1-1-1996

Introduction—Survivor Stories

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We are all survivors. We understand both the lash we avoid and the comfort we embrace from the pain we remember. Both suffering and trauma mark our experience.

In “Constitutions and ‘Survivor Stories’,” a conference held at the University of California, Santa Cruz, on January 13 and 14, 1995, participants from many disciplines argued over how surviving has marked us. What effect has surviving had on our political culture? How has it shaped what we demand of law and what law in turn can give us? Has it sharpened or occluded our memory of our own experience? More importantly, perhaps, is survivorship itself a form of victimhood? Does it condemn those who have outlasted suffering to repeat the patterns of their pain? Do our stories of survival liberate or enslave us? Can we, in other words, survive our own survivor stories? These are just a few of the issues the conference considered.

Robert Meister’s Sojourners and Survivors: Two Logics of Constitutional Protection1 traces the influence of survivorship on American antidiscrimination law. He sees in our history two major, competing conceptions of discrimination. The first, which he calls the “sojourner model,”2 grounds individual rights in interstate comity. It holds that “[f]ederally protected constitutional rights [a]re not rooted in natural rights of individuals, but [a]re rather the traces of one’s own state’s equal and alternative claim to sovereignty in the interstate system.”3 In this view, which Meister argues Chief Justices Marshall and Taney and President Wilson all shared, respect for individual rights springs from the sovereignty of the state the sojourning individual comes from, not from any sovereignty the individual himself possesses. Any equality among individuals derives from equality among states. Dred Scott4 worked out the implications of this model most notoriously. In that case, the Court argued that respecting slave states’ sovereignty required free states to recognize

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1. 3 U Chi L Sch Roundtable 121 (1996).
2. Id at 142.
3. Id at 127.
slaveholders’ right to human property. The slaves’ human rights yielded to slaveholders’ assertion of their own states’ sovereignty.

Against this model, Meister finds another working. This competing model, which he calls “Lincolnian,” rests on a particular interpretation of the nation’s civil war experience. The Lincolnian model views that “national trauma as a unifying experience[e] and . . . seeks to replace the moral logic of victim and perpetrator with the moral logic of common survivorship and collective rebirth.” It sees all of us, victim and perpetrator alike, as survivors of slavery. To overcome the threat of continuing victimization and to ease political acceptance by defeated perpetrators, Lincolnianism puts everyone on an “equal moral footing.” To some, this fresh start approach to moral bankruptcy will prove troubling. As Meister admits, it does a better job of relieving guilt than of doing justice.

Meister’s modelling pays off in two ways: it helps explain much of our constitutional history and it offers criticism of some strands of contemporary legal theory. First, Meister argues that the development of American constitutional law marks a shift from a pure sojourner model—in cases like Dred Scott, the Slaughter-House Cases, and the Civil Rights Cases—to a model conflicted between sojourners and survivors. In his view, Brown v Board of Education and its progeny mark the high point of this tension. Second, Meister points out that to the extent we accept the Lincolnian view of the 14th Amendment we should “stop listening to the voice of the victim insofar as this is what it takes to recover from a traumatic history and to reunite.” This call to “stop listening” has disturbing implications not only for critical race theorists, as Meister notes, but also for any brand of legal theory that privileges the voice of personal experience.

Wendy Brown’s In the ‘folds of our own discourse’ The Pleasures and Freedoms of Silence pursues this same argument from a different angle. Brown notes that in our age without certainties the personal voice has assumed the mantle of truth and experience has become our only authority. Citing “compulsory feminist discursivity,” she decries the emptying of private life into the public realm and the consequent trivialization of the public sphere. As she puts it, “these [individual] productions of truth not only bear the capacity to chain us to our injurious histories as well as the stations of our small lives but also to instigate the further regulation of those lives, all the while depoliti-

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5. Meister, 3 U Chi L Sch Roundtable at 138 (cited in note 1).
6. Id at 139.
7. Id at 143.
8. Id at 156.
9. 83 US (16 Wall) 36 (1872).
10. 109 US 3 (1883).
12. Meister, 3 U Chi L Sch Roundtable at 185.
cizing their conditions.”

Confession, Brown fears, may become the regulatory truth of the identity group. By privileging survivor stories, we make the story of greatest suffering the greatest truth about the identity group. The ultimate danger is that the tellers of survivor stories will, by constantly retelling their trauma, debilitate themselves from ever overcoming it. The survivor’s voice, in this view, represents a most effective form of self-victimization. As Brown describes the problem, first-person survivor’s discourse can “silence those whose experiences do not parallel those whose suffering is most marked . . . [and the stories] also condemn those whose sufferings they record to a permanent identification with that suffering.”

Brown calls on us to assume a more complex relationship to the trauma than just declaring its truth. To her, that traditional position is largely self-defeating. Instead, she asks women (and implicitly members of other victim groups) to experiment with “silence.” By that term she means more than simply quiet. Silence can be that, but more important it “signifies a relation to regulatory discourses, as well as a possible niche for the practice of freedom within those discourses.” Silence is both quiet and resistance. In feminism, it entails, among other things, the calling into question of those personal truths that victim discourse privileges.

Judith Butler’s *Burning Acts: Injurious Speech* approaches trauma discourse from the opposite perspective. She considers the dangers in perpetrators, not victims, employing this rhetoric. To her, hate speech represents trauma discourse from the oppressor’s perspective. Through hate speech the perpetrator invokes the victim’s whole history of oppression in order to make that oppression powerfully present. Unlike Meister, who believes that hate speech violates the Lincolnian survivors’ covenant against looking back, Butler believes that hate speech presents a more specific problem. It injures not through raising painful memory, but through reinstating a powerful form of oppression. Its injury lies not in reminding victims and perpetrators of their trauma, but in making past victims victims once again.

Butler works this insight quite deeply. By analyzing the rhetoric of the Supreme Court’s hate speech decisions, she argues that the Court not only has normalized racism but also has done injury itself. Even more interestingly, Butler plays out this analysis by looking at Catherine MacKinnon’s identification of pornography as a kind of hate speech. This overly simple identification, Butler argues, aids neither women nor the victims of hate speech. It confuses representation with reality.

In *Freedom of Speech and the Constitutional Tension Method*, Eugene

15. Id at 186-87.
16. Id at 192.
17. Id at 193.
18. Id at 188.
Volokh agrees that hate speech injures but argues that a legal cure is worse than the harm. He identifies what he calls the “constitutional tension method” as the interpretive methodology required to validate hate speech regulation under the First Amendment. This method rests on the belief “that the Constitution itself defines certain kinds of political truth, and that speech which interferes with the implementation of this truth may be suppressed.” In this view, hate speech may be regulated because it conflicts with the value of equality, which the Fourteenth Amendment and other parts of our Constitution enshrine.

After reviewing the history of this general approach to the First Amendment, a history that has permitted suppression of much political speech, Volokh asks why we should think that this method would work any better today. In the past, this approach allowed suppression of some unpopular speech because it conflicted with democracy, one of the Constitution's central values. Would regulation in the name of equality do any better? In particular, considering the people who occupy the bench, might this method not redound to the injury of those it is intended to protect?

In Declarations of Rights, Jeremy Elkins investigates a different kind of survivor's story—that of the political survivor. He argues that the constitutional history of the American Revolution reflects our having survived a trauma of political legitimacy. In his view, the conflict between an imperial and colonial politics resulted in a kind of aspirational constitutional theory. This peculiarly American approach sees constitutional rights not as legally enforceable protections, but rather as statements designed to shape our political culture. As Elkins writes, “[t]he point of declaring . . . rights . . . was not thus to enact a law, but to articulate certain aspects of the nature of the people and the state—aspects which might otherwise tend to be poorly represented.” Or, as he later writes, “by articulating certain fundamental principles, these declarations would . . . help to recall and to promote at least part of what governmental institutions were most likely and dangerously to forget.” Rights were, in other words, designed to remind us of what we should strive to be.

Does such a conception of rights leave any room for judicial review? Elkins believes that it does, but only if we radically reconceive judicial review itself. As he reads our history, the political crisis we survived through the Revolution problematized the notion of political representation. “[T]he people,” he writes, are “not ever fully embodied within any institutional form” and so “proper representation of "the people" requires the existence of counterpoints to the particular representation of the people that any single institution offers.” This gap between the people and their structures of

21. Id at 224.
22. Id at 236.
24. Id at 310.
25. Id at 320.
26. Id.
representation invites the judiciary to play a novel representation-reinforcing role. In Elkins's view, judges should not see their role principally as ascertaining the intrinsic meaning of a text or discovering the intentions of the framers, but rather as representing certain fundamental aspects of the people that are likely to be neglected by other political institutions. Such judicial review would make institutions better reflect the people while at the same time admitting that the people can never be perfectly embodied within them.

The papers, like the conference itself, present a lively discussion of some of the most central political issues of our time. They contribute to several longstanding legal debates—from the doctrinal to the theoretical—and question much orthodoxy. Any further introduction would merely postpone their enjoyment.