Symposium

Wrong Tomorrow, Wrong Yesterday, but not Today: On Sliding into Evil with Zeal but without Understanding

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Collaboration with systems of evil—the overall topic of this Symposium—is a problem as fresh as contemporary news accounts. *The New York Times* recently carried a front-page story about the dilemmas described by young Serbs who were evading military conscription because they understood the evil of Slobodan Milosevic's genocidal policies against the Kosovar Albanians but nonetheless felt a patriotic duty to protect their country against foreign assaults. As one young man put it, "'we'd like to see [Milosevic] hanging.' But . . . '[i]f the guys from NATO come here, we will shoot them.'"[1] As wrenching as this kind of dilemma may be, it is not the problem of collaboration that I want to discuss. My concern is with a more difficult problem, as I see it—a problem that is more insidious and difficult to identify as such. The young Serbian resister knows that his President is an evil man, and he feels the moral conflict between his revulsion at this evil and his patriotic impulses. My concern is for circumstances where the evil is not understood as such by its perpetrators, where they are unaware at the time they are acting of the wrongfulness of the actions in which they are engaged.

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1. Steven Erlanger, *Serb Conscripts Drift into Hiding: Assert Patriotism While Using Safe Houses to Avoid Army*, N.Y. Times, Apr. 5, 1999, at A1, *available in* LEXIS, News Library, New York Times File.

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There are, of course, some people who are so malevolent—so far from any commitment to moral conduct as most people understand it—that they will never acknowledge wrongdoing. Nothing but force can constrain such people from their depredations. Though it is often difficult to impose effective controls on shameless wrongdoers—Slobodan Milosevic is a contemporary example of this difficulty—nonetheless, in principle, the problem is clear because the brazen evil-doing is clear. My concern today, however, is in a murky realm.

Justice Louis Brandeis identified the problem I want to address in a dissenting opinion arguing against permitting the use of wiretaps by law-enforcement officials.[2] The worst menace, he said, does not come from "evil-minded rulers;" people are "naturally alert" to repel their "invasions."[3] "The greatest dangers," according to Brandeis, "lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[4] This is the source for the subtitle I have given to this presentation, "on sliding into evil with zeal but without understanding." My focus is, however, somewhat different from Brandeis' perspective. He was judging other people's conduct and urged his fellow-judges not to be misled by the evident "beneficence" of the wrongdoers' purposes. My concern is, in a sense, with the other side of this judgmental difficulty—with the problem that the perpetrators themselves have in cutting through their belief in their own goodness, to grasp that they are in fact, involved in inflicting great evil.

The defining characteristic that I would give to these inflictions—and the core difficulty that I see in the perpetrators' capacity for moral evaluation—is in the first part of my title. The perpetrators themselves once understood the wrongfulness of their conduct; that is what I mean by "wrong yesterday." And when some future judgment day arrives, the perpetrators will once again themselves understand, acknowledge and truly regret the evil they have done; that is what I mean by "wrong tomorrow." "But not today"—on the day, that is, when the deeds are actually committed, the perpetrators see themselves only as well-meaning, as zealously engaged in morally correct conduct.

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2. *See* Olmstead v. United States, 277 U.S. 438, 471-88 (1928) (Brandeis, J., dissenting).

3. *Id.* at 479 (Brandeis, J., dissenting).

4. *Id.*

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The subject-matter addressed by at least three of the other participants in this Symposium illustrate these defining characteristics. Professor Finkelman and Professor Carrington addressed the American institution of slavery and its aftermath.[5] From my perspective, one of the most striking aspects of our historical experience was the shift in the dominant attitude from an acknowledgment of its intrinsic wrongfulness by the leaders of the Revolutionary War generation, including Southern slave-owners such as Thomas Jefferson and James Madison, to the insistence among the Southern leadership of the succeeding generation that slavery was a "positive good" both for society and for the slaves themselves.[6] This self-delusion persisted and even intensified after the Civil War among Southern white leaders and Northern fellow-travelers who resurrected enslavement in the Jim Crow regime. It was not until the Civil Rights movement of the 1960s that this delusional bubble about white paternalism and black contentment was definitively exploded—when the acknowledged wrong of "yesterday" was re-acknowledged as wrong by "tomorrow's" hindsight, and large numbers of white perpetrators suddenly saw "today's" conduct as morally unjustified.

The institution of the death penalty, which Professor Cottrol addressed, may also fit this pattern—though this is still a story in progress.[7] In my own lifetime, there has been a striking shift in the dominant attitude toward the death penalty which, I believe, has direct parallels in our historic experience of slavery. In 1966, national opinion polls showed that 47% of the American public favored abolition of capital punishment while only 42% supported its continuation; in 1968, the Supreme Court referred to supporters of the death penalty as a "dwindling minority,"[8] reflecting a widespread belief that the United States would soon join the rest of

5. *See* Paul Finkelman, *Thomas R.R. Cobb and the Law of Negro Slavery*, 5 Roger Williams U. L. Rev. 75 (1999); Paul D. Carrington, *Lawyers Amid the Redemption of the South*, 5 Roger Williams U. L. Rev. 41 (1999).

6. *See infra* text accompanying notes 31-33.

7. *See* Robert J. Cottrol, Address at the *Lawyer Collaboration with Systems of Evil* symposium entitled *The American Death Penalty at Century's End: The Problem of Systemic Injustice* (April 16, 1999).

8. Witherspoon v. Illinois, 391 U.S. 510, 519-20 & n.16 (1968) (citation omitted).

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western civilization in its abolition.[9] Yet, by 1985 opinion had shifted dramatically, with polling data in that year indicating that 72% approved the death penalty; today the approval rate is even higher.[10] What was wrong "yesterday" has thus become right "today." We have not reached "tomorrow's" re-kindled moral condemnation. I share the confidence of Justices William Brennan, Thurgood Marshall and Harry Blackmun,[11] however, that this tomorrow will come someday and that American society will look back on this era of state inflictions of death with the same disbelieving revulsion as we now recall the physical dismemberment of criminal offenders—killing them by literally tearing their limbs from their bodies—which was accepted state penal practice well into the eighteenth century.[12]

Let me offer one more historical example which makes even more starkly apparent this contradictory pattern of wrong yesterday and tomorrow, but not today. Consider the shifting treatment of mentally ill and mentally retarded people in the United States. In the mid-nineteenth century, there was a wave of moral outrage at the cruelty of the dominant practice of confining such people in chains and prisons, indiscriminately mixed with criminal offenders; a new regime was instituted of special residential facilities with beneficent treatment provided under medical supervision. By the end of the century, however, the worst features of the old regime were re-created in these institutions—mentally disabled people stashed away in gigantic, remote institutions, often in isolation rooms, chained to their beds, regularly beaten by staff and other inmates.[13] The moral outrage that had so clearly condemned these practices fifty years earlier had somehow faded away. It was not until the 1960s and 1970s that the moral condemnation was re-

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9. *See* Franklin E. Zimring & Gordon Hawkins, Capital Punishment and the American Agenda 3 (1986) ("The pattern is so simple it is stunning. Every Western industrial nation has stopped executing criminals, except the United States.").

10. *See* Robert A. Burt, *Cruelty, Hypocrisy, and the Rehabilitative Ideal in Corrections*, 16 Int'l J.L. & Psychiatry 359, 362 (1993).

11. *See* Callins v. Collins, 510 U.S. 1141, 1145-46 (1994) (Blackmun, J., dissenting from denial of certiorari); Gregg v. Georgia, 428 U.S. 153, 231-32 (1976) (Marshall, J., dissenting); William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 Harv. L. Rev. 313, 331 (1986).

12. *See* Michel Foucault, Discipline and Punish: The Birth of the Prison 3-69 (Alan Sheridan trans., Vintage Books 1979) (1978).

13. *See* David J. Rothman, The Discovery of the Asylum: Social Order and Disorder in the New Republic 265-66 (1971).

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kindled; and then, when public interest lawyers led judges and the general public to look closely at the inhumane practices in these institutions,[14] virtually everyone found it hard to believe that this evil had been tolerated for a moment's time, much less for an extended period of some seventy-five years. Yet, during all this time, reputable physicians had presided over these institutions; reputable judges had routinely committed people to these institutions; and the general public had ignored the reality of the horrors perpetrated within them. Wrong yesterday, wrong tomorrow—but accepted practice today.

How are we to understand this kind of collaboration with systems of evil—this initial understanding of evil that somehow turns into blindness? Then, when moral vision suddenly returns, it seems incredible (not just to outsiders, but to the participants themselves) that the evil inflictions were not always clearly understood as such. How are we to understand this, and how are we to guard against it for the future?

I do not have easy answers to these questions; but I do want to offer a difficult and complicated answer, or at least a difficult and complicated speculation that may help us find the way to an answer. The clearest way that I can offer you this speculation is to focus on another example of this pattern which I have been describing—an example where the shift between moral clarity, moral blindness and restored vision did not happen from one generation to the next, but happened instead in an hour's time or even less. I want to focus on a social science experiment conducted in the 1960s by Stanley Milgram, a psychologist at Yale University.[15]

The Milgram experiment is still well-known, at least among undergraduate psychology students; but I believe that it should be better known, that all of us should think hard and continuously about it. I say this because I believe that the Milgram experiment demonstrates the ease with which any one of us, without exception, can be seduced into collaboration with, into the commission of unspeakable evil. Milgram described his experiment as demonstrating "obedience to authority;" but this description understates

14. *See* Robert A. Burt, *Pennhurst: A Parable*, *in* In the Interest of Children: Advocacy, Law Reform, and Public Policy 265, 289-91 (Robert H. Mnookin ed., 1985).

15. *See* Stanley Milgram, Obedience to Authority: An Experimental View (1974).

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its disturbing implications, for the experiment shows at a deeper level that most people are easily inclined to seduce themselves into a willing alliance with malevolent authority.

This was the experiment. Milgram ran advertisements in local New Haven newspapers asking for volunteers to participate in a psychological experiment about learning techniques.[16] He obtained volunteers from a virtual cross-section of the community; when each one arrived at his laboratory, Milgram arranged a rigged drawing of lots whereby the volunteer would be designated the "teacher" and an associate, who was posing as another volunteer, would be designated the "learner."[17] The so-called "learner" was then strapped into a formidable-looking machine and the "teacher"–the volunteer experimental subject–was told that he should administer electrical shocks from this machine each time the "learner" made a mistake in recalling a list of word associations.[18] The electrical shocks were marked on the front panel of the machine, with indications of escalating intensity from 15 volts to 450 volts. Labels appeared above the voltage markings that ranged from "slight shock," to "danger: severe shock" at 375 volts, to only a chilling "XXX" at 435 volts.[19] At the beginning of the experiment, the teacher-subject was himself subjected to an actual shock from the machine at a 45 volt level, which most described as somewhat painful.[20]

The experiment then proceeded. In its basic format, a grey-coated laboratory technician who described himself as "the experimenter" stood by the side of the teacher-subject and the "learner" was in an adjoining room, able to be heard but not seen. As the shocks escalated in intensity, the learner cried out with escalating intensity.[21] At 150 volts, the learner refused to participate any further, complaining that he had previously suffered from a heart condition and that his heart was "bothering" him and he demanded to be unstrapped from the machine.[22] At 270 volts, the learner let

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16. *See id.* at 14-15.
17. *See id.* at 16-21.
18. *See id.* at 19-20.
19. *See id.* at 20.
20. *See id.*
21. *See id.* at 16-23.
22. *See id.* at 55-57. The heart problem "suffered" by the learner was a variation to the experiment after the original series of experiments using New Haven participants was completed. *See id.* at 55.

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out what Milgram described as "an agonized scream;" at 300 volts, the learner refused to say another word, and thereafter remained utterly silent.[23] Whenever the teacher-subject hesitated or outright refused to administer a further electrical shock, the experimenter cooly instructed him that the "experiment require[d] that [he] continue,"[24] or that he had "no other choice"[25] and he "*must* go on."[26] If asked whether the shocks were truly dangerous for the learner, the experimenter would respond with a bland and self-contradictory assurance, "[a]lthough the shocks may be painful, there is no permanent tissue damage, so please go on."[27]

In fact, the machine was rigged so that no shocks were actually administered,[28] but the illusion of real-life shocks was utterly convincing to all of the teacher-subjects. For those inclined to disbelieve Milgram's account on this score, I urge you to look at the film; the teacher-subjects show such distress as they administer these shocks that it is clear they believed in the reality of their painful and even life-threatening consequences.[29] Indeed, at the end of the sequential administration of shocks, several of the teacher-subjects stated that they believed the learner had actually died.[30] In this basic format of the experiment, almost two-thirds of the teacher-subjects administered the electric shocks up to 450 volts, "XXX," the highest level possible.[31]

After the conclusion of the experiments, many of the teacher-subjects justified their actions in various ways—that they were just "following orders," or that they trusted that the experimenter would not really let anything bad happen, notwithstanding the overwhelmingly contrary evidence of their own senses during the

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23. *Id.* at 23.

24. *Id.* at 21.

25. *Id.*

26. *Id.*

27. *Id.*

28. *See id.* at 3.

29. *See* Obedience: The Milgram Experiment (Yale Univ. 1965); *see generally* Milgram, *supra* note 15, at 40-43 (discussing the behavior and reactions of participants in the experiment).

30. *See* Milgram, *supra* note 15, at 73-77, 87-88 ("Mr. Gino [a teacher-subject] summarizes his reaction to his own performance. 'Well, I faithfully believed the man was dead until we opened the door. When I saw him, I said, 'Great, this is great.' But it didn't bother me even to find that he was dead. I did a job.'").

31. *See id.* at 35.

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experiment.[32] Not all of them, however, engaged in this post-hoc justification; some were openly condemnatory of their own conduct—including one man who said that when he told his wife of the experiment, she responded, "You can call yourself Eichmann."[33] This appellation, of course, speaks to the broader implications of the experiments; Milgram designed them in the immediate wake of Eichmann's trial in Jerusalem, in order to test the typicality of his conduct—to test, one might say, Hannah Arendt's thesis about the "banality," the utter ordinariness, "of evil."[34] Professor Weisberg's presentation in this Symposium about the administration of anti-Semitic laws in Vichy France provides a similar context for this test.[35]

The Milgram experiment, in an almost incredibly compressed and stark demonstration, reproduces the basic paradigm I have been discussing. Before embarking on the experimental protocol—that is, "yesterday"—the teacher-subjects clearly knew that inflicting pain on a helpless and unwilling person, perhaps even killing him, was wrong; and when the experiment was concluded—when "tomorrow" arrived—all of the subjects knew that the infliction itself had been wrong. It was only in the doing of the deed—it was only "today"—that its evil character somehow evanesced. How are we to understand this blinded evil?

Milgram himself offers an insufficient explanation for his results—essentially, he claims, the experiment shows that most people are willing to obey authority rather than question its moral standing.[36] This may be a true observation, but in the context of his experiment, it is a misleading truth. This explanation contains a background assumption, i.e., that the commission of evil requires the presence of active malevolence somewhere. In Milgram's paradigm, there is active malevolence in the person giving orders, though the agent is dumbly willing to obey whether or not his leader is purposefully evil.

This was too glib a way of understanding the essential dynamics involved in Milgram's experiment; there was in fact no clear

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32. *See id.* at 7-8, 44-54.

33. *Id.* at 54.

34. *Id.* at 5-6; *see* Hannah Arendt, Eichmann in Jerusalem: A Report on the Banality of Evil (1964).

35. *See* Richard H. Weisberg, *The Risks of Adjudicating Vichy*, 5 Roger Williams U. L. Rev. 127 (1999).

36. *See* Milgram, *supra* note 15, at 135-52.

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division between "blind agents" and "evil principals" in it. Consider, in particular, the role that Milgram himself played in this experiment. Like the "teacher-subjects," he was inflicting escalating pain on helpless, unwilling victims; he was putting the "teacher-subjects" in his experiment at considerable (though nonconsensual) risk for life-long future suffering when they confronted the personal implications of their own moral weakness, their own willingness to injure an innocent person. Unlike the teacher-subjects, however, no one directly ordered Milgram to inflict pain. Does this mean that Milgram himself was the evil instigator of this unjustified infliction? Or does it mean, as I would say, that Milgram's own role in blinding himself to the unjustified pain he was inflicting points to the deeper significance of his own experiment—that obedience to authority is not its key? Instead, something more pervasive and important was at work in explaining why so many people, including Milgram, set aside their ordinary moral intuitions against harming obviously innocent, unwilling and helpless human beings.

I believe we can come toward a deeper understanding of the Milgram experiment—and the general phenomenon of self-deluded commission of evil—in two steps. The first step was provided in a recent essay by David Luban, who maintained that the results of the Milgram experiment can be explained by the seductive force of the "slippery slope."[37] Luban suggested that the teacher-subjects never asked themselves—should I inflict intolerable pain on this helpless person?[38] This is the question that appears salient to us as outside observers, but from the perspective of the participating teacher-subject, the relevant question was much narrower; it was—I have already inflicted x volts on this person; should I now inflict x plus a small added increment?[39] The addition of each of these small increments ultimately amounted to apparently lethal force in almost two-thirds of the cases, but the teacher-subjects never directly confronted this ultimate result. Instead, when the actual decision presented itself about whether to escalate by a small increment, the teacher-subject could acknowledge the destructive and immoral implication only by admitting that his im-

37. David J. Luban, *Milgram Revisited*, 9 Researching Law: An ABF Update, Spring 1998, at 8.

38. *See id.*

39. *See id.*

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mediately preceding act of adding a small increment was itself destructive and immoral in retrospect. The teacher-subject was so intent on justifying his prior action—in holding to a conception of himself as a decent, moral person—that he could not acknowledge that he was precipitously sliding into ever more destructive inflictions of evil.

An outsider might think that a decent, moral person would have refused to participate in the experiment from the outset; that its potentiality for terrible inflictions should have been apparent to all of the teacher-subjects from the first moment that they saw the voltage panel with its explicitly threatening escalations up to "Danger: Severe Shock" and "XXX."[40] But, the teacher-subjects walked into the Yale laboratory carrying with them the assumption not only that they were decent, moral people, but that these strangers whom they were meeting for the first time—the Yale experimenter and the other apparent volunteer—were also decent and moral. They were all engaged in pursuing the obviously moral result of increasing scientific knowledge. This is also the best explanation and even justification for Milgram's own conduct in initiating the experiment in the first place—even to the extent of deceiving the experimental subjects. Milgram could reasonably have concluded that the scientific study of obedience to authority, the Eichmann paradigm, was socially important; it could only be studied by withholding information from experimental subjects. But, he also could have believed that almost no one would escalate the shocks after the moment of the learner's protests. This was the advance assurance that Milgram obtained from a panel of psychiatrists before launching the experiment; at the time, this assurance seemed plausible.[41] Even if, however, the initiation of the experiments was a reasonable and decent act, their continuation after the first few escalations—accompanied by enormous emotional upheavals on the part of the teacher-subjects—should have alerted Milgram to the transformed and now-monstrous implications of his inflictions. But he was blinded by his own good intentions, and by the evident reasonableness of his first step onto what became a slippery slope into wrongdoing.

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40. *Id.* at 5.
41. *See* Milgram, *supra* note 15, at 27-31.

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This explanation itself is only a first step toward fully understanding the brutal transformation of the enterprise by the teacher-subjects and by Milgram himself. David Luban is correct that the incremental shocks on the voltage meter appeared quite small;[42] this, however, overlooks the immediate events that surrounded the teacher-subjects' decisions to increase from one increment to the next. There were no sharp distinctions between 15 and 120 volts; but at 120 volts, the learner shouted in pain for the first time. There was another novel break at 150 volts, when the learner for the first time refused any further participation in the experiment, and (even if we ignore the novelty conveyed by the obviously increasing agony of the learner's screams of pain) there was another break at 300 volts when the learner for the first time announced that he would no longer speak. The increment beyond, say, 150 volts was not simply another 25 volts, but 25 volts plus overriding the learner's protests for the first time; it is difficult to see how the teacher-subjects would view this as an insignificant and merely incremental addition.

The crucial question, then, is what led the teacher-subjects to ignore anything that the learner said—to treat not only his protests but his agonized screams of pain as if they had no relevance, as if they did not exist. I believe the answer to this question can be found in Luban's observation about the blinding force of the teacher-subjects' commitment to think of themselves as decent, moral people; however, the observation requires some elaboration before we can see its full significance.

In order to provide this elaboration, I want to shift ground for a moment—to another context where it is quite common for one person to ignore another person's screams of agonized pain, i.e., in the provision of medical treatment. Remember the first time you went to a physician for an inoculation; your future health—indeed, the success of the world-wide program of public health immunizations during the past hundred years—would have suffered greatly if your doctor had fully honored your screams of terror at the injection. As benign and relatively inconsequential as this purposeful infliction of pain and terror may be, there are many other situations in medical practice where unnecessary pain and terror is inflicted—and where physicians and other health care providers are

42. *See* Luban, *supra* note 37, at 5, 8.

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strangely obtuse to these inflictions and unwilling or unable to take obvious and simple palliative steps. Disregard for treatable pain by medical professionals is a pervasive phenomenon in medical practice; this inattention reaches a peak of intensity for life-threatening and irreversibly terminal illnesses. The most extensive research ever conducted into the treatment of dying people in the United States, published in 1995, found that the "last few days" of half the patients were "spent . . . in moderate or severe pain," without adequate provision of palliative care.[43]

Many different explanations have been offered for this pervasive medical misfeasance: physicians' ignorance about pain treatment, legal constraints on the use of pain-relieving narcotics, physicians' fears about hastening death and physicians' aversion to dying patients.[44] All of these are plausible, though only partial, explanations. The inattentive physicians do not, however, have evil motivations; they are not purposefully taking pleasure in their patients' suffering. Something more difficult to grasp is at work here. In effect, these physicians are engaged in a quite common maneuver of turning away from victims, refusing to listen to their pain and imposing a regime of silence on them so powerful that even their agonized screams cannot be heard.

A recent article by Marguerite Lederberg, an attending psychiatrist at Memorial-Sloan Kettering Cancer Center in New York, offers a profoundly illuminating account of the underlying reasons that well-meaning physicians as well as family members are inclined to "silence the victims" of life-threatening illnesses.[45] This imposed silence, she suggests, is part of a fundamental dynamic of scapegoating, blaming the victim for his own suffering; and the underlying cause of this scapegoating is not evil motivation, but ironically enough, quite the contrary.[46] As she puts it, speaking of cancer patients, their physicians and families are inclined to tacitly blame them "for their own afflictions as an inadvertent side

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43. The Study to Understand Prognoses and Preferences for Outcomes and Risks of Treatments (SUPPORT) Principal Investigators, *A Controlled Trial to Improve Care for Seriously Ill Hospitalized Patients*, 274 JAMA 1591, 1595 (1995).

44. *See* Committee on Care at the End of Life, Approaching Death: Improving Care at the End of Life 128-34 (Marilyn J. Field & Christine K. Cassel eds., 1997).

45. *See* Marguerite S. Lederberg, M.D., *Blaming the Victim: Can We Learn to Stop? Cancer as the Battleground*, *in* Celebrating Elie Wiesel: Stories, Essays, Reflections 225 (Alan Rosen ed., 1998).

46. *See id.* at 225-26.

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effect of desperate compassion."[47] Those who love the patients "cannot tolerate [their] undeserved and incurable suffering."[48] Dr. Lederberg discusses one case where the parents of a twenty-year old, terminally ill boy asked her to evaluate him for what they believed was a psychologically based eating disorder.[49] On interviewing the young man, she found that he—like his parents—was blaming himself, that he was "letting his family down by not eating and not having 'a better attitude.'"[50] Dr. Lederberg concluded that the young man's failure to eat was not psychological in origin, but was a biologically based derivative of his illness, a "terminal anorexia."[51] The interesting phenomenon for her—and for us—is the reason that the parents, in particular, were so eager to ascribe their son's anorexia to psychological causes. Let me quote Dr. Lederberg's analysis at some length:

> In reality, his parents loved him passionately and were desperate with grief at seeing their child becoming more and more wasted. At some level, they felt they had failed their child in having been unable to protect him against this catastrophe. Racked by their helplessness, they would feel moments of emotional exhaustion and a desire to flee, as well as moments of resentment and rage about their own suffering, all of which led to irrational guilt and anxiety. Yet they were determined to stand by him and function supportively at the hospital bedside even in the face of their looming loss. It was too much to bear without seeking some relief. So, like him, like all of us, they searched for a way out of meaninglessness. The current excitement about the role of the mind in altering the course of cancer provided them with a ready-made framework. It gave meaning and it dictated a course of action. If their son could harness the power of his mind, that, at least, would be a possible intervention in the face of intolerable helplessness. Thus, focusing not on the sick body but on the allegedly underutilized mind, they had made their son responsible for his terminal anorexia rather than confronting and enduring the injustice and tragedy of their situation.[52]

47. *Id.* at 226.
48. *Id.*
49. *See id.*
50. *Id.*
51. *Id.* at 227.
52. *Id.*

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The young man's own response of blaming himself for his poor attitude had a similar impetus; as Dr. Lederberg put it, "the need to seek for explanations that give meaning to toxic events is universal, and self-blame is often preferable to betrayal or random tragedy when the reward is a sense of control, illusory though it is."[53]

I believe that this analysis gives us the key to understanding the Milgram experiments. The teacher-subjects who ignored the agonized screams of the learner were not, of course, motivated by the kind of desperate, passionate grief felt by the parents of Dr. Lederberg's cancer patient. But Milgram's experimental subjects, like the parents and the patient himself, were "search[ing] for a way out of meaninglessness," they were struggling to find some "sense of control" in a situation that had suddenly and inexplicably spiraled out of control, so far as they were concerned.

Put yourself into their shoes, into their own sense of their immediate experience. The teacher-subjects had come to a laboratory at Yale University in response to a public advertisement to participate in a scientific enterprise; all of this seemed benign, respectable and predictable. The subjects at first encountered exactly what they had expected: a well-spoken, properly attired experimental scientist, an array of scientific-looking equipment and another pleasant-looking volunteer also apparently eager to do his bit for the advancement of scientific knowledge.[54] Suddenly, however, this prosaic, benign-seeming enterprise appeared to be transformed into something completely different, completely unexpected: agonized screams from the learner and bland assurances from the experimenter that there would be "no permanent tissue damage,"[55] coupled with an adamant insistence that the experiment must continue.[56] The situation simply made no sense, so far as the teacher-subjects could fathom it. Was the learner truly in pain? How could this be, given the assurances and demands of the experimenter? Was the experimenter lying? Why would he want to have the learner not only hurt but possibly even killed—which was the inescapable implication of the learner's anguished shouts.

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53. *Id.*

54. *See* Milgram, *supra* note 15, at 16, 19.

55. *Id.* at 19, 21.

56. *See id.* at 21.

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There were, of course, many different ways for the teacher-subjects to make sense of this incredible situation. Most of them followed the path that Dr. Lederberg has identified; they refused to admit the existence of injustice. If the learner was truly suffering pain, that would be unjust; he was an apparently decent, innocent man who did not deserve to suffer. If the experimenter was lying to them about the harmless consequences of the shocks, that would also be unjust; he would be betraying his obligation to be decent and honest toward them and the learner. The teacher-subjects were thus caught in a bind; no matter which way they turned, toward the learner's version that he was suffering intolerable pain or the experimenter's version that any pain should be ignored, something or someone would be unjust, something or someone would be wildly wrong here.

This is more than injustice. These utterly contradictory accounts of what is going on—the utter contradiction between the learner's version and the experimenter's version—undermine the teacher-subjects' ordinary ways for making sense of the world. In a word, Milgram's experiment had created a world of meaninglessness. In order to restore meaning to their world, the teacher-subjects were obliged to ignore either the learner's version or the experimenter's. Most subjects, when forced to choose, opted for the correctness of recognized authority, the Yale-affiliated scientific experimenter. This bias towards constituted authority is the conventional understanding of the experiment's result—though it is likely that the teacher-subjects were more inclined toward this bias than the general population, based on their willingness to volunteer as participants in scientific experiments. Whatever the soundness of Milgram's hypothesis that most people are inclined to obey constituted authority, the more interesting finding—and the more universal characteristic to which it testifies—is the dynamic that pushed his subjects to look toward constituted authority. That dynamic was the teacher-subjects' underlying conviction that the world cannot be a meaningless place, that there must be a coherent explanation for anything that happens. This is obviously a wish, a hope, a normative belief—not an objective reality; and there is a kind of desperation behind this belief, because if it were not true, then the world would be a random and unsafe place.

Some people may pride themselves on their capacity to truly acknowledge this existential reality, that the world truly *is* a ran-

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dom and unsafe place. But none of us really live out our daily lives based on that belief. Who would dare get out of bed in the morning, if this were really true? But then, who would dare stay in bed? Paralysis, craziness—this is what would follow from really, truly believing that the world has no reliable structures of meaning, or—to put it in other, but equivalent words—that the world is an unjust place.

It is not, however, easy to maintain this needed belief in the predictability, the safety, the meaningfulness, the justice of the world. To hold to this belief requires continuous, rigorous denial of much regularly repeated and convincing evidence to the contrary. All of us are well-practiced, from our daily routines, in this art of denying the plain evidence in front of us. Accordingly, when some especially disturbing evidence of meaninglessness and injustice presents itself to our attention—when our young son is struck with terminal cancer, when our fellow-volunteer in the Milgram experiment screams in pain—the first impulse for most of us is to deny this plain evidence of our senses. It requires an act of will to acknowledge this injustice; denial is the path of least resistance, the easy and tempting path.

This is the path, the slippery slope, toward escalating evil. As the evidence of innocent suffering increases, the initial commitment to denying this evidence mounts. It even begins to gallop, as a kind of pre-emptive strike against the looming, fearful prospect of even more convincing evidence that might, unless fiercely and relentlessly opposed, break down our walls of resistance. This is not an inevitable dynamic; it is possible to interrupt it, as a response to overwhelming evidence or as an act of will. However, surrendering to this dynamic is the easy and always tempting path. Contrary to Milgram's suggestion, this is not obedience to some external authority; more fundamentally, it is obedience to a voice within, obedience to an internal commitment to maintain one's belief in the meaningfulness and justice of the world.

Let me return to the two historical examples I cited earlier—the nineteenth century response to black slavery and the contemporary American response to capital punishment—to further illustrate the workings and the malignancy of this dynamic. Regarding slavery, consider this passage from the Supreme Court's opinion in

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the *Dred Scott* case.[57] *Dred Scott*, of course, is by general agreement today ranked as the low point, the most deeply immoral ruling, in our constitutional jurisprudence (though I must say that the decision has earned this rank only after a close race in a crowded field).[58] In the course of reaching the conclusion that black people, whether slave or free, could not be United States citizens and therefore could not bring suit in any federal court, Chief Justice Taney considered the constitutional implication of the resounding moral statement in the *Declaration of Independence* that "all men are created equal."[59] In order to exclude all blacks from citizenship, Taney had to conclude somehow that Jefferson's stirring proclamation did not apply to black people. Listen to Taney's reasoning:

> The general words ["all men are created equal"] would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.
>
> Yet the men who framed this declaration were great men—high in literary acquirements—high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting.[60]

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57. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

58. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279 (1987) (upholding death penalty notwithstanding evidence of race discrimination); Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding anti-sodomy law for private, consensual sexual relations); Buck v. Bell, 274 U.S. 200 (1927) (upholding compulsory sterilization of "mental defectives"); Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding race segregation laws for passengers of railway coaches); Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842) (finding slave-owners' constitutional right to recapture slaves without judicial process).

59. *Dred Scott*, 60 U.S. (19 How.) at 410.

60. *Id.*

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There is a kind of lunatic logic in this passage. If the authors of the *Declaration of Independence* had intended to include blacks when they spoke of the equality of all men, then their continued commitment to the institution of slavery would be unjust from their own internal perspective. But Chief Justice Taney insisted that our founding fathers were constitutionally incapable of having unjust thoughts; they were "incapable," he stated, "of asserting principles inconsistent with those on which they were acting."[61] In actual historical fact, the founders were very much aware of this particular inconsistency; by their own testimony in the published works of Thomas Jefferson and the unpublished papers of James Madison, they were acutely aware of the injustice they were engaged in.[62] Whatever pain these Southern slaveowners felt about the pain they were inflicting on their slaves, however, it was not sufficient for them to abolish the institution. In effect, their successors were forced to decide whether to end the pain that they themselves felt from acknowledging injustice and that they were unjustly inflicting on their slaves. Chief Justice Taney clearly shows the path that the slaveowners took: they refused to acknowledge their own pain, they refused to admit the injustice that the previous generation had acknowledged but failed to correct.

From our contemporary perspective, it would have obviously been preferable for the founding fathers to do more than acknowledge the inconsistency between their principles and their conduct; they should have abolished slavery at the same moment that they freed themselves from what they regarded as the enslavement of British colonial rule. But, failing this, their awareness of their own injustice was obviously preferable to the moral blindness of their successors. And that blindness did more than perpetuate the injustice; in order to acquit themselves of injustice, and to maintain the fiction that they lived in a just world and that slavery was a "positive good," they inflicted escalating injuries on black people.[63] The succeeding generation of Southerners reversed the previous state laws that had permitted the gradual growth of a free

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61. *Id.*

62. For Jefferson's views, see David Brion Davis, The Problem of Slavery in the Age of Revolution, 1770-1823, at 169-84 (1975); for Madison's views, see Robert A. Burt, *Comments on James Oakes, "The Compromising Expedient,"* 17 Cardozo L. Rev. 2057, 2058-59 (1996).

63. *See* Robert A. Burt, The Constitution in Conflict 163-72 (1992).

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black population through easy voluntary manumission by individual slaveowners; they ended the tentative legislative moves toward the wholesale, though gradual, abolition of slavery in the upper South; and they imposed a new regime of state punishment for slaves when their individual owners were considered too "lenient."[64] Chief Justice Taney's move in *Dred Scott* was a natural extension of this escalating entrenchment of injustice; by depriving all blacks, slave or free, from any redress in federal courts, Taney could ensure that it was even easier for the white population to blind themselves to the realities of the evil system in which they were collaborating. In addition to excluding blacks from federal courts, Taney also ruled that Congress had no authority to regulate or exclude slavery in United States territories, that slaveowners had a constitutionally protected property interest in their slaves which permitted no interference or regulatory supervision by any federal authorities, whether Congress or the territorial legislatures. This too was in the service of cultivated blindness. The relationship between master and slave became a wholly private transaction; no outsiders were entitled to examine it. Outsiders could rest comfortably in their belief that they were not in any way implicated in the master-slave relationship or the institution of slavery; their world was untainted by slavery, their world was just, notwithstanding the existence of slavery. Justice demanded—the Constitution required—that no outsider was entitled to consider the moral status of slavery, and thus, their refusal to look at the institution—their blindness itself—was defined as an occasion for self-congratulation, as respect for the demands of justice.

This same vicious paradox, this same self-righteous slide into acceptance and escalation of wrongdoing, is evident in the modern Supreme Court's jurisprudence of capital punishment. In its broad strokes, there have been three phases to this jurisprudence: the first phase from the late 1960s until 1976, when the Court acknowledged moral tension between the death penalty and basic principles of justice; the second phase from 1976 until 1983, when the Court promised that federal courts would supervise the administration of the death penalty to protect principles of justice; and the third and current phase, with escalating intensity since 1983, when the Court has closed off almost every imaginable avenue for

64. *See id.*

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federal court attention (at the same time that state tribunals have effectively narrowed their supervision).[65] With the death penalty, as with slavery in the nineteenth century, our society is maintaining its belief in its own moral integrity, its justice, by an act of self-blinding—all the while insisting that this denial was itself in the service of the principles of justice.

I began this presentation by quoting Justice Brandeis' observation that "[t]he greatest dangers to liberty . . . [come from] men of zeal."[66] From the examples I have explored, we can now see that the danger arises not simply because this evil is hard to detect, but because it is disguised by the proudly proclaimed beneficent motives of moral zealots. The evil itself can be caused by this zealotry—an unshakable conviction of one's own self-righteousness can be both a hallmark and a proximate cause of the sliding into evil.

The examples I have explored do not demonstrate that moral zeal is intrinsically evil; they do show that belief in the beneficence of one's own motivation can readily slide into the commission of great evil and that moral complacency and self-blinded zealotry can be two sides of the same coin. Milgram's teacher-subjects sinned in clinging to their mistaken belief about the coherence and justice of their situation by stubbornly—zealously, one might say—turning away from the evidence of their senses regarding the pain they were inflicting on the learner-victim. A similar self-deception afflicted the Southern slaveowners who maintained that slavery was a "positive good," the modern Supreme Court Justices who have insisted that capital punishment is a just and fairly administered institution, and Stanley Milgram who believed that the ethical norms of science justified his deceptions and inflictions toward non-consenting subjects. All of these wrongdoers exemplify unquestioning belief in the goodness of their motives and the consequent coherence and justness of their world.

How then can we avoid this impetus toward collaborating with evil? I can state my conclusion abstractly: the only way is to tolerate and even to cultivate moral conflict. Rather than rushing to resolve moral conflict, to identify the single correct moral answer

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65. *See generally* Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 Mich. L. Rev. 1741 (1987) (describing the evolution of the death penalty debate within the Supreme Court).

66. Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

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in conflicts either between people or within ourselves individually, we should keep the conflicts, the moral tension in high visibility. We should, that is, be less concerned about the supposed dangers of unresolved conflict and more concerned with the dangers of suppressing awareness of moral tension and confusion—the dangers I have identified in turning our attention away from the pain and injustice we inflict on others in order to alleviate our sense of moral tension and confusion.

There are clearly other ways to blind oneself to the existence of terrible evil; there is an important, though often scorned, social role for zealous advocates of moral truths, for prophets of righteousness hurling thunderous condemnations of the darkness surrounding them. Justice Brandeis himself was widely understood to be imbued with a prophetic temperament[67]—his contemporaries referred to him as "Isaiah" with a mixture of admiration and exasperation.[68] I read his warning against "men of zeal" not as disdain for the prophet's vision, but as a self-corrective, a moral discipline that he struggled to impose on himself to keep his sense of balance and humility.

There are other examples of this moral balance that illustrate both its dimensions and its difficulties to achieve in practice. Two are particularly salient in our country's struggle with the evil of slavery: Abraham Lincoln and his complex attitude toward slavery—his clear moral revulsion coupled with his commitment to gradual, rather than instantaneous, abolition—and the United States Supreme Court's equivalent attitude toward race segregation in the first *Brown* decision,[69] proclaiming clear moral condemnation, coupled with its commitment in the second *Brown* decision[70] to gradual, rather than instantaneous, abolition. Both Lincoln and the *Brown* Justices exemplify efforts to pursue high moral objectives while avoiding moral zealotry and its impetus toward escalating destruction. Both efforts also illustrate the practical difficulties of finding this balance, since they failed to avert violence and escalated injustice in their wake—the Civil War more

67. *See* Robert A. Burt, Two Jewish Justices: Outcasts in the Promised Land 18-24, 33-36 (1988) (discussing Brandeis' character).

68. *Id.* at 62.

69. Brown v. Board of Educ., 347 U.S. 483 (1954).

70. Brown v. Board of Educ., 349 U.S. 294 (1955).

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so, however, than the long-term aftermath of *Brown* and the Second Reconstruction for which it set the stage.[71]

It is not easy to distinguish between the evils of moral complacency and the evils of moral zealotry, the overweening self-righteousness that has been my central focus in this essay as the hallmark and cause of the slide into wrongdoing. We are surrounded, in this country and internationally, by exemplars of both practices—both by selfish indifference that turns away from obvious and easily remedied suffering and by religious fundamentalists, sexual vigilantes and self-righteous moralists who in the supposed service of eradicating sin are, in fact, collaborating with evil. The challenge of this Symposium, the basic challenge of a lifetime, is to clearly identify and act on the difference between moral conviction and moral arrogance. It is not easy to accomplish this goal.

71. I have written about the moral goals and practical failures of Lincoln and the *Brown* Court at some length elsewhere. *See* Burt, *supra* note 63, at 77-102 (chapter 3, *Lincoln's Egalitarian Answer*), 271-310 (chapter 8, *An Egalitarian Response: Brown v. Board of Education*); *see also* Robert A. Burt, *Brown's Reflection*, 103 Yale L.J. 1483 (1994) (discussing how the Supreme Court's failure to mandate immediate desegregation in the face of "Southern white resistance," while continuing to inflict "wrongful oppression on black people" was indicative of an even larger moral tragedy—the failure of the ideal "that social relations should not rest on force but on mutual respect among equals.").

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