Law and Political Discourse*

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This essay has three purposes and three corresponding parts. The first is to sketch some essential relationships between law and political discourse that in particular affect the life chances of individuals. The second purpose is to survey the structure of current political discourse in order to indicate its likely influence upon contemporary law and individual lives. This discussion reveals a political discourse that is becoming monolithic, conservative, and normalizing in ways that tend to exclude from effective consideration the experiences, interests, and values of individuals who differ from the "standard self" that this discourse presumes. The consequence of this trend is to make it increasingly difficult to argue for the pluralistic values of human liberties, equality, and social justice that a strong and healthy democracy presumes. The third purpose of the essay is to describe and argue for a type of public policy analysis that might open up contemporary political discourse to a greater plurality of values and interests, thereby nudging, as it were, our political discourse and law in more democratic directions.

This essay presupposes a complex audience, or rather a set of special, related audiences. Legislators, judges, and other public officials who participate in making decisions that affect the life chances of individuals should be interested in the theoretical questions taken up by this essay. Others who wish to influence public decisions, including those of us who write on law and public policy issues, should also be interested. In general this essay aims to contribute to a frequently overlooked aspect of law and public policy: the question of treating and advocating pluralistic values when the political and legal environment and their attendant discourses are becoming markedly hostile to these values.

Relationships

Law mediates between social systems and the life chances of individuals. Thus, capitalism as we know it is defined in major part by property law, contract law, corporations law, tax law, and constitutional powers or rights. The life chances of employees, managers, owners, consumers, and other persons affected by the enterprises of capitalism may often be affected by the presence or absence of legal rights that mediate between their lives and the capitalist system. For example, interpretations, applications, and modifications of the legal concept of "employment at will" can expand or diminish the powers and opportunities of managers, owners, and employees in significant ways. Similarly, systems of public education are constituted by laws that empower, regulate, and tax individuals and organizations who support, operate, or attend the public schools of the state. Laws which affect this social

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system can have a major impact upon the life chances of school children, religious ways of life, or small business and homeowners who are subject to increased or unequal property taxes. As a third example, the criminal justice system is grounded in law that defines criminal conduct, criminal legal procedures, and the authority and resources of the police, public prosecutors, and public defenders to investigate, prosecute, and defend against allegations of criminal conduct. Laws that make adjustments to this system can potentially have major effects on the life chances of persons who are charged with crimes, convicted of crimes, or victimized by criminal behavior.

Other institutions also mediate between social systems and the life chances of individuals. Institutions such as business corporations, churches, private schools, charities, public agencies, and families are powerful entities that mediate between individuals and our social systems of work, family, education, and pleasure. However, the law is often capable of questioning these “private” mediations and establishing regulations over these other regulatory and mediatory relationships, and thereby affecting life chances in a less direct way than the previous examples. What is important for our purposes is to note that, whenever law mediates between social systems and individuals’ life chances, there are complex opportunities for the contemporary discourse of politics to intervene and influence this mediation. It is this relationship between contemporary political discourse and legal decisions which affect life chances that should be at or near the center of any democratic theory of law and public policy analysis.

Political discourse can influence legislation in many ways: through TV news, radio talk shows, newspaper editorials, and other forms of “infotainment”; by formal and informal discussions or communications between lobbyists, private citizens, and legislators; and through the speeches and other less formal conversations among politicians that enable them to obtain reelection, provide “symbolic assurances” to their publics, and organize the coalitions or make the deals that are necessary to produce legislation. To be sure, the interests of constituents and the political values of individual legislators themselves are other important factors in legislation. These factors may appear independent of political discourse — although, in fact, they often or even typically are shaped by political discourse in subtle ways. Nonetheless, the webs of political discourse outlined here appear to be an important determinant of legislation — especially legislation that concerns the vital life chances of individuals such as death penalty laws, criminal sentencing, family law, the law of sexual abuse, privacy rights statutes, the regulation of discrimination in employment or housing, and the construction of state budgets and regulations for public education, health care delivery, or welfare programs.

Less obviously, but importantly, political discourse plays a significant, if usually indirect role in “hard cases” of judicial and administrative decisions, particularly when these decisions implicate the life chances of individuals. This influence is likely to pertain even if one believes that judges and administrators should and can justify their decisions exclusively by “legal standards” as opposed to “political values.” First, hard cases involve complex interpretations and difficult judgments among competing legal and factual arguments in which there are no obvious or noncontroversial “right answers.” In these situations, one’s political values and the state of our political discourse will inevitably, and indeed appropriately, be relied on in one sense or another to help decisionmakers choose “the better answers” from among competing arguments. Second, judges and key administrators are selected for their offices by an openly political — one might say democratic — process, and we often expect these officials to rely on their understandings of contemporary political values to make their decisions in at least certain kinds of hard cases.

Let us consider some examples of how contemporary political discourse has arguably played an important role in judicial or administrative decisions that mediate between social systems or institutions and the life chances of individuals. In 1954, the Supreme Court’s decision in Brown v. Board of Education declaring segregated public schools unconstitutional was arguably influenced silently, but significantly, by the imperatives of the Cold War’s political discourse that depicted the United States as a citadel of freedom, human rights, and racial justice by comparison to unfree Soviet societies. How could Supreme Court Justices be blind to such discourse in deciding whether the plaintiffs’ arguments from the abstract language of the Equal Protection Clause outweighed in the balance the States’ arguments about half a century of reliance on precedents which had held that “separate but equal” segregated public facilities were constitutional? In 1973, the Supreme Court’s decision in Roe v. Wade surely was subject to similar implicit or tacit influences from the discourse of the second women’s rights movement in America that sought women’s access to abortion procedures as part of its program to obtain greater freedom and equality for American women. More recently, the various controversial political battles about constitutional interpretation, privacy rights, and sexual harassment that have erupted over and around the nominations of Robert Bork and Clarence Thomas to the Supreme Court appear to have influenced President Clinton’s subsequent desires to nominate two “centrist” rather than “liberal” judges to the Supreme Court. Closer to home, one can detect political discourse influencing the law’s mediation between social systems and individuals’ life chances in District Judge Terry Bullock’s decision in 1991 that the Kansas Constitution imposes a duty upon the State to provide equal opportunity public school financing for all children. Judge Bullock based his decision in part, quite appropriately, upon an historical record of political discourse in Kansas that had emphasized the “first impor-
tance" of education in connection with the adoption of certain general educational provisions in the Kansas Constitution.\textsuperscript{10}

Relationships between political discourse and the law can run in the opposite direction too, from law to political discourse, at least in those few significant judicial or administrative decisions that draw substantial political attention. Again, Brown and Roe are good examples. The Supreme Court’s decision in Brown affected the extent and nature of subsequent political discourse about civil rights in this country, as evidenced in particular by passage of the Civil Rights Act of 1964.\textsuperscript{11} Similarly, the Court’s decision in Roe has focused and influenced our political discourse on questions about abortion rights, constitutional privacy, and more general feminist claims for equality.\textsuperscript{12} Participation in politically significant judicial and administrative decisions is, thus, a means of affecting contemporary political discourse, though the relative infrequency of these kinds of decisions suggests that this method is probably not a very practical way to influence or change our overall political discourse.

We should also note a third relationship between law and political discourse: political discourse itself contains and often relies upon some very general concepts about the law. These concepts include notions that law is universal, treats all persons equally, is capable of solving social problems, and is part of an inherent “progress” in American society. The law is also thought to maintain some kind of transcendental order while promoting justice almost automatically, as it were, simply as a matter of following its specified procedures.\textsuperscript{13} While this discourse contains substantial mythic qualities (When law is applied to factual situations, is it particularism as likely as universalism? Is not law most famously at work in cases of disorder rather than order? Why should we assume that “procedural justice” inevitably produces “substantive justice”?),\textsuperscript{14} the salient point for our discussion is that these general ideas about law tend to support the present currents in American political discourse. For example, the idea that law maintains a transcendental order (without any reference to criminal justice resources, social conditions, or the state of disorder that prevails) supports the current widely popular notion that criminal punishments alone may be used to solve “the crime problem.” Similarly, the notions that law is universal and that law treats all persons equally are used to limit affirmative action programs and the developing law of sexual abuse in order to avoid the spectre of “special treatment” for racial minorities and women. Thus, although general ideas about law have been around a long time in political discourse, they provide a cohesive and apparent justification for many applications of the newly dominant principles in this discourse.

Political Discourse Today

Contemporary political discourse, as revealed in recent political campaigns, radio and TV talk shows, and political discussions in newspapers and popular journals, is developing a relatively monolithic, conservative structure that may be said to consist of four basic principles and an underlying conception of the self or standard individual who is governed by public policies. The four principles are: a strong commitment to individual responsibility that tends to ignore social conditions or social constraints; a policy imperative or “system imperative” that economic growth must trump any government policy which conceivably might limit growth; a “disciplinary imperative” to control workers, students, welfare recipients, or family members who deviate from the moral conventions that have defined these roles historically or traditionally; and a principle of suspicion or distrust of any government action that represents or reflects the liberal welfare state.\textsuperscript{15} These principles or imperatives, in their overlapping ways, are informing political ideologies and choices on all sides of the political spectrum, from left to right. Moreover, in their aggregate effects, they are constructing a conception of a “standard self” or “standard individual” as the imaginary subject of government policies who is mainly white, middle class, and male: a conception that forecloses effective political consideration of other conceptions of the self and of the democratic, pluralistic interests and values that accompany these other conceptions.\textsuperscript{16}

Each of these four principles has an appropriate place in any healthy democratic discourse, to be sure, and each one is embedded in our American political tradition. Individuals are responsible for their actions, and indeed we could not imagine relationships among humans if this were not so. Policies that promote economic growth can be invaluable as means to obtain cherished
human ends; and democracy’s principles of robust citizenship and majority rule contemplate measures of both self- and social discipline. A continuing skepticism about the values of the liberal welfare state helps maintain both the accountability of the state and our democratic traditions of self-reliance and human liberties. The point of this discussion, however, is that these principles at present constitute a new or transformed structure of political discourse that is obscuring or excluding from attention other invariable principles of human liberties — equality among different kinds of people, accurate social observations, and social justice — principles which a healthy democratic community also requires.

The strong principle of individual responsibility states or implies that individual persons are fully responsible for their life chances, that individuals are fully responsible for wrongful acts that occur in society, and accordingly, that social systems are absolved of all blame and scrutiny as possible causes of harms to individuals or as limitations upon an individual’s life chances. The new dominance of this principle is evident in contemporary political discourse about crime, welfare, the family, race discrimination, and employment. This dominance has a number of important policy consequences. Under this principle, individuals should be punished harshly for their wrongful acts — to make them understand their moral responsibility for their wrongdoing — and this punishment should occur even if it fails to deter criminal behavior, to compensate the victims of crimes, or helps to construct more hardened criminals and causes additional crime. Thus, with virtually no or little consideration of social schemes to mitigate or limit criminal behavior, poverty, or unemployment, there is widespread political support today for expanding the death penalty, for applying “three strikes and you’re out” criminal punishment policies, and for denying extra payments for children born to women receiving welfare assistance. Under this principle, neither society nor the state need be concerned about assisting the life chances of disadvantaged individuals. Whether persons are low-income welfare recipients, unmarried teenage mothers and their children, divorced mothers and children living in poverty, or the unemployed residents of inner cities whose economies have been devastated by the shift of the “post-industrial economy” away from manufacturing jobs, it is individuals rather than social systems who are perceived as agents exclusively responsible for these disadvantaged situations.

The strong principle of individual responsibility is dominant also in the unwillingness of courts and legislatures to contemplate the possibility that systemic racial attitudes, which are not susceptible to proof as wrongful acts by individuals, could nonetheless bias the fairness of criminal trials against black defendants, or particularly against black defendants who have harmed white victims.

The second principle that dominates contemporary political discourse is the system imperative of economic growth. As William Connolly explains, in analyzing the anti-domestic spending, de-regulation policies of the Reagan Administration in the 1980s, “[g]rowth, previously seen as the means to realization of the good life, has become a system imperative to which elements of the good life . . . are sacrificed.” In other words, the virtual inability of all politicians today to even think about, let alone conceive the wisdom of, any new taxes or new government regulations to promote the public good (as evidenced by the overwhelming distaste for both taxes and regulations in the current political debates about national health insurance) can be explained less as a conscious policy choice and more as an imperative of the current political system that has become thoroughly wedded to or integrated with the private economic interests of corporate organizations, their managers, and their owners. To be sure, American political discourse, on the right, left, or center, traditionally has given a “primacy to economic growth”; but now, with the economic growth of the mid-twentieth century having disappeared over the past twenty years, the concept of promoting economic growth as an end in itself has become a rigid mantra in political discourse that automatically defeats any government policy that might conceivably limit savings by the wealthy or the economic freedom of capitalist enterprises.

The “disciplinary imperative” of contemporary political discourse complements the previous two principles by justifying state action that would discipline or help others discipline individuals who deviate from the growth-oriented norms of individual responsibility. This imperative specifies the adoption of government norms or regulations that would promote or produce more docile, more obedient persons who are attuned to promoting both economic growth and traditional moral conventions. Such government policies include, for example, reducing collective bargaining rights, limiting unemployment insurance, or maintaining a large, low-paid workforce of illegal aliens in order to ensure a more docile and more motivated workforce; promoting prayer in schools or expanding vocational training to obtain more compliant students, more compliant workers, and to reduce inner-city crime; repealing “welfare as we know it” or imposing welfare payment sanctions for childbirth, poor school attendance by children, or the failure to keep medical appointments in order to promote “more productive” welfare recipients; and promoting two-parent, heterosexual families by re-imposing obstacles to divorce like fault criteria or waiting periods. In effect, the disciplinary imperative in contemporary political discourse would convert democratic governments into complicit agents in the expansion and enforcement of the “normalizing gaze” of modern disciplinary institutions such as carefully supervised factory workplaces, classrooms, the traditional two-parent family, military regimens, and prisons or asylums.
The three prior principles are relatively concrete or specific in their orientations to and recommendations about public policy. The principle of individual responsibility and imperative of economic growth dictate reduced government programs except for the imposition of harsher criminal penalties. The disciplinary imperative supports particular regulations that are perceived as promoting both individual responsibility and economic growth.

In contrast, the fourth principle of contemporary political discourse is more diffuse and even ironic at times in its application to government programs. This, fundamentally, is a principle of suspicion: the state should be distrusted at all times. This principle applies with particular force, moreover, to operations of the state that may be characterized as operations of "the liberal welfare state," and ironically it applies even when the suspicion is aimed at programs that objectively benefit the distrusters and would appear to give them greater freedom, economic security, individual dignity, and self-reliance.28

The historian Charles Maier noted recently that a sense of malaise “currently sours public opinion in the countries of Europe, in Japan, and in North America,” and that this includes “a broad distrust of political representatives regardless of ideology.”29 What might explain this pervasive distrust of public officials? It cuts across politics, the boundaries of industrial democracies, and it is manifest in such recent phenomena as the end of the Liberal Democrats’ rule in Japan, the rise of Silvio Berlusconi’s coalition government in Italy, and the apparent speedy tumbling of incumbents (by elections or in polls) in both the United States Congress and the United States Presidency during the 1990s.30

William Connolly suggests that we look among the ironies of the liberal welfare state to explain the “malaise” or “legitimation crisis” which modern democratic governments face.31 In short, the liberal welfare state, fueled in essential ways by the substantial growth of industrial economies since World War II, taught us not only to expect a measure of economic security and advancement, but also to think of ourselves as dignified and free persons, self-reliant, and skeptical, robust democratic individuals.32 As long as economic growth satisfied our material expectations and kept us focused primarily on our own private achievements, many of us could accept and even promote vigorous efforts by the liberal welfare state that benefited other groups of persons or the environment in ways that did not appear directly to benefit ourselves. Now, however, twenty years of inflation, economic recessions, economic stagnation, increasing inequality in the distribution of economic resources, and the restructuring of employment opportunities in the American economy threaten both our material expectations and our sense of personal identity as dignified, free, self-reliant individuals who should be fully capable, for instance, of providing better lives for our children. Rationally there is nothing that individuals can do about the operations of economic institutions, and moreover, the liberal welfare state has historically (at least in our lifetimes) undertaken responsibility to make economic conditions better for all of us. In these conditions, then, it seems rational to the individual to blame or distrust the state, or at least political representatives who can be voted out of office, for not making our conditions better than they are.33 It also seems rational to block any extensions of the liberal welfare state to groups of persons who are different from us or to the general environment and even to distrust the state’s delivery of services to oneself whenever this delivery may impinge upon our increasingly fragile sense of personal identity as dignified, free, and self-reliant individuals. Whatever its causes, it goes without saying that the principle of suspicion or distrust, which would dismantle the liberal welfare state as we know it, provides a substantial impetus or motivation to the prior principles of individual responsibility, economic growth, and growth-oriented discipline, and that the four principles in the aggregate constitute a most powerful discursive structure.

The social consequences of this new political discourse appear to be potentially vast in scope and potentially transformative in their ability to produce new social inequalities and disciplinary technology. Consider, for example, a particular case. Should the State of Kansas adopt an “unrestricted voucher plan” for public financing of elementary and secondary education?34 Such a plan would provide the parents of each child a “voucher,” a public subsidy, in a given amount, adjusted perhaps for regional cost differences and particular disabilities of students, which could be used together with any available private monies to send the child to any private or public school “of the parents’ choice.” Under this plan, private schools would be subject to general non-discrimination laws, but they otherwise would be free to establish their own
admissions criteria, to charge tuition in excess of the state-provided voucher amount, and subject to some basic education or testing requirements, to establish their own curricula of either a secular or religious nature.

Each of the four principles of the new political discourse provides unambiguous support for this sort of public financing of education. The strong principle of individual responsibility will be served by giving parents additional control over and responsibility for influencing or determining the nature of their own children’s education. The growth imperative will be served by a likely influx of private funds (from wealthy parents) to supplement the public subsidy and send (some) children to private schools, thus reducing demands on the public treasury and on taxes to provide public funds for primary and elementary education. Moreover, the consequent diminishment of public spending on the declining public schools that are left to serve the children of parents who cannot afford supplemental tuition payments will be “justified” by the principle of individual responsibility that makes individuals responsible for their own life chances and those of their children. Advocates of voucher plans will also claim that such plans will produce “better schools” as a result of competitive market decisions by consumers and producers, and thereby serve the growth imperative by producing students who are better able to compete in the new high-technology global marketplace. The fact that many students (in a sense all students) will now be attending school under contracts made by their parents may also enhance the students’ motivation and discipline,34 thus promoting the disciplinary imperative of political discourse. Finally, the likely dismantling or restructuring and downsizing of public school agencies in the face of their subsidized competition from private schools will satisfy the principle of suspicion or distrust of the state.

An unrestricted voucher plan would also obtain facile support from two of the general mythic notions about law in American political discourse: that law can solve social problems and that law treats all persons equally. Of course, the “social problem” in this case, the reputed decline in public education services, may well not exist,35 and an unrestricted voucher plan is likely to expand inequalities in the education of children from different economic classes and races. But then, the new political discourse is often based on myth and ideology rather than careful empirical observations, and this seems particularly true with contemporary calls for “privatizing” government services.36

The final consequence of the new political discourse is more implicit and more deeply psychological than the relatively direct political effects we have considered so far. Can one not say that the new political discourse is creating or presupposes a collective and particularly limited sense of the “political/legal subject,” or in other words, of a standard type of individual who is perceived or imagined as the ideal subject of political and legal regulation? This standard self, in contrast to the robust individuality and pluralistic possibilities of subjects presumed by the discourses found in the liberal welfare state, might be sketched as follows. This subject is a relatively healthy, “mature” or middle-aged, white, middle class, mostly male, mainly heterosexual, educated or educable person who is capable of providing motivated, disciplined work in a succession of rapidly changing jobs. This subject assumes individual responsibilities under all legal and moral codes and helps maintain the responsibilities of other family members, provides growth-oriented (that is, non-union, highly skilled, and low wage) labor on demand, willingly accepts (or fails to protest) the advancing disciplinary society, and of course, does not need at least most of the services of the liberal welfare state. This subject is quite capable of taking care of himself and any family members. This standard (mythical) subject fits perfectly with the dominant principles of our contemporary political discourse.

The problem with this standard individual, of course, is that he does not exist. He excludes the possibilities, interests, and values of difference, plurality, most of humanity, and the ideas of equal respect and concern for persons who are different from us, of respect for our environment which is another type of otherness, and most generally, of respect and concern for “the Other.” If political discourse proceeds with the presupposition that public policy should be made with only this one standard subject in the mind’s eye, our public policies will lose democratic legitimacy. We should turn, then, to consider how contemporary political/legal discourse might be redirected towards the pluralistic interests and values that are found in a multicultural society like ours.37

What Is To Be Done?

In this section I continue to presume an audience of several groups who are interested in law and public policy, but I shall focus on the work of nonpublic persons who write on law and public policy issues. I do this in part because this is my experience, and in part because it is these persons, unlike public officials, who have the luxury and the obligation of recording for others their own reflections on and confrontations with the values of political discourse in their consideration of public policy issues. Public officials must deal with these values, too, but in more concrete and diffuse ways that defy generalization by categories.

One choice, which democracy must respect, would be to promote the new political discourse. Normative economic analysis of law, which strives to make legal rules more efficient, formal arguments to expand due process protection for economic interests against public agencies, cost-benefit analyses which tend naturally to emphasize what is objectively quantifiable (government costs) and thus to favor limits on government actions, and libertarian essays that would free capitalist enterprises from government regulation on philosophical grounds,38 are major examples of this
kind of choice in public policy analysis. This kind of work may increase our knowledge of the methods or justifications for the principles in the new discourse, but I wonder how influential this kind of public policy analysis in particular cases is likely to be. As our contemporary political discourse already seems dominated by ideas of promoting economic growth, making government services more efficient, and reducing the impact of government regulations on business liberties, this sort of analysis may have little actual influence on public decisions. This sort of analysis may, in other words, only provide footnotes to decisions that would be made the same way without regard to the analysis. In any event, this sort of thinking about public policy does not seem likely to contribute much to recognizing or restoring the broader values of pluralistic democracy to political discourse or the law.

A second choice which democracy must also respect and may even require at times would be to attempt "technical" sorts of law and public policy analyses that are based largely on legal sources and attempt to ignore or defer larger questions of political values and political discourse. Suppose, for example, that one decides to study some aspect of Kansas zoning law such as zoning practices regarding particular kinds of commercial or industrial uses and ultimately recommends "a rationalization" of the law in this area based on existing Kansas statutes, cases, and recent legal developments in other states. Or suppose that one decides to propose a new legislative regulation of surrogate mothers in Kansas based on a synthesis of existing regulations in other states. 

Because law serves political and social values, these recommendations would presumably be tilted either towards or against the values of the new political discourse, even though the studies seem to be technical and apolitical. Implicitly, however, these studies are likely to rely upon, give greater weight to, or feature prominently the more recent "cutting edge" developments in the particular area studied, just as courts tend to give greater weight to recent precedents. Further, the recent developments are likely to bear the effects or show traces of certain principles in the new political discourse: the growth imperative and distrust of state in the case of zoning regulations or the disciplinary imperative's teaching about "proper family behavior" in the case of surrogate motherhood. Thus, the end, technical public policy studies probably cannot successfully avoid the questions of the new political discourse. One must take a position in favor of the discourse or engage in efforts to broaden the discourse and make it more pluralistic, more democratic, simply to do a good job of justifying one's ultimate recommendation regardless of the recommendation's content.

In contrast to the previous choices, I propose four counter-principles that may help us interrogate the dominant structure of today's political discourse and open this discourse to more pluralistic values and interests in the course of analyzing and making public policy. First, we should engage in public policy studies that in one way or another are open and responsible to others who are different from us, to otherness, to "the Other." In order to interrogate the standard subject of contemporary political discourse and begin to question effectively the strong principle of individual responsibility, the imperative of economic growth, and the disciplinary imperative, we should, in our public policy studies, begin to question our own selves by opening ourselves to others who are different from us in one or more important characteristics, such as gender, sexual orientation, religion, race or ethnicity, economic class, medical condition, or age.

To be sure, opening ourselves to the Other is inevitably an intricate and risky business. The criterion of openness is not satisfied by mere knowledge or an understanding of the Other in the sense of obtaining rational knowledge about different persons or the environment outside us. Rather, any process of being open and responsible must involve the more passive, more emotional actions of caring for the life chances of others, listening to different voices as part of intercultural dialogues, taking personal criticism, imagining sympathetically or empathetically what the lives and life chances of others could be, accepting separatist as well as interactive and assimilationist impulses among various groups, and then, but only then, making judgments and taking actions in a deliberative and reasoned way about the just (and unjustified) desserts of the Other.

But, one may ask: How do we enter into an ethos of openness and responsibility to the Other? Initially, one does this by choosing a public policy issue to analyze and by the perspectives or experiences that one brings to bear upon the issue. Certainly there is no end to law and public policy issues that affect life chances in family life, employment, criminal process, education, health care, and welfare programs of persons who are different from us. The more difficult problem lies with discovering methods of encountering the Other and engaging in dialogues that are open and responsible to other persons or the environment and that are not manipulative or domineering. Mari Matsuda's proposal that legal scholars should engage in an "affirmative action reading" of texts which embody authentic voices of other persons and groups is one tactic that may be helpful. Another strategy would be to emulate Stewart Macaulay's ground-breaking work

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on the social effects of contract law and begin talking with relevant persons about their life chances and the effects or possible effects of particular laws upon these chances. The three remaining counter-principles may also be viewed as “methods” for accomplishing the feat of successfully entering into an ethos of openness and responsibility to others.

The second counter-principle is time-honored and hardly revolutionary or even controversial. This principle merely says: counter the principles of the new political discourse with facts. As we have noted, there appears to be a good measure of myth, ideology, and exaggeration in the four principles of the new political discourse. In this situation, countering mere opinions with facts, whether these are anecdotal facts gleaned from cases, news reports, or Stewart Macaulay-type interviews, more substantial narratives constructed by others or the analyst, or facts which have been analyzed and presented previously by historians or social scientists, seems like good sense, or good “horse-sense” as Karl Llewellyn used to say.

For example, in our case of a proposed unrestricted voucher plan for financing Kansas public education, one might pursue the following avenues to question claims made on behalf of the plan under the four principles of the new political discourse: How do private schools currently operate? What are the demographic characteristics of their student populations, their admissions criteria, and the nature of their curricula? What percentage of Kansas public school students are likely to be without additional private funding and thus be limited to public schools that are funded by vouchers alone? What are the demographic characteristics of these students? Where do they attend public schools now, and what are the conditions of these schools by comparison to Kansas public school norms? To be sure, satisfactory answers to such questions will often be the most difficult and most frustrating part of good public policy analysis, but these questions should be raised and our best efforts made to obtain facts that counter the mere opinions and imperatives of any political discourse, let alone the contemporary political discourse of four strong principles.

The third counter-principle, another time-honored one, is to search for oppositional theories, that is, social or moral theories that can at least raise argumentative difficulties for “the theory” or claims of the new political discourse when it is applied to particular public policy issues. For example, in the case of school vouchers, one may look for the losses to democratic values that would occur if the voucher plan produces, as seems likely, a decentralized private-public school system that separates students among schools by economic class, race, and religion, if not gender, and that provides substantially greater funds to the private schools which would benefit from private monies added to their public subsidies. In this situation, the losses to democratic values seem likely to be quite substantial. First, inequalities in educational opportunities will probably increase as a matter of class and race. Secondly, there will be a loss in the ability of our schools to train their students to be “democratic citizens,” or in other words, as persons who are habituated to deliberating, listening, arguing, criticizing, and judging public issues along with different groups of persons in the multicultural forums that our contemporary public schools are capable of providing. Thus, oppositional theories may often be a fruitful source of ideas, as well as a source of questions about facts, that the public policy analyst can employ to extend the scope of discourse about particular public policy issues.

The final counter-principle returns us to more challenging and unusual territory. Here I suggest we try to follow and implement William Connolly’s recommendation that critical democracy requires us to challenge fundamental assumptions, to challenge in particular the principles and imperatives of the new political discourse. Most importantly, we should stand willing to challenge the system imperatives of economic growth and normalizing discipline that would impose severe restrictions and liabilities on state actions without regard to competing values. To be sure, material resources, meaningful employment, and certain disciplinary regulations are important, essential aspects of the life chances of individuals in a liberal democracy, but are continuous growth of the material economy and unquestioned disciplinary norms necessary to realize these aspects of democracy? More specifically, what evidence (as opposed to speculative theory and opinion) says that continuous and unqualified government policies “to promote growth” and “promote discipline” by reducing taxes, reducing public spending, freeing private enterprises from regulation, and promoting worker docility have in fact promoted the economic growth, meaningful jobs, and reasonably equitable resource distribution that is necessary to distribute rich and satisfying life chances in a widespread manner? These are the kinds of questions that public policy studies should keep before their readers if we are to edge the political/legal discourse of our time towards a more open, richer, more pluralistic, and more democratic discourse.

Notes

* Thomas Heilke and Peter Schanck provided helpful comments on prior drafts.

include a sense of purpose as well as means and a healthy democracy must arrange for the social conditions as well as rights that support a widespread flourishing of the life chances of individuals. See, e.g., Connolly, supra note 15; Joseph Raz, *Multiculturalism: A Liberal Perspective*, DISSERT, Winter 1994, at 67.


19. See, e.g., Frances Fox Piven, *Welfare Reform and the Quandaries of the Left*, DEMOCRATIC LEFT July/Aug. 1994, at 3-5 (arguing that the Clinton Administration’s welfare reform proposals and related exhortations about family values and individual responsibility constitute political “scapegoating” of poor and colored women to obtain right-wing political support).


22. See id. at 17-49; see also Martin Woollacott, *Pay the Price for Insecurity*, GUARDIAN Wkly., Aug. 28, 1994, at 25 (suggesting that “the new animus against the aged evident in all industrialized societies” could reduce medical care, pensions, and morale to the point of increasing the death rate among the elderly and that this animus “has to be, in part, a result of the changing economic situation. If employers have little need for lifetime labor, they have less reason to support the state’s system of care in old age.”).


25. See, e.g., Piven, supra note 19, at 3; DeParle, supra note 17.


27. *See Michel Foucault, Discipline and Punish* (Alan Sheridan trn., 1977); Connolly, supra note 15.

28. I have in mind such phenomena as American farmers who distrust the very farm price support programs which they recognize make their farming possible; elderly persons who distrust social
security or medicare programs; and middle class individuals who distrust public education while at the same time raving about the education they or their children have received in suburban public schools. Thus, for example, on August 11, 1994, on National Public Radio, there was a report of elderly persons who “didn’t want government messing with their Medicare program.” Or consider Oliver North campaigning quite successfully with tobacco farmers in Virginia against big government and government interventions in free economic markets! See David Corn, Why Ollie Will Win: Fear and Loathing in North Country, Nation, Oct. 24, 1994, at 450-52.


30. Professor Maier offers no explanation in his essay for he is concerned with correlating the pervasive sense of public distrust with two other features of “moral crises” in democracies: 1) a sense of aftermath or let-down after great events, which in the current case is the end of the Cold War, and 2) “seismic shifts in intellectual orientation and social thought.” See id. at 48, 53-58.


32. See id. at 3-4, 17-18, 69.

33. See id. at 76-83.


40. For arguments of our ethical responsibility to others, otherness or the Other, see, for example, DRUCILLA CORNELL, TRANSFORMATIONS: RECOLLECTIVE IMAGINATION AND SEXUAL DIFFERENCE (1993); STEPHEN K. WHITE, POLITICAL THEORY AND POSTMODERNISM (1991); CAROL GILLIGAN, WOMEN’S VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT (1982). See also WILLIAM E. CONNOLLY, IDENTITY/DIFFERENCE: DEMOCRATIC NEGOTIATIONS OF POLITICAL PARADOX (1991) (arguing for an ethic of caring about or cultivating our senses of both identity and difference).

41. See Roger Berkowitz, Risk of the Self: Drucilla Cornell’s Transformative Philosophy, 9 BERKELEY WOMEN’S L. J. 175, 190 (1994) (reviewing DRUCILLA CORNELL, TRANSFORMATIONS: RECOLLECTIVE IMAGINATION AND SEXUAL DIFFERENCE (1993)).

42. See NEL NODDINGS, CARING (1984).


44. See Bill Ong Hing, Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society, 81 CAL. L. REV. 863 (1993).

45. See CORNELL, supra note 40; WHITE, supra note 40; Anthony V. Alfieri, Practicing Community, 107 HARV. L. REV. 1747 (1994) (reviewing GERALD P. LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE, (1992)); Lynne N. Henderson, LEGALITY AND EMPATHY, 85 MICH. L. REV. 1574 (1987). For a more conservative view about the importance of sympathy and detachment towards the arguments of others in making difficult legal decisions, see Kronman, supra note 2. See generally TODOROV, supra note 43 (describing the misunderstandings, cruelty, violence, variants of love, and attempts at intercultural dialogues among Europeans and Mesoamericans in their discovery of each other during the one hundred years after Christopher Columbus’s initial landing in the New World).


47. See Mari Matsuda, Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Over Ground, 11 HARV. WOMEN’S L. J. 1, 4-6 (1988). Matsuda’s idea about obtaining affirmative action knowledge might be extended, I think, to other cultural forms such as movies or music.


49. See supra text accompanying notes 17-37; see also Sclar, supra note 37 (documenting the phenomena of myth, ideology and exaggeration in current proposals to “privatize” government services).

50. See AMY GUTMANN, DEMOCRATIC EDUCATION (1987); HENG, supra note 36.

51. See GUTMANN, supra note 50.

52. See CONNOLLY, supra note 15, at 3-9, 29-30, 38-41.