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Complaints

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Lawyers, who have monopoly authority first to turn grievances into pleadings and then to interpret, amend, answer, dismiss, reinstate, or otherwise manipulate them, are fond of a distinction between amateur and professional complaints.[1] Away from the realm of law, a complaint is a protest, or "[a]n expression of pain, dissatisfaction, or resentment."[2] Inside the covers of a law review, however, the word complaint usually means something very different: "[t]he original or initial pleading by which an action is commenced."[3]

Even though we lawyers know that law gets built out of citizen-initiated protests, then, we like to proclaim the professional complaint strongly distinct from what an ordinary person with no legal training can emit. In this Essay, I want to venture a contrary stance, noting how the cry of protest and the commencement of civil litigation are alike. I praise both.

Some cries of protest resemble the commencement of civil legal actions. Those that recount injuries to the complainants themselves, rather than to third parties, evoke the legal requirement that a plaintiff have standing. A protest that proclaims an injustice based on some failure to comply with a general, categorical principle, rather than merely a failure to please the complainant, fulfills the crucial obligation that a plaintiff state a claim on which relief can be granted. And a protest presented forthrightly *qua* complaint–that is, a proclamation about having been done wrong that the complainant owns, names, and declares plainly enough for at least one other person to hear–honors those values about transparency and responsibility that inform legal complaints in public life.

Private and public complaints alike affirm the value of open expression. The amateur complainant speaks to at least one person and often to many; the professional complainant participates in law-making in a process generally held accessible to public view. Courts are accessible to onlookers, most of the time. Reporters and transcriptionists and videographers turn judicial proceedings into public records. When judges exclude journalists from courtrooms or seal records, they will often declare in detail how the party who sought secrecy overcame a

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1. *See, e.g.*, Jan Armon, *A Method for Writing Factual Complaints*, 1998 DET. C.L. MICH. ST. U. L. REV. 109 (describing the formation of professional complaints out of clients' stories).

2. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 386 (3d ed. 1996).

3. BLACK'S LAW DICTIONARY 285 (6th ed. 1990).

presumption of openness.[4] In refusing to tolerate anonymous charges and holding complainants accountable for at least some of the consequences of their expression, courts (like complaints) link responsibility with access and opportunity.

Such liberal and democratic notions suggest not only that private complaints resemble public ones; they also provide reasons to hold them both in high esteem. Fidelity to principles, expressions heard from those persons who have standing to speak, and the kind of edification that derives from public proclamation all ought to be favored for many of the same reasons that undergird liberal political theory and democracy. In certain settings, I believe, private complaints can fulfill public ideals.

Interlocking sets of conventional wisdom oppose this thesis, and so in order to build its argument the Essay begins with an overview of antipathy to complaints in contemporary American society, moving thence into contemporary American law. Complaint-antipathy has flourished, I believe, as a rearguard reaction to those challenges that threaten powerful élites. In the aggregate, such challenges are important and deserve honor: without deeming all complaints justified or politically salient I will argue, turning to the feminist literature for most of my examples, that they add up to a force for improvement. It is in their potential to effect progress that "landmark," "groundbreaking," or otherwise celebrated lawyers' complaints[5] share their most important common ground with amateur complaints–those made by a wife to a husband, a student to an instructor, a friend to a friend.

I.

A reader as yet unconvinced that amateur complaints and lawyer-monopoly complaints are at heart the same phenomena might look at the rationales, both academic and popular, that seek to suppress them both. Teaching Torts each fall, I confront the disapproval of my students when they learn that an entire body of law could be grounded in such disreputable stuff. Long before they had arrived at law school, the culture had done its work: our American aversion to others who complain, as well as our tendency to suppress at least a portion of our own complaints, develops early.[6] We citizens learn from not only from parents, schoolteachers, school administrators, employers, supervisors, editorial writers, talk-

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4. *Compare* United States v. Lilly, 185 F.R.D. 113, 116 (D. Mass. 1999) (concluding that, on balance, the government's request for secrecy must be denied), *with* United States v. 25 Coligni Avenue, 120 F.R.D. 465, 470-71 (S.D.N.Y. 1988) (concluding that secrecy would be permitted, notwithstanding the presumption against it).

5. Due note ought to be taken here, I suppose, of the "courts can't achieve social change" scholarly school, headed by GERALD ROSENBERG, THE HOLLOW HOPE (1991). I weighed in on that controversy in Anita Bernstein, *Better Living Through Crime and Tort*, 76 B.U. L. REV. 169 (1996) and do not want to belabor the views published there, except to say that my current, narrower thesis–that amateur and professional complaints are politically significant in similar measure–should not affront those who hold the Rosenberg view, or anyone who doubts the progressive potential of litigation. My argument is more about equivalence and parity than about the progressive force of litigation.

6. I use the pronouns "we" and "our" occasionally to indicate lawyers, and always to refer to persons located in the United States, limiting the thesis of this Essay to American law, culture, and society.

radio broadcasters, but also our friends and lovers (a special category to which I will return below), that we should not complain.

Buzzwords vary, but in their fundamental hostility to complaints they make the same condemnation. Take "politically correct," for instance. Nobody can say quite what the phrase means; we know only that it castigates groups and those who speak in their behalf for being . . . what? Noisy? Self-righteous? Leftist? Yes, but also *aggrieved*, I think: "political correctness" attacks a posture of complaint. "The litigious society" and "Americans are litigious," phrases I type into Lexis-Nexis from time to time just to stick my finger into the Zeitgeist, also complain about complaints. Our culture has no counterjargon or vocabulary to describe the squelching, suppression, and deterrence-norms that keep individuals from complaining.

Academics too use a distinct–and somewhat veiled–vocabulary to attack complaints. Among the buzzwords that have found a home in both scholarly journals and popular conversation are "rights," which are generally bad things, in contradistinction to "responsibilities," always good. In *A Nation Under Lawyers* and *Rights Talk*, both trade books published for general audiences, Mary Ann Glendon of Harvard Law School summarizes a chorus against the concept of rights.[7] Glendon says that this unfortunate preoccupation leaves Americans worse off than they would otherwise have been. I read Glendon to criticize complaints rather than rights: her writings object to the aggrieved posture, the querulous demand, and the grandiose association of one's interests with principles, rather than any of the entitlements interred in unread Universal Declarations and unmarked Soviet graves. In principle, rights can exist without complaints. In life, I would contend, they do not. In order to understand rights, one needs wrongs.[8]

And so the communitarian critique that attacks rights necessarily attacks complaints. Under the rubric of communitarianism, writers praise neighborliness, volunteering, families, national service, and altruism in general, sometimes without any trace of attack. But when one studies communitarian proposals to search for their center–using pertinent questions, such as, Where do they differ from liberal prescriptions? What offends communitarians? How would communitarian reasoning allocate the benefits and detriments that societies produce?–one finds a desire to discourage people from articulating their grievances.[9]

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7. MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY (1994); MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

8. *See* John C.P. Goldberg, *Reconstructing Liberalism: Rights and Wrongs*, 97 MICH. L. REV. 1828 (1999) (reviewing ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW (1999)) (distinguishing between the two concepts in tort law); *see also* Anita Bernstein, *How to Make a New Tort: Three Paradoxes*, 75 TEX. L. REV. 1539, 1544 (1997) (describing the relation between the two).

9. *See generally* Katha Pollitt, *Passing the Test: Your Communitarian Virtues May Qualify You Too*, CHI. TRIB., Jul. 31, 1994, at 10 (noting vagueness within communitarian thought).

"Liberalism" and "individualism" share territory with complaints, and much of the pejorative content of these terms reflects hostility toward the expression of protest. To complain is to evoke the liberal concept of a person with a life plan and a set of preferences that only she can rank and revise.[10] Some circumstances would please her, presumably; those about which she has complained do not. Complaints point to transgressions, suggesting that someone has crossed a boundary surrounding the complainant.[11] Like rights, therefore, liberalism and individualism require complaints in order to function.

Another related perspective sees complaints as protuberances, jutting to mar a surface. "The nail that sticks up must be hammered down," runs the proverb attributed to Japan and Japanese culture.[12] When affected by Americans who look at Japan, this concept of the complaint as blemish can be described only as Orientalism, combining a vulgar misinterpretation of Confucian culture with a myopic gaze eastward from the West.[13]

Wa, it is alleged, approximately "harmony," teaches the citizen where he or she belongs, conveys the futility of protest, and melds the population into a productive whole while, in another hemisphere, foolish individuals tatter the fabric of society with their complaints.[14] This American orthodoxy has been in place for a generation: in the late 1970s the arrival of high-quality automobiles and other manufactured goods in the United States spread admiration for Asia, once restricted to an élite, among a wider public. And so Derek Bok, then president of Harvard, could write in 1983 that Americans have much to learn from the Japanese, where "engineers make the pie grow larger;" in the United States, by contrast, lawyers can "only decide how to carve it up."[15] Tremors through the Japanese economy that began in the early 1990s shook the fatuous Orientalists a little–Americans have not so much to learn from this mentor now, perhaps–and so praise for Japan in the law reviews these days takes a more moderate tone. Yet, again and again, writers have to point out that Japan has plenty of lawyers (by some reckonings, more per capita than the United States), plenty of litigation, ample discontent, and numerous complaints.[16] A similar generalization fits China and Korea and the rest of Asia. Although the mythic

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10. For an overview of this liberal concept, see James Boyle, *Anachronism of the Moral Sentiments? Integrity, Postmodernism, and Justice*, 51 STAN. L. REV. 493, 519 (1999).

11. On boundary imagery as a constituent of liberal thought about the law, see Linda C. McClain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 YALE J.L. & HUMAN. 195 (1995).

12. Along with Paul Fanning, I have elaborated on this phrase. *See* Anita Bernstein & Paul Fanning, *"Weightier Than a Mountain": Duty, Hierarchy, and the Consumer in Japan*, 29 VAND. J. TRANSNAT'L L. 45 (1996).

13. *Cf.* EDWARD W. SAID, COVERING ISLAM: HOW THE MEDIA AND THE EXPERTS DETERMINE HOW WE SEE THE REST OF THE WORLD (rev. ed. 1997) (exploring Western misunderstandings of other cultures).

14. *See* Bernstein & Fanning, *supra* note 12, at 61.

15. Derek C. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570, 573-74 (1983).

16. *See* Bernstein & Fanning, *supra* note 12, at 67-72 (describing how Japanese practices meld a large base of trained lawyers and citizen complaints into "bureaucratic informalism").

continent of natural, unforced, cooperative harmony remains as fictitious as Atlantis, believers who should know better continue to extol it.

As a follow-up to communitarianism, Orientalism, sloganeering ("litigious society," "politically correct"), and responsibilities-not-rights crusades–all of which attack the complaint preemptively, before a speaker articulates it–enthusiasm about "forgiveness" addresses complaints that emerge after these suppressive influences have failed. Forgiveness-enthusiasm, popular in the academy as well as in the larger culture,[17] squares off against complaints already formed: *Give it up; move on; let it go.* In academic writing on forgiveness, philosophers and theologians and psychologists disagree on fundamentals–such as the nature of forgiveness, how forgetting relates to forgiving, whether the transgressor must express remorse in order to obtain this grace, the possibility of national or collective forgiveness, the need for the person who forgives to reintegrate the transgressor into his life–and it would be a gross overstatement to say that all of these diverse writings amount to the same free pass for wrongdoers.[18] Many writings on forgiveness, indeed, denounce the free pass.[19] These counterinstances aside, a substantial literature does commend forgiveness for its own sake, insisting that as a general rule it is better to forgive than not to forgive, and urging readers and listeners to invest in this endeavor.[20]

Although some advocates of forgiveness might disagree, I would contend that this enthusiasm–the notion that, barring the exceptional circumstance, it is always better to forgive than not to forgive–takes an antagonistic stance toward all complaints. To forgive is to gainsay a complaint: to complain, in turn, is to reject provisionally the option of forgiving. Where the complaint, upon reflection, proves ill-founded and forgiveness becomes the right thing to do, an aggrieved person should gainsay her complaint. In different situations, however, the complaint is well-founded, and forgiveness is the wrong thing to do.[21] Timing is critical. Every protest

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17. *See generally* Symposium, *The Role of Forgiveness in the Law*, 27 FORDHAM URB. L.J. 1349 (2000); Scott Heller, *Emerging Field of Forgiveness Studies Explores How We Let Go of Grudges*, 27 CHRON. HIGHER EDUC., Jul. 17, 1998, at A18.

18. A helpful review of the literature appears in E.D. Scobie & G.E.W. Scobie, *Damaging Events: The Perceived Need for Forgiveness*, 28 J. THEORY SOC. BEHAV. 373 (1998).

19. *See, e.g.*, SUSAN JACOBY, WILD JUSTICE: THE EVOLUTION OF REVENGE 347 (1983) (claiming that it is wrong to forgive unless the offender is contrite); Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135, 1144 (2000) (reviewing the work of Jeffrie Murphy and Jean Hampton).

20. *See, e.g.*, PHILLIP C. MCGRAW, LIFE STRATEGIES: DOING WHAT WORKS, DOING WHAT MATTERS 201 (1999) (claiming that forgiveness restores chemical balance); R.P. Ritzgibbons, *The Cognitive and Emotive Uses of Forgiveness in the Treatment of Anger*, 23 PSYCHOTHERAPY 629, 630 (1986) (calling forgiveness "a powerful therapeutic intervention"). Hannah Arendt appears to endorse forgiveness as policy, speaking of it as a "need." HANNAH ARENDT, THE HUMAN CONDITION 240 (1958).

21. I do not wish to misrepresent the forgiveness writers, some of whom try to respect principle while commending a general policy of forgiveness. One philosopher, for example, portrays forgiveness as something like a legal acquittal of a defendant who did in fact do wrong: the wrongdoer, even if "frozen-hearted," merits this grace whenever–or perhaps because–her actions make "biographical sense." Cheshire Calhoun, *Changing One's Heart*, 103 ETHICS 76 (1992). For another example, some psychologists argue that one can simultaneously forgive and keep

has a natural lifespan, and when potential complainants or third parties abort a complaint before permitting it to be articulated and proclaimed, they destroy a vital thing that has not yet served its purpose. After the complaint has fulfilled its potential–but *only* then–forgiveness may well be in order.

In recent years the media have reported illustrations of how an overriding, squelching policy of forgiveness threatens the force of complaints. Consider for example the decision in South Africa, following the historic national elections in 1994, to refer many controversies from the apartheid era to a forgiveness-oriented Truth and Reconciliation Commission.[22] Under the most controversial provision of this policy, individuals responsible for acts of great violence, even murder, were permitted to seek amnesty from the Amnesty Committee of the Commission if their acts had been committed in a political context and if they presented their account as confession.[23] The policy provoked great anger in South Africa, expressed most poignantly by relatives of murdered black Africans.[24] But Desmond Tutu, a key figure of the plan, insisted that pragmatic acceptance of this forgiveness policy was the best course for the nation.[25]

It would be impertinent for me to criticize a democratic country's political compromise, especially one achieved through good faith and with great sorrow. Nor would I want to say that establishing the Truth and Reconciliation Commission rather than a war tribunal on the Nuremberg or Hague model was a bad idea. Amnesty programs usually provoke anger, and this one at least forced wrongdoers to confess, unlike the blanket amnesty plans that have been implemented elsewhere.[26] I question only the statutory decision to identify confession and repentance as prior to a complaint–that is, to emphasize the articulation of

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alive one's complaint and, further, that this mental exercise may be the best response to outrages like childhood sexual abuse where the person forgiven, but also remembered as a transgressor, is a relative of the one who forgives. *See, e.g.*, Estelle Frankel, *Repentance, Psychotherapy, and Healing Through a Jewish Lens*, 41 AM. BEHAVIORAL SCIENTIST 814, 831 (1998) (recounting the author's integrative approach to therapy); Suzanne R. Friedman & Robert D. Enright, *Forgiveness as an Intervention Goal with Incest Survivors*, 64 J. CONSULTING & CLINICAL PSYCH. 983 (1996) (reporting a clinical experiment). One must admire this heroic effort to make the game more than zero-sum, but forgiveness as *a priori* policy still remains antithetical to complaints.

22. The Commission has a website at <http://www.truth.org.za.> (visited Sept. 22, 2000) (copy on file with the *McGeorge Law Review*).

23. *See generally* GEIKO MULLER-FAHRENHOLZ, THE ART OF FORGIVENESS: THEOLOGICAL REFLECTIONS ON HEALING AND RECONCILIATION (1997). Applicants for amnesty were not required to say they were sorry. *Id.* at 92.

24. *See Relatives of Victims Bitter over Granting of Amnesty*, AFRICA NEWS SERV., Feb. 26, 1999, *available in* 1999 WL 12922297.

25. For reflections on this discussion of Tutu's, see Dan Markel, *The Justice of Amnesty? Toward a Theory of Retributivism in Recovering States*, 45 U. TORONTO L.J. 389 (1999).

26. *See* Paul Lansing & Julie C. King, *South Africa's Truth and Reconciliation Commission: The Conflict Between Individual Justice and National Healing in the Post-Apartheid Age*, 15 ARIZ. J. INT'L. & COMP. L. 753, 784 (1998) (discussing the blanket amnesty policy of Argentina).

wrongdoing by the wrongdoer, rather than by the person aggrieved.[27] Human institutions cannot conceive of wrongdoing–let alone adjudicate it–unless they start at the beginning. Only a complaint, never a confession, declares the beginning of a public wrong.

One finds in popular media a similar confusion accompanying the decision to forgive transgressions that injured others rather than oneself. Arrested after twenty-three quiet years as a fugitive, Katherine Anne Power declared at her trial that after an arduous struggle, she had finally achieved forgiveness.[28] Of herself. By herself. For her crimes against others. Perhaps she has also forgiven Pol Pot his killing fields.[29] She reminds me of a little joke of my brother's: after sneezing, he'll proclaim, "*Bless* me!" Like blessings, complaints are relational, situated in a dyad. Societies add another element to the relation: as third parties, they hear and receive these proclamations. This third-party function is a limited one: although the outsider can choose adjudication and dismissal in response to complaints that either lack merit or lie beyond the jurisdiction of repair, it cannot effect forgiveness.

Enthusiasm for forgiveness *per se*, then, necessarily blurs two important boundaries: between complainant and wrongdoer, and between wrongdoer and social auditor. Each of these three roles follows a separate script and cannot usurp the functions of another. With all due respect for the Truth and Reconciliation Commission, complainants must speak first and articulate their grievance before accused wrongdoers can have anything to confess. Katherine Power notwithstanding, the injured person is the only human being who can forgive, and only the complainant or the third-party auditor can acquit, excuse, justify, or absolve. Furthermore, even though the complainant holds the power to frame, articulate, and forgive complaints–to say what the grievance is and what it is not, and to decide what to make of it–we onlookers, acknowledging this power, need not applaud forgiveness as such, any more than we must applaud the exercise of any other power as such. Some uses of power are right, some wrong. The current fashion of antipathy to complaints ignores this distinction.

II.

This background condition of hostility accompanies, and probably helps to generate, a set of related phenomena in American law. Envision a path, like a flowchart or a kind of Complainant's Progress. If we think of the complaint as a grievance that can move from informal through increasingly rule-governed

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27. As anti-apartheid activist Mary Burton put it, "[w]e keep hearing from the government representatives about forgiving and forgetting, about wiping the slate clean. The trouble is, we have not even written on the slate yet." *Quoted in* MARK HAY, UKUBUYISANA: RECONCILIATION IN SOUTH AFRICA 34 (1998).

28. *See* Gordon D. Marino, *The Epidemic of Forgiveness*, COMMONWEAL, Mar. 24, 1995, at 9.

29. *Id.* Marino adds that literary geniuses Dryden and Dostoevsky insisted that forgiveness "belongs to the injured." *Id.*

iterations, we can see the accompanying sequence of barriers that bar complaints from adjudication. We have considered some of the societal tendencies that discourage the formation and retention of grievances. Now suppose that an undeterred complainant not only keeps his complaint alive but tries to amplify it in formal terms within the American legal system. What may he expect to encounter?

A slammed courthouse door, very often, to start. The tort reform movement of the last three decades has succeeded in denouncing his protest as a problem in itself, even before he expresses it. Complaints filed in courts of law have been blamed for a kind of American national inferiority, featuring "anticompetitiveness," stifling of innovation, enrichment of the wrong sort of lawyers, and a general malaise.[30] A complainant who proceeds anyway to court will find the rhetoric hardened into statutory rules. Plaintiffs are barred, or they are discouraged by reforms like caps on compensatory damages (which can only hack crudely at the quantity of litigation rather than refine its effects and, as President Clinton and others have pointed out, impose extra burdens on women, disabled persons, and plaintiffs who do not currently hold paid employment),[31] coerced sessions with expert panels (a reform commonly associated with medical malpractice, where complaints fare especially poorly), mandatory arbitration in fora that favor repeat players, harsh variations on the collateral source rule, narrow readings of statutes of limitation, revisions of common-law joint liability that enrich tortfeasors at the expense of injured people, and statutory reductions in the amount of punitive damages a successful litigant can recover. I actually don't mind a couple of these reforms, and I've defended all of them, at least for argument's sake, over the years in my classes. Some of them seem more principled than others, less likely to exclude meritorious grievances. But in the aggregate they amount to suppression of complaints, and I believe that suppression of complaints is an important motive for their enactment.

Suppression is not the whole story, of course; other changes in the law have encouraged the formation of new complaints in the courts. In the early 1990s, Congress passed the Americans with Disabilities Act and the Civil Rights Act amendments, creating new bases of jurisdiction in the federal courts for aggrieved individuals. An earlier example is the determination that sexual harassment can constitute sex discrimination; this change in the interpretation of Title VII and related civil rights laws combines existing statutory law with judge-made expansion in favor of complainants. Are we dealing, then, with the proverbial mixed bag for

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30. *See* MICHAEL E. PORTER, THE COMPETITIVE ADVANTAGE OF NATIONS 649 (1990) (asserting, without evidence, that products liability retards innovation and progress); Foreword, *Symposium on Civil Justice Reform*, 42 AM. U. L. REV. 1245, 1245-46 (1993) (noting attacks on liability by the Bush administration's Council on Competitiveness); Gregory T. Miller, *Behind the Battle Lines: A Comparative Analysis of the Necessity to Enact Comprehensive Federal Products Liability Reforms*, 45 BUFF. L. REV. 241, 263-74 (1997) (quoting and analyzing rhetoric).

31. *See Veto Message from the President*, 142 CONG. REC. H4425 (daily ed. May 6, 1996) (expressing concerns about the unequal burdens that caps on damages would impose); Troy L. Cady, Note, *Disadvantaging the Disadvantaged: The Discriminatory Effects of Punitive Damages Caps*, 25 HOFSTRA L. REV. 1005 (1997).

complaints, some hostility and some support in the past couple of decades? I don't think so.

Consider the complementary force to closing the courts: the professionalization of dispute resolution. Professionalization advocates see the complaint as an instrument that will give amateurs too much power if it is not carefully referred to the right authorities. Juries are the quintessential amateurs. According to popular myth, they are too headstrong, irrational, unpredictable, ignorant and just plain stupid to be trusted with decisionmaking authority. And so the American Association for the Advancement of Science and the American Bar Association came together in a 1998 pilot project to provide judges with nonpartisan experts who could explain the technical or otherwise abstruse material that would come up in their dockets.[32] Litigation concerning silicone breast implants has been referred conclusively to panels of experts asked to opine on the question of causation.[33] The expert panels used in medical malpractice cases lift factfinder questions–on reasonableness, fidelity to a standard of care, and assessment of damages–out of the jury box.[34]

At one level, the disenfranchisement of the juror is an old idea, far from a new trend. Luminaries like Holmes and Cardozo took complaints away from juries and into their own hands.[35] One might even say that tort law consists principally of that which the jury may *not* determine, the rest of Torts being mere fact-bound dispute resolution–and cumbersome, inefficient dispute resolution at that. But contemporary jury-antipathy differs from that of the great jurists in that it is a subset of a larger denunciation: it attacks the courts and the litigation process. Complaints are more vulnerable now than they were under the sway of Holmes or Cardozo. Either of these judges may have been siding with defendants when he sought to strengthen the power of a judge vis-à-vis a jury, but whether or not it is true that jurors favor complainants more than judges do, it is certainly true that the movement to

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32. *See* Ellen E. Deason, *Court-Appointed Expert Witnesses: Scientific Positivism Meets Bias and Deference*, 77 OR. L. REV. 59 (1998). Of course, judges have long held the power to appoint experts as litigation consultants under the Federal Rules of Evidence. Something resembling a norm or custom, however, seems to discourage them from using this power. *See* Joe S. Cecil & Thomas E. Willging, *Accepting* Daubert's *Invitation: Defining a Role for Court-Appointed Experts in Assessing Scientific Validity*, 43 EMORY L.J. 995, 1004-05 & tb.1 (1994) (reporting that a large majority of federal judges have never used a court-appointed expert).

33. *See generally* Hall v. Baxter Healthcare Corp., 947 F. Supp. 1387 (D. Or. 1996); Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983 (1999) (describing procedures used by Judge Sam Poiter in the breast implant litigation consolidated in his court).

34. *See generally* Steven Hetcher, *Creating Safe Social Norms in a Dangerous World*, 73 S. CAL. L. REV. 1 (1999).

35. *See* Baltimore & Ohio R.R. v. Goodman, 275 U.S. 66, 69-70 (1927) (Holmes, J.) (insisting that every driver of a private vehicle has a duty to "stop, look, and listen" before crossing railroad tracks, a duty that no factfinder could waive in a particular case); Palsgraf v. Long Island R.R., 162 N.E. 99, 100-01 (N.Y. 1928) (Cardozo, J.) (holding that the plaintiff was owed no duty with respect to her injury and so could not reach a jury). Holmes attacked jury competence, believing that the judge's familiarity with similar fact patterns enables him to reach better decisions. *See* OLIVER W. HOLMES, JR., THE COMMON LAW 123-29 (1881).

professionalize dispute resolution supports the transfer of power away from the political institution that is most inclined to hear complaints.

Adjudication tends to credit unprofessional opinion and ill-organized sources of power, while legislatures and administrative agencies mistrust these forces. Forensic conventions and practices, for example, often refuse to accept the teachings of science-credentialed experts, while embracing that which the experts have not (yet) validated.[36] By contrast, expertise comes naturally to legislatures and agencies. Legislators and administrators have certainly wrought folly every bit as foolish as the mistakes of courts, but when non-judicial branches of government bungle, their mistakes are almost always rooted in the higher authority of demagoguery, or corruption, or bad bargains–a shared disaster, with plenty of blame to go around–rather than the peculiarity of one decisionmaker or one complaint. Even sordid alliances acknowledge some kind of limiting principles. The errors, then, are expert errors. If the jury is institutionally inferior to the judge because it is amateurish, then the litigation system, which shares the jury's fondness for homespun and improvised (rather than officially sanctioned) versions of the truth, must be institutionally inferior to legislative and administrative methods of effecting legal change. If, however, amateurishness is or can be a virtue because it is available to all, then legislative supremacy–or at least one of its expressions, the rush of comprehensive federal statutes written to take power away from the courts[37]–warrants mistrust.

Courts give a more attentive hearing to the protests of disadvantaged individuals than these complaints would receive in the legislatures.[38] By way of explanation for the phenomenon, Richard Abel has asserted that judges are simply less crooked than the politicians who write or repeal statutes.[39] Sounds right to me, but let's assume he's wrong: citizen-initiated protests will still find the courts more congenial than the state houses. Within a system of adjudication, the complaint supports jurisdiction and provides a basis for relief; within statutory or administrative schemes, however, the impetus to effect change derives not from individual protests but from a conjunction of desires held by more than one person–that is, a shared sense of the common good (as the optimists would say) or ignoble rent-seeking alliances (if you prefer to have it so). The proponent of change must build an organization or, to put

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36. For discussion of one example of this phenomenon, see Michael R. Leippe, *The Case for Expert Testimony About Eyewitness Memory,* 1 PSYCHOL. PUB. POL'Y & L. 909, 910 (1995). *See generally* Rebecca S. Dresser et al., *Breast Implants Revisited: Beyond Science on Trial,* 1997 WIS. L. REV. 705, 764-65 (noting that for numerous scientific and quasi-scientific forensic methods have become widely accepted despite an utter lack of validation).

37. *See, e.g.*, 15 U.S.C.A. §§ 77l(b), 78a-78mm (West 1997 & Supp. 2000) (imposing hurdles on securities litigation); *id.* § 78j-1 (West 1997 & Supp. 2000) (limiting recourse against accountants and accounting firms); 28 U.S.C.A. §§ 2261-2266 (West 1994 & Supp. 2000) (limiting habeas remedy under "antiterrorism" statute).

38. *See generally* Richard L. Abel, *Questioning the Counter-Majoritarian Thesis: The Case of Torts*, 49 DE PAUL L. REV. 533 (1999).

39. *Id.* at 556.

it quaintly, a faction.[40] In this conception of political legitimacy within a democracy, an individual's complaint is little more than carping, and complainants are spoilsports rather than architects of change. Drawn to comprehensive, forward-looking reform, and inclined to favor rational authority handed down from the top, administrators and legislators–as well as their partisans among legal scholars[41]–tend to see complaints as blemishes rather than a source of societal improvement.

The division between (bad) complaint-fostering courts and (good) complaint-squelching legislatures emerges sharply from an article by tort reform leader Victor Schwartz, who uses the phrase "judicial nullification" in his summary of decisional law that struck down tort reform legislation.[42] In this view, courts behave lawlessly when they use relatively indeterminate citizen protections–due process, equal protection, open-courts guarantees–to invalidate those reform statutes that bar complainants from adjudication. I find the phrase striking. In legal commentary, nullification usually refers to decisions by juries that the commentator dislikes. The opposite of nullification is said to be law itself, expressed in doctrinal rules or jury instructions–that is, the domain of the judge. Judges have denounced nullification in fierce terms, sometimes using the word "lawless."[43] Now Schwartz says that the judicial branch itself nullifies.

Perhaps judge-readers were shocked to hear this pejorative applied to them, but they should not have been surprised. Tort reform long ago declared war on the citizen-initiated complaint generally, not on any tort rule in particular. If complaints are a problem, then by extension so too are judges, who have the temerity to regard human indignation as an engine for their labors, a reason they go to work, even though they know that indignation can certainly make the judicial day exasperating. To be sure, judges are a problem only in a relative sense. A tort reformer typically would like a judge just fine, compared to a jury. But the same anti-complaint sentiment that fuels hostility toward juries will also fuel hostility toward judges if the reformer can find a way to move this power to an expert, a legislature, an administrative agency–all locales more inclined to favor that entity which would be otherwise at the receiving end of a complaint.

Let us proceed along the path of Complainant's Progress as it winds through the judiciary. Our hero, no more daunted by tort reform and the professionalization of dispute resolution than by complaint-suppressants in the larger culture, sticks to his grievance and files it in court. Depending on the nature of his complaint, he may encounter a new hurdle: mandatory alternative dispute resolution (ADR). Alternative dispute resolution functions to rewrite the complaint, or at least to bend

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40. *See generally* THE FEDERALIST NO. 10 (James Madison) (describing alliances within legislatures).

41. A thoughtful expression of this view is in Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173 (1998).

42. Victor E. Schwartz, *What You Can Do to Save Tort Reform from Judicial Nullification*, METRO. CORP. COUNS., Nov. 1998, at 1.

43. See the oft-quoted *United States v. Washington*, 705 F.2d 489, 494 (D.C. Cir. 1983) (en banc).

it into a new-formed application where there can be no grievance, only a state of discontent that needs to be assuaged. Whereas the concept of a grievance presumes that one party is right and the other wrong, alternative dispute resolution sees shades of gray, ascribing parity to both sides.[44]

Like academic attacks on rights and liberalism, this stance cannot tolerate the stubborn essence of a complaint. We have noted that adjudication cannot exist without complaint; a stated grievance gets things going. Though it originates by the same means, alternative dispute resolution (except when accepted voluntarily) denies the centrality of its progenitor, preferring to extol accommodation, healing, settlement, reconciliation, efficiency, gentleness, and other characteristics that can be defined approximately as the opposite of complaints. When he encounters ADR that he doesn't want, our complainant has reached another minefield: a consensus that certain types of grievances do not warrant the full attention of the law, even though longstanding legal rules cover them and even though a person has cried out to the law for justice.[45]

In family law, the complaint is treated with particular aversion. For example, following what has been dubbed "the friendly parent rule" for custody disputes, judges take into account the parents' relative tendencies toward cooperation with the estranged spouse.[46] A friendly attitude toward visitation and other involvement helps one parent to achieve custody, while hostility toward the other parent makes a custody award less likely. Several states have codified this rule.[47] Given the zero-sum nature of the custody contest, rewards for friendliness amount to punishments for disputatiousness: the friendly parent rule frowns on the aggrieved parent's store of complaints *per se*, regardless of their merit. As critics continue to point out, a parent might have excellent reasons for feeling disinclined to cooperate in childrearing with an estranged spouse.[48] When one parent feels unfriendly toward the other because he or she knows (perhaps on the strength of evidence that does not quite convince court personnel) that the other parent has behaved abusively toward their children, the friendly parent rule not only rewards the abuser but delivers its

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44. I hope not to be misunderstood to say that the black-and-white outlook of adjudication is inherently fairer or more accurate or more useful than the perspective of mutual responsibility that characterizes the softer forms of alternative dispute resolution, particularly mediation. As with the comment about social change, *see supra* note 5 and accompanying text, I would like to make only a narrow point: The persistent vogue of alternative dispute resolution amounts to yet another expression of antipathy toward the complaint.

45. *See generally* Judith Resnik, *Many Doors? Open Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211 (1995).

46. *See* Joanne Schulman & Valerie Pitt, *Second Thoughts on Joint Custody: Analysis of Legislation and Its Implications for Women and Children*, 12 GOLDEN GATE U. L. REV. 539, 554 (1982).

47. *See, e.g.*, ALASKA STAT. § 25.20.090(6)(E) (Michie 1999); 5 ILL. COMP. STAT. ANN. 5/602(a)(7) (West 1993); OHIO REV. CODE ANN. § 3109.04(F)(1)(f) (West 1999); *see also* Divorce Act, R.S.C. 1985, c.3 (2d supp) (Can.).

48. *See* Amy Haddix, *Unseen Victims: Acknowledging the Effects of Domestic Violence on Children Through Statutory Termination of Parental Rights*, 84 CAL. L. REV. 757, 807 (1996) (noting that domestic violence is inconsistent with being "friendly"); Marie Laing, *For the Sake of the Children: Preventing Reckless New Laws*, 16 CAN. J. FAM. L. 229, 244-45 (1999) (same; authored by feminist psychologist).

reward in a form that makes future harm to the children more likely.[49] I do not mean to say that all, or even most, feelings of unfriendliness toward an estranged spouse originate in a legitimate grievance related to the well-being of innocents. A divorced parent might feel unfriendly toward the other parent because of financial anxieties, or resentment over having been discarded in favor of a rival, or a nearly infinite set of other vexations. The injustice of the friendly parent rule is not that unfriendliness is good but that it is derivative, by itself neither good nor bad. It is a byproduct of grievances that may well, or may well not, deserve to be honored.

The premise that I want to question here is that disagreement can be reduced to mere emotion or some other trivial condition based on the status of the parties. This detriment is imposed on no other class of litigants. One can hardly imagine a formal advantage to being, say, a friendly patent licensee, or an amiable adverse possessor, nor a rule that would deem the resentment that litigant *X* feels for litigant *Y* as a reason to rule against *X* and in favor of *Y*.[50]

Such isolation of family disputes as less principled than other litigation comports with a larger tendency to regard intrafamily claims as having something pettier than Justice at stake. Immunity doctrines once held that a hurt person need not have access to the courts if the person who hurt him was a family member; these doctrines survive for certain claims.[51] Contract law, like the law of torts, prefers to keep away from assertions of rights based on agreements between husband and wife.[52] The eccentric "domestic relations exception" holds that notwithstanding the diversity jurisdiction statutes, which give federal courts the power to decide cases involving state law where the plaintiff and defendant reside in different states, diversity jurisdiction does not exist where the dispute concerns the litigants' marriage.[53] Rationales for the domestic relations exception could just about make a reader laugh out loud,[54] but the exclusion of family matters from federal-court

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49. *See* Schulman & Pitt, *supra* note 46, at 555.

50. A defender of the friendly parent rule might maintain that this analogy is misplaced because disputes over patents and adverse possession do not typically involve a vulnerable young third party who lives with at least one of the disputants and shares the emotional consequences of the litigation. Resentfulness is an unattractive trait, and a parent's resentfulness can inflict psychological harm on a child; all other things being equal, the parent less afflicted with an unattractive trait that can harm a child should have custody. Neither in theory nor in practice, however, does the friendly parent rule advance this cheerful goal. *See generally* Penelope Eileen Bryan, *Women's Freedom to Contract at Divorce: A Mask for Contextual Coercion*, 47 BUFF. L. REV. 1153, 1192-1201 (1999) (offering a comprehensive critique).

51. *See* Ira Ellman & Stephen L. Sugarman, *Spousal Emotional Abuse as a Tort?*, 55 MD. L. REV. 1268, 1282 (1996) (noting that most courts will not hear claims of invasion of privacy or intentional infliction of emotional distress between spouses).

52. *See, e.g., In re* Marriage of Parker, 997 S.W. 2d 833, 839 (Tex. App. 1999) (refusing to enforce an agreement relating to real property); Borelli v. Brusseau, 12 Cal. App. 4th 647, 654 (1993) (refusing to enforce a husband's contractual obligation to convey property to his wife via his will).

53. *See* Ankenbrandt v. Richards, 504 U.S. 689, 693 (1992).

54. *See* Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073, 1083-87 (1994) (arguing that *Ankenbrandt's* rationales for the domestic relations exception are not only unpersuasive but also incoherent).

prestige–freeing up Article III judges to concentrate on breaches of petty commercial contracts and obedience to the federal sentencing guidelines–wins the famous feminist verdict of That's Not Funny: federal jurisdiction is an honor,[55] and an exception to federal jurisdiction withholds this honor.[56]

III.

These last illustrations of doctrinal barriers to the courts–examples of how the law can bolster an ideology of informalism that complainants find unwelcome and dismissive–suggest a relationship between women and complaints. Essayist Katha Pollitt noted this relation when she claimed that communitarianism is "antifeminism redux."[57] The timing of responsibilities-not-rights as a sociopolitical fad should indeed raise suspicion. Rights, long associated with American patriotism and noble causes–think *Gideon's Trumpet*, or Richard Kluger's *Simple Justice*–became tainted as hostile to responsibilities just after women (and racial minorities) began to augment their powers of complaint.

I would extend Pollitt's critique of communitarianism, and claim that the prevailing hostility toward complaints stems in part from hostility to the consequences of feminism. My conclusion comes from biographical origins. I grew up in the seventies living with parents in conditions of rancor, and spent many hours of adolescent research on the question of whether divorce is a good thing. Pouring through newspapers, library books, and the monthly feature "Can This Marriage Be Saved?" in my grandmother's *Ladies Home Journal*, I found a consensus. Miserable marriages are not worth saving; don't stay together only for your children's sake, because children can see through your shabby bravado; remember to value your own life and happiness. Divorce connoted a touch of Hugh Hefner-ish freedom, maybe glamor. When I would urge my mother to end her marriage, I had the pundits on my side. Now, that marriage was impossible, but I'd have had the pundits on my side back then even under serene marital conditions. Hey, you only live once! Your wife turns forty, trade her in for two twenties. When, over the next decade, statistics and anecdotes and Hollywood scripts began to tell Americans what they already knew but hadn't faced–that many (most, as it turned out) of the divorce-initiators were women, and that the bells of freedom and happiness and self-actualization toll for

55. The legal scholar who has explored this feminist insight in the greatest depth is Judith Resnik. *See* Judith Resnik, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 GA. L. REV. 909 (1990); Judith Resnik, *"Naturally Without Gender": Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682, 1739-49 (1991) [hereinafter Resnik, *Naturally*]; Resnik, *supra* note 45.

56. *See* Resnik, *Naturally, supra* note 55, at 1749 ("Dealing with women–in and out of families, arguing about federal statutory rights of relatively small value–is not how [federal judges] want to frame their job.").

57. *See* Pollitt, *supra* note 9.

wives as much as husbands[58]–the rhetoric changed. Divorce became shallow and selfish. The dear children, who speaks for them? If you're thinking of leaving your husband, warns the chorus, remember that your kids need their father.[59] Back in my day, I suppose, we kids didn't.

Associations between women and complaints are manifold. First among them is that if women are more disadvantaged in society than men because of their gender (a fact that space constraints force me to assert rather than demonstrate), then women have more to protest than do men, and the systemic suppression of complaints that I have described would disproportionately burden women. Suppressants in the culture, furthermore, are pushed with particular vehemence on women: more than boys, girls are taught that expressing a complaint makes them look and sound unattractive. Popular culture inhibits a woman from articulating her protests with its stereotype of an ugly aggrieved female, embodied in the film *Fatal Attraction* where Glenn Close played a vengeful, rabbit-boiling discarded mistress.[60] "Nagging," "bitching," and even whining and crying are gendered activities.[61] To compound this burden, longstanding traditions that have forbidden women to protest in public may not be quite dead. The documents that helped to bring forth the American republic–the Declaration of Independence, the Federalist Papers, the Constitution and its precursors–portray a nation led by articulate complainers, denouncers, worriers, and strategists who anticipated all kinds of trouble. Women tried to participate in this public dialogue and were ordered to be silent.[62]

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58. *See* Liz Else, *The Woman Who Dared To Ask*, NEW SCIENTIST, June 10, 2000, at 40 (interviewing researcher Shere Hite, who recalled the surprising nature of these findings in the 1980s); Fran Stewart, *Women in Financial Ruins After Broken Marriages*, PLAIN DEALER (Cleveland), Aug. 31, 1999, at 1F (reporting that women initiate about two-thirds of divorces, which leave them "[h]appier–but poorer").

59. *See* LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE (2000) (lamenting harm to children); Ronald K. Henry, *After the Divorce, in* THE FATHERHOOD MOVEMENT: A CALL TO ACTION 105, 107 (Wade F. Horn et al. eds., 1999) (noting that the old rhetoric has been "repudiated" in favor of "a broad political and scientific consensus that children need two parents").

60. On this stereotype in action, see Joe Joseph, *School for Seduction is Flirting with Disaster*, TIMES (London), Dec. 1, 1999, *available in* LEXIS, News Group File (describing a course on how to flirt).

61. *See* Jim Dickins, *Voices Shouting to Be Heard*, CANBERRA TIMES, Oct. 10, 1999, at A9 (quoting an Australian magistrate who said that some women provoke domestic violence by "nagging, bitching, and emotionally hurting men"); *see also* Judy Harrison, *Feminist History Comes Alive: Leaders Hold Discussion*, BANGOR DAILY NEWS, Aug. 28, 1997, *available in* LEXIS, News Group File (noting that second-wave feminists have been called "the whining and crying generation").

62. Abigail Adams's famous "Remember the Ladies" plea got nowhere with her husband John. *See Remember the Ladies, in* THE FEMINIST PAPERS: FROM ADAMS TO DE BEAUVOIR 10 (Alice S. Rossi ed., 1973). No American woman attempted a career in public speaking until the early 1830s when Maria Steward, a freeborn African-American schoolteacher, tried to give speeches on the subject of abolition. Vociferous opposition drove her off the lecture circuit and back into the classroom. When the Grimke sisters, Sarah and Angelina, picked up this work and traveled to lecture on abolition, they were greeted with denunciations, cancellations of their hall-booking contracts, and threats of violence. A pastoral letter from the Congregationalist ministers of Massachusetts in 1837, aimed at the Grimkes, informed the faithful that "the power of woman is her dependence." Public protest from her would be unholy: "When she assumes the place and tone of man as public reformer . . . her character becomes unnatural." *See* WENDY KAMINER, WOMEN VOLUNTEERING 32-33 (1984). Until very recently, and perhaps even today, a woman who undertakes to utter a protest defies an "almost holy, sexual code of silence." *Id.* at 32.

Forcible restraints on speech now having been eased, American women enjoy their freedom to complain in public. They have revealed an affinity for the complaint as an instrument, articulating their discontents to both the people they deem the offenders and outsiders, including friends and acquaintances. Men, in the aggregate, appear to favor nonverbal expressions of their discontents vis-à-vis women.[63] A man in the United States is more likely than a woman to choose such alternatives to complaining as domestic battery, heavy consumption of criminalized drugs and alcohol, retreat into white-collar shelter (his office, his computer), harsh silence, and denial of his unhappiness when asked about it.[64] The gender-oppression inherent in hostility to complaints, then, does not burden women alone.

A relation between women and complaints is part of the larger struggle of women's liberation. Earlier in the path of Complainant's Progress, we might observe that the formation of a complaint expresses personhood–an identity that separates the aggrieved individual from the world around her. Western conceptions of law and justice rest on the philosophical belief that persons derive their value in large part from their uniqueness and their separation from others. The legal construct of "the family" operates to deny this identity and, in consequence, the personhood of a woman becomes harder for her to assert. As numerous feminists have written, what law and convention mean by the family is a justice-free sphere, the private haven into which men can retreat when they weary of contractarian rigors.[65] On the outside, a man has to comply with the bargains that characterize society: the market, the categorical imperative, the police power of the state, and unspoken nonaggression pacts with other men.[66] But he feels oppressed by this merciless Justice, the cold precision, allocations doled out measure for measure and pound for pound. He needs private refuge. He finds it near his woman, at home.

Although home may provide a haven, it is the larger world, along with its various social contracts, that enables a person to enjoy full advantage of this shelter. Individuals feel invited to stroll out of the household and into public life when they encounter a variety of lures: good wages for remunerative work, a feeling of safety in the streets, a sense that they belong wherever they want to go (and in the event of misfortune will not be blamed for having been there), social conventions that disapprove of their spending much time in dull labors (like housecleaning or unrelieved child care) and competitions in the job market that, in the name of

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63. *See Women May Have a Handle on Anger*, CHI. TRIB., May 21, 2000, at 8; *see also* WARREN FARRELL, WOMEN CAN'T HEAR WHAT MEN DON'T SAY (1999) (lamenting the consequences to relationships of male silence).

64. On drugs and alcohol, see Fred Tudiver & Yves Talbot, *Why Don't Men Seek Help? Family Physicians' Perspectives on Help-Seeking Behavior in Men*, 48 J. FAM. PRAC. 47, 50 (1999); on withdrawing behaviors, see *supra* note 63; on the propensity of men to commit domestic battery, see the Department of Justice summaries of data at <http://www.ojp.usdoj.gov/bjs/homicide/intimates.htm> (visited July 20, 2000) (copy on file with the *McGeorge Law Review*).

65. *See generally* SUSAN MULLER OKIN, JUSTICE, GENDER, AND THE FAMILY 25-40 (1989) (attributing this view to Michael Sandel and Allen Bloom, among others).

66. *See* CAROLE PATEMAN, THE SEXUAL CONTRACT (1988); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

meritocracy, can reward them with status and power. Whenever they lack these inducements, individuals (children, for instance) become relatively powerless inside the household because they cannot credibly threaten to walk out and not return. Lures of public life are not entirely unavailable to women, especially in the United States, but men get many more of them. Relatively shut out of the public world, relatively captive in a justice-free zone, a woman lives a life that contains less justice than a man's. The concept of a private realm, hidden discreetly from the glare of fairness and ethical imperatives that will be enforced by law, still endures to deny her identity.

In this context, the amateur complaint has a poignant, lonely power. It is the only thing that those who are denied access to public institutions can use to make their grievances heard. Inside a household, a person cut off from expressing a public complaint will not necessarily prosper should she issue a private one. Her householdmate with more external opportunities can still stroll, or react with violent disapproval, should he hear something accusatory. Often the complainant-to-be understands that silence would be prudent. Yet she speaks! Heeded or not–heard, ignored, or denounced–the complaint emerges formed and with promise. The chances are that it will be lost or suppressed. But once emitted, it has the power to effect change.

Its promise is inchoate, but one can speculate about the potential to society of hearing and amplifying the private complaint. One example of a battleground of interest to the law that would be informed by more complaints from women concerns sexual exclusivity, or what is more tendentiously called fidelity. Complaints would shed light on the mystery of sexual ethics, now veiled and contested.[67] What are the rights and duties of persons engaged in sexual relationships with respect to opportunities for sex with persons outside the dyad? Is the formality of marriage necessary to support an expectation of mutual fidelity? Does getting married mean that one forsakes all other partners, or is marital monogamy just a default setting that conscientious spouses can change by negotiation? If negotiation around the monogamy default is possible, should it address the likelihood that one partner has more power than the other in the market, so to speak, for new partners? Or is the real default setting a double standard leaving husbands but not wives free to roam? Does starting to have sex and spending time together create some kind of basis of expectations? Expectations of what? The questions may seem misplaced in a law review. We know the cliché about all being fair in love and war–and that it applies only to love: international law delimits certain acts as wrong in war, and errant nations, more than errant lovers, have been deemed unjust following adjudication. Most of us don't think about "the law" of relationships. We still hear the insistence that "there *are* no rules." We abjure

67. For an exploration of these and related questions, see SEXUALITY, SOCIETY, AND FEMINISM (Cheryl B. Travis & Jacquelyn W. White eds., 2000).

concern for principle, pretending that we don't see the distinction between, for instance, lying to your partner about whether you have a sexually transmitted disease on the one hand, and rejecting an aspiring lover or turning down a marriage proposal on the other.

The difference between the two lies in transcendent ideals that unite what appear to be disparate, unrelated events. Principles can be found even behind a bedroom door. As Jane Larson has argued masterfully, lies told in order to gain sexual favors violate the blackletter content of common-law rules condemning deceit, and ought to be regarded as close analogues to commercial misrepresentations.[68] And just as a shopkeeper's disappointment or frustration at having been undersold does not demonstrate that the victorious competitor has done anything wrong, the feeling of sexual rejection by a lover does not indicate wrongful conduct by the beloved either. Forcing both complaints about disappointment and complaints about deceit into the same unprincipled category –"lovelorn," "heartbroken"–retards the formation of sexual ethics.

Complaints would not only help to form sexual ethics but also to reveal those ethics that already exist. The project is long deferred. In *The Second Sex*, Simone de Beauvoir commented on the belief, dear to many men, that women are incapable of abstract principle.[69] Weighed down by particulars and individual circumstances, it is alleged, women lack the power of transcendence. Because they cannot understand abstraction, they cannot reason, but merely gossip. Carol Gilligan has done much to refute this accusation,[70] but de Beauvoir, some thirty years earlier, had her own rejoinder. Women, wrote de Beauvoir, regularly confront the denial of principle in their lives. Lovers urge them to deceive their husbands, for example, even though telling a lie is as close as one can get to violating a universal moral precept,[71] and pious Catholics immediately insist on abortion, says de Beauvoir, when their mistresses announce that they are pregnant. In this world, a woman would be crazy to cling to transcendent ethics. Experience tells her that what she reads in books, hears preached in church, or is told to study in the schoolroom is valid only to the extent that it does not tread on a man's sexual convenience. For moral tutelage, all she can have is conversation. Comparing accounts with other women instructs her in moral resemblances and analogies, the only meaningful guidance she can find.[72] To which masterful summary I can add only: These accounts are complaints.

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68. *See* Jane E. Larson, *"Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374 (1993).

69. *See* SIMONE DE BEAUVOIR, THE SECOND SEX (H.M. Parshley trans., 1952); *see also* MISOGYNY IN THE WESTERN PHILOSOPHICAL TRADITION (Beverley Clack ed., 1997) (recounting numerous iterations of this belief).

70. *See* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982) (deeming "care" just as good as abstract justice as a basis of moral reasoning).

71. Even Hobbes, famous for denying that "murder" was a universal evil, was revolted by dishonesty. *See* Dana Chabot, *Thomas Hobbes: Skeptical Moralist*, 89 AM. POL. SCI. REV. 401 (1995).

72. *See* DE BEAUVOIR, *supra* note 69, at 603, 612-18.

IV.

Moving beyond women, I would now contend that the amateur complaint, like its public or professional cousin, can be an instrument of progress for all of humanity.[73] The clearest example of this progressive power derives from a well-founded complaint that reaches a wise and sympathetic auditor. Persuaded that a complainant has pointed out a genuine wrong, the auditor acts to rectify the injustice, and the world is improved. Progress. Anti-slavery and civil rights activism illustrate this type of potential inherent in complaints. But I would go further than this near-consensus, attributing power to complaints beyond the happy conjunction of righteous protest and responsive decisionmaker.

This view has philosophical antecedents, notably in the work of Jürgen Habermas. In *The Theory of Communicative Action* Habermas identifies three attitudinal aspects of communicative speech, all studied within analytic philosophy as sources of social truth: the *objectivating attitude*, evoking neutral disinterest; the *expressive attitude,* "in which a subject presenting himself reveals to a public something within him to which he has privileged access"; and the *norm-conformative* attitude, referring to the expectations of social groups.[74] Different instances of speech can express different pieces of this tripartite scheme.[75] Strikingly, a complaint deploys all three attitudes, suggesting that it is an especially eloquent source of information about the shared worlds that communication creates and explores.[76]

Human rights activists have embraced this conception of proclaimed, communicated truth as an instrument of social repair.[77] In this perspective, truth derives from accounts or narratives about the past. For these activists, according to the paraphrase of Habermas rendered by theologian Mark Hay, the recitation must be "in a form that the general population can understand. This exposing and recording of the truth needs to be completed by a ritual moment which presents a picture of the past as clearly as is possible."[78] Truth is established not in the sense of juridical proof but rather as an instrument or process.[79] Although Hay later

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73. *But see supra* note 5 (noting the contrary stance in scholarship about whether professional complaints can effect social change).

74. JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION, VOLUME I: REASON AND THE RATIONALIZATION OF SOCIETY 309 (Thomas McCarthy trans., 1981).

75. *See id.* at 314-15 (offering examples).

76. *See id.* at 100 (noting the existence of the "objective world," the "social world," and the "subjective world").

77. *See generally* DAAN BRONKHORST, TRUTH AND RECONCILIATION: OBSTACLES AND OPPORTUNITIES FOR HUMAN RIGHTS 145-46 (1995) (detailing the relationship between truth and reconciliation).

78. HAY, *supra* note 27, at 117.

79. *See* IRIS MARION YOUNG, *Impartiality and the Civic Public: Some Implications of Feminist Critiques of Moral and Political Theory, in* THROWING LIKE A GIRL AND OTHER ESSAYS IN FEMINIST PHILOSOPHY AND SOCIAL THEORY 92, 102-03 (1990) (noting that for Habermas, truth can be "achieved only from a process of discussion").

proceeds to note the value of accuracy in the conclusions of third parties such as judges and administrators,[80] the earlier, declaratory stage of the truth-making process stands separate as an account of the power of the complaint. Because of this conceptual independence, my ideal of progress also embraces the wrongheaded or unpersuasive complaint, and does not require that an auditor heed or obey.

In this rather expansive vision, the complainant makes a contribution by stating a syllogism: major premise, minor premise, conclusion. It is this structure that defines a complaint and distinguishes it from other assertions of grievances that amount to no more than whining. Compare:

Professor X is never around. I keep looking for him and he's never in his office. He's inaccessible.

with

The law school requires faculty to be available to students during posted office hours.

Professor X wasn't in his office during the posted hours on Wednesday. When I came looking for him during his office hours, I learned that he had left for the day.

Therefore, Professor X has deprived me (and, presumably, my classmates) of access to him as a faculty member.

I do admit this example descends a bit from Progress, abolitionism, civil rights, and the like. But the distinction between whining and complaining, portrayed here through the example of a law student's grievance, shows how much more forceful the latter can be–even though the complaint states the grievance in more narrower terms, without sweeping condemnation. Like a complaint in the legal sense, the syllogism invokes a general rule or principle, asserts that the one-complained-about has violated the rule, and invites auditors to conclude that the complainant is determined to have suffered a wrong.[81] A whine is just a minor premise: *My foot hurts. He's sexist. I don't want to shovel my sidewalk.* Even when inclined to support the complainant, an auditor lacks the information necessary to reach a judgment, and can offer only a vague kind of sympathy, if that. Put as a syllogism, however, the complaint tacitly invites the auditor to respond at the level of principle or generality. This structure does not deny feeling or emotion, but helps to cast the grievance as a matter of public interest, worth the attention of those whose feelings are not caught up in the dispute.

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80. HAY, *supra* note 27, at 117-19.

81. For feminist critiques of this structure, see Margaret Thornton, *Technocentrism in the Law School: Why the Gender and Colour of Law Remain the Same*, 36 OSGOODE HALL L.J. 369, 379 (1998); YOUNG, *supra* note 79, at 103 (denying, with reference to feminism, the existence of universality and the "impartial point of view").

To return to our sexual-fidelity example, consider the possibility of forming sturdy syllogisms in this arena, thought of as being all about emotion and chaotic bewilderment.[82] Many have scoffed at the slogan that "the personal is political," and I too worry about deeming self-actualization just as good as political action in behalf of oppressed *other* people. Liberation ought to extend beyond one's mirror or conversations with one's friends. That said, complaints connect private grievances with public consequences. And so those with this potential ought to be fostered and heard, even if they sound at first like mere whining. For example, "She broke my heart" tells us auditors nothing of a general nature; the personal remains personal. "He asked me out, and we became romantically involved; several weeks later, a mutual friend told me that he was married" implies a syllogism. What is the major premise? Perhaps, *In circumstances where context suggests that both parties are unattached, and sexual interest between them is manifest, one must not conceal the fact that one is married; silence on the subject is a misrepresentation.* Maybe I've got it wrong. I am operating almost in a void, after all. Until the progressive potential of complaints comes closer to maturation, we will all continue to struggle in a dark thicket.

In the meantime, individuals ought to cultivate the rhetorical, communicative, and expressive exercise of forming a true complaint, distinguished from an outburst or a whine. Precision in the formation of complaints is a craft and a process as much as it is evidence of something inherent. The effort conduces to citizenship. The citizen, like a litigator, works to form a complaint by starting with the sensation of grievance and moving toward an expression that can achieve understanding in another person.[83] It may be helpful to envision the effort of trying to make a ripple reach a distant point on the surface of water. Concentric circles start in a private, individual center and move toward more and more public proclamation along the outer rings, with ethical force pulling the complaint outward. Complaints similarly emerge from the person who is aggrieved: "What exactly do I feel? How does this grievance indicate a failure that would be of concern to someone not directly affected by this wrong?" The analytic effort starts with the feeling of one person and extends the sentiment outward. When the complainant determines that his grievance fits the model of a syllogism–that, put another way, it is not whining–he ought to express it. Wherever proclamation of the complaint beyond the offender would bring a matter of interest into public discourse, this expression deserves to reach an audience beyond the offender.

With citizens thus engaged, complaints conduce to progress not only because they are the instruments of the dispossessed–a larynx, or a keyboard, or pen and paper, rather than power or money, is what you need to complain–but also because

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82. *See supra* text accompanying notes 67-69.

83. *See* YOUNG, *supra* note 79, at 102-03 (summarizing Habermas's theory of communicative action: "Reason . . . means giving reasons, the practical stance of being reasonable, willing to talk and listen.").

of their function as units of history.[84] For this reason, the complaint has won support away from leftish politics like mine. Historian Robert Nisbet, for example, who describes himself as conservative, has pointed out that progress cannot exist without a sense of the past.[85] Acknowledging that faith in progress is "dogma" that cannot be empirically proved, Nisbet laments the deterioration of this faith in the contemporary West. When they lack faith in progress, he writes, human beings are relegated to despair and boredom, for which neither history nor genetics has prepared them.[86] One can readily substitute "the complaint" for "faith in progress" in this argument: a defining trait of a complaint is the faith that its articulation will yield improvement. The complaint necessarily evokes the past, as does Nisbet's faith in progress. An assertion of having been wronged implicitly pays tribute to an ideal established in the proximate past. The complainant looks optimistically ahead to a future that will bring redress. Despair and boredom do not blight the experience of complaining.

Thus, complainants have found ideals of a better future when they looked at analogies derived from the past. Some of these efforts have won the honor of fame and emulation. Martin Luther King Jr. found common ground with the liberation struggle of eighteenth-century white, propertied men who practiced invidious discrimination on the basis of race and sex.[87] Kathleen Barry thinks of prostitution under certain conditions as "sexual slavery."[88] William Eskridge and Andrew Koppelman borrow locutions from the lexicon of racial justice–"apartheid" and "miscegenation"–to describe the *de jure* detriments that American law imposes on same-sex unions today.[89] By analogy to past experience, these complaints about political injustice proclaim that history constructs the future.

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84. Geiko Muller-Fahrenholz notes the narrowness of a perspective that the past is "over and finished." MULLER-FAHRENHOLZ, *supra* note 23, at 92-93. Non-Western cultures see the past as ongoing and whole, he argues, with consequences for the process of forgiveness and integration that I have identified as related to complaints. *See supra* notes 17-29 and accompanying text.

85. ROBERT NISBET, HISTORY OF THE IDEA OF PROGRESS 4-5 (1980) ("[T]he idea of progress holds that mankind has advanced in the past–from some aboriginal condition of primitiveness, barbarism, or even nullity–is now advancing, and will continue to advance through the foreseeable future.").

86. *Id.* at 348-50.

87. *See* Martin Luther King, Jr., *"I Have A Dream" Speech at Lincoln Memorial, in* LEND ME YOUR EARS 497 (William Safire ed., 1992) (noting King's references to the Declaration of Independence).

88. *See* KATHLEEN BARRY, FEMALE SEXUAL SLAVERY 33 (1979) (characterizing prostitution as sexual slavery when these sex workers cannot escape).

89. *See generally* WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET (1999); Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988); *see also* Craig W. Christensen, *Legal Ordering of Family Values: The Case of Gay and Lesbian Families*, 18 CARDOZO L. REV. 1299, 1388 n.541 (1997) (noting numerous other scholarly expressions of the miscegenation analogy).

V.

Two basic objections to the thesis of this Essay warrant a few parting words. One is that complaints are not progressive but reactionary: just as a loaded handgun is said to be more likely to hurt a family member than to defend a home against intruders, so too will the complaint nestle in the arsenal of the wealthy and powerful, serving as a weapon against weaker antagonists.[90] The other is that complaints are dangerous instruments–costly, burdensome, and tending to discourage that which is constructive–and are entitled to no encouragement.[91]

It is tempting for the proponent of any affirmative argument to say that opposite objections cancel each other out, and I shall begin by yielding to that temptation. The complaint cannot at the same time be both too powerful and not powerful enough, and therefore at least one of the criticisms is wrong. And yet the arguments for both force and impotence are intermittently persuasive, suggesting that the complaint holds some ability to effect change, but not enough power to cause severe or radical destruction. Complaints are mild sources of progress rather than armaments of revolution. This mildness may irk onlookers: in its affinity for individual expression, public discourse, and persuasive reasoning, the complaint is a liberal device, and the L-word still affronts both the left and the right. So be it.

Inasmuch as the two criticisms do not cancel each other out, they do raise concerns that I would want to heed. The first criticism–that complaints, like other weapons, are the prerogatives of the powerful–commends vigilance against the use of complaints to intimidate or to silence dissenters.[92] Yes, affluent fathers have been known to press custody claims in bad faith; cries of "reverse discrimination" and "political correctness" take up a lot of public space; the game of discovery abuse, which often involves complaints, is an expensive sport. As Douglas Branson has shown, however, many abusive quasi-complaint tactics that bullies are said to favor have led to vigorous, and often effective, condemnation.[93] Furthermore, complaints expressed by the powerful do not stop adversaries in their tracks, and the cultural and legal complaint-suppressants surveyed earlier in this Essay serve to burden even powerful individuals or corporations that seek to complain. Moreover, if I can get

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90. *See, e.g.*, WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT 289 (1991) (demonstrating that litigation is not always progressive); *see also* Cheryl B. Preston, *Consuming Sexism: Pornography Suppression in the Larger Context of Commercial Images*, 31 GA. L. REV. 771, 823 n.251 (1997) (calling citations to Audre Lorde's phrase "the master's tools will never dismantle the master's house" virtually "required" in much feminist scholarship).

91. *See generally* PATRICK M. GARRY, A NATION OF ADVERSARIES: HOW THE LITIGATION EXPLOSION IS RESHAPING AMERICA (1997); PHILIP K. HOWARD, THE DEATH OF COMMON SENSE (1994); OLSON, *supra* note 90.

92. I am thinking of defamation law, for many speakers a chill on expression, and the use of litigation to intimidate ill-funded environmental activists. On the latter, see GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT (1996).

93. *See* Douglas M. Branson, *Book Review*, 48 CASE W. RES. L. REV. 459, 463-66 (1998) (contending that the portrait of infinite, venal corporate power in Ralph Nader & Wesley J. Smith's *No Contest* is exaggerated).

anywhere in pressing my distinction between complaining and whining,[94] some of the complaint counterrevolution-by-the-powerful will happily weaken.

Even if the rich are unduly advantaged in the land of complaints, the association between professional and amateur complaints that I urge here operates to ameliorate oppressive conditions. Lawyer-monopoly complaints are expensive–a fact that contingency fee agreements, lawyers who volunteer to work without pay, statutory fee shifting, treasuries too rich to be inhibited by opportunity cost, and other complications of the market for attorneys cannot eliminate. By comparison the amateur complaint is cheap. Cheapness is a trait that the poor and the weak can always appreciate. When leveraged closer to parity with its professional counterpart, a private complaint amplifies the voice of the relatively powerless. I would not press this ingenuous point too far–the amateur complaint can achieve only so much and no more–except to insist that given longstanding political inclinations to keep money from the poor, anyone who seeks to transfer power to poor or oppressed people should consider the potential of nonmonetary instruments.

The contrary notion–that complaints are too powerful–enjoys much wider support, among academics and lay citizens alike.[95] In his comprehensive attack on lawyer-monopoly complaints, Patrick Garry ascribes to them a host of evils: litigation entrenches the self at the expense of community and trust;[96] it encourages individuals to think of themselves as victims and adversaries;[97] it wastes time and money.[98] Amateur as well as professional complaints raise the specter of magnified errors: sometimes a grievance can result from miscommunication or another benign event; on other occasions complaints are simply false (or half-true) accusations; and the decision to complain can harden an experience into the narrow shape of protest where an individual might otherwise have considered a range of alternative expressions, some of which would have given her power rather than forced her to appeal to others for aid.[99] The complaint preempts and denies nonadversarial reactions to distress that, if given a chance, might have pleased all concerned.

Most of these objections amount to aesthetic or faith-based assertions about which conditions foster human happiness–assertions that cannot be proved or measured.[100] (The wasting-time-and-money argument, by the way, is equally

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94. *See supra* Part IV.

95. *See generally supra* Parts I and II (describing social tendencies and legal practices that suppress the complaint as a menace).

96. *See* GARRY, *supra* note 91, at 48-53.

97. *See id.* at 59-61, 105-119.

98. *See id.* at 176-82.

99. Thanks to Sean Lowe, asked to play devil's advocate, for his concise articulation of these arguments.

100. Some evidence, however, does suggest that concerns about false accusations are exaggerated. In response to the widely held belief that rape complaints are often fabricated, researchers have attempted to determine what percentage of the accusations are false. As a problem of empirical investigation, this question is almost impossible to answer, but a consensus indicates that false accusations are rare for all crimes, including rape. *See* Margaret A. Cain, Comment, *The Civil Rights Provision of the Violence Against Women Act: Its Legacy and Future*, 34 TULSA L.J. 367, 373 n.52 (1999) (noting one Los Angeles study that found that accusations of rape were less likely to be

unamenable to proof.[101]) If you want to look gloomily at American complaints and see malaise, buck-passing, the stifling of individual potential, and other wearisome burdens, I can't stop you. My own paeans to complaints as sources of progress and citizenship are on approximately the same plane, no more or less verifiable by disinterested empiricism than the denunciations. An impasse looms, then, on the question of whether a climate of complaint-fostering or complaint-suppression is the way to make people feel better about their lives.

In response, then, I need to move from the individual and her fulfillment *vel non* to look more generally at our politics and society. This world is not optimal: agreed? Some of its conditions ought to be changed. Now, how can societies identify that which ought to be changed? They can perhaps consult investigators, charging these people with the duty to be neutral, or they can receive the protests of speakers who claim they are injured. Without disparaging neutral expertise,[102] I argue simply that it alone will not do. The process of improving needs information, and some of that information can be provided only through the force of articulated, personal protest.

Lacking this force, we lapse into a dream world of quiescent acceptance, where law sees itself as concerned with "social order" rather than "values debates" or "failed hopes and hopeful dreams."[103] Patrick Garry associates this utopia with Europe,[104] certainly a preferable locale for those who want the social stability that a feudal heritage provides.[105] But in the United States, instability and restlessness hold more positive connotations of expansion and improvement. Granted, these effects are not guaranteed to make you feel good in the way that getting a plaintiff to stop suing you, or keeping your querulous spouse quiet, will always feel good. The pursuit of happiness in the United States is a tougher task, a personal struggle. Toward this end that complaint-suppressors so earnestly seek, I cannot offer any suggestions but the obvious one: if you don't feel good about complaints, you can take a cue from the litigation-explosion literature, and complain about them.[106]

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false than accusations of other crimes). As one court has noted, the possibility that a complainant is lying is an insufficient reason to reject all complaints: "if the possibility of fabricated complaints were a basis for not criminalizing behavior which would otherwise be sanctioned, virtually all crimes other than homicides would go unpunished." People v. Liberta, 474 N.E. 2d 567, 574 (N.Y. 1984).

101. *See generally* Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 733-40 (1998) (noting deplorable, tendentious nature of the data used to denounce the American civil justice system).

102. *But see supra* note 79 (suggesting that there is no such thing).

103. GARRY, *supra* note 91, at 56.

104. *Id.* at 55.

105. *See generally* Bernstein & Fanning, *supra* note 12, at 55-60 (arguing that American culture does not disapprove of litigation so much as do the cultures of other nations, because of its lack of a feudal tradition).

106. *See supra* notes 7, 90-91 (citing works that complain about complaints).

CONCLUSION

It is almost a truism that we Americans live in what Robert Hughes has called a culture of complaint, and that we'd be better off if we didn't.[107] Differing with this view, I have in the past noted that although the United States has achieved a degree of openness to complaints that is found nowhere else in the world, it also has a fierce ideology of resistance to them, the latter condition much more hidden from discussion.[108] I have broached that discussion here, defending complaints against a chorus of opprobrium. This defense of the complaint covers both lawyer-monopoly complaints–the kind prosecuted in courts–and private complaints, spoken by amateurs about their lives.

In building this defense of an unjustly reviled instrument of social change, I have had occasion to express skepticism about several phenomena, including popular and academic expressions of enthusiasm about forgiveness.[109] Although forgiveness can be a salubrious process, I have argued, enthusiasts should not commend it prematurely, before a grievance has had its chance to fulfill its melioristic potential. Forgiveness as *a priori* policy can deny the complaint before it is heard.[110]

In conclusion, I salute a different perspective on commending forgiveness, one that I think deserves to be pursued. Theologian Geiko Muller-Fahrenholz, a German scholar who chooses occasionally to write in English, brings an outsider's fresh take on the language with the term "re-membering," a word he coined to describe the integration that can ultimately result from a complaint.[111] Re-membering means bringing together the disparate pieces of what had once been complete.

Wrongs dismember that which was once whole. Complaints begin the work of restoration: an expressed complaint is the instrument for both individual redress and the amelioration of societal ills. When we achieve "re-membering," we reach the end of the story that I have sought to begin in this Essay.

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107. *See* ROBERT HUGHES, CULTURE OF COMPLAINT (1993).
108. *See* Anita Bernstein, *Law, Culture, and Harassment*, 142 U. PA. L. REV. 1227, 1278 (1994).
109. *See supra* notes 17-25 and accompanying text.
110. *See supra* note 27 and accompanying text.
111. MULLER-FAHRENHOLZ, *supra* note 23, at 36.