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BETTER LIVING THROUGH CRIME AND TORT

ANITA BERNSTEIN*

Every law pertaining to crime or tort originates from a conjunction of optimism and political power. Crimes and torts—especially in a legalistic, democratic, secular, liberal-pluralist setting such as the United States—are human artifacts, created in the hope of improving social existence. Occasionally citizens engage in the task of changing the law of crime and tort to cure a social ill that they have perceived. Their efforts are the subjects of this Paper. For specificity and to tie my thesis together, I use as examples three American social-political-legal events: the attack on pornography led by feminists,¹ the movement against cigarette smoking,² and citizens' campaigns aimed at reducing the harm attributed to liquor.³

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¹ DANY LACOMBE, *BLUE POLITICS: PORNOGRAPHY AND THE LAW IN THE AGE OF FEMINISM* 5 (1994) ("Feminists replaced sex with sexism as the focus of the pornography debate."). Some other ideological efforts against pornography also fit within my subject, but I have chosen to focus on the feminist attack to keep the example more compact.

² See generally PETER D. JACOBSON ET AL., *THE POLITICAL EVOLUTION OF ANTI-SMOKING LEGISLATION* 34-44 (1992) (connecting legislative reform with increased anti-smoking sentiment and popular activism); Robert L. Rabin, *Institutional and Historical Perspectives on Tobacco Tort Liability*, in *SMOKING POLICY: LAW, POLITICS, AND CULTURE* 111-12 (Robert L. Rabin & Stephen D. Sugarman eds., 1993) (attributing the first wave of tobacco litigation to a series of articles in the *Reader's Digest* linking smoking to lung cancer); Cassandra Tate, *In the 1800s, Antismoking Was a Burning Issue*, *SMITHSONIAN*, May 1989, at 107, 107 (describing the anti-smoking movement early this century, which culminated when ten states prohibited the sale, manufacture, or possession of cigarettes).

³ See generally Paul Aaron & David Musto, *Temperance and Prohibition in America: A Historical Overview*, in *ALCOHOL AND PUBLIC POLICY: BEYOND THE SHADOW OF PROHIBITION* (Mark H. Moore & Dean R. Gerstein eds., 1981) [hereinafter *ALCOHOL AND PUBLIC POLICY*] (examining alcohol policy options). See also John M. Faust, Note, *Of Saloons and Social Control: Assessing the Impact of State Liquor Control on Individual Expression*, 80 VA. L. REV. 745, 746 (1994) [hereinafter Faust Note] (arguing that public ambivalence about alcohol control "has resulted in the quiet intrusion" of government regulation into "a vulnerable sphere of individual rights").

Crusades of this type engage the legal system in what I call melioristic law reform, a sub-genre of law reform aimed at social progress.⁴ Melioristic law reform has many antagonists. Across the political spectrum, critics complain: Melioristic law reform is too powerful, too weak, never genuine or grass-rooted but rather a statist fraud, destructive of communities, counterproductive, legalistic, tyrannical, and trivial.⁵ Albert Hirschman's concise phrase, "perversity, futility, jeopardy,"⁶ sums up what critics say about melioristic law reform; although all three alarms are worth attention, jeopardy seems to be the gravest risk and the most powerful criticism. Despite this hostility, however, melioristic law reform flourishes in the United States. The task of trying to explain its appeal and persistence yields something of a response to critics.

My premise is that the intersection—here I mean combination and

⁴ I use "melioristic law reform" to mean citizen-driven law reform that proposes changes to the law of both crime and tort. The adjective "melioristic" refers to the hopes of proponents and is not intended to imply that the proposal is necessarily a good idea. For a persuasive critique of law reform, see Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 769-70 (1987) (arguing that traditional justifications for faith in law's autonomy as a discipline have been seriously undermined by a "series of confidence-shattering events," particularly the unforeseen harms of reforms in bankruptcy law, no-fault divorce, environmental regulation, and class actions, among other reforms).

"Melioristic law reform" is distinguishable from "cause lawyering." For extensive description of the latter, see generally JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* (1978) (examining such law-based social crusades as environmental litigation, consumer protection, civil rights, and social welfare). Scholarly treatments of cause lawyering discuss the theory and practice of achieving social change with the cooperation of an energetic judiciary. Cause lawyering is concerned generally with group-identified allocations of resources. In contrast, melioristic law reform, as I see it, consists of efforts to improve individual behavior through changes in tort and criminal law. Rather than seeking distributive justice via judicial decision, melioristic law reform emphasizes change through the political process at the individual level. These two conceptions of reform reflect their respective eras: Cause lawyering flourished in the expansionist 1970s, whereas melioristic law reform is suited to the current decline of judicial activism.

⁵ See *infra* notes 54-71 and accompanying text. In addition to other critical writings that I will discuss below, work in this tradition includes GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 336-37 (1991) (concluding that without political support, effective implementation mechanisms, and established precedents to lend legitimacy to their decisions, courts have been relatively ineffectual in producing significant social change); see also MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF AMERICAN POLITICAL DISCOURSE* at xii (1991) (contending that legalism's preoccupation with rights expresses American individualism but ignores "our traditions of hospitality and care for the community").

⁶ See ALBERT O. HIRSCHMAN, *THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY* 133 (1991).

conjunction—of crime and tort is a useful lens-like device to study law reform, because movements that seek to change *both* the law of crime⁷ and tort represent law reform at its utmost: that is, its most comprehensive and intrusive. Whereas other types of law reform (such as changes to the tax law or court procedures) may have important effects, a reform that tries to change both the law of crime and tort reveals its ambition to reach intimately into individual lives. Thus anyone who is concerned about jeopardy⁸ in law reform ought to worry especially about melioristic law reform. And if melioristic law reform is defended successfully against the charge of jeopardy, then all of law reform is defended, to a greater extent.

How does the intersection of crime and tort coexist with reform movements? The analysis offered here is functionalist:⁹ this Paper examines

⁷ Nine-tenths of animal species, it is said, are insects that even educated lay persons have never heard of, and a similar proportion governs the American taxonomy of crimes. Thus like most writers who discuss the criminal law, I work with a somewhat blinkered definition of crime, one that overlooks the proliferation of technical crimes and the tendency of lawmakers to criminalize violations of administrative law, to the point where criminal penalties are attached to more than 300,000 federal regulations. See John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875, 1880-81 (1992) (internal citation omitted). The idea of “crime” here is commonsensical; consistent with my interest in social problems, I mean to refer to crimes that citizens understand and take into account.

⁸ The jeopardy thesis “argues that the cost of the proposed change or reform is too high as it endangers some previous, precious accomplishment.” HIRSCHMAN, *supra* note 6, at 7.

⁹ The reference to functionalism, a much-banded word, requires a bit of definition and a disclaimer. Following Talcott Parsons, I mean by functionalism the belief that aspects of a society interrelate in purposive ways. Thus law reform movements and the doctrines of crime and tort, both social institutions, work together. As a sociological method, functionalism invites study of this working coexistence. In this Paper I use functionalism in this narrow sense.

I also share Parsons’s view that the center of society is found in institutional structures, even though individual persons make choices that are at least partially free. Institutions help to determine the actions of individuals, and in turn these institutions derive continuity from action. See TALCOTT PARSONS, *THE STRUCTURE OF SOCIAL ACTION* 106 (1937) (discussing marriage and property as “institutional modes of regulation of conduct”); cf. LACOMBE, *supra* note 1, at 139 (referring to “the mutually constitutive nature of structure and agency”). I do not agree with much of what has been said in the name of functionalism, including the prescriptive writings of Parsons. See, e.g. TALCOTT PARSONS & ROBERT F. BALES, *FAMILY, SOCIALIZATION AND INTERACTION PROCESS* 3-5 (1955) (suggesting that the historical increase in the divorce rate in the United States constitutes part of a phase in which the nuclear family transfers a variety of functions to other social institutions); Talcott Parsons, *Age and Sex in the Social Structure of the United States*, 7 AM. SOC. REV. 604, 610 (1942) (arguing that the social isolation of the conjugal family, of advanced age groups, and of middle class

the intersection as a social phenomenon, and as it has been experienced. Referring to the three examples mentioned above—the crusades against pornography, smoking, and liquor—I note in Part I some defining traits of melioristic law reform. Foremost of them is that although both crime and tort are invoked, activists use crime and tort in a decentralized—even haphazard—fashion. Social movements frequently outlive their founders, shift radically over the years, and attract a disparate membership. Decentralization occurs because the rise of a social movement precedes legal strategies.

A second identifier is stigma. When a social movement pursues change in the law of both crime and tort, it also pursues extralegal sources of social control. Though legalistic in the sense of wanting government and society to conform to a law-centered model,¹⁰ melioristic law reform also aspires to educate, influence, and shame individuals. The Paper thus examines the effect of non-legal social controls on human behavior and how those devices complement legal reform.

Other traits further identify melioristic law reform. Persons who lead the movement, if they are not obscure, present themselves as reluctant public figures. Although critics frequently impugn their motives, charging that reformers seek fame or power, these leaders lack a patent financial interest in the cause. Activists usually appeal to individual freedom, in a somewhat defensive way: Aware that their project may not fit within a tradition of negative liberties, they nevertheless use rights-rhetoric and individualism in the discourse that they initiate.

In Part II, descriptive and normative claims come together, as I argue that melioristic law reform is generally a desirable kind of democratic expression. Whereupon two challenges emerge: Is melioristic law reform, in truth, democratic expression? And is it always a good thing? Regarding the first, the descriptive challenge, I acknowledge that my claim about “better living” through melioristic law reform depends on some enthusiasm for democracy, notwithstanding that democracy often falls from its ideals. The claim also derives from two strands of faith, progressivism and secularism,¹¹ and indicates that I am a pluralist, that is

married women can be attributed to the absence of formal age and sex differentiation). For me, functionalism alone does not justify a status quo, and although I approve of the deployment of crime and tort by social movements, I regard the defense of this connection as a task separate from functionalist description.

¹⁰ See JOHN H. BARTON ET AL., *LAW IN RADICALLY DIFFERENT CULTURES* 9 (1983) (explaining legalism as “the belief (and practice) that law should be the principal organizing framework of government and society”).

¹¹ For discussion of legal traditions contrary to progressivism and secularism, see HENRY S. MAINE, *ANCIENT LAW* 7 (Beacon Press 1970) (1861) (“[I]n the infancy of mankind, no sort of legislature, not even a distinct author of law, is contemplated or conceived of. . . . The only authoritative statement of right and wrong is a judicial sentence after the facts. . . .”).

to say a believer that groups exist and share power.¹² The transcendent validity of progressivism, secularism, and pluralism certainly cannot be proved. Progressivism—the tenet that society moves toward a better state of earthly affairs—has been ascendant for less than four hundred years.¹³ Only since the Enlightenment, moreover, has it been understood that *homo faber*, rather than gods or a single Maker, builds positive law.¹⁴ These beliefs site my arguments in their place and time.¹⁵ Continuing my functionalist approach, however, I argue that progressivism, secularism, and pluralism serve purposes.

There remains the question of whether it is a good thing for the rest of us when activists engage the legal system, especially the law of crime and tort, to achieve their goals. I do not presume to answer this question, and try only to make some of the case for an affirmative response. Certainly melioristic law reform is a source of harm. Consider again the preeminence of jeopardy in the refrain of perversity, futility, and jeopardy. Some social movements propound bad ideas. All successful social movements intrude, coerce, and leave some people worse off. Melioristic law reform, as was mentioned, represents social movements at their most intrusive and coercive.

For this reason the normative claims I make here are limited for the most part to process virtues. Melioristic law reform engages the citizenry, adjusts political power, provokes debate and critical thought, alleviates isolation and anomie, and occupies a population in self-government. Contrary to a view that I attribute to Professor Mary Ann Glendon and others, this political and social use of law is at least consistent with, if not conducive to, other civic endeavors associated with a thriving community. The civic functions of melioristic law reform become more important as other institutional sources of political engagement decline. Despite its costs, melioristic law reform is part of the wealth of an affluent democracy.

¹² The literature on pluralism is vast. For an overview, see Louise Marcil-Lacoste, *The Paradoxes of Pluralism*, in *DIMENSIONS OF RADICAL DEMOCRACY: PLURALISM, CITIZENSHIP, COMMUNITY* 128-30 (Chantal Mouffe ed., 1992) [hereinafter *RADICAL DEMOCRACY*] (collecting the major sources of pluralist thought in philosophy, ethics, and political theory).

¹³ See JOHN BURY, *THE IDEA OF PROGRESS* 35-36 (1920) (identifying the origins of progressivism in the first quarter of the seventeenth century).

¹⁴ See, e.g. JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 1 (C.K. Ogden ed., 1931) (1802) (directing legislators to make laws that “establish the unity and the sovereignty” of the principle of utility).

¹⁵ See A.W.B. SIMPSON, *INVITATION TO LAW* 16-17 (1988) (arguing that only recently has law been seen as “an instrument for change, for reform, for improvement, [and] for producing a different sort of society”).

I. CRIME AND TORT DEPLOYED IN MELIORISTIC LAW REFORM: A FUNCTIONALIST VIEW

A. Dispersal

Although individuals in each movement may concentrate on one specific proposal, melioristic law reform efforts generate proposals to change both the law of crime and the law of tort, revealing a strategy of dispersal that is often not planned. When a social movement seeks to change both crime and tort, it indicates that it favors real change over centralized control. Dispersal is uniquely effective: Legal change is more likely to create social change when the power to initiate legal action—to turn on the machinery of the state—is spread between government officials and citizens.

Crime and tort describe these two spheres of power; melioristic law reform chooses both.¹⁶ In several senses, however, crime comes first.

¹⁶ Antismoking activists crafted criminal bans on smoking by women and by minors, see RONALD J. TROYER & GERALD E. MARKLE, *CIGARETTES: THE BATTLE OVER SMOKING* 34-35 (1983), as well as absolute prohibition in 14 states during the late nineteenth century, see Tate, *supra* note 2, at 107. More recently, public-places bans and other criminal-law restrictions have emerged. Tort and products-liability lawsuits against cigarette manufacturers evolved in stages or “waves” beginning in the 1960s. Rabin, *supra* note 2, at 110. Despite some feminists’ assertions that the criminal law does not fit the needs of those victimized by pornography, many activists have sought to expand criminal sanctions. See, e.g., FRANKLIN M. OSANKA & SARA LEE JOHANN, *SOURCEBOOK ON PORNOGRAPHY* 313-40, 390-92 (1989) (detailing approaches involving obscenity law and nuisance law, but noting the gross under-enforcement of obscenity laws and the possible unconstitutionality of nuisance enforcement measures); Lori Douglass Hutchins, Note, *Pornography: The Prosecution of Pornographers Under Prostitution Statutes—A New Approach*, 37 SYRACUSE L. REV. 977, 1002 (1986) (advocating application of prostitution statutes to pornography suppliers); Robin Morgan, *How to Run the Pornographers Out of Town (and Preserve the First Amendment)*, Ms., Nov. 1978, at 55, 79-80 (enumerating criminal-law strategies, among other approaches).

More famous, however, has been a civil rights ordinance crafted by Andrea Dworkin and Catharine MacKinnon at the request of the city of Minneapolis. The statute would allow victims to sue for harms attributable to pornography. On the origins of this celebrated and vilified attempt at law reform, see Paul Brest & Ann Vandenberg, *Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis*, 39 STAN. L. REV. 607, 607-08 (1987) (identifying as the source of the ordinance the “intersection” of efforts by two neighborhoods to eliminate pornographic bookstores and theaters and the personal experiences of women whose lives had been affected by male consumption of pornography).

Activists spurred the creation of drunk-driving crimes and highway checkpoints, and after a national campaign helped to criminalize the sale of alcohol to persons under the age of 21. See John R. Ashmead, *Putting a Cork on Social Host Liability: New York Rejects a Trend*, 55 BROOK. L. REV. 995, 995 nn.1 & 4 (1989). In the history of tort law, antiliquor activists are credited with the creation of dramshop acts. Mary M. French et al., Special Project, *Social Host Liability for the Negligent Acts of Intoxi-*

Crime fits more closely than tort with the intensity of reformers' ambitions, and the American campaigns against pornography, smoking, and alcoholic drinking appear to have been lured first to criminal law. A ban stands for urgent disapproval, in its purest form. Tort usually comes later, appearing to be something of a supplement, after reformers learn that a ban can never work perfectly.

Functioning as instruments, crime frames the perceived social ill as a scourge, and tort connects this scourge with harmed individuals—that is, victim-plaintiffs, who are essential to melioristic law reform. This one-two punch of crime and tort makes the reform somewhat dependent on causal propositions, which activists have to assert and re-defend to the point of irritation;¹⁷ but the punch is powerful. Without victims, reformers cannot gain imaginative attention, and in its use of victims a crime-tort paradigm offers corrective justice redoubled, a prospect of law-based restoration grounded in reasoning.

Melioristic law reform spurns the academic classification of crime as public and tort as private.¹⁸ This traditional division focuses on harms and discrete acts. For reformers, however, the relevant harm is a social ill, public in all circumstances; and it is tort that does much of the collectivist work of reform. Though “public,” crime burrows inward, accusing the individual; the “private” law of tort spreads outward, creating by its assertion money-links between individuals, manufacturing firms, insurers, local governments, and others. The drunk driver, especially when he or she kills, stands for our dark heart and our causal responsibilities, we who sell, serve, enable, condone: Friends-who-let-friends are connected to harm. Thus to reformers, crime centers and tort diffuses. The wide reach of the two combined suggests some of the breadth of melioristic law reform.

The dispersal of power between the realms of crime and tort is accompanied by the dispersal of power among individuals who are strangers to one another. Decisions to create or modify crimes and torts toward one social goal have disparate origins. Melioristic law reform, never a centralized movement, attracts different leaders and activists who work in sepa-

cated Guests, 70 CORNELL L. REV. 1058, 1065-67 (1990) [hereinafter Special Project] (explaining the indebtedness of modern dramshop acts to the nineteenth-century temperance movement).

¹⁷ For example, pornography defenders historically have rebuffed prohibitionists on the basis of causation. Catharine MacKinnon argues that this linear understanding of causation—“in the ‘John hit Mary’ sense”—ignores the silencing effect of pornography. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 156-57 (1987) (complaining also that “atomistic linear causality as a *sine qua non* of injury” is a standard that prevents gender equality from developing).

¹⁸ See Robert W. Drane & David J. Neal, *On Moral Justifications for the Tort/Crime Distinction*, 68 CAL. L. REV. 398, 402-03 (1980) (describing the public/private distinction, criticism of it, and its intuitive appeal).

rate times and places. The American antiliquor movement, for example, metamorphosed from nineteenth-century censure to a medicalized view of alcoholism;¹⁹ if various leaders of this crusade had met, they might well have loathed one another. The history of the antismoking movement records less dissent and more common ground, but very diverse players: King James I, who took legal measures against tobacco and wrote a famous denunciation of the substance,²⁰ finds twentieth-century colleagues around the world whose credo is egalitarianism.²¹ The feminist campaign against pornography is connected to antecedent reformers who worked within obscenity law and did not care to liberate women. These differences in personnel are always so great as to leave the term "movement" something of a misnomer.²² Reformers do not so much have common membership as a commonly-perceived evil.²³

¹⁹ ALCOHOL AND PUBLIC POLICY, *supra* note 3, at 10-11 (discussing the transition and showing how public policy has embraced the view that over-consumption is a disease).

²⁰ In 1604 James published his "Counterblaste to Tobacco":

Tobacco is a filthy weed and the custome is lothsome to the eye, hatefull to the nose, harmefull to the braine, dangerous to the lungs, and in the blacke stinking fume thereof, nearest resembling the horrible Stigian smoke of the pit that is bottomelesse.

MICHAEL GROSSMAN & PHILIP PRICE, TOBACCO SMOKING AND THE LAW IN CANADA 1-1, 1-6 (1992) (internal citation omitted).

²¹ STEVE ALLEN & BILL ADLER, JR., THE PASSIONATE NONSMOKER'S BILL OF RIGHTS 22-23 (1989) (equating smokefree public spaces with freedom and rights generally, and objecting to the idea of smoking as a "right").

²² Although they are "popular with the conservative constituencies that traditionally favor legal restrictions on sexual expression of all kinds," anti-pornography laws have been drafted by feminists who "oppose traditional obscenity and censorship laws." Lisa Duggan, *False Promises: Feminist Anti-Pornography Legislation*, 38 N.Y.L. SCH. L. REV. 133, 133 (1994).

²³ In an "information age," of course, activists cannot escape awareness of parallel or related efforts, and so they confront the question of how closely to ally with one another. Though alliances do result, melioristic law reform is always centrifugal, tending toward more dispersal. When they choose to disperse powers, reformers accept the risk that giving legal weapons to more actors will lead to abuses. Sometimes this inclusion of others is reluctant. See, e.g., MACKINNON, *supra* note 17, at 203 (explaining her choice of civil-law rather than criminal-law strategy); see also *id.* at 283 n.52 (discussing other benefits of a civil enforcement model). Other times reformers have few qualms about sharing power, as is the case with antismoking campaigns. See JACOBSON ET AL., *supra* note 2, at 19. Two Australian activists have written approvingly about dispersal as a strategy, adding that "the dominant culture" legitimizes antismoking efforts by redefining smoking as a public health issue rather than a personal right. ROLAND EVERINGHAM & STEPHEN WOODWARD, TOBACCO LITIGATION: AFC v TIA: THE CASE AGAINST PASSIVE SMOKING 16 (1991).

B. *Extralegal Sanctions*

The principal extralegal sanction accompanying melioristic law reform is shame.²⁴ The old-fashioned word retains tremendous force²⁵ and is always essential to the reform, in several ways. Before they create new crimes and torts, reformers are inspired by revulsion or outrage. After crimes and torts are established, stigmatization serves various supportive and gap-filling functions; for example, stigmatization affects prosecutorial discretion, impelling both action or inaction by the state. Because enforcement costs are everywhere too high to permit full use of the criminal sanction,²⁶ some of the general objectives of criminalization are achieved via stigmatization.²⁷ Shame is engaged both before an individual decides to commit a crime and after conviction, spreading influence into punishment and rehabilitation efforts.²⁸ Tort too is buttressed by the shaming that precedes, follows, and accompanies litigation.²⁹

²⁴ One philosopher discusses the creation of extralegal sanctions as a necessary social process. Edna Ullmann-Margalit, *Revision of Norms*, 100 ETHICS 756 (1990).

²⁵ Michael Lewis contends that shame is both "species-specific" and the most psychically significant emotion we possess. MICHAEL LEWIS, *SHAME: THE EXPOSED SELF* 2 (1992) ("[I]t encompasses the *whole of ourselves* . . ."); see also Jonathan Alter & Pat Wingert, *The Return of Shame*, NEWSWEEK, Feb. 6, 1995, at 21, 22 (observing that social control through shame is reemerging as a communitarian value after suffering a decline during the 1950s and 1960s).

²⁶ Put another way, the highest probability that a criminal will be apprehended and successfully prosecuted occurs when there are the greatest numbers of costly police, prosecutors, judges, and defense attorneys. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 225 (4th ed. 1992).

²⁷ John Braithwaite goes further. Agreeing that shame and stigma do much of the work of criminalization, he argues that shame and stigma ought to do much more of this work, and criminal justice, a professional domain for lawyers, government employees, and theorists, ought to do less. To Braithwaite, the professionalization of crime control helps to explain increases in crime rates in recent decades. JOHN BRAITHWAITE, *CRIME, SHAME AND REHABILITATION* 26 (1989) ("Professional criminology, in all its major variants, can be unhelpful in maintaining a social climate appropriate to crime control because in different ways its thrust is to professionalize, systematize, scientize, and de-communitize justice.").

²⁸ Compare *id.* (arguing that expansion of shaming can improve the function of the criminal law) with Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1883-84, 1943-44 (1991) (characterizing shaming practices used in American sentencing and rehabilitation as futile and potentially cruel).

²⁹ An early study of this phenomenon, undertaken in the late 1950s, assessed the effect of being sued for malpractice on the careers and personal lives of physicians. Richard D. Schwartz & Jerome H. Skolnick, *Two Studies of Legal Stigma*, in *THE OTHER SIDE: PERSPECTIVES ON DEVIANCE* 103, 111-12 (Howard S. Becker ed., 1964) (finding no correlation between being sued for malpractice and the continued success of the defendants' medical careers). The experience of the two of three movements where tort actions have been brought shows that opprobrium can also be deployed as a counterreform measure. See Rabin, *supra* note 2, at 124 (describing how tobacco-

More specifically, melioristic law reform often produces a "self-enforcing" criminal law or related norm, whereby the state need not exert direct effort in policing offenders due to the force of stigma.³⁰ Extralegal controls reinforce much of the law, not only law identified with social movements, but the expansive sweep of melioristic law reform helps to build stigmatic effects that strengthen acceptance of legal change. For example, researchers who studied public reactions to new government measures against cigarette smoking in the 1960s and 70s found that each change increased the percentage of people who regarded cigarette smoking as deviant.³¹ Although Professor Rabin has concluded that tort lawsuits did not have this educative and stigmatic effect,³² one may surmise that dispersed activism and revisits to old themes, both characteristics of melioristic law reform, helped to stigmatize smoking in a way that any single criminal-law proclamation could not.³³ The feminist anti-pornography campaign had its clearest success in creating a norm against the consump-

seller defendants systematically portrayed plaintiffs as unattractive and noting that in one case the defense introduced evidence that the plaintiff was "a heavy drinker [who] lived with other women while he was married [and] had trouble holding a job") (internal citation omitted).

Courts construe dramshop acts to deny recovery to plaintiffs whose intoxication causes injury to themselves, despite broad language allowing a claim by "any person injured." This narrow construction, apparently grounded in moralism, exists apart from contributory negligence, or skewed versions of comparative negligence, both of which favor defendants. Special Project, *supra* note 16, at 1069.

Andrea Dworkin argues that because victims of pornography have been kept out of the courts and thus out of American public life, they do not hear one another's accounts and remain in a state of isolated shame. ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* at xxvii-xxviii (rev. ed. 1989) (protesting the use of the word "anecdotal" to describe the few accounts of pornography-related abuse that have become public, because it trivializes the experience).

³⁰ See JACOBSON ET AL., *supra* note 2, at 13 (noting that many antismoking laws are "self-enforcing"); Note, *A Perspective on Non-Legal Social Controls: The Sanctions of Shame and Guilt in Representative Cultural Settings*, 35 IND. L.J. 196, 249 (1959-1960) (asserting that guilt sanctions "are self-enforcing and require much less expenditure of effort than would legal sanctions alone").

³¹ TROYER & MARKLE, *supra* note 16, at 52-60. The authors add that this perception continued to climb even when newspapers started to run fewer stories about new measures. *Id.* at 62-63 (but noting that, in spite of the decline, the issue of the harmful health consequences of smoking remained in the public arena).

³² Rabin, *supra* note 2, at 126-27.

³³ This point about multiple inputs suggests that Rabin comes to judgment too hastily. Discussing law-based responses to the problem of cigarette harm, Rabin contrasts the successful "public health perspective" informing criminal and quasi-criminal bans with the failed "individual rights perspective" behind tort litigation. *Id.* at 111. My view of melioristic law reform precludes this kind of relative assessment, as I see new crimes and torts as parts of a larger movement rather than end points; thus it is always hard to tell which measures have succeeded and which failed. In any case I

tion and approval of pornography.³⁴ A newer American character, the designated driver, was created extralegally, after the changes of melioristic law reform had achieved some effect; this entity exists to promote stigma that serves the liquor-control movement.³⁵ Extralegal sanctions occupy a midpoint between laws and a movement that builds changes to crime and tort.

C. *The Recurring Discourse*

1. Legal Versus Extralegal Measures

Extralegal sanctions function so powerfully in melioristic reform that they compete with the entire structure of crime and tort that activists build.³⁶ In the view of many, social reform ought to eschew law and emphasize stigmatization, because of dangers present in legal control.³⁷ Law

regard "the individual rights perspective" as integral to melioristic law reform. See *infra* Part I.C.3.

³⁴ Richard Randall describes the social value of pornography in terms of its stigmatization. By indicting pornographic portrayals of women as deviant, feminists have helped "sharpen or reinforce what is acceptable or favored" sexually. RICHARD S. RANDALL, *FREEDOM AND TABOO: PORNOGRAPHY AND THE POLITICS OF A SELF DIVIDED* 265 (1989); see also Ilsa Lottes et al., *Reactions to Pornography on a College Campus: For or Against?*, 29 SEX ROLES 69, 84 (1993) (describing disapproval of pornography among college students surveyed). One survey, done in the mid-1980s, found that 56% believed that exposure to pornography causes rape, and 54% believed that exposure to pornography causes other forms of sexual violence. EDWARD DONNERSTEIN ET AL., *THE QUESTION OF PORNOGRAPHY: RESEARCH FINDINGS AND POLICY IMPLICATIONS* at ix (1987). Although these majorities are narrow, they would not have been identifiable before the feminist campaign. I offer my own impressions about the declining acceptability of pornography among elites *infra* at text accompanying notes 56-60.

³⁵ The exact origins of the designated driver are unclear. Compare Edwin Diamond, *Guns and Poses*, NEW YORK, Dec. 6, 1993, at 32 (calling concept "another Hollywood-Harvard [School of Public Health] collaboration") with Jerry Keller, *Applause and Anger*, BEVERAGE WORLD, May 1994, at 4 (taking credit for the concept on behalf of "the beer industry"). Undisputed, however, is the secondary nature of this creation: The designated driver arose in the United States only after activists had fashioned crimes and torts.

³⁶ This competition is related to confusion over when law ends and non-legal forms of ordering in society begin. For discussion of this question, and a good resolution, see Brian Z. Tamanaha, *The Folly of the "Social Scientific" Concept of Legal Pluralism*, 20 J. L. & SOC'Y 192, 212 (1993) (protesting against pluralists' use of the word "law" to describe "lived patterns of normative ordering").

Commenting on a draft version of this Paper, my colleague Richard McAdams notes that extralegal and legal sanctions interrelate in another way: In a law-centered society, attempts to revise prominent laws can provide momentum and publicity for struggling social movements. By taking on the venerated First Amendment, for instance, feminists ensured attention and generated discussion.

³⁷ On feminist concerns, see *infra* note 74 and accompanying text. On anti-legalist

to these observers appears secondary to the mission of changing society. Reformers disagree.³⁸ The fundamental characteristic of melioristic law reform is its belief that law, particularly crime and tort, can solve social problems by influencing the behavior of individuals. Although crime and tort are basic to this task, extralegal forces are indispensable to making law effective at every stage of the reform. A debate over which type of measure works better is never resolved; melioristic law reform needs both.

2. Leaders

Melioristic law reform is often, but not always, identified with individuals. Foremost, these persons lack a financial stake in the reform, appearing often reluctant, almost ascetic. Although they often specialize in either criminal-law or tort proposals, leaders of the movement seldom distance themselves from—indeed often endorse—measures in which they do not specialize. Their support of both crime and tort establishes their bona fides, because although it is easy to imagine speaking out of avarice for a change in either crime or tort (financial interests might include attorneys' revenues, new prison construction, expansions of substance-abuse treatment facilities, and so forth), few who want to make money would invest their energy toward changes in both tort and criminal law.

In favoring both crime and tort, reformers reveal their desire to intrude into private lives and individual decisionmaking, for the good of strangers. Melioristic law reform thus can showcase leaders who are frankly meddlesome, and who appear fanatic and humorless.³⁹ A para-

concerns as stated by Mary Ann Glendon, see *infra* notes 67-71 and accompanying text.

³⁸ "Forget law, educate—as if law is not educational," Catharine MacKinnon wrote, describing tersely this strain of questioning and criticism. MACKINNON, *supra* note 17, at 223.

³⁹ The theme of humorlessness is often explored in popular writing about melioristic law reform. Antismoking efforts, feminist crusaders, and antiliquor activists are mocked in, respectively, CHRISTOPHER BUCKLEY, *THANK YOU FOR SMOKING* 3 (1994) (satirizing antismoking activists as "dedicated haters"); FLORENCE KING, *WHEN SISTERHOOD WAS IN FLOWER* 1 (1982) (recounting the narrator's story of being "shanghaied into the feminist movement"); and the 1932 Broadway melodrama, *Carry Nation*; see also SAMUEL L. LEITER, *THE ENCYCLOPEDIA OF THE NEW YORK STAGE, 1930-1940* at 114-15 (1989) (describing the nineteenth-century temperance fanatic of the title, who attacked saloons with a hatchet "after receiving what she claimed to be a divine revelation"). Also blowing in the zeitgeist are "feminazis," a Benson & Hedges ad campaign that ridicules public-places bans, and the rock group DAMM, or Drunks Against Mad Mothers. As a counterreform tactic, calling law reformers humorless—especially if they happen to be feminists—seems effective, or so I concluded after my research on the creation of sexual harassment law. Anita Bernstein, *Law, Culture, and Harassment*, 142 U. PA. L. REV. 1227, 1278 n.248, 1306-

dox emerges: To forestall cynicism about their motives, leaders need their grim and ascetic personae; but melioristic law reform is also a manifestation of American optimism, and American social movements that hope to achieve change must show themselves to be capable of change, of lightening up. After many years of effort on behalf of melioristic law reform, leaders either begin to work differently,⁴⁰ start to condemn the extremism and intransigence of their cause,⁴¹ or harden in their commitment and allow change to occur in the form of new claimants to the title of leadership.⁴²

A related paradox is that melioristic law reform cannot begin without leadership, but also cannot maintain it. Failed movements send their leaders into obscurity; a successful movement spreads legal change, and thus consciousness, away from its center. The centrifugal nature of melioristic law reform, among other circumstances, forces each leader in the movement to work with much less money, personnel, publicity, and discipline than the magnitude of her project would seem to require. But this dispersal is also an opportunity for individuals. Specific proposals concerning crime and tort give leaders canvasses small enough to paint, while a bigger picture grows around them.

07 (1994) (noting the prevalence of anti-feminist rhetoric that chastises feminist women for being "humorless," "joyless," and "puritanical").

⁴⁰ A good example of this type of leader, although his work is not discussed here, is Ralph Nader. For a summary of his activities in melioristic law reform, see Murray Fisher, *Ralph Nader, Consumer Rights Crusader*, PLAYBOY, Jun. 1992, at 53, 53 (noting that Nader switched tactics from agitation to participation by placing his name on the 1992 presidential ballot).

⁴¹ Candy Lightner, first the grieving mother-against-drunk-driving and later the worldly public figure who took a job lobbying for the liquor industry, exemplifies this choice. Walt Wiley, *Candy Lightner's New Cause*, SACRAMENTO BEE, Oct. 18, 1994, at B1 (listing the organizations Lightner has affiliated herself with, including the Beverage Institute, Americans Against Crime, and the American-Arab Anti-Discrimination Committee).

⁴² Dworkin and MacKinnon have been so widely mocked and challenged that a *Time* magazine writer referred to them as the Al Sharpton and Louis Farrakhan of the women's movement. Lance Morrow, *Men: Are They Really That Bad?*, TIME, Feb. 14, 1994, at 52, 58 (also noting that MacKinnon and Dworkin are "convenient targets for antifeminists"). Many writers put themselves forward as new, revisionist feminists, who would cure the excesses of their predecessors. See, e.g., RENE DENFIELD, *THE NEW VICTORIANS: A YOUNG WOMAN'S CHALLENGE TO THE OLD FEMINIST ORDER* 10-11 (1995) (arguing that young women are abandoning the women's movement because it clings to an oppressive vision of womanhood); CAMILLE PAGLIA, *VAMPS AND TRAMPS: NEW ESSAYS* 107 (1994) (titling one chapter "The Return of Carry Nation: Catharine MacKinnon and Andrea Dworkin"); CHRISTINA H. SOMMERS, *WHO STOLE FEMINISM? HOW WOMEN HAVE BETRAYED WOMEN* 275 (1994) (foretelling the demise of the "gender feminism" of Susan Faludi, Gloria Steinem, and others, in favor of a new wave of "equity feminism" that wisely abandons "militant gynocentrism and misandry").

3. *Positive Liberty*

These leaders relate uneasily to the notion of liberty, a powerful word to the pluralistic and progressivist constituencies they must convince.⁴³ On the one hand, they regard their cause as consistent with individual freedom.⁴⁴ On the other hand, melioristic law reform seeks influence over every force affecting social order—that is, crime, tort, and extralegal sources of authority—and this big grab, for its sheer ambition, looks tyrannical. It is only partly effective for spokespersons to say that they are poor, financially outmatched, or obscure, too humble to exert control.⁴⁵ They must also state their agenda in terms that comport with some concept of freedom.

This tension means that proponents of melioristic law reform are continually obliged to explain how their ambitions fit within a traditional view of liberty that is negative and tends to regard laws, especially new laws, as obstacles, barriers, and restrictions.⁴⁶ Opposing the anti-tobacco campaign, the cigarette industry achieved its best success by positing a (limited) right to smoke and appealing to freedom.⁴⁷ As portrayed in the media and public commentary, feminist attacks on pornography are countered almost exclusively by civil libertarians.⁴⁸ Antiliquor activists

⁴³ John Stuart Mill adverted to the complexity of “liberty” when he wrote that “when society is itself the tyrant—society collectively over the separate individuals who compose it—its means of tyrannizing are not restricted to the acts which it may do by the hands of its political functionaries. Society can and does execute its own mandates.” J.S. MILL, *ON LIBERTY* 4 (Blackwell’s 1948) (1859).

⁴⁴ See, e.g., ALLEN & ADLER, *supra* note 21, at 18-19, 22-23 (explaining that the non-smokers’ rights movement has achieved legislative successes, even in the face of the powerful tobacco lobby, because there is no cognizable right to smoke).

⁴⁵ In this sense debates over melioristic law reform resemble the discourse about political correctness, voluminously reported in the media during the early 1990s, when representatives of each side called themselves beleaguered and their opponents tyrannical. For a compilation of essays supporting and opposing “political correctness,” particularly in educational settings, see *DEBATING P.C.: THE CONTROVERSY OVER POLITICAL CORRECTNESS ON CAMPUSES* 1 (Paul Berman ed., 1992) (attributing the first shot in the debate to a 1990 *New York Times* article).

⁴⁶ This tension in the feminist anti-pornography movement appears as a constitutional dilemma: First Amendment-type freedom to produce and consume pornography thwarts women’s efforts at gaining full political, social, and economic equality. MACKINNON, *supra* note 17, at 166 (“Equality for women is incompatible with a definition of men’s freedom that is at our expense.”).

⁴⁷ See JACOBSON ET AL., *supra* note 2, at 16-17 (calling this tactic “clearly more effective than continued reliance on contesting the scientific evidence”). For an attack on this counterreform device, see EVERINGHAM & WOODWARD, *supra* note 23, at 26 (reprinting sections of an advertisement published by the Tobacco Institute claiming “little evidence and nothing which proves scientifically that cigarette smoking causes disease in non-smokers”).

⁴⁸ Nadine Strossen described the feminist-libertarian opposition:

have been challenged to reconcile the right to buy liquor with the obligation to be drafted, or treated as an adult in the criminal courts.⁴⁹

Activists are not at liberty, as it were, to disdain freedom as a value; instead they claim this value as their own. Antipornography crusaders allude to physical integrity (i.e. freedom from rape and degradation);⁵⁰ antismoking activists portray cigarette smoke, rather than their own bans and lawsuits, as an aggressor;⁵¹ the antiliquor campaign looks forward to roads free from drunk drivers (i.e. the right to rely on all others behind a wheel), while away from the specifics of drunk driving, persons who favor increased legal sanctions for the harms caused by alcohol often advert to the alcoholic's intimates, the ranks of Al-Anon and the "codependent," who have rights, too.⁵² In building these arguments, melioristic law reform seeks to broaden the existing dominant paradigm of "freedom from" to address more interests, values, and aggrieved persons.⁵³

We adamantly oppose any effort to restrict sexual speech not only because it would violate our cherished First Amendment freedoms . . . but also because it would undermine our equality, our status, our dignity, and our autonomy.

NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX AND THE FIGHT FOR WOMEN'S RIGHTS 14 (1995); see also *id.* at 59-106 (describing ACLU efforts); SUSAN M. EASTON, THE PROBLEM OF PORNOGRAPHY: REGULATION AND THE RIGHT TO FREE SPEECH 71 (1994) (describing the efforts of the Feminist Anti-Censorship Task Force ("FACT"), and likening the feminist anti-pornography campaign to the *fatwa* against Salman Rushdie).

⁴⁹ See Rupert Cornwell, *Out of America: Land of the Free Besotted by Tight Drink Law*, THE INDEPENDENT (London), Nov. 3, 1993, at 15 (speculating that the high drinking age may be a holdover from Prohibition, an expression of American puritanism, or a quid pro quo for a lower driving age).

⁵⁰ See DWORKIN, *supra* note 29, at 224 ("We will know that we are free when the pornography no longer exists."); cf. Marianne Wesson, *Sex, Lies and Videotape: The Pornographer as Censor*, 66 WASH. L. REV. 913, 918 (1991) (observing the "significant incidence of . . . instrumental uses of pornography as a tool of coercion, intimidation, and abuse" against women, namely by sex offenders).

⁵¹ See *Castano v. American Tobacco Co.*, 870 F. Supp. 1425 (E.D. La. 1994) (alleging that industry altered and misdescribed the nature of tobacco in cigarettes); Irene Scharf, *Breathe Deeply: The Tort of Smokers' Battery*, 32 HOUS. L. REV. 615 (1995) (arguing that exposure to cigarette smoke can constitute intentional harmful contact).

⁵² But see Dean R. Gerstein, *Alcohol Use and Consequence*, in ALCOHOL AND PUBLIC POLICY, *supra* note 3, at 182, 216-18 (concluding that little recent evidence supports the "imagery that pits drinking against the family," and noting a positive correlation between consumption and income).

⁵³ See generally DAVID BOLLIER & JOAN CLAYBROOK, FREEDOM FROM HARM: THE CIVILIZING INFLUENCE OF HEALTH, SAFETY AND ENVIRONMENTAL REGULATION at vii (1986) (characterizing the "freedom of victims" as morally superior to the "corporate taxonomy" that emphasizes the costs of regulation); BURTON A. WEISBROD ET AL., PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS (1978) (reconciling economic-analysis perspectives with the goals of public interest law).

II. MELIORISTIC LAW REFORM AS DEMOCRATIC EXPRESSION

In a democracy, citizens contribute to the writing and change of law. Thus, if democracy exists, then struggles to change the law of crime and tort are forms of democratic expression. Changing the law of crime and tort requires persuasion, cooperation, alliances, compromise, and interdependence—all characteristics of democracy. Melioristic law reform resembles other examples of a broad kind of democratic expression (broad, that is, in the sense of not being confined to the vote, or majoritarianism) such as petitions to the government, the financing of political campaigns, the elimination of structural obstacles to voting, political speech, and other initiatives.

Various writers, however, have challenged the claim that law reform is democratic expression. The antipluralist literature uses an attack on law reform to express a larger quarrel with progressivism and pluralism, and its skepticism about law reform extends to doubting that democracy exists. Antipluralist traditions maintain that law reform originates at the top, or from the middle of a circle.⁵⁴ There are no social movements, only force. This disbelief in the possibility of genuine law reform echoes Marx's themes of false consciousness and historical materialism, while the suggestion that concentric designs underlie pluralism recalls Foucault.⁵⁵

⁵⁴ To some writers, for example, law reform is "part of the inevitable reproduction of the 'order of things'," LACOMBE, *supra* note 1, at 9 (internal citation omitted); the state constructs social problems and then proffers law reform as their solution, with the aim of achieving greater control. *Id.* at 10. The apparent pluralism behind melioristic law reform is illusory to those who find a centralizing ideology behind institutions such as schools, the family, and neighborhoods. See STANLEY COHEN, VISIONS OF SOCIAL CONTROL: CRIME, PUNISHMENT AND CLASSIFICATION 77 (1985). Others contend that citizens' power to achieve change is absolutely bounded by caste, "the original sin of superstratification." DON MIXON, OBEDIENCE AND CIVILIZATION: AUTHORIZED CRIME AND THE NORMALITY OF EVIL 65, 73 (1989). Antipluralism, in this descriptive sense, also exists on the right and center-right, most conspicuously in economics-tinged political theory. To take an example from the antiliquor chronicles, one explanation of both Prohibition and Repeal vigorously rejects sociological theses to contend that both the banning and unbanning of the sale of liquor were done to increase tax revenues. Donald J. Bourdreaux & A.C. Pritchard, *The Price of Prohibition*, 36 ARIZ. L. REV. 1, 2-3 (1994). Similarly, public choice theory, and perhaps rational choice theory as well, is committed to the notion that people have differing tastes, which sounds like pluralism in its description yet conflicts with my claims about the functions of idealism and self-sacrifice in melioristic law reform.

⁵⁵ Professor Lacombe suggests that any theory of the melioristic possibilities of law reform must necessarily grapple with the work of Foucault, who understood the concept of reform as social control disguised as change. Not surprisingly, Lacombe finds in Foucault both refutation of and support for her claims. LACOMBE, *supra* note 1, at 10 (finding Foucault's definition of reform inconsistent with his descriptions of resistance and the emergence of nontraditional values).

Unlike "the rhetoric of reaction," which finds law reform harmful or useless, antipluralist criticism believes that it is simply a charade.

The thesis of this Paper accommodates this radical doubt in some measure, while also urging observers to allow the experience of melioristic law reform to temper their theorizing. Space constraints and other limitations prevent me from refuting antipluralist skepticism about law reform. I have had a chance, however, to allude to the history of three crusades. This history suggests that social movements—which are the antecedents of melioristic law reform—are vibrant, significant in their effects, and diverse in their origins. The achievements of melioristic law reform provide some evidence for the existence—and the instrumental benefits—of progressivism and pluralism in the United States. Consider four points.

First, although all three causes continue, they have also achieved results—outcomes that are jagged over time, with setbacks and gains, not a neat split between *pro* and *contra*. These rough spoils look like the result of a tussle in a democracy. Regarding pornography, neither the criminal nor the tort/civil rights approaches propounded by law reformers have been used significantly, with obscenity and other crimes not prosecuted much more often than before the feminist onslaught in the late 1970s;⁵⁶ and the MacKinnon-Dworkin ordinance was nullified by the courts.⁵⁷ Yet unquestionably pornography has gone into retreat among the respectable and the visible. In upmarket books and journals, some gay men, lesbians, and self-declared feminist women applaud pornography,⁵⁸ but heterosexual men in high places distance themselves from the stuff,⁵⁹ and are often quick to agree that it harms women.⁶⁰ College film socie-

⁵⁶ See RANDALL, *supra* note 34, at 220-21 (explaining why prosecution of obscenity crimes is seldom used to control pornography). Moreover, those convicted on obscenity charges often receive only a minimal sentence. 1986 ATT'Y GEN. COMM'N FINAL REP. 370-71.

⁵⁷ See *American Booksellers Assn., Inc. v. Hudnut*, 771 F.2d 323, 332 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986) (holding the statutory definition of pornography unconstitutional because it discriminates on the basis of viewpoint).

⁵⁸ See STROSSEN, *supra* note 48, at 15; Jeffrey G. Sherman, *Love Speech: The Social Utility of Pornography*, 47 STAN. L. REV. 661, 662 (1995) (arguing that gay male pornography should be valued as a social good because it enables its consumers "to lead fulfilling lives").

⁵⁹ See, e.g., JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* 271, 329-30 (1994) (reporting the horrified reaction of Clarence Thomas to accusations that he was an avid consumer of pornography); Sherman, *supra* note 58, at 685 (suggesting that such dissociation causes psychological harms).

⁶⁰ *Hudnut*, 771 F.2d at 329-30 (conceding *arguendo* that pornography is as harmful as feminist activists claim); accord ATT'Y GEN. COMM'N, *supra* note 56, at 324-26 (acknowledging causal relationship between exposure to sexually violent pornography and aggressive behavior towards women). But see LACOMBE, *supra* note 1, at 81-83 (summarizing conclusions of Canada's Fraser Committee, including its dismissal of

ties no longer present pornographic features as banners of sophistication, as they did when I was a student in the late 1970s. A mixed outcome: by no means a tie. Crime and tort measures have been more successful for the antismoking cause than for the feminist attack on pornography—one cigarette ban follows another in the United States, and tort suits about cigarettes, though not yet successful with juries, have accomplished more than tort suits about pornography—but this result too is uneven and shifting. Suppliers and enemies of cigarettes agree on no middle ground. With liquor, a reasonably fair fight of haters-versus-makers, dry against wet, is even plainer. Although the crimes and the torts of abusing liquor, or furnishing it carelessly, have been established, this movement has reached barriers.⁶¹ Again, I do not claim that melioristic law reform has led to the identification of a happy middle between activists and pariahs. The point is only that these three debates may be seen as political battles, as vital as many in the American democratic arena.

Second, as Dany Lacombe concluded in her chapter called "The Enabling Quality of Law Reform," that study of melioristic law reform "should warn us against reifying the 'state,' against depicting it as a unified entity above social relations that represses or monopolizes social agents."⁶² At its most successful, melioristic law reform sketches a state that follows MacKinnon's prescription of more attention to the personal experiences of individuals.⁶³ At a minimum it points to the fissures in any construction of the state as monolith. What, for instance, does this entity think of cigarette smoking?⁶⁴ Comparable variables vex the question about the antiliquor crusade; there is no obvious side for the state to back. And the question of what the state thinks of pornography as a feminist issue is at least equally complex or ironic.⁶⁵

Third, the experience of melioristic law reform reveals the flexibility of liberalism in a democratic state. Liberalism can stretch to coexist with, if

the anti-pornography women's movement's claim that violent pornography leads to aggression against women).

⁶¹ Special Project, *supra* note 16, at 1108 (discussing a state court case in which the court limited social host liability to situations when the host directly served the guest); Wiley, *supra* note 41, at B1 (alluding to Candy Lightner's differences with MADD).

⁶² LACOMBE, *supra* note 1, at 139.

⁶³ Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 543 (1982) (noting that feminist method seeks to reconstitute experience as theory).

⁶⁴ On the one hand, consider Medicare savings attributable to premature death, tax revenues, symbolic support of a unifying cultural symbol, and a tame outlet for mild rebelliousness; on the other hand, tobacco subsidies, grave losses in productivity and national health, and the coercive and punishing effects of smoke onto citizens who do not choose it.

⁶⁵ This is so unless one agrees with MacKinnon's angry suggestion that nearly every political agent not enrolled in her cause is simply a pimp or a collaborator. See MACKINNON, *supra* note 17, at 204-05 (mentioning feminist lawyers and the ACLU).

not foster, two other concepts that have been posited as its antagonists: communitarianism and a wider definition of liberty that includes positive rights.⁶⁶ This flexibility is widely misperceived. To Mary Ann Glendon, for instance, legal and extralegal-communal sources of social order compete in a zero-sum contest. As law increases, "unofficial social controls" diminish in force.⁶⁷ Glendon condemns the rise of legalism in the United States, which may have expanded since Tocqueville first noticed it,⁶⁸ as an eroder of family authority, custom, neighborly relations, and even the power of etiquette.⁶⁹ But the experience of melioristic law reform testifies against this rigid division between community and liberal legalism. To be sure, any individual decision to seek redress through litigation, rather than through some alternative, does express an either-or choice. Glendon could have condemned the conditions that impel Americans to make that choice. Instead, wavering on what exactly she finds objectionable in the current American legal landscape,⁷⁰ Glendon veers from this target.⁷¹ Her attack on legalism neglects the possibility that modifying

⁶⁶ See Chantal Mouffe, *Democratic Citizenship and the Political Community*, in RADICAL DEMOCRACY, *supra* note 12, at 225, 231 (arguing that ideals of citizenship can be consistent with "the priority of the right over the good"); SUSAN M. OKIN, WOMEN IN WESTERN POLITICAL THOUGHT 282 (1992) (arguing that the liberalism/communitarianism dichotomy, frequently noted in the 1980s, misdescribes liberalism); Quentin Skinner, *The Idea of Negative Liberty: Philosophical and Historical Perspectives*, in PHILOSOPHY IN HISTORY 193, 202-08 (Richard Rorty et al. eds., 1984) (citing Machiavelli, among others, to contend that modern concepts of liberty are compatible with civic engagement and virtue).

⁶⁷ MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 267 (1994).

⁶⁸ De Tocqueville observed:

The spirit of the law, born within schools and courts, spreads little by little beyond them; it infiltrates through society right down to the lowest ranks, till finally the whole people have contracted some of the ways and tastes of a magistrate.

ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 270 (George Laurence trans., J.P. Mayer ed., 1969) (1835-1840).

⁶⁹ See *id.* 257-79 (labeling American society "One Vast School of Law").

⁷⁰ Most of Glendon's book attacks the proliferation of lawsuits and legalism generally. GLENDON, *supra* note 67, at 3 ("our law-dependent polity"); *id.* at 221 (noting critically "an increase in the demand for judicial services") (internal citation omitted); *id.* at 275 (blaming "legal opinion leaders" for "peddling an idea of law that promised too much"). But near the end of *A Nation Under Lawyers* she appears to retreat:

What is problematic is not the amount so much as the quality of the new law that is being produced; not the number of lawyers so much as the way they imagine their roles; not the rise in litigation so much as the peculiar uses to which the courts are being put.

Id. at 274. Elsewhere she simply alludes to malaise. See, e.g., *id.* at 14 (noting the "great sadness" of contemporary American lawyers).

⁷¹ As the political scientist Anna-Maria Marshall has pointed out to me in conversations, Gerald Rosenberg is similarly shortsighted in *The Hollow Hope*, where he

crimes and torts can be a communal function, extending well beyond any particular conflict brought to the courts.

Far from on the one hand empowering an atomistic man who wants to be free from anything he dislikes, or on the other hand turning all of society into an absolutist gulag, melioristic law reform invokes liberal ideals and sets them loose. Individuals who begin with an idea behind melioristic law reform can build a community: The phrases "secondhand smoke" and "mothers [or students] against drunk driving," for instance, which are media clichés to many of us, have also been sources of friendship and comfort. Melioristic law reform also builds second-generation communities: If averse to Women Against Pornography,⁷² one can join the Feminist Anti-Censorship Task Force.⁷³ Of course, the creation of each new collective does not necessarily improve on the immediate past. But given their status as players in a democracy and their disconnection from, or at least independence of, powerful organizations, new collectives that arise as a result of melioristic law reform are unlikely to be serious menaces. At their best they can contribute significantly to human flourishing.

Melioristic law reform threatens more traditional notions of liberalism only when fragments of the movement join to create a powerful entity that imperils the life-plans of individuals who are less powerful than the reform. Many feminists, for instance, fear that legal force mixed with the feminist opposition to pornography yields a powerful and repressive chemistry that will ultimately leave women badly harmed.⁷⁴ The student

argues that because celebrated Supreme Court decisions like *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Roe v. Wade*, 410 U.S. 113 (1973), have had only partial success in furthering the goals of social reformers who brought these cases, it has been demonstrated that "the courts" cannot "bring about social change." ROSENBERG, *supra* note 5, at 82. Even if Rosenberg's empirical findings are complete and correct (a debated point), law reform movements are not summed up, or encapsulated, in one famous case. The civil rights movement, for instance, used crime, tort, and extralegal sanctions in thousands of settings, and the phrase "*Brown v. Board of Education*" is often only shorthand, or synecdoche.

⁷² Andrea Dworkin also mentions Women Against Violence in Pornography and Media, Women Against Violence Against Women, People Against Pornography, Feminists Against Pornography, and Women Against Sexist Violence in Pornography and Media. DWORKIN, *supra* note 29, at 225-26.

⁷³ On FACT, see Nan D. Hunter & Sylvia A. Law, *Brief Amici Curiae of Feminist Anti-Censorship Task Force et al.*, in *American Booksellers Association, Inc. v. Hudnut*, 21 U. MICH. J. L. REF. 69, 69-75 (1988) (providing history of the organization).

⁷⁴ See CAROL SMART, *FEMINISM AND THE POWER OF LAW* 139 (1989) (contending that women's "demand for legal rights is now problematic"); Marianne Wesson, *Girls Should Bring Lawsuits Everywhere . . . Nothing Will Be Corrupted: Pornography as Speech and Product*, 60 U. CHI. L. REV. 845, 871 (1993) (observing the reservations of many feminists about using "male-originated power against continuing male dominance and violence"). Margaret Atwood's celebrated feminist dystopia, *The Hand-*

commentator John M. Faust argues that antiliquor efforts imposed a price—on individual expression and even group-based notions of the self—that has been devalued by observers who did not have to pay it.⁷⁵ I do not mean to join the ranks of reformers who advocate legal change with blithe disregard of its cost. It is important, however, not to overlook the benefits, even the benefits for “liberals,” of law reform; among them is often an expanded concept of freedom.

Critics may continue to think it Orwellian for activists to characterize their projects as freeing, but life has moved on; we now know about externalities,⁷⁶ the trouble with thinking about eighteenth-century-style rights of “man,”⁷⁷ the carcinogenic vectors that almost certainly extrude from a burning cigarette,⁷⁸ and the highway as social construct.⁷⁹ Although a definition of liberty, to this liberal, cannot be manipulated to deny all separation between an individual and the collective, melioristic law reform has not really gone so far, despite its critics’ anxiety. An elastic word has been extended, in a constructive manner; at the same time, the original virtues of liberalism have not yet been harmed.

Fourth and finally, melioristic law reform adds a dash of instability to a political system that is always in danger of becoming stagnant. Because this trace is, after all, melioristic rather than revolutionary, the Marxist objection to law reform—that it conceals class-based absolute power, or forestalls truly radical action—retains force for those who are genuinely committed to revolution. This minority view aside, citizens in general benefit from the potential for change that melioristic law reform offers, especially in the American political system, which like all other political systems rewards stasis.⁸⁰

maid's Tale, may be read as an allegory about the same harm to women. Wesson, *supra* at 848 (interpreting the novel as a critique of the feminist anti-pornography movement).

⁷⁵ See Faust Note, *supra* note 3, at 772-73. More specific objections have been aimed at some drunk-driving laws, whose per se rules about blood alcohol levels make it impossible in many cases for drivers to know whether they are violating the law, and thus constrain behavior in an unprincipled way. See Philip J. Cook, *A Sociological Problem*, *SCI.*, Jul. 29, 1988, at 603, 603 (reviewing *SOCIAL CONTROL OF THE DRINKING DRIVER* (Michael D. Laurence et al., eds. 1988)).

⁷⁶ See WEISBROD, *supra* note 53, at 404-05 (discussing third-party effects of economic behavior).

⁷⁷ See LACOMBE, *supra* note 1, at 151 (describing the Enlightenment affinity for defining social systems with reference to the “rights of man”).

⁷⁸ See generally Maria Okonska, *Legal Aspects of Passive Smoking: An Annotated Bibliography*, 86 *LAW LIBR. J.* 445 (1994) (cataloguing major works, including EPA study and seminal research first published in *New England Journal of Medicine*).

⁷⁹ See Chad Rubel, *Why Dog It? Trains Are Better*, *MARKETING NEWS*, Feb. 13, 1995, at 9 (arguing that although Amtrak is castigated as a socialistic failure, it is the federal highway system that deserves this opprobrium).

⁸⁰ See Sheldon Wolin, *What Revolutionary Action Means Today*, in *RADICAL DE-*

In the United States, access to lawmaking both evidences and expands power. Without the disruptive and subversive pressure of forces like melioristic law reform, law would remain in the control of the entrenched. Melioristic law reform, being fundamentally about change—social change coupled with new law—shifts power distributions in several ways. The movement unites disparate individuals and frames new communities.⁸¹ Specific proposals concerning crime and tort divide, reshape, and rebuild constituencies, generating new groups or strengthening existing affiliations.⁸² Melioristic law reform also can be destructive: By barging into individual lives, it challenges (although seldom in a direct way) such fixtures of liberal political theory as the public-private distinction and the unitary nature of the patriarchal family. This grouping-and-regrouping is the essence of political power. As the political scientist Sheldon Wolin has pointed out, relationships—“family, friends, church, neighborhood, workplace, community, town, city”—give power to political beings, not only in the sense of being:

able to effect decisive changes; [political power] also means the capacity to receive power, to be acted upon, to change, and be changed. From a democratic perspective, power is not simply force that is generated; it is experience, sensibility, wisdom, even melancholy distilled from the diverse relations and circles we move within.⁸³

In this expansive view of political power, melioristic law reform is a kind of energy that presses against stasis, paralysis in government, alliances that are no longer vital, and anachronistic rules. The powerful combination of crime and tort intensifies the energy that goes with all political movements. As long as democracy and pluralism persist, even in attenuation, this force cannot be stored or channeled.

MOCRACY, *supra* note 12, at 240, 242-44 (describing stasis in American politics, traceable to the founding documents of the United States).

⁸¹ See LACOMBE, *supra* note 1, at 138 (asserting that individual anti-pornography advocates, acting as social agents, formed “new collective identities,” and evidence “the enabling quality of the law reform process”).

⁸² See *supra* notes 69-71 and accompanying text (alluding to feminist division and regrouping over pornography); cf. Lawrence Rand, *A Different Road*, CHI. TRIB., Feb. 22, 1995, § 5, at 1, 5 (describing Quad A, a spinoff of Alcoholics Anonymous oriented away from religion and offering “a feminine approach to alcoholism”). A class-action lawsuit by nonsmoking flight attendants against cigarette sellers has brought together a group of similarly-situated workers for whom unionization has not been completely successful. *Broin v. Philip Morris Co., Inc.*, 641 So.2d 888 (Fla. App. 1994) (remanding with instructions to reinstate the class).

⁸³ Wolin, *supra* note 80, at 251-52.

CONCLUSION

By "better living through crime and tort," this Paper has referred to social movements that seek to improve the lives of individuals through the intrusive and challenging avenue of what I have called melioristic law reform. The distinguishing trait of melioristic law reform efforts is their interest in changing both crime and tort. I noted other identifying conditions, and offered some praise for these efforts.

Because some of this apologia applies to other types of law reform and to social movements generally, however, I ought also to defend my taxonomical project. Why sub-distinguish "melioristic law reform" when law reform and social activism, both relatively clear concepts, cover much of the same terrain? Put another way, what is distinctive about social movements that choose to change both crime and tort? In the introduction I raised the *a fortiori* argument that because melioristic law reform uses both crime and tort it is the most comprehensive type of law reform; thus if it can be defended against the charge of overaggressiveness, then all of law reform is thereby defended. But a few more words of defense may be necessary, at both a particular and a general level.

The particularistic response focuses on the identifying characteristics of law reform concerned with both crime and tort, and insists that they are salient. For example, my criteria exclude from melioristic law reform such business-based initiatives as regulatory rollback and tort reform. This boundary-setting is part of a current debate about firms as public actors. To be sure, trying to distinguish which efforts in American politics are led by "people" and which by "business" may be a foolish enterprise, as Justice Scalia has written,⁸⁴ but case law and scholarly writing suggest that the task is significant.⁸⁵ At a tactical level, the classification offered here could interest activists who are participating in or resisting melioristic law reform efforts, and want to proceed aided by theory. More generally, diverse social movements can fall within my definition of melioristic law reform—consumerism, abortion crusades pro and con, recovered-memories-about-sexual-abuse pro and con, environmentalism—and it is useful to learn in what ways they are alike.

Still more generally—perhaps wishfully—one can think of melioristic

⁸⁴ *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 685 (1990) (Scalia, J., dissenting) (characterizing the distinction as "entirely irrational").

⁸⁵ Following a suggestion from my colleague Richard Hasen, I am alluding to campaign finance law. In *Austin*, where Scalia did not prevail, the Supreme Court upheld a statute limiting corporate campaign expenditures, distinguishing corporations from human persons for this purpose. 494 U.S. at 659-60. Explorations of this problem include *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197, 207 (1982) (noting the concern that corporations might exact promises from legislators via strategic use of "war chest" funds); see also CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 209 (1993) (characterizing the constitutional standard for corporate speech as "especially ill-developed").

law reform as part of a larger taxonomy of law reform and social movements, an invitation to more refined labeling, and a spur to further empirical investigation about whether better living has indeed been achieved through crime and tort. We know so little about law reform. In the United States, where most melioristic law reformers like to think of themselves as heirs of abolitionists and civil rights heroes, who are the real heirs and who are the pretenders? If melioristic law reform is indeed part of the wealth of a democracy, how much is it worth vis-à-vis its costs? Where has law reform bungled? Throughout this Paper I have mentioned political faith. But melioristic law reform is ultimately a call to action.