the 'sanctified universe of obligation'?

It cannot be said that all Germans were responsible for all Jews' deaths. The notion of collective responsibility may be gratifying, yet apart from being incorrect, points to no preventative measures. I suggest a notion of spheres of responsibility,

28 F Chalk and K Jonassohn *The History and Sociology of Genocide: Analyses and Case Studies* (1990) Yale University Press New Haven and London, 231.

29 G Tyrnauer 'The Forgotten Holocaust of the Gypsies' (1991) 55 *Social Education* 2, 111.

30 C Tatz 'Australia's Genocide. "They Soon Forget Their Offspring"' (1991) 55 *Social Education* 2, 97.

31 Kuper, 54.

32 Hannum and Hawk, cited in Fein (1990), 78.

33 Integral not in economic terms, but in emotional and moral terms: that the group not be seen as 'stranger'.

34 Note P Minkinen's argument: 'Otherness and Difference: On the Cultural Logic of Racial Tolerance' (1992) 3 *Law and Critique* 2, 165.

35 Dawidowicz (1975), Lifton (1986), cited in Staub, 60. The program did however continue. Hitler was secretive about its existence from the beginning for fear of the German population's reaction. Orders for the program were backdated to 1 September 1939 so they would be seen as a needed 'war measure': discussed in the film *The Architecture of Doom*.

36 H Fein *Accounting for Genocide: National Responses and Jewish Victimization During the Holocaust* (1979) The Free Press New York, 4.

37 Y Bauer 'Jew and Gentile: The Holocaust and After' *The Holocaust in Historical Perspective* Australian National University Press Canberra, 52.

38 n 37.

or spheres of action: that we are all responsible within our own spheres of movement and influence, within our own space and lives. This is a direct responsibility, different to the vaguer, usually more abstract responsibility we can feel for events happening in the larger world.³⁹

It is true that the concentration camps and their mission were kept largely secret from the German population. It was thought that they would not accept such draconian measures and openness in any case would have disrupted the 'deportation to the East' deception that served to move Jews without (at the beginning) any knowledge of their destination and therefore to keep hope alive and resistance largely in check. Yet Germans could not claim to be unaware of dismissals of Jewish colleagues at work, bans on Jewish shops and businesses, humiliations in schools, and unexplained disappearances, events which occurred within their own spheres. Does it matter what the ordinary German knew or did not know about the 'final solution'? Why was segregation acceptable? Why was deportation acceptable? At the stage of the concentration camps the genocide could not have been stopped by German citizenry. However, there were stages — quite definite stages — which Germans may have felt uncomfortable about, but which the majority did not protest about. Stages which were acceptable. Stages upon which they perhaps could have made an impact.

The Jewish philosopher Jean Amery, a survivor of Auschwitz, observed that "the expectation of help, the certainty of help, is indeed one of the fundamental experiences of human beings." But the gravest loss produced by the Holocaust, he went on to suggest, was that it radically undermined that "element of trust in the world . . . the certainty that by reason of written or unwritten social contracts the other person will spare me — more precisely stated, that he will respect my physical, and with it also my metaphysical, being."⁴⁰ Already in April 1935, Rabbi Joachim Prinz of Berlin wrote:

The ghetto is the 'world'. Outside is the ghetto. On the marketplace, in the street, in the public tavern, everywhere is ghetto. And it has a sign. That sign is 'neighbourless'. Perhaps this has never before happened in the world, and no one knows how long it can be borne; life without a neighbour.

Hans Mommsen argues that it was moral indifference, not rabid antisemitism, which lay at the bottom of the Holocaust.⁴¹ He distinguishes such indifference from lack of solidarity of the average German with his or her Jewish fellow citizen:⁴² yet are not the two intertwined? 'To be indifferent is to make a

39 In many ways the word bystander is an anachronism: for we are all, always, participants: in our family, our society, our state, our nation and our world: we choose, through our actions, the level of that participation.

40 J Amery *At the Mind's Limits: Contemplations by a Survivor on Auschwitz and Its Realities* cited in RL Rubenstein and JK Roth *Approaches to Auschwitz. The Legacy of the Holocaust* SCM Press Ltd, 363-364.

41 H Mommsen 'The Reaction of the German Population to the Anti-Jewish Persecution and the Holocaust' in P Hayes (ed) *Lessons and Legacies. The Meaning of the Holocaust in a Changing World* (1991) Northwestern University Press, 154.

42 n 41, 153.

value judgement. To be indifferent is to not act, to not want to act: in the case of the Third Reich it was to not want Jews to be a part of the German world.

The question 'Who is to have a voice in the political community?' was absolutely decisive for National Socialism.⁴³ The notion of community was one of division and exclusion in the Third Reich: the Nazi ideal of *Gemeinschaft* (community) divided the people of Germany into Insiders and Outsiders, 'good citizens' and Jews.⁴⁴ Once we start hypothesizing about the kind of person in the "non-genocidal community", questions of inclusion and exclusion become an issue, negating the fundamental basis of such a society which is the inclusion of all. The issue therefore (and this is crucial) is not *who* is included, but *how* people relate to each other, the spirit which exists and the action that is taken.

Community in Modernity

This question of community is a central one to modernity. How, asks Roberto Unger, can persons with conflicting views of the good and of reality can live at peace with each other and with themselves.⁴⁵ How, in an age which heralds individualism, can we foster community? How do we find the balance? How, when we are bonded to others through processes over which we have little control, can we create community, a bonding other than the technical? It is a core question of our age. What can we do to keep people together? Durkheim's question is just as valid today. But should we rather be asking: what can people do to keep themselves together?

The notion of community is also seductive. We need to be careful not to drown in nostalgia, nor engage in a 'back to the polis' quest. Drucilla Cornell remarks that a number of twentieth-century thinkers have become deeply sceptical of any appeal to the ideal of community. This scepticism, she writes, is based on a deep suspicion that lurking behind the ideal of community is a nostalgia for an integrated 'organic wholeness',⁴⁶ or, as Dorothy Allison phrases it, an 'ecstatic sense of oneness'.⁴⁷

Community traditionally implies cohesion and unity, yet a unity dependent on the exclusion of others. It was community which the Third Reich cried out to, to the Body of the Volk, to the purity of German blood. Julia Kristeva reminds us of the romantic interpretation and the Nazi implementation of the *Volksgeist*, a

43 RL Rubenstein 'Afterword: Genocide and Civilization' in I Wallimann and MN Dobkowski (eds) *Genocide and the Modern Age: Etiology and Case Studies of Mass Death* (1987) Greenwood Press Westport Connecticut, 290.

44 R Gellately "'A Monstrous Uneasiness": Citizen Participation and Persecution of the Jews in Nazi Germany' in Hayes, 194.

45 RM Unger *Law in Modern Society: Toward a Criticism of Social Theory* (1976) The Free Press New York, 167.

46 D Cornell 'The Poststructuralist Challenge to the Ideal of Community' (1987) 8 *Cardozo Law Review* 991.

47 Cited in IM Young 'The Ideal of Community and the Politics of Difference' in LJ Nicholson (ed) *Feminism/Postmodernism* (1990) Routledge New York and London, 309.

dependence which, she argues, changes all too rapidly into a repressive force aimed at *other* peoples and extolling *one's own*.⁴⁸ If we yearn for that "golden age" when true community and communal values existed, the days of kin and lore, we need to ask, in today's terms, how golden was this age? Who was embraced within this community? Upon whose subjection were these communities dependent? And, with the reality of urban living, is the face to face communication envisioned by many "communitarians" unrealistic anyway?⁴⁹

Are modernity and community incompatible? Can we find space within modernity for the moral imperative, for the anti-genocide community? Our world focuses on the 'I'.

[E]ach affirms him or herself as distinct, as unique and non-other, as though there were room only for one and not for two, as if two and otherness were forbidden. The Serb says: I am no Croatian; to be Croatian is to be non-Serb.⁵⁰

How do we bring reason and morality together (combine technical and practical reason), make people responsible for their actions, create a framework of ethics and consciousness? How do we establish the primacy of ethics and morality, which must be at the core of genocide prevention? All has a 'place' in the modern world: morality is seen to live in the family, in the home, in the intimate relationship. But try bringing the ethical relationship into the public world, the marketplace or even the university. Try changing the law tutorial into a forum for dealing with racist or sexist attitudes. Unless the tutorial deals with it as part of the course (as in courses such as *Discrimination and the Law* and *Law and Society*), it is seen as out of place and an indulgent diversion.

Being 'in community'

I suggest a notion of being *in community*. In the context of genocide prevention, this must be the meaning of community. Being *in community* can combat sameness, nationalistic fervour and apathy. It is to hear the Other, to know no 'stranger', to absorb, to reflect, to listen, to hear, and then to act. It is a reflexive community that we seek. We do not want a society moving for its own sake towards a 'better world' yet failing to articulate how the change is to be made, society attempting to change without intervening in the contradictions and tensions of existing society: this is not the change nor the society that we desire.⁵¹ The participating, aware, reflective, *thinking* society will be one that is 'in community', one whose processes and ends are just. Such a society is not necessarily composed of heroes or superhuman giants who save the world and brim with idealism. It must not be governed by some fundamentalist value scheme. This is no idle Utopia beyond our reach. The anti-genocide community

48 J Kristeva *Nations Without Nationalism* (1993) Columbia University Press New York, 53-54.

49 See IM Young (1990).

50 H Cixous 'We Who Are Free, Are We Free?' in B Johnson (ed) *Freedom and Interpretation* (1993) Basic Books, 19.

51 See IM Young, 315.

is a question of dialogue and a sense of a common humanity. A young Dutch cavalry officer who saved Jews during the Holocaust said when asked why:

Every other person is basically you. . . . Gradually, by opening your eyes, you see that . . . everyone is you. . . . It's the mirror, again. . . . That's the kind of attitude you have for most of these rescues.⁵²

Being *in community* is the antithesis of indifference and more than tolerance. For whereas there is no solidarity without the tolerance for the otherness of the other, tolerance is not solidarity's sufficient condition.⁵³ As Bauman contends:

True, one cannot conceive of cruelty perpetrated *in the name* of tolerance; but there is a lot of cruelty that tolerance, through the lofty unconcern it feeds, makes *easier to commit*.⁵⁴

Tolerance and Civility

Boundaries and brakes to genocide form the core and the framework of the non-genocidal society. Tolerance can sometimes establish harmony. Yet tolerance provides no reason, no brake to genocide, oppression or racism. Tolerance cannot combat these: there is no strong why, no reason to do so. There is no dialogue in tolerance, no vision or strengthening of self. It is a fragile cover.

Do civility and civil society provide the necessary depth for and commitment to prevention of genocide? The meaning of civility today is no more than politeness or courtesy. Yet in a broader and more ancient sense, civility is "behaviour befitting a citizen": to be civil is to be guided by the distinctive virtues of public life.⁵⁵ In particular, as Selznick notes, civility signals the community's commitment to dialogue as the preferred means of social decision.⁵⁶

Michael Walzer writes that ideally, civil society is a *setting of settings*: all are included, none is preferred. It is the option which is least heroic, most mundane, yet ultimately the most fulfilling and productive. He terms it "critical associationalism".⁵⁷

Civility is a framework, a mode of interaction, not a passion. It assumes diversity and conflict, looks for reconciliation, but uses respect, not love. Shils terms it the "collective self-consciousness of a society".⁵⁸

52 Cited in KR Monroe, MC Barton and U Klingemann 'Altruism and the Theory of Rational Action: Rescuers of Jews in Nazi Europe' (1990) 101 *Ethics* 114.

53 Z Bauman *Modernity and Ambivalence* (1991) Polity Press Cambridge, 262.

54 n 53.

55 P Selznick *The Moral Commonwealth: Social Theory and the Promise of Community* (1992) University of California Press Berkeley and Los Angeles, 390-391.

56 n 55, 391.

57 M Walzer 'The Civil Society Argument' in C Mouffe (ed) *Dimensions of Radical Democracy. Pluralism, Citizenship, Community* (1992) Verso London and New York, 105.

58 E Shils 'The Virtue of Civil Society' *Government Opposition*, 35.

Civility implies that we are all in the same moral universe, and that we should act as such. The question is how deep this commitment is. If the esteem and respect shown to others is only superficial and conventional (as Shils remarks it can be⁵⁹), what does this achieve? Civil society may exist on the surface, but take away the cordiality, and what is left?

Can civility then be a brake on genocide? Leo Kuper cites a story of the deportation of the Chechens in Russia. An officer gave an order to shoot the eighty year old chairman of one of the village Soviets (who after assisting in the removal of his fellow villagers, was determined to stay), his daughter-in-law and her child. Blinded and trembling, the soldier to whom the order had been issued said, "The man I will shoot, but not the woman and child." Before the soldier had finished his last word he had been shot by the officer who in the same instant shot the three villagers. The author Nekrich, who told the story in his book *The Punished Peoples*, saw the soldier's actions as saving the honour of the Russian people and he as a symbol of human brotherhood and its inseparable bonds.⁶⁰ Why, when he was ready to kill the old man? As Kuper comments, the attitudes of soldier and officer are poles apart.

In the action of the soldier, there would seem to have been the influence of some ancient chivalry towards women and children, whereas the officer was immediately disposed to engage in a root and branch extermination. The soldier was held back by powerful restraints, inhibiting indiscriminate slaughter and protective of future generations. By contrast, the officer acted in total rejection of ties of common humanity, and in total disregard to the guilt or innocence of his victims.⁶¹

Civility was a brake in this situation. Yet even though the forms of civility are in tune with the anti-genocidal society — the society which is *in community* — something more is needed to flesh out the civil society. In pre-modern times civility could function as a constraint. Yet modernity offers distance, the ethic of efficiency and an absence of central morality as its defence. Civility was no brake in the Holocaust or any other modern genocide. Civility, as with tolerance, lacks the depth, the engagement that is needed to oppose genocide, to generate a community that is anti-genocide. It also lacks a moral sphere, or social space, in which to move.

Discourse Ethics and the Moral Conversation

Ferdinand Tönnies conceived of two 'ideal types' present in all social orders: *Gemeinschaft* (loosely translated as 'community' and representing organic, holistic, traditional, familial and authentic social orders) and *Gesellschaft* (loosely translated as 'association' or 'society' and representing decadent, atomistic and materialistic social orders fractured by self-interest and class conflict.⁶² Tönnies'

59 Shils, 31.

60 Kuper, 190.

61 n 60, 191.

62 F Tönnies *Gemeinschaft and Gesellschaft* (1955) 1st ed 1887 Routledge & Kegan London: "I call all kinds of association in which natural will predominates *Gemeinschaft*, all of those which are formed

theory examines societal life at all levels: how people relate, how they view authority, the place of morality. Neither *Gemeinschaft* nor *Gesellschaft* posits the 'ideal community'. Toennies initially strove for a community embracing both the public and the private spheres. Realizing we are stuck in *Gesellschaft*, he sought to develop pockets of community within society. Toennies' notion of examining community on all levels, not just the political, the notion of a 'spirit of community', is moving towards what I am interested in.

Is the idea of the 'moral conversation' the answer? Benhabib argues that the racist, the sexist or the bigot can challenge the principle of universal moral respect and egalitarian reciprocity within the moral conversation, but if they want to establish that their position is right not simply because it is mighty, they must convince with argument that this is so.⁶³ This brings into question notions of 'right' and 'wrong' argument. We know from the nature of the free speech theorists and from scientific racist argument, that academic argument is not necessarily right. Benhabib answers this in part. She writes that if we do not view such discourses in legalistic terms as articulating the standpoint of right-bearing 'generalized others', and if we understand them as the continuation of *ordinary moral conversations* in which we seek to come to terms with and appreciate the concrete others' point of view, we do not have to submit to the distorting lens of procedural universalism.⁶⁴

If argumentation is the standard and if, as Bauman remarks,⁶⁵ shouting is the only thing one can do to promote one's cause, then how do we differentiate? If each voice is a voice of reason, each recipe (for a meaningful and secure world) is rational, it is always one rationality against the other, and reasoned argument will help little. Each recipe puts up good reasons to be accepted and so at the end of the day only the pitch of voice and the size of chorus offer a guarantee of being in the right. "I shout, therefore I am" is the neotribal version of the *cogito*.⁶⁶ The discourse of reason, as discussed, does not necessarily promote the discourse of ethics: in fact, it more likely precludes it. So how can we incorporate the moral conversation into our society without argumentation? Do we change the concept of rationality, one which is connected to ethics and morality?

Benhabib argues that what is important is not so much what public discourse is about as the way in which this discourse takes place.⁶⁷ Communicative ethics institutionalises an actual dialogue among actual selves who are both 'generalized others', considered as equal moral agents, and 'concrete others', that

and fundamentally conditioned by rational will, *Gesellschaft*": *ibid.*, 17. Note comments by D Gross, Review, 'Weber in Context: The Dilemmas of Modernity', 111.

63 S Benhabib *Situating the Self. Gender, Community and Postmodernism in Contemporary Ethics* (1992) Polity Press Cambridge, 32.

64 n 63, 52.

65 Z Bauman 'Racism, Anti-Racism, and Moral Progress' (1993) 1 *Arena Journal* 19.

66 *Ibid.* Niklas Luhmann asks whether society is that system against which all rationality has to prove itself rational: N Luhmann 'The Concept of Society' (1992) 31 *Thesis Eleven* 79.

67 n 63, 95.

is, individuals with irreducible differences. Individuals enter the dialogue as themselves, not as 'universalized others'. Yet how is the power differentiation between groups and individuals resolved? How do victims gain a voice?

Ultimately, neither the concreteness nor the otherness of the 'concrete other' can be known in the absence of the *voice* of the other.⁶⁸ As Benhabib remarks:

The viewpoint of the concrete other emerges as a distinct one only as a result of self-definition. It is the other who makes us aware both of her concreteness and her otherness. Without engagement, confrontation, dialogue and even a 'struggle for recognition' in the Hegelian sense, we tend to constitute the otherness of the other by projection and fantasy or ignore it in indifference.⁶⁹

Only in this way can we move away from the 'ideal reasonable individual', from Rawls' 'original position' or his 'least disadvantaged individual'. Benhabib argues that moral theory, and particularly a theory of justice for a democratic polity must be concerned with the process of public dialogue through which individuals come to an understanding of the sufferings, miseries and humiliations (and I add, hopes and dreams) of those fellow citizens who are quite unlike themselves.⁷⁰

We need to move beyond the liberal notion of community, to look past the abstract individual. We need to ask: Who are we are 'in community' with? This we can only discover through the notion of 'voice'. Voice, with vision, are key elements of community.

Are 'discourse ethics' or 'communicative ethics' the answer? Juergen Habermas's discourse ethics, notes Fred Dallmayr, is concerned not so much with the formulation of concrete norms or values as rather with the grounding of normativity itself.⁷¹ Communication is the key. Communicative ethics is not a 'bargaining mechanism', nor a "strategic model of negotiated promises among conflicting particular interests".⁷² Importantly, it is also not a question of 'toleration' of the Other, nor of liberal plurality. Communicative ethics anticipates non-violent strategies of conflict resolution as well as encouraging cooperative and associative methods of problem solving.⁷³ Benhabib argues that this is not a utopian vision in the sense of being irrelevant. Rather,

in a world of complete interdependence among peoples and nations, in which the alternatives are between non-violent collaboration and nuclear annihilation, communicative ethics may supply our minds with just the right dose of fantasy such as to think beyond the old oppositions of utopia or realism, containment or conflict.⁷⁴

68 n 63, 168.

69 n 63.

70 n 63, 177.

71 F Dallmayr in S Benhabib and F Dallmayr (eds) *The Communicative Ethics Controversy* (1990) The MIT Press Massachusetts, 2.

72 n 71, 5.

73 n 63, 49.

74 n 63, 49.

Discourse or communicative ethics springs from modern theories of autonomy and the social contract. Instead of asking (as did Kant) what an individual moral agent could or would will, without self-contradiction, to be a universal maxim for all, one should ask (with Apel and Habermas): what norms or institutions would the members of an ideal or real communication community agree to as representing their common interests after engaging in a special kind of argumentation or conversation?⁷⁵

Neither discourse ethics nor the moral conversation provide the whole answer. Both raise questions of the nature of reason, and neither totally 'remoralize' the public space.⁷⁶ Both recognize the principles of dialogue, inclusion and of voice, and that norms must be generated. However, it is unclear how these voices are to be heard, outside of a framework of rights: which gets you heard but not listened to.

The Reflexive Community

My vision is of a community with 'reflexive morality': a community which thinks, in the 'moral sense'. Hannah Arendt raises some pertinent questions, in line with her theory of the "banality of evil".⁷⁷ She asks:

Is our ability to judge, to tell right from wrong, beautiful from ugly, dependent upon our faculty of thought? Do the inability to think and a disastrous failure of what we commonly call conscience coincide? Could the activity of thinking as such, the habit of examining and reflecting upon whatever happens to come to pass, regardless of specific content and quite independent of results, could this activity be of such a nature that it 'conditions' men against evil-doing?⁷⁸

It is a tempting theory, and an exciting thought. If we stimulate people to think, to reflect, to remove themselves from the self-absorbment of the ego, to be 'in community', then yes, surely they cannot help but listen and absorb.

Arendt quotes Socrates: "It isn't that, knowing the answers myself I perplex other people. The truth is rather that I infect them also with the perplexity I feel myself."⁷⁹ The key word is *infect*. To infect (with wonder or anger or thought or action) is, on one important level, to be in community. Once a bond exists — a bond which states that this person or this group or this stranger is a part of my world, I am affected by them and I can affect them, I must deal with them — then we are part way there. Empathy or tolerance are not the aim nor even the method: both of these relationships have the capacity to be paternalistic and are passive. It

⁷⁵ n 71, 24.

⁷⁶ Even though Cohen and Arato remark that the parameters of discourse ethics can exist only in empirical contexts, and that rationality in such contexts can be only a matter of degree, this does not address the inherent problems of reason: if reason controls the discourse, then whose context is the backdrop and how are the voices heard?: JL Cohen and A Arato *Civil Society and Political Theory* (1992) The MIT Press Cambridge Massachusetts, 407.

⁷⁷ H Arendt *Eichmann in Jerusalem: A Report on the Banality of Evil* (1964) Viking Press New York.

⁷⁸ H Arendt 'Thinking and Moral Considerations: A Lecture' (1971) 38 *Social Research* 3, 8.

⁷⁹ n 78, 22.

is rather a sense of operating on the same level to start with; of being *in dialogue* and therefore *in community* with them. Not in dialogue as you, in your own world, are comfortable with, not necessarily on your terms. But in a dialogue that recognizes difference. At this stage you need not even believe that such difference is a good thing, that this difference can even enhance your life or worldview. You must merely accept it, as told to you by the Other, who then ceases to be an Other, but is a part of the community: not your community, not your school or church or club or family: but the broader community which affects you on every level.

If we are in dialogue, if we create our norms through discourse, then we have a far greater chance of regulating our lives than through rules prescribed from 'on high'. Arendt makes this point convincingly. She argues that non-thinking can be dangerous.

By shielding people against the dangers of examination, it teaches them to hold fast to whatever the prescribed rules of conduct may be at a given time in a given society. What people then get used to is not so much the content of the rules, a close examination of which would always lead them into perplexity as the possession of rules under which to subsume particulars.⁸⁰

Essentially, the more people adhere to codes, rather than generated norms and beliefs, the easier it is to swap codes, to reverse values believed to be widely held, indeed as Hitler reversed "thou shalt not kill".

We can learn from Emmanuel Levinas' project, which leads us not to determine a morality, but rather the essence of the ethical relationship in general.⁸¹ Rather than addressing how people's 'moral drives' are neutralized,⁸² we need to examine these moral drives and how they are *activated*. For discourse does not mean silencing, the voices can be discordant. Harmony is not necessarily the goal. As Audre Lorde tells us:

Anger is an appropriate reaction to racist attitudes, as is fury when the actions arising from those attitudes do not change. . . . My response to racism is anger. That anger has eaten clefts into my living only when it remains unspoken, useless to anyone.⁸³

A combination of reflective thought, the moral conversation and discourse ethics moves closer to the notion of being *in community* and of recognition of the Other. Yet can ethics and reason be merged at the societal level? Can this vision be realized at the grass-roots level? Can the boundaries and the generation of the moral conversation be assured if based solely in civil society? The question now is whether law can provide the public forum for development of this notion of community. Can the institution of law, the process of law, in combination with such dialogue and engagement generate the anti-genocide society? Can the institution of law provide a framework for what Zygmunt Bauman terms the

80 n 78, 26.

81 Cited in Drucilla Cornell (1987), 995.

82 Z Bauman (1989), 185.

83 A Lorde *Sister Outsider* (1984) The Crossing Press New York, 129-131.

“remoralization of human space”⁸⁴ Can it provide the central moral sphere that the modern world lacks? Can it recreate morality, force it out of its ‘rational’ mode, where rationality, efficiency and ‘managing better’ equal morality?

Law as a Framework for Generation of an Anti-Genocide Community

*The victim's is an implacable viewpoint. It does not insist on revenge but it does insist on truth. It does not punish, but it does not acquit either.*⁸⁵

Why focus on the community for prevention of genocide? Why not operate at the level of international law, of state power? Firstly, because due to the manner in which the United Nations *Convention on the Prevention and Punishment of the Crime of Genocide* (1948) operates, it is a ‘States game’. Victim groups have no voice. States are the only units which can bring charges of genocide to the international forum.⁸⁶ And, even if redress could be found, it is still *after* the event. Secondly, and primarily, it is generally too late to wait, as some may suggest, until “the Brownshirts start walking down the street” to wait until the genocidal policy is institutionalised. The action then becomes a salvage operation rather than the creation of something powerful and strong that will intervene and protest.

If we ask, can law prevent genocide (not punish, but prevent), what are we asking? I argue that in its functioning on two levels, it is possible for law to interact with the two ‘pillars’ of genocide: state power and citizen indifference.

Law as Telos: Maximum and Minimum Levels of Law

The first level is law as imposition and law as prohibition. That law functions as a block to genocide, that it plays a role in the creation of rights. The law as a block to genocide may be better forged by the instruments of international law, yet law as a block to racist and oppressive behaviour obviously has a place. This first level of law (transcendental, hierarchical, impositional) addresses the issue of

⁸⁴ Z Bauman (1993), 21.

⁸⁵ G Konrad ‘The Viewpoint of the Victim’ (1990) 2 *Cardozo Studies in Law and Literature* 1, 11.

⁸⁶ A major shortcoming of the Convention is its definition of a victim group (being a “national, ethnical, racial or religious group”) which leaves out political, sexual, social and economic groups (although it has since been recommended in the report of the Special Rapporteur Benjamin Whitaker [July 1985] that such groups be included). The absence of political groups particularly has had the unfortunate effect of diverting discussion of genocide prevention. Instead, we are engaged in a debilitating, confusing debate over whether a situation is ‘legally’ genocide. As well, reservations have been included by signatories: for example, the former Soviet Union and the States of the former Soviet Bloc adopted a reservation that they are not bound by Article IX, virtually guaranteeing that they cannot be held internationally accountable for acts of genocide. No charges of genocide have ever been found (the International Commission of Jurists ruled that neither the killings in Equatorial Guinea under Macias, nor Pakistan’s murder of members of the Awami League and the educated elite of Bangladesh were genocide). David Hawk and the Cambodian Documentation Commission spent many years trying to find a government which would bring the charges against Pol Pot and the Khmer Rouge. No government was willing and the charges were therefore never brought to the World Court. No genocide court, as provided for in Article VI of the Convention, has been established in any case. Bosnia and Herzegovina, as a State, has been able to bring a charge of genocide against Serbia and Montenegro (application filed at the International Court of Justice, 8 April 1993).

state power, the 'sovereignty' of state and the conflict with the dignity and life of the person.

The second level is that law provides a framework for development of a society, a community, a civil society in which genocide is not an option. It should create the infrastructure for generation of a society 'in community' and for discourse and debate. A society that interacts with the State, that is an important site of power for creation of values and norms. A society of difference where the Other does not exist in the exclusionary sense, a community which can overcome the bureaucratic distance of modernity. This is a community which generates a life-affirming anti-genocide force. This second level of law (framework for community, interaction with state) can address the issue of citizen indifference. For the formal expression of human rights, equality and anti-discrimination law can do no more than establish the boundaries of the aware anti-genocide society. This second level of law can possibly provide its substantive essence.

The 'minimum' of law (the first level) is generally expected. It is expected that law function as a constraint to uncivil and criminal behaviour, that it preserve order, that it be a rights-provider, that it set policy, that it provide a framework for cooperation, that it maintain the structural status quo and the moral or values status quo. The minimum promises no paradise, but it does promise harmony. It also promises legitimacy.

Yet it is the 'maximum' of law (the second level) which needs to be explored. The maximum promises vision: that law be more than an institution of restraint and order, that it be actively inclusive, that law point the way forward, that it incorporate a specific telos and that it help formulate this telos. This second part to the law is the most visionary. It engages with and interprets society and may point to 'truth'.⁸⁷ Whereas the 'minimum' ensures that society does not regress (ethically and structurally), the 'maximum' helps determine this progress.

It is crucial that the two levels of law interact. Each informs the other and one without the other lacks any ontological base. The second level of vision and semi-autonomy must be open to society. But to what degree? And to what degree is it autonomous? It must contain a prevailing consciousness of society and a vision of society, and this is both the border, or framework of law, and its bridge. Interaction with the voice and voices of society, input and output, is the process of law and of justice. When new values are created by society, this is a signal to law. How are these valuations made, and by whom? If values are interpreted by the internal morality of law, a dynamic which is (semi-) autonomous, by legal reasoning, then how is this reasoning determined? How indeed is the connection between social facts and norms created?

87 J Boyd White argues that law is a branch of rhetoric. Not rhetoric as we now know it, not the deceitful, persuasive abuse of language it has become, but the rhetoric of the polis, of Aristotle: rhetoric as the counterpart of dialectic, of the discovery of truth: J Boyd White 'Thinking About Our Language' (1987) 96 *The Yale Law Journal*.

Law and society operate as two parallel, developing, interacting systems. A vision of society is always present in the law but it is a constant, developing process. Law picks up on, and reinforces, the values of society: the two edge towards each other in a see-saw motion. Law can be violent in its projection of an imagined future upon reality.⁸⁸ It is a process of the form of the law with its own dynamic being given substance by society and substance coming from the form of law. Law as an institution 'shape[s] human interaction'.⁸⁹ Importantly, it is also shaped by human interaction. Law is not an empty vessel waiting to be filled by society but neither is it full. An internal dynamic frames and fuels the deep structure of law. The question then becomes whose or what signals are sent to the institution of law. What substance is given and whose voices are heard?

The law does not only arbitrate, but it collects, absorbs, distils and interprets, it takes us one step beyond what we have. To be legitimate and to be seen as relevant and right, the institution of law needs to codify and embrace society's hopes and aspirations — be in contact and in debate — yet also be aware of the past, of our collective historical consciousness. It is more than a question of adding up all citizen's beliefs, and these equalling 'the law'. It is also about developing a process which converges to a 'common good'. And as Gyorgy Konrad remarks, humankind cannot speak, the individual can.⁹⁰

In formulating our vision, how do we achieve the balance of creation between 'below' and 'above', between the 'sovereign imperative and the expression of the popular spirit'?⁹¹ How is law absorbed by society, how does the law absorb society's ideas and ideals? Law is not an "undistorted reflection of society's collective morality."⁹² What if a community is racist? And is this racism (if dominant) reflected in the law? Violence from above does not eliminate violence from below: it is but a short term solution. Law is an institution, a technique, it is rhetoric, it is an educational tool, it must always be connected with ethics and values, it must have a goal.

The key is the process of interaction between law and society: the signals that are sent and received, the voices that are heard and the vision that is formed.

Law is not the ultimate solution to discrimination and racial prejudice, or to genocide prevention. It is not our only reality. It can, however, be an important framework. A framework that, as Drucilla Cornell argues, must be open to transformation, that should possess an "institutional humility before the call to justice".⁹³ For the danger, as Drucilla Cornell illustrates, is that as a system law

88 RM Cover 'Violence and the Word' (1986) 95 *The Yale Law Journal* 1604-1605.

89 DC North *Institutions, Institutional Change and Economic Performance* (1990) Cambridge University Press Cambridge, 3.

90 Konrad, 19.

91 P Fitzpatrick *The Mythology of Modern Law* (1992) Routledge London, x.

92 Durkheim: S Lukes and A Scull (eds) *Durkheim and the Law* (1983) Martin Robertson & Co Ltd Oxford, 6.

93 Cornell (1990), 1057.

can become its own 'positive' social reality in which the status of its own myths cannot be challenged.⁹⁴

Justice and Dialogue

Law in its true sense cannot exist without justice. Law in its deepest sense entails a commitment to justice. How does one talk of justice? It is such an abstract concept, yet so fundamental to a discussion of genocide prevention. It is not retributive justice, not distributive justice, but the seemingly intangible "real" justice that we are after.

Philip Selznick draws a continuum between law, justice and community. He argues that if community is to flourish, a robust conception of justice is required.⁹⁵ His vision is of "communitarian justice". He writes:

Law pours content into abstract principles of justice; gives them a distinctive configuration; binds them to a special ethos and a special history. This process is marked by an inescapable tension. Every legal order is to some extent a reflex of power and domination, yet every legal order has some commitment to principle of justice. How that tension is resolved is a key to the construction of moral communities.⁹⁶

I argue that inclusion of all voices, especially those of the underprivileged and the excluded is a key to the resolution of the tension that Selznick notes. A moral community exists when there is legally institutionalized dialogue. The articulation and recognition of different voices, however, should not trade one mode of oppression for another. A situation whereby different groups are categorised, boxed and effectively muted is not the aim. We need to move on from a liberal conception of justice where "justice is the attainment of the balance between . . . different spheres and groups."⁹⁷ Justice must be more than distributive.⁹⁸ It must be more than based on the rights of the individual or the collective: it must look towards their recognition.

The quest for justice, says Alan Wolfe, has invariably involved grand stories. The just act, the just person and the just society have been viewed as possessing an otherworldly nature, as if only heroic action on the part of heroic actors could

94 n 93, 1061.

95 Selznick, 428.

96 n 95, 434-435.

97 P Murphy 'Is the Philosophy of Rights Enough?' (1992) 32 *Thesis Eleven* 16. Note the 1982 Canadian Charter of Rights and Freedoms, part of the *Canadian Constitution Act 1982*: Alan Cairns argues that the Constitution, rather than being a living vehicle for the creation of *nomos* firmly based in a citizen's narrative, has become "an arena in which groups — defined by language, ethnicity, culture, race and gender — vie with each other for status and recognition. . . . As the Constitution reaches down selectively into Canadian society it has become a social document of great symbolic value, the supreme instrument of social recognition and its denial": A Cairns 'Citizens (Outsiders) and Governments (Insiders) in Constitution-Making: The Case of Meech Lake' (1988) *Canadian Public Policy* 140, 128.

98 See M Walzer on distributive justice: *Spheres of Justice. A Defense of Pluralism and Equality* (1983) Basic Books New York, 3.

achieve, or even approximate, them.⁹⁹ Yet justice (and injustice) is experienced and obtained where life is lived — in the family, the home, the neighbourhood, the workplace, the places of recreation.¹⁰⁰ It arises out of lived experience, out of the stories and voices of all: particularly the victims. It arises out of them, forms them, and incorporates them into the telos of law and thereby community. Justice arises out of this space, out of the challenge to law, out of the relationship to the other. Yet justice cannot exist without law, without both levels of law, without rights, without order, without telos and without vision. Justice informs law and is the process and dynamics of law. Justice must be the driving force and the encompassing spirit of our forum of law when the law is to be instrumental in prevention of genocide. The process of justice addresses the question¹⁰¹ of the relationship between 'is' and 'ought' in the law. It addresses the central questions and issues of our society.¹⁰²

It is Emmanuel Levinas' messianic conception of justice, demanding the recognition of the call of the Other, which is the key to the notion of being *in community* which I am after. The call of the Other will always remain as a call and can never be fully answered.¹⁰³ It is out of this space between the individual and the Other that justice arises and informs law. It is imperative that we hear the call of the Other. Yet although we can absorb some of the knowledge and being of the Other, it is not necessary that we understand. To try to know the Other, according to Levinas, is itself unethical, because to do so would be to deny her difference and her otherness.¹⁰⁴ Justice, explains Levinas, only has meaning if it retains the spirit of dis-interestedness which animates the idea of responsibility for the other person. Reciprocity is not the issue: we are all responsible for ourselves and our own responsibility.¹⁰⁵ For the anti-genocide community, responsibility for the Other is crucial. This is the justice that must be the backdrop and the impetus for law, for creation of telos, for combining nomos and narrative.

Justice informs and is the backdrop for the process of law. What then is the relationship between 'real people', the law, and justice? Do the three come together to form community? How does the law reflect, build upon or change the dominant attitude towards the Other?

It is a question of signals and framework, as discussed above. If we are to explore the notion of law as a framework for a community which is anti-genocide,

99 A Wolfe 'Algorithmic Justice' in D Cornell, M Rosenfeld and D Gray Carlson (eds) *Deconstruction and the Possibility of Justice* (1992) Routledge New York and London, 361.

100 RJ Wilson 'Human Rights and Empowerment of the Poor' (1991) 1 *Beyond Law* 3, 53.

101 Asked by V Aubert In *Search of Law. Sociological Approaches to Law* (1983) Martin Robertson & Co Ltd Oxford, 5.

102 See RM Unger (1976). Unger argues that the study of the legal system takes us straight to the central problems faced by the society itself.

103 Cited in D Cornell 'The Philosophy of the Limit: Systems Theory and Feminist Legal Reform' in Cornell et al (1992), 87.

104 n 103, 88.

105 E Levinas 'Responsibility for the Other' *Ethics and Infinity. Conversations with Philippe Nemo* (1985) Duquesne University Press Pittsburgh, 98-99.

law as a framework and impetus for a spirit of being *in community*, for development of civility, not merely tolerance and indifference and boxing of people and groups, then *how* 'the law' is informed, within which framework of reasoning, within which boundaries, and by whom or what is vital. Law is viewed as the core of our society: our vision of community is reflected in our vision of law. It is therefore appropriate that law be the framework: but how?

The Anti-Genocide Community: Rights as Boundaries

The framework for the anti-genocide community permeates all levels of law: the level of order, the courtroom, the child welfare agency, structure and justice.

How are the boundaries of this anti-genocide community to be established? Hannah Arendt believed the process of judgment to be a boundary principle for a moral community: when Eichmanns refuse to judge or neglect to judge, they leave the moral community, if ever they were in it.¹⁰⁶ Yet do not the boundaries rise above the particulars of an individual community? Are there not universal notions of justice and morality that can be found that permeate the law? Need truth and community be totally dependent on each other? I believe not. I adopt Ernst Gellner's position that there is external, objective, culture-transcending knowledge; that there is external truth.¹⁰⁷ It is the process of discovery, through Levinas' relationship between peoples, that is so important. There are certain universals that inform my work, that form the basis of genocide prevention.

One of them is that genocide is wrong. Genocide is not a relative moral value, but an objective crime. It is both morally and legally abhorrent. It is not traditional, not relative, and is not "the story of humanity everywhere".¹⁰⁸ It is never excusable and never inevitable. It must always be judged. So too segregation, discrimination and racism, whether institutionalised or ad hoc. The sanctity of the individual is paramount. These are all universal norms, moral absolutes, boundaries to the anti-genocide community. One boundary is that of 'hate speech'. It is how we arrive at the decision that 'hate speech' does not belong in public discourse, and why it is in the discourse of law that is of importance. And in terms of people being *in community*, 'hate speech' as relationship and boundary drawing is crucial. It is akin to Roberto Unger's question and identification of one of the central problems of modern society: how persons with conflicting views of the good and of reality can live at peace with each other and with themselves.¹⁰⁹

106 MW Jackson 'Thinking and Judging' (1987) 7 *Windsor Yearbook of Access to Justice*, 97. Jackson defines judgment as the assertion of values that are no longer underwritten by a transcendent reality: 93.

107 E Gellner *Postmodernism, Reason and Religion* (1992) Routledge London and New York, 75.

108 Dr S Collier 'Questions of genocide, conflict and death' Letter to the Editor *Sydney Morning Herald* 22 November 1993, 12.

109 Unger, 167.

Hate Speech

The issue of racist and sexist speech strikes at the heart of our society. It examines our foundations and our values, it questions our ideal of community and it asks what we mean by 'freedom'. By denying freedom of speech, are we being 'unfree' or are we creating a new kind of freedom?

Language and communication keep us together. They maintain and foster community. It is through shared discourse that community can be achieved. Language can also tear us apart and erect boundaries. We need to look at the harm that discriminatory speech, especially within the public arena, can do. When it is in the public arena, it not only has more chance to influence others and incite hatred and prejudiced attitudes, but it is a clear statement of the boundaries and beliefs of our community. A legal response to racist (and sexist) speech is a statement that victims of racism (and sexism) are valued members of our polity.¹¹⁰

The word is not said in isolation. It is part of a structure of institutionalised racism and sexism. It works in concert with other discriminatory tools to keep victim groups in an inferior position. It affects, and is a part of, the fabric of our society. It is a ritual assertion of supremacy.¹¹¹

Patricia Williams has called the blow of racist messages "spirit murder".¹¹² Spirit murder is not physical murder. It is, however, a tool of ostracism and isolation. It is able to remove an individual and a group from a society. It contributes to dehumanization. Matsuda writes of the pain of the victim.

However irrational racist speech may be, it hits right at the emotional place where we feel the most pain. The aloneness comes not only from the hate message itself, but also from the government response of tolerance. When hundreds of police officers are called out to protect racist marchers, when the courts refuse redress for racial insult, and when racist attacks are officially dismissed as pranks, the victim becomes a stateless person. Target-group members can either identify with a community that promotes racist speech, or they can admit that the community does not include them.¹¹³

Racial vilification legislation is not control of ideas. It is not a return to book burning. Racial supremacy is one of the ideas we have collectively and internationally considered and rejected.¹¹⁴ This is attested to by a number of international treaties and covenants.

We need to challenge the illusion of a 'free market place of ideas'. The forum is not an equal one. Oppressed groups are generally not on the same footing as

110 MJ Matsuda 'Public Response to Racist Speech: Considering the Victim's Story' (1989a) 87 *Michigan Law Review*, 2322.

111 R Delgado and J Stefancic 'Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?' (1992) 77 *Cornell Law Review*, 1288.

112 P Williams 'Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism' (1987) 42 *University of Miami Law Review*.

113 Matsuda (1989a), 2338.

114 n 110, 2360.

those who vilify them: not as groups and not as individuals. And without the law, they are rarely in a position to fight back, to make their views heard. How do 'outsiders' speak in the dominant narrative?¹¹⁵ We are not talking of a true exchange of ideas: this is not a 'fair fight', but a situation in which a huge imbalance of power exists. To suggest then that these issues can be fought out in the public arena as it presently exists is to deny the reality of our fragmented and unequal society. Rather, there is a possibility that the existence of such legislation can provide a forum for such debate. And that it can send a strong boundary-forming signal to society. Laws can be proactive without diminishing freedom.¹¹⁶ Freedom of speech is not an absolute.

An objection to racism, discrimination and oppression frame the boundaries of our anti-genocide community. The framework to this however is the language of formal equality and a rights discourse. It is the law as 'minimum' but is informed, as discussed above, by some strong values and universal maxims developed by the telos of law or 'maximum of' law.

The structure of impersonal rules and rights can not only provide a background guarantee: it can also furnish a basis on which people can act to initiate *new* relations with other people even from a position of alienation from the affective bonds of existing attachments and community.¹¹⁷ And this is where I see the place of rights: as a framework, a boundary and a beginning. A beginning for the creation of the anti-genocide community, for the creation of the spark of civil society that can fill this framework.

What I am after goes beyond the human rights discourse of 'adding up rights'. Genocide prevention is not a matter of arithmetic. For all their false promise, the rules of formal equality play a very definite role. It is arrogance to assume we can do without them: to victim groups they are a vital guarantee. The record of genocide and oppression does not indicate that we have somehow 'gone beyond' rights. Apart from the legal and economic protection rights provide, they send a very real message to society in language that is understood. Rights provide a starting point, a focus for change and discourse, a tool to raise consciousness and expectations. Rights are a 'barrier' before the edge, before the abyss of second-class citizenship. They are a normative requirement for participation in

115 Delgado and Stefancic, 1287.

116 B Brown in A Borovoy, K Mahoney et al (colloquium) 'Language as Violence v Freedom of Expression: Canadian and American Perspectives on Group Defamation' (1988/89) 37 *Buffalo Law Review* 2, 373.

117 J Waldron 'When Justice Replaces Affection: The Need for Rights' 11 *Harvard Journal of Law and Public Policy* 3, 631. Bearing in mind that the discourse of rights can be dangerous: it can suggest a reality that does not exist, it can send a deceptive message and be a false signal that the 'problem' (of equality, inclusion and results) has been 'solved'. The myth can also be internalised by the victims, who can feel personally responsible for their situation: that only if they try harder will they be accepted, if they act otherwise they won't be hurt.

discourse.¹¹⁸ And formal 'rule equality' as Martha Fineman terms it, can lead on to substantive 'result equality'.¹¹⁹

Law must guarantee these rights. In order to do so, those whom rights most protect and empower must have a voice. And those most empowered must listen, must heed the voices. For it is 'voice' which must inform the lines of communication between society and the law if justice (inclusion and action) is to be achieved. Not just the acts of people within society, but the 'why'.

Victims' Voices

The story of genocide is the story of muting the voice of the victims. This is particularly so in the case of genocide denial. The Turkish Government still denies their genocide of the Armenians (although now admitting a number of deaths). When charged¹²⁰ with the crime of genocide against the Guayaki (Ache) Indians, the Government of Paraguay replied that there was no intention to destroy the Guayaki: "Although there are victims and victimizer, there is not the third element necessary to establish the crime of genocide — that is 'intent'. Therefore, as there is no 'intent', one cannot speak of 'genocide'".¹²¹ Similarly, in relation to charges of genocide against the Indians in the Amazon river region of Brazil, the Permanent Representative of Brazil replied, in part, that "the crimes in question were committed for exclusively economic reasons, having acted solely to take possession of the land of their victims". Genocide was said not to have occurred because there was no "special malice or motivation" to "eliminate the Indians as an ethnic or cultural group".¹²² This type of analysis removes the victim from the equation of genocide. It also denies a broad notion of intent, including negligence or recklessness.

Our traditional legal institutions do not hear the voices of the oppressed 'Outsider' stories are rarely accepted. Yet it is these same legal institutions that we nominate as their protectors. Law in its interaction with society is shaped by the dominant discourse of society: victim groups have no 'in' to the law's vision of and for society. If law is instrumental, or central, to our definition of community, then it is vital that the law has access to and engages with the community.

Law and Narrative

James Boyd White argues that the law should take as its most central question what kind of community we should be, with what values, motives, and aims.¹²³

118 See Cohen and Arato (1992), 397.

119 M Fineman 'Implementing equality: ideology, contradiction and social change: A study of legal rhetoric and results in the regulation of the consequences of divorce' (1983) *Wisconsin Law Review*.

120 In March 1974 the International League for the Rights of Man joined with the Inter-American Association for Democracy and Freedom in a protest to the United Nations Secretary General.

121 The Defence Minister of Paraguay, cited in Leo Kuper (1981), 33-34.

122 1969: cited in Kuper, 34.

123 J Boyd White (1985), 698.

Yet how can it do so when so many in our community are not heard and when their voices are drowned out or misinterpreted? As Arthur Leff asks, "Who among us . . . ought to be able to declare 'law' that ought to be obeyed?"¹²⁴

An 'offer of inclusion' from those in the dominant position is not enough. Zygmunt Bauman demonstrates the falsity of this liberal promise of equality and inclusion. He comments that the meaning of the liberal offer is the affirmation of the superiority of that site in society from which the offer has been made.¹²⁵ Yet, as he writes, ethnic-religious-cultural strangers do vest their hopes of emancipation with the liberal vision of the benefits which come with self-improvement and self-transformation.

All too often, they go out of their way to suppress everything that makes them distinct from the 'best people' and hope a devoted emulation of the superior ways will render them indistinguishable from the hosts. The harder they try, however, the more the finishing line seems to be receding. When finally it seems to be within their grasp, a dagger of racism appears from beneath the liberal cloak. The rule of the game are changed; or, rather, only now the earnestly 'self-refining' strangers discover that what they mistook for a game of emancipation was in fact the game of domination.¹²⁶

The 'invitation to join' may not be enough or even be in the right direction, but it may, not denying the inherent hierarchy, racism and sexism in our legal system, be a first step. For perhaps indeed once the voices are 'in' they can transform the structure and the reality. Once a dialogue of voices and stories are the norm, the language of 'us' and the invisible 'them' will be redundant. By refusing to listen to the call of Other, we neglect to question ourselves and neglect to truly live.¹²⁷

It is not enough to talk abstractly and theoretically of injustice and discrimination. Racism hurts, words wound. Pain needs to be on the legal agenda. Abstraction can be worse than useless. High talk about language, meaning, sign, process, and law can mask racist and sexist ugliness if we never stop to ask, as Mari Matsuda urges: "Exactly what are you talking about and what is the implication of what you are saying for my sister who is carrying buckets of water up five flights of stairs in a welfare hotel? What do you propose to do for her *today*, not in some abstract future you are creating in your mind?"¹²⁸ It is difficult. Yet vision too needs to be on the agenda. Law as vision, law as structure and order, and the reality of people's lives must work together. It is a slow process. The title of Wendy Pollack's article: 'Sexual Harassment: Women's Experience vs Legal Definitions'¹²⁹ points out the gulf that exists.

124 A Leff 'Unspeakable Ethics, Unnatural Law' cited in M Matsuda 'Looking to the Bottom: Critical Legal Studies and Reparations' (1987) 22 *Harvard Civil Rights Civil Liberties Law Review*, 324.

125 Z Bauman 'Strangers: The Social Construction of Universality and Particularity' (1988-89) 78 *Telos*, 15, 126 n 125.

127 JM O'Fallon and CC Ryan 'Finding a Voice, Giving an Ear: Reflections of Masters/Slaves, Men/Women' (1990) 24 *Georgia Law Review*, 888-889.

128 MJ Matsuda 'When the First Quail Calls: Multiple Consciousness as Jurisprudential Method' (1989b) 11 *Women's Rights Reporter* 9.

129 (1990) 13 *Harvard's Women's Law Journal* 35.

How do we combat the abstract, neutral, objective *face* of law and our legal system? How do we infuse it with meaning, join the *nomos* to the narrative? How do we combat the myth of the 'reasonable man'? How do we make the legal forum inclusive rather than exclusive and elitist? How does law become just?

We do this through stories: stories of the woman who was raped, the gay couple denied accommodation, the child who was victim of a racial slur, the girl sexually harassed. These are not just stories *about*, but stories from *within*. These are narratives that need to be told by those who experienced them, lived through them or who are living and experiencing and suffering now. They can be stories of joy too. Stories that say "this is who I am, this is what I like, this is how I want to live my life". The important thing is that they are known and valued and seen as part of it all. That they enable us too to engage, to affirm the Other, to be 'in community'.

Stories reinforce identity. They recapture the lived experiences of real people marginalized and made invisible by abstraction and the principles of neutrality. Powerful stories can force legislators to listen. Listen truly and eagerly, with new eyes and ears; accept a new vision and a new way. Stories refocus on the 'site of oppression'¹³⁰ and sharpen our definition of justice. They move us away from the falsity of 'point-of-viewlessness'¹³¹ which concentrates on what *really* happened as opposed to what those involved *thought* happened, as if the first is somehow objective and true.

Richard Delgado contends that there is a war between stories. I disagree. A war implies equality: rough equality of weaponry, of power and of standing. This is not the case between insider and outsider groups. It is certainly no the case in the genocide. This is not a "level playing field" where the best story wins. If we talk in terms of war we are dealing with a war *against* the story of the victim and the outsider. Repression is a more appropriate word. Repression which need not exist if dialogue is entered into, if certain groups are not looked at as 'outsiders' but as one of the community. If we start with the premise that all must be listened to, then theory and precepts can be formulated, and not the other way round.

Minnie Bruce Pratt describes her early involvement in the women's movement after having lost her children in a custody fight for being a lesbian and her reluctance to look for or recognize struggle and difference within the movement itself.

I didn't understand what a limited, narrow space, and how short lasting, it would be, if only *my* imagination and knowledge and abilities were to go into the making and extending of it. I didn't understand how much I was still inside the restrictions of my culture, in my vision of how the world could be. I, and the other women I worked with,

130 A Brittan and M Maynard write that the terms of oppression are not only dictated by history, culture and the sexual and social division of labour but also profoundly shaped at the site of oppression: A Brittan and M Maynard *Sexism, Racism and Oppression* (1984) Basil Blackwell Oxford, 34.

131 The term is Catherine MacKinnon's, cited in K Lane Scheppelle 'Foreword: Telling Stories' (1989) 87 *Michigan Law Review* 7, 2089.

limited the effectiveness of our struggle for that place by our own racism and anti-Semitism.¹³²

The discussion of voice is indicative of a larger issue. The issue is how one views society and the individual's and collective's role within that society. Of who constitutes that society, who forms it, whose vision it possesses. Is the individual or the group object or participant?

Treatment of an individual or group by the law demonstrates, certainly to that individual or group, how the law views them and where they are located in the community, if at all. In the context of failure to protect and 'compensate' victims of racist speech, Mari Matsuda comments that a legal response to racist speech is a statement that victims of racism are valued members of our polity.¹³³

It is important that we redraw the lines of our community. Yet we do not want a community that stagnates, that is enclosed and that is not driven. We need a community that agitates and still dreams. The human must not be reduced to the material and the measurable, as though a good or just society were a function of the rate of individual consumption, not a set of shared relations, attitudes, and meanings.¹³⁴ We do not want Marcuse's one dimensional man, Adorno's subjectless subject, Heidegger's they-man or Weber's specialist and man of order:¹³⁵ all products of the developmental logic of modernity, non-thinkers and non-participants. We need to move away from this exclusive bureaucratic ends-means rationalization of life, where our questions are 'What do we want?' and 'How do we get it?'. The overriding metaphor is that of the machine; the overriding value is that of efficiency, conceived of as the attainment of certain ends with the smallest possible costs.¹³⁶ The approach that needs to be taken is two-fold: what will help society deal with its racism, its sexism, its discriminatory nature, and what will ensure that society becomes dynamic and true?

Stories make the world make sense. They deepen its dimensions and throw it into sharp relief, from its most warm and glorious to its most crawling and horrible. If we edit the stories that we hear, gloss over them, touch them up, imbue them with the neutral and the objective, shape them in our own image, then they are lost and so are we. To appropriate others' narratives is to destroy. These narratives, and the people behind them, then mean nothing and we are left with a world with no true basis, meaning or direction. It is a hollow world, and a false one. We tolerate it at our peril.

An abundance of stories and of voices help along the path to justice. On an important level, this is justice. The dynamism and freedom of voice are a force

132 M Bruce Pratt 'Identity: Skin Blood Heart' in E Bulkin, M Bruce Pratt and B Smith *Yours in Struggle: Three Feminist Perspectives on Anti-Semitism and Racism* (1988) Firebrand Books New York, 30.

133 Matsuda (1989a), 2322.

134 J Boyd White (1985), 698.

135 Cited in A Milchman and A Rosenberg 'Hannah Arendt and the Etiology of the Desk Killer: The Holocaust as Portent' (1993) 16 *History of European Ideas* 224.

136 J Boyd White (1985), 686.

against what Robert Cover sees as the violence of legal interpretation.¹³⁷ The stories of those who have experienced racism and any form of discrimination are of special value in defeating racism. They defeat the myth and define the problem. And they help us to engage.

Storytelling does a great deal for outsider communities: It is a tool in community building, it is instrumental in self-preservation, dignity and pride and it validates shared and often undiscussed experiences. It could do a great deal for the insider community, for us *all* as an *integrated whole*.

What is the law attempting to achieve? Remedies for objective, neutral people as they *should* exist in society as it is perceived by one group of people, or remedies for the actual, real, flesh and blood people as they *do* exist? The institution of law cannot keep denying difference, denying reality. To do so de-legitimizes it. Is there a 'correct' way to behave when being raped? How is one 'supposed' to feel when being the butt of racist speech, or the object of sexual harassment? Our emotions and affect, argues Toni Massaro, should be as much a part of normal legal discourse as the 'objective' legal rules.¹³⁸ Why not be angry, why not show pain, why not be silent?

Yes, we do all inhabit different worlds. They are not often worlds that can be easily understood or perceived. Yet this does not make them any less legitimate or any less part of a communal narrative. For there is no 'right' world or perception. There are certain moral precepts that we hold to be true and universal: such as racism and sexism are wrong. It is in order to fully bring morality and modernity together, in the form of community, that voices need to be heard and other worlds explored. As N Goodman states, "If I ask about the world, you can offer to tell me how it is under one or more frames of reference; but if I insist that you tell me how it is apart from all frames, what can you say?"¹³⁹

Stories are the oldest, most primordial meeting ground in human experience. Their allure will often provide the most effective means of overcoming otherness, of forming a new collectivity based on the shared story.¹⁴⁰ Stories can be the basis for a community based on morality and 'togetherness' rather than 'otherness'. It is not 'sameness' that is being sought. Difference is vital. What is required is an appreciation of this difference, an attitude of civility and not mere tolerance. It is an attempt to move away from being totally enmeshed in 'one's own', the 'cult of origins' that Julia Kristeva terms a hate reaction, a defensive

137 Cover argues that legal interpretative acts signal and occasion the imposition of violence upon others. That legal interpretation takes place in a field of pain and death. For pre-understanding imposes the listener's narrative meaning onto the story, thereby displacing the narrative meaning of the storyteller: R Cover 'Violence and the Word' (1986) 95 *The Yale Law Journal* 1601.

138 T Massaro, 2104.

139 N Goodman 'Ways of Worldmaking' (1978) cited in JO Cole 'Thoughts from the Land Of And' (1988) 39 *Mercer Law Review*, 917.

140 R Delgado 'Storytelling for Oppositionists and Others: A Plea for Narrative' (1989) 87 *Michigan law Review* 2438.

hatred which so easily backslides to a persecuting hatred.¹⁴¹ Stories have a chance of overcoming this. And stories can meet in the forum of law.

Stories can introduce an ethic of care into our legal discourse, an ethic lost in the bureaucratic machine of modernity. They can help recreate community through dialogue. Because stories, when told to convince and to create reality, are a common bond. As Kathryn Abrams comments,¹⁴² stories are made believable by the subtle invocation of something common and recurring.

In the end, we cannot afford to ignore narratives and voices of the 'Other'. We cannot afford to avoid the 'site of oppression'. For to do so is to silence ourselves, and to forego justice.

Conclusion

It is important to heed the words of the Hungarian Jewish author Gyorgy Konrad.

I want a civil society which restricts the state, in which the citizen is led in his act by his own conscience and not by his superior. A human environment in which I cannot be ostracized, trampled under foot, and killed. I find the extent to which civilians make independent judgments insufficient.¹⁴³

Mari Matsuda talks of "multiple consciousness". This is "not a random ability to see all points of view, but a deliberate choice to see the world from the standpoint of the oppressed". That world, she argues, is accessible to all of us. Holding onto a multiple consciousness will allow us to operate both within the abstractions of standard jurisprudential discourse *and* within the details of our own special knowledge.¹⁴⁴ This is what a framework of law, based on rights and voice, can achieve. Truth and justice are not totally informed by voice (we are aware of certain universals and knowledge beyond the boundaries of a particular society). Yet truth and justice cannot exist without voice. The truth we reach out for cannot, as Gianni Vattimo comments, be reduced to the simple recognition and reinforcement of 'common sense'. It must, however, be experienced, not as an object which can be appropriated and transmitted, but as a horizon and a background upon which we may move with care.¹⁴⁵

In its interaction with society and through its awareness of different voices, the law can foster a recognition of what Richard Weisberg terms a "central

141 J Kristeva (1993), 3.

142 K Abrams 'Hearing the Call of Stories' (1991) 79 *California Law Review* 1003 cited in Marc A. Fajer 'Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men' (1992) 46 *University of Miami Law Review* 521-522.

143 Konrad, 12.

144 M Matsuda 'When the First Quail Calls: Multiple Consciousness as Jurisprudential Method' (1989b) 11 *Women's Rights Law Reporter* 9.

145 G Vattimo *The End of Modernity. Nihilism and Hermeneutics in Post-modern Culture* (1988) Polity Press Cambridge and Oxford, 12-13.

reality".¹⁴⁶ It can be the background for truth. It is possible for law to provide a framework, on both the visionary and technical level (the maximum and the minimum), for a community where such reality of oppression and exclusion is not avoided (unlike during the Holocaust). It is possible for law to stimulate development of a civil society which can be mobilized against final exclusion of a group. It is possible for law to be an instrument of prevention rather than perpetration. It is possible for law to institutionalise a check, a brake to genocide. Within a framework of rights and universals, using the interpretative powers of law and its discourse, with clear signals from the potential victim groups, providing a forum for a responsibility to and engagement with the Other, a recognition of the voice of the Other. . . In such a society, and with such a conception of law, genocide may not be an option. It is possible for law to provide and foster such an anti-genocide community, to provide the anchor and the impetus that is necessary for the moral conversation. Law, possessing legitimation that other forums lack, may achieve this. It is possible that through voice informing law, ethics and reason may work together so that a moral forum may exist, a concept of the good other than the technical. Many questions still need to be addressed and asked. Yet groups subject to extermination have a right to receive something more helpful than tears and condolences from the rest of the world.¹⁴⁷ Through a reinvigoration of our forums of law we may be able to provide this something.

146 R Weisberg 'Avoiding Central Realities: Narrative Terror and the Failure of French Culture Under the Occupation' (1983) 5 *Human Rights Quarterly* 2, 151-170.

147 B Whitaker *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide* United Nations Economic and Security Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, thirty-eighth session, item 4 of the provisional agenda, 1986 (E/CN.4/Sub.2/1985/6), 6.