COUNTERING KULTURKAMPF POLITICS THROUGH CRITIQUE AND JUSTICE PEDAGOGY

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I. Introduction

THE Ninth Annual Latina and Latino Critical Theory Conference (LatCrit IX) was held in Malvern, Pennsylvania between April 29 and May 1, 2004. This year's conference theme, Countering Kulturkampf Politics Through Critique and Justice Pedagogy, brought together a wide array of scholars, academics and activists from diverse backgrounds and disciplines to reflect on the current state of affairs. Like previous LatCrit gatherings, this year's conference sought to create an interdisciplinary and multidimensional environment where the participants could critically address the effects of the traditional conservative and current neo-conservative legal and policy oriented initiatives that have focused on the "rollback" of the New Deal and Civil Rights legacies. This "rollback" has been especially evident in the Supreme Court's increasing restrictions and narrowing of individual rights in polemical areas such as abortion, affirmative action, the free exercise of religion, the rights of criminal defendants, work-place protections for immigrants and bilingual education. Participants were encouraged to offer reflections and engage in a dialogue regarding the effects of the use of Kulturkampf narratives on various aspects of both United States domestic and international law and policy.

The German notion of Kulturkampf or "culture wars" was originally adopted by Bismarck to describe his coercive policies against the Catholic clergy's efforts to control various domestic institutions during the 1870s. At the time, local Catholic clerics, presumably under the control of the Vatican, a foreign force, sought ideological hegemony over government institutions such as public education. As Francisco Valdes expounds in this symposium's Afterword, while the notion of "cultural wars" has been present in the U.S. legal and political landscape for more than three decades, it would not be until the 1992 Republican National Convention when Patrick J. Buchanan coined the notion of "cultural war" to describe his bid for the "Soul of America." It would not be until 1996, however, that Justice Antonin Scalia formally used the term Kulturkampf to describe his dissenting opinion in Romer v. Evans. Ironically, while the original notion of Kulturkampf was adopted by Bismarck to describe his challenge to the efforts by non-state actors such as the Catholic Church to take control of governmental institutions, conservatives and neo-conservatives in the United States have invoked this term in an effort to undermine and "rollback" progressive and civil rights oriented law and policy. These conservatives seek to carry on an agenda that employs a narrative of culture aimed at transforming the core democratic and egalitarian principles of the United States. More importantly, liberal efforts during the 1990s to accommodate conservative challenges by adopting a language of diversity, multiculturalism and tolerance enabled the creation of an ideological framework that not only validated competing conservative ideologies, but also empowered them.
This year's conference brought scholars and activists from diverse disciplines and interests to discuss ways in which scholars, educators, students and activists could share competing critiques of the ideological state apparatus [FN12] and further offer alternative perspectives on how to counter the impact of the Kulturkampf narrative. As noted above, the efforts by conservative and neo-conservative ideologues to redefine social, economic and political institutions threatens to undermine and ultimately dismantle the institutional gains achieved during various historical, social and political struggles by a wide array of progressive forces. For LatCrit scholars and activists, these initiatives represent a return to conditions under which various forms of subordination flourished without restraints, and the perpetuation of other forms of subordination and exploitation. The struggle over the foundations of the state apparatus is tantamount to a struggle for justice, democracy and equality for traditionally subordinated groups in both the United States and within the sphere of influence of this empire.

In recent years the debates over Kulturkampf were brought to the forefront in Supreme Court Justice Antonin Scalia's vicious dissents in Romer v. Evans and Lawrence v. Texas. [FN13] In both instances, Justice Scalia sought to frame challenges to state initiatives that had the effect of not only discriminating against gays, but in the case of Texas also criminalizing "homosexual conduct" as cultural wars. In Justice Scalia's cultural battlefield, the discrimination and criminalization of gay identity was reduced and represented as the discrimination and criminalization of historically and traditionally reprehensible conduct, which in turn should be fought in the political realm through "normal democratic means." [FN14] It is not hard to see how the notion of Kulturkampf has become a sort of code word invoked to dismiss some Fourteenth Amendment challenges to conservative laws and rulings that seek to erode some of the more important principles gained by progressive social struggles. What is ironic, however, is that while conservatives have traditionally invoked the need for the Courts to be neutral arbiters of disputes as a last resort and not to interfere with the democratic process, when it comes to addressing issues that challenge their ideologies, they are the first to become activists and to use the Courts to intercede on behalf of conservative interests. One way to explain this *752 double standard is by suggesting that conservative jurists and policy-makers are first and foremost conservatives, and then legal, actors. This has become more complicated with the emergence of a neo-conservative administration that embraces market oriented policies, and the increasing political acquiescence of liberals.

My main contention is that conservative and neo-conservative ideologies are premised on anti-democratic and anti-egalitarian principles that, by definition, undermine the democratizing and egalitarian objectives of progressive and civil rights struggles. Moreover, while it is possible to trace continuities between conservative and neo-conservative currents, there are also some clear distinctions between both that need to be recognized. [FN15] These distinctions are important because they explain some of the nuances in the ways in which power has been exercised in order to enable increasing rollbacks on law and policy. Of course, the distinctions can also help us expose the "wolf in sheep's clothing" that lurks in the midst of conservative and neo-conservative concessions to the challenges posed by subordinated, oppressed and exploited subjects. These distinctions can also shed light on some of the inequalities of power, class and status harbored by liberalism and its agents. [FN16]

The conservative animus toward democracy can be readily traced to the aftermath of the French Revolution and more specifically to the anti-Jacobin writings of Edmund Burke, who denounced the French Revolution for, among other things, allowing a mob of subjects guided by their irrational passions to acquire political power. [FN17] Anglo-American conservatives like Russell Kirk who identify as the heirs of the Burkean tradition, have argued that democracy has a tendency for resolving social, economic and cultural questions by political means while subordinating religious and moral solutions.
Kirk, the acknowledged godfather of U.S. conservatism, argued that democracy allows liberals and radicals to promote "the illimitable progress of society," while threatening to efface the natural distinctions among men from different classes and orders in society. This argument has also been defended by so-called paleo-conservatives like Barry Goldwater. Likewise, the intellectual father of neo-conservatives, Leo Strauss, was deeply suspicious of democracy because it permitted "less wise" individuals to act on their tyrannical passions in the polity.

Conservative narratives also tend to defend anti-egalitarian positions premised on a wide array of arguments. While most agree that equality can only occur in the eyes of God, and some may accept a minimalist or narrow conception of equality in the legal realm, the conservative narrative is generally premised on the reaffirmation of natural classes and castes. Kirk was clear that cultural battles are dangerous and need to be fought by conservatives because:

> In nature, obviously, men are unequal: unequal in mind, in body, in energies, in every material circumstance. The less civilized a society, and the more generally will and appetites prevail unchecked, the less equal is the position of individuals. Equality is the product of art, not of nature; and if social leveling is carried so far as to obliterate order and class, reducing a man to "glory in belonging to the Chequer No. 71," art will have been employed to deface God's design for man's real nature.

Yet, while conservatives like Kirk were willing to accept some sort of equality in the courts of law, others like Goldwater were honest enough to state that "[w]e are all equal in the eyes of God but we are equal in no other respect." Furthermore, efforts to appeal to the law as an egalitarian institution in the face of various forms of social, economic, political oppression, subordination and marginalization were seen by Goldwater as "artificial devices for enforcing equality among unequal men (and) must be rejected if we would restore that charter and honor those laws."

The ultimate premise of a conservative argument was a call for government non-intervention, at least when dealing with civil rights challenges. This anti-egalitarian ideology has translated into a rejection of the Fourteenth Amendment's Equal Protection Clause, and a host of other interpretations of the Constitution that seek to address the pervasive inequalities afflicting our polity, at least when convenient and when it does not entail selecting a neo-conservative president. The clear implications of these ideologies are the efforts to return to a status quo were the polity is guided and governed by the wisdom of white, Christian, heterosexual and property owning men.

In contrast, the neo-conservative term is much more complicated and escapes easy categorization. To be sure, while it is readily evident that neo-conservative ideologies have no qualms defending anti-democratic positions, despite the current administration's rhetoric, egalitarian principles are sometimes tolerated despite the underlying currents of a conservative natural rights ideology. In my opinion, what distinguishes the dominant neo-conservative narrative is a willingness to subordinate conservative principles, and for that matter all principles, to a market oriented ideology. Yet, this market oriented ideology, which has bathed in the currents of the neo-liberal economic wave, also departs from a more traditional New Deal/liberal willingness to use surplus resources gained in the markets for social programs, and makes these additional resources available for war and other imperialist pursuits. In a sense, the neo-conservative narrative has been both navigating the currents of a tempestuous ocean, while also trying to channel its currents in ways that maximize profits. To this extent, it is possible to argue that the neo-conservative narrative has endorsed narrowly tailored notions of equal opportunity, often betraying conservative principles, so long as those notions are
profitable. The continuities and tensions between the conservative and neo-conservative ideologies can be readily discerned in at least two areas: namely, the relationship of natural rights to democratic participation and the relationship between narrowly tailored identities and the market.

Leo Strauss, like most conservative thinkers, affirmed the natural superiority of some men over others throughout his work. [FN29] While not all natural rights arguments are premised on the affirmation that natural distinctions among men will have an impact on their ability to participate in the polity, hence Abraham Lincoln's argument in speeches like "A House Divided," [FN30] Strauss' argument did affirm that most men were less capable of understanding political issues and could likely perpetuate various forms of tyranny, including democratic tyranny. [FN31] In the context of law, Justice Scalia's use of the notion of natural distinctions is readily evident in the language of his dissenting opinion in Romer, where he writes that: The Colorado homosexuals; they can be favored for many reasons--for example, because they are senior citizens or members of racial minorities. But it prohibits giving them favored status because of their homosexual conduct--that is, it prohibits favored status for homosexuality. [FN32]

As I will suggest throughout this Foreword, part of what is at stake in the use of a natural rights argument is the affirmation of an artificial duality that can counterpose an essentialist/biological conception of identity against an alternative form of identity that is tantamount to a narrow conception of culture, or more precisely conduct. The effect of the use of natural distinctions is to create a one-dimensional conception of subjectivity that excludes the multiple dimensions and intersectionality aspects of the subject's identity.

What is at stake in this argument is the preservation of the status quo, or rather, as Justice Scalia puts it, the "current social order." [FN33] Moreover, the Court should not interfere on behalf of subordinated subjects whose identity can be understood to be a form of conduct. It follows, that the de-criminalization of a homosexual identity should be pursued in the private realm where "every group has the right to persuade its fellow citizens that its view of such matters is best." [FN34] The problem with this argument is that conservatives and neo-conservatives alike are also quite clear that the majority of people are not able to reason and are generally guided by their passions. In other words, while conservative and neo-conservative arguments are clear that there are natural distinctions among citizens, and hence the masses should be prevented from demanding more democracy, they are also clear that various forms of discrimination against historically and traditionally subordinated subjects and groups should be resolved in an imagined public and democratic realm. Of course, reality is a bit more complex. My aim, however, is to clarify the tensions of this argument in order to expose the double standards inherent in conservative and neo-conservative sophistry. Conservative and neo-conservative narratives are also misleading and seek to reframe the terms of debate in ways that discourage democratic and egalitarian challenges emanating from historically and traditionally subordinated subjects and groups, hence the narrative of Kulturkampf, a narrative that recasts the debates in terms of a war between competing expressions of conduct.

Neo-conservatives also part company with traditional conservatives with regards to the role of the market, and more precisely the influence of profit in legal and policy decisions. Notions such as equality and justice are ultimately subordinated to what is best for the markets. What is right and what is just is determined by what is good for business. To be sure, in Grutter v. Bolliger, [FN35] Justice O'Connor had no qualms in defending certain forms of narrowly tailored race based affirmative action if these were
good *756 for the markets. In her words, "[t]hese benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." [FN36] Ironically, this argument has the potential to undermine traditionally conservative positions because the markets, when they are not being manipulated by a corporation, tend to respond to consumption, not to morality. In addition, this argument readily forgoes the democratic process in the interest of encouraging profits and successful businesses in a competitive marketplace. Perhaps this is the space where neo-conservative and neo-liberal ideologies partner up.

The Kulturkampf narrative enables conservatives and neo-conservatives to recast issues of inequality, exploitation, marginalization and other forms of subordination as narrow cultural wars, or more precisely fits of spite. This Foreword suggests that this is accomplished by employing at least two narrative strategies, namely the use of mutually contested dualities, and the representation of identity as a narrow and/or one-dimensional contested site. The dualities in question rely on the creation of artificial distinctions between binary constructions such as essential/behavioral identities, the private/public, the social/economic, etcetera. Additionally, those identities deemed to be "cultural" become contested sites which are subject to narrowly tailored external definitions that seek to deny the multidimensional and intersectional complexities of a broader notion of identity.

The LatCrit initiative is part of a critical tradition of scholars who have been committed to exposing these and other double standards and contradictions, which in turn reproduce various modalities of multidimensional subordination, oppression and exploitation. LatCrit has been providing a critical and democratic institutional space to question, reflect and challenge these and other forms of subordination, while simultaneously creating an intellectual space/institution where legal scholars can explore alternative forms of resistance. This commitment has taken material form in conferences, workshops, courses, publications and a host of other projects that seek to influence the way in which legal actors and other activists contribute to the transformation of the society in the pursuit of more democratic and egalitarian principles of justice. This particular symposium explores how the "cultural wars" can offer an alternative space for critique and for transformation.

The internal contours of this year's conference have also been shaped by the loss of Professor Jerome McCristal Culp, Jr. Professor Culp taught at Duke University School of Law and was a founding member of LatCrit. He died due to complications associated with kidney failure on February 5, 2004. Professor Culp was not only a mentor, colleague and friend, but also an inspiration to LatCrit. He was not only a founding pillar to the *757 institution, but a guiding light for many Critical Race Theorists and LatCrit scholars and activists. This year's conference and symposium memorialize the influence and loss of Professor Culp.

Since its inception almost a decade ago, LatCrit has published its symposium in the sponsoring institutions' law journals. [FN37] The publication not only provides a historical record of the papers and articles presented in the annual meetings, but also contributes to LatCrit's building process. More importantly, the publication of the symposium contributes to the *758 widespread dialogue among scholars and activists alike. To be sure, the reader often is likely to find innovative, thought provoking articles and commentary in the long list of LatCrit publications. This year, LatCrit's articles will be published in two parts, and in two journals, the Villanova Law Review and the Seton Hall Law Review. [FN38] Each publication will contain an array of articles that are representative of the substantive discussions that took place during the annual conference.
II. LatCrit IX: A Call for Critique and Action

The five clusters in this symposium issue address various dimensions of the LatCrit movement. The first cluster celebrates and memorializes Jerome McCristal Culp, Jr. through a series of personal reflections about his influence in the formation of LatCrit and his influence on Critical Race Theory scholars and friends. These reflections demonstrate some of the ways in which LatCrit has provided a space where scholars' personal lives have become more political in public ways. The second cluster of articles represents a continuing dialogue between LatCrit, understood as a space for critical reflection and community activism. The third cluster of articles provides examples of pedagogical approaches that embody LatCrit principles. A fourth and related section addresses competing debates and critiques of methodological questions that LatCrit scholars and activists consider. The symposium concludes with a discussion about multiple dimensions of nationalism and internationalism. This latter cluster provides the reader with various discussions of relevance of LatCrit theory to national and international issues.

A. Tribute to Jerome McCristal Culp, Jr.

A testimonio is a process by which an individual who experiences an act of state sponsored oppression in his or her private life is driven to denounce it in the public sphere. [FN39] In many ways, the reflections on Jerome McCristal Culp, Jr.'s influence are testimonios of LatCrit scholars who were challenged in various ways to denounce various forms of oppression and subordination. All of the tributes to Professor Culp emphasize the strength of his convictions and the power of his influence. These are all captured by Angela P. Harris's introduction, which highlights the centrality and love for Jerome M. Culp and those he loved. [FN40] All of these accounts contribute to the celebration of a central pillar in the institutional development of LatCrit. Among other things, Jerome McCristal Culp should be remembered as a guiding light in the continuous construction of a LatCrit movement.

Robert S. Chang's memorial provides a generational recognition of Professor Culp's presence and influence during his early years as a student at Duke Law School. [FN41] Professor Chang's essay documents Professor Culp's scholarship and contributions to Critical Race Theory and LatCrit. In addition, Adrienne D. Davis offers a picture of three dimensions of Professor Culp. [FN42] She describes his intellectual contributions and critiques in disciplines other than law. As Professor Davis notes, Professor Culp not only held a Ph.D. in economics, but he took on well-known law and economics pundits such as Judge Richard Posner. [FN43] Professor Davis also emphasizes Professor Culp's consistent contributions in the area of Critical Race Theory and the centrality of race to thoughts about politics and society. A third and final snapshot captures the humility and strength of Professor Culp that should serve as a beacon to future LatCrit scholars. [FN44] Scott Lee concludes this by emphasizing Professor Culp's strength, convictions and place in the development of Critical Race Theory and the LatCrit movement more generally. [FN45]

B. Community Organizing and Direct Activism

Historically, LatCrit meetings have provided an intellectual space where scholars and activists have been able to exchange ideas and strategies and discuss thoughts on community activism. LatCrit has provided a forum that welcomes and embraces community activists and scholars alike. More importantly, LatCrit forums have provided a safe space where activists and scholars can offer substantive critique, support, solidarity and reflection on community activism. This dialogical space has also led to the institutionalization of efforts to develop a transnational dialogue among scholars and activists and to create institutions that promote these relationships among members of
the legal profession and the community. Examples abound, but one could readily look at
the curriculum of the Critical Global Classroom ("CGC"), the efforts to support the
Community Development Externship ("CDE") or the program schedule of most
annual meetings. The dominant focus, however, has been on coalition building and
praxis. To be sure, LatCrit participants have been continuously encouraged to reflect on
ways in which they can contribute to community activism. [FN46]

As I suggested above, one of the key effects of the Kulturkampf narrative is to create an
often artificial and exclusionary duality that reframes identities in either
essentialist/biological or cultural/conduct terms. This conceptualization not only seeks to
deny the multidimensional and intersectional complexities of subjects, [FN47] but also
creates artificial distinctions between traditionally subordinated populations that
contribute to the erosion of various forms of social, economic, legal and political
solidarity. The ideological subordination of identity to these narrowly tailored
classifications is especially problematic because it obscures the distinction between
contingent forms of identity and homogeneous subjectivities. To be sure, the
representation of identity as a one-dimensional homogeneous subjectivity further
obscures ideological differences between subjects who may share membership in
traditionally subordinated groups. Yet, more importantly, as the essays in this cluster and
the symposium more generally point out, the internalization of these forms of subjectivity
by traditionally subordinated subjects and groups can often lead to the reproduction of
various forms exclusion, marginalization and oppression. [FN48] The essays in this
cluster not only discuss some of the ways in which these forms of subjectivity reproduce
various forms of subordination, but also offer us some suggestions to counter this
narrative.

LatCrit scholars historically have addressed some of the challenges posed by a liberal
approach to identity politics and have offered alternative perspectives that recognize the
centrality of ideologies. [FN49] The debates surrounding the nomination of the Bush
administration's White House Counsel, Alberto Gonzalez, to the post of Attorney General
for the United States Department of Justice (USDOJ) were representative of the
challenges posed by the political positions that privilege narrowly constructed narratives
of identity over ideology. Judge Gonzalez would be the first Latino to hold the position of
Attorney General in the United States, and given the historical relationship between law
and Latina/os, this appointment holds great symbolic value. Of course, Gonzalez, a
confidant of a right-wing U.S. President who has publicly advocated for the creation of
detention facilities and intelligence gathering practices that are in clear violation of
international and United States constitutional principles of due process, justice and
fairness, also embraces a right-wing ideology. Ironically, traditional Latina/o grassroots
groups like the National Council on La Raza (NCLR), and other mainstream groups such
as the League of United Latin American Citizens (LULAC), publicly endorsed Judge
Gonzalez's nomination and were advocates for his appointment despite the fact that at
the time, Judge Gonzalez's ideological positions endorsed arguments that created the
conditions for the creation of civil rights groups in the first place.

One would think that the story of Judge Clarence Thomas and the effects of his legacy in
the Supreme Court would provide sufficient evidence of the perils of privileging a
narrowly constructed identity over ideology. More importantly, it is not readily evident that
the benefits that Chicanas/os may accrue from gaining the ear of the President, may
not in the long run undermine the collective gains of a social struggle for civil rights,
which in turn may further undermine the status of Chicanas/os in other ways. Certainly
groups like the National Latina/o Law Students Association (NLLSA) and the National
Lawyer's Guild (NLG) have been clear in their opposition to Mr. Gonzalez's nomination.
The polemic surrounding the endorsement by community organizations of Mr. Gonzalez
and the challenges posed by professional associations is representative of the types of
challenges in which LatCrit scholars have been engaging. LatCrit has provided an
intellectual space that allows critical dialogue between activists and scholars to explore the complexities of these identity debates. This year's conference, like others in the past, provided a "safe" environment where these tensions could be addressed.

Victor Romero's essay addresses the question of collective responsibility and minority coalition building head on, and offers an alternative paradigm that privileges self-sacrifice and stewardship as guiding values for coalition building in anti-subordination struggles. Drawing on Elizabeth M. Iglesia's work, he challenges the notion of class-based and racial forms of essentialism as guiding points in community activism. Romero challenges the dominant model that privileges "self-interest," "partner accountability" and equal access to power by demonstrating some of the ways that these strategies have failed to produce the desired result, and in fact have led to opposite outcomes. He writes that "this coalition paradigm would hold as its paramount objective the promotion of anti-subordination through self-sacrifice and stewardship." Romero's goal is to encourage coalition building approaches that alleviate oppression in all forms and reduce the reproduction of multidimensional and intersectional forms of subordination.

By extension, drawing on Romero's argument, it is possible to suggest that LatCrit scholars and community activists interested in anti-subordination struggles should be willing to sacrifice their desires to see a Latina/o in the Attorney General's office, in order to promote a greater conception of the public good. To be sure, Romero's argument privileges the importance of alleviating the reproduction of oppression, even at the expense of identity politics. Stated differently, it is preferable to sacrifice some gains in the interest of reducing oppression for all.

In contrast, the essay by Anita Tijerina Revilla offers a micro-history of the Raza Womyn student organization at the University of California, Los Angeles (UCLA), which emerged in response to sexism and homophobia experienced by various members of Movimiento Estudiantil Chicana y Chicano de Aztlán (MEChA). This fascinating account traces the development of Raza Womyn within the context of a hostile environment that reproduced various forms of subordination. I am reminded of Margaret E. Montoya's reflections on similar dynamics occurring within the National Association of Chicano Studies (NACS) and the sexism that women members faced within this professional association. This essay explores various ways in which a homogenizing conception of identity obscures various forms of subordination within a Latina/o narrative of identity. Tijerina Revilla's argument is especially important because, unlike essentialist/biological forms of subjectivity, ethnic identities are more contingent on kinship and other forms of contingent membership. Moreover, a Kulturkampf conception of conduct would clearly require that an ethnic conduct that is inconsistent with the norm should be subordinated in favor of assimilation to the dominant narrative, a historical and traditional form of Anglo-American national identity.

C. What Is an Ethic of Teaching?

LatCrit has been, by definition, an effort to create a critical and intellectual environment that can contribute to the education of faculty, students and non-academic participants. Virtually every annual conference and the resulting symposia have dedicated a space for the exchange of critical pedagogies and innovative teaching strategies. This concern with a critical approach to the teaching of law in the social realm has been informed by a concern with equality, difference, justice and a host of other critical commitments embraced by participating members.

In recent years, the Kulturkampf narrative has been invoked to challenge ethical approaches to teaching in at least two ways: namely, in a call for more neutral academic institutions and as a rhetorical device to police the academy. In Romer and later in Lawrence, Justice Scalia invoked the "cultural wars" narrative to criticize the
Association of American Law Schools' (AALS) Bylaws, which denounced homophobic practices. Ironically, Justice Scalia's dissent made a call for more neutrality in the legal academy as way to counter the influence of these institutions on the legal profession. [FN61] As the ongoing litigation over the impact of the Solomon Amendment [FN62] readily reveals, the a call for neutrality in the face of discriminatory policies adopted by the U.S. military is tantamount to a betrayal of non-discriminatory educational objectives of the legal academy. [FN63] More importantly this call for neutrality has the clear effect of restricting the academic freedom of educational institutions and further encouraging the domestication of ethical consciousness among students. This is yet another example of the types of double-standards defended by conservatives. On the one hand, conservatives like Scalia demand that educational and legal institutions take a neutral stance with regard to state sponsored forms of discrimination and to seek to resolve these issues in the democratic arena, yet the very same state institutions are the ones being challenged by subordinated minorities.

The Kulturkampf narrative also has been invoked in efforts by right-wing ideologues to police the academy in ways that restrict the ability of scholars to engage in the critical reflection of social and political issues. Conservatives have employed two approaches to achieve this end. The first and most insidious is an outright effort to impose a nationalist conception of identity on college campuses through the public persecution of perceived un-American scholars [FN64] and research agendas. [FN65] This approach has been reinforced by a call for a new McCarthyism on liberals and educational institutions that contribute to the intellectual formation of liberals. [FN66] Like other conservative narratives these approaches are premised on the subordination, exclusion and marginalization of anti-American scholarship. This ideological approach ultimately constructs a Kulturnation or narrow conception of a "cultural nation" that readily excludes any form of difference that challenges the status quo. An ethic of teaching demands that educators provide students with a wide array of intellectual resources that can enable students to understand social, political, legal--and in general the complexities of--relationships of power in any given discipline or subject of study.

A second approach has employed the language of "intellectual diversity" as a justification for the creation of academic curricula that embraces conservative ideologies as legitimate narratives. [FN67] Ironically, while Horowitz claims to depart from traditional conservatism on a wide array of issues, including the condemnation of homosexuality, he appropriates liberal arguments to create a space where conservative ideologies can acquire equal standing regardless of the intellectual merits of these ideologies. [FN68] In other words, while "conservatives," or rather contrarians, like Horowitz--who can make intelligent critiques and challenge the dogmatism of ideological positions--would probably contribute to the creation of interesting polemical environments, the unfortunate reality is that the conservatives Horowitz is readily inviting to the table are not interested in intellectual debates. They are interested in the subordination of progressive and critical voices that challenge the status quo and invite the transformation of social, legal, economic and political institutions in more egalitarian ways. The essays in this cluster challenge these and other efforts to restrict intellectual freedom by embracing an ethic of teaching that privileges critical commitments to the polity, a more holistic approach to teaching that accommodates various strategies for learning and an ethic of caring.

Professor Antonia Darder provided the keynote speech for the LatCrit IX Annual Conference. The speech challenged those present to link the civil rights movement to "anti-imperialist struggles around the globe--that is, struggles to challenge capitalism through embracing a politics of class struggle and anti-racism." [FN69] Professor Darder's speech challenged LatCrit scholars and activists, or "citizens of the Empire," to challenge liberal educational policies and voice their dissent whenever possible. [FN70] More importantly, Darder's argument brings structural concerns over international capitalism to
the forefront. Although not stated directly, the language and content of her speech echoes Michael Hardt and Antonio Negri’s arguments as articulated in their book entitled Empire. [FN71] Despite the often incisive and interesting critiques of imperialism and empire offered by Hardt and Negri, I think Alex Callinico’s fundamental challenge *766 to the amorphous notion of the "multitude" is critical to understanding how LatCrit scholars and activists can draw upon the insights of Empire to challenge current global forms of subordination. [FN72]

To be sure, LatCrit has consistently provided a forum where critical scholars and activists can organize and gather resources to counter various forms of local and global subordination. More importantly, LatCrit has consistently provided an institutional space that has enabled scholars and activists to secure resources to develop projects with commitments to progressive social change. Of course, as Nelson E. Soto contends, teachers still need to care about making critical interventions. [FN73]

While web-based pedagogy is not new, and by now some of the virtues and perils of this approach are well known, the process of organizing virtual classrooms can be daunting and difficult. Fran Ansley and Cathy Cochran provide a clear and concise guide for the development and management of a web based resource for law students. [FN74] Moreover, the article discusses various ways in which the site hosts/designers/managers can become empowered and create an innovative educational environment.

D. Methodology

Traditional conservative thought is, by definition, anti-intellectual. [FN75] The conservative argument has, by definition, focused on uncovering the sometimes hidden secrets in history, tradition, custom, religious texts and a host of other sources. While there may be various ways to uncover original and universal conservative truths, there is a common contempt for speculative and creative efforts to offer new sources of knowledge. More importantly, conservative narratives are for the most part guided by clear moral standards, and the method of discerning these is generally contingent on the outcome. More importantly, the conservative and neo-conservative narratives have been dominated by concern with nationalist narratives that subordinate intellectual pursuits to competing narratives of national security, interest and identity. In a sense, the Kulturkampf narrative has been premised on a Kulturkation, or a national culture narrative that is self-referential in its definitions. The Kulturkampf narrative relies on creating artificial dualities that enable conservative ideologues to reframe the terms of debates in narrowly tailored categories that obscure the complexities *767 of issues, identities and perhaps our ability to conceptualize society, and the polity more generally.

This appeal to patriotism, national interest and a national conception of culture has been used as a gauge to measure what constitutes legitimate research and a legitimate source of knowledge. Drawing on her training in the British School of cultural studies (the "Birmingham School"), Professor Imani Perry challenges this argument by suggesting that an unfamiliar perspective can help us gain new insights in the study of the relationship between race and law in the United States. [FN76] Professor Perry also asserts that the European/Birmingham tradition of cultural studies can "also provide useful means of interrogating norms that provide bases for the structure of power." [FN77] This appeal to a conception of popular culture as a legitimate source of knowledge validates critical perspectives from traditionally subordinated groups and enables connection to critical approaches to the study of power in a transnational realm. More importantly, this intellectual tradition has the potential to offer alternative perspectives that denounce the effects of historical and traditional conservative ideologies.

In contrast, Professor Mary Romero offers a powerful critique that draws upon C. Wright Mills's conception of the sociological imagination. [FN78] Professor Romero states that
she will "critique the propensity among LatCrits, and Outcrts, to be overly psychological in their analysis and use of various forms of story-telling." [FN79] The effect of this practice too often leads to psychological reductionism and an individual focus on issues that obscures and displaces structural change. This tendency, Professor Romero contends, can often lead to the reproduction of the conditions that create the need for progressive scholars. She concludes by offering three areas in which a sociological imagination can assist the LatCrit project, namely:

1. We need to draw less from our own stories and more from the inclusion of ethnographic research, which retains a structural analysis into the everyday lives of Latinas and Latinos;

2. We need to do what only the scholar can do--establish the connections between the micro level of personal narratives, the institutional structures and historical circumstances. We must identify patterns of subordination within which the individual story makes sense.

3. Similarly, we need to ground discourse analysis and popular culture studies in institutional structure, discussing ideology and hegemony. We must maintain focus on the connection between ideas and material existence. [FN80]

Professor Romero's critique provides an important reminder of how master narratives, including cultural narratives, can also reproduce various forms of subordination by neglect. To be sure, one of the dangers of the Kulturkampf narrative is the tendency of creating artificial dualities that seek to subordinate multidimensional identities to one-dimensional subjectivities, and simultaneously recast problems as cultural, or rather behavioral. The end result is that economic aspects of a problem are separated from social and political aspects of identity. Professor Romero's argument challenges "Outcrts" to avoid reproducing this Kulturkampf narrative and to refocus on the concrete material effects of subordination. [FN81]

E. Nationalism

The articles in this cluster engage three different dimensions of the relationship between the Kulturkampf narrative and the national imagery. They also expose three tensions and/or double standards inherent in the efforts to impose a new Pax Americana on the world within the context of the current war on terrorism. At the heart of this tension is a clash between the conservative rhetoric in favor of isolationism and a neo-conservative call for imperialism. [FN82] Some of the double standards inherent in this, and other tensions, can be discerned from the clash between a U.S. rhetoric of favoring the spread of democracy, while simultaneously rejecting national affirmations of sovereignty; the U.S. claim to favor "human dignity," [FN83] while simultaneously creating inhumane detention camps; [FN84] and the selective rejection of international law as a legitimate source of law in the United States despite the clear language of Article Six of the United States Constitution. [FN85] Unfortunately, the "culture wars" narrative*769 has been employed to obscure the material effects of these legal and policy initiatives.

The current neo-conservative foreign policy has been guided by efforts to promote cultural or regime change [FN86] throughout the U.S. sphere of influence in accordance with national interests. [FN87] Neo-conservatives have employed the Kulturkampf narrative to recast the complexities of global and international forces in narrow dualities that can be used to arbitrarily differentiate between friends and enemies, good and evil countries, the civilized and the uncivilized and a host of other one-dimensional dualities. [FN88] This narrowly tailored conception of the world not only obscures the complexities of international actors, but also undermines the possibility for democratic and egalitarian participation in multilateral arenas by privileging unilateral and bilateral relationships.
One of the key effects of this ideological representation of the world has been the rejection of independent affirmations of national identity by nations that may reject U.S. policy. In a sense, the Kulturkampf narrative informing U.S. foreign policy has been premised on a standard of national identity or Kulturnation that is contingent on U.S. interests. Both Professors Maria Clara Dias and Angel Oquendo offer arguments for "progressive" forms of nationalism that counter the current neo-conservative narrative.

Dias argues that nationalists can embrace a human rights practice and develop national rights narratives that are consistent with human rights norms. In addition, she argues that self-determination can provide co-nationals with the opportunity to develop progressive local norms that are just and consistent with international norms of justice. She concludes by alluding to the experiences of Puerto Ricans, Palestinians, Kurds and others. Dias's article, however, defends the right of nations to assert a claim to define their own sovereignty independent of the national interests of other nations.

In contrast, Professor Angel Oquendo argues for a "pluralist model that declares that the state apparatus should value and actively promote the existence and co-existence of various national subgroups, without favoring any one of them." Oquendo's article offers a post-national critique of the liberal and communitarian debates as a way to abandon the more subordinating forms of nationalism that dominate contemporary debates. Oquendo's argument also contributes to a longstanding debate within the LatCrit community. To be sure, longtime members of LatCrit Pedro A. Malavet and Ediberto Román have been engaging this issue since the inception of LatCrit almost a decade ago.

While Oquendo's argument is primarily concerned with the philosophical underpinnings of the relevant debates, and his examples in the United States tend to focus on the possibilities for ethnic and racial groups, it is possible to argue that the case of Puerto Rico provides practical strength to his proposal. Despite the imperial/colonial relationship between the United States and Puerto Rico, it is possible to argue that the United States has tolerated various forms of Puerto Rican cultural and institutional nationalism without incident. For example, Puerto Rican Olympic teams regularly challenge the United States in the international arena as sovereign opponents. Oquendo's argument suggests that nations that have occupied and conquered smaller nations and groups can develop political arrangements that incorporate a plurality of nationalist interests from within. The problem, however, is that contemporary forms of nationalism are premised on the subordination of racial and ethnic minorities.

Despite the neo-conservative rhetoric regarding the commitment of the Bush administration to respecting the civil and human rights of U.S. citizens and persons detained during the course of the war on terrorism, this administration has not only adopted the use of "enemy" or "unlawful combatant" categorizations to indefinitely detain suspected individuals in military camps. Yet despite the Bush administration's rhetoric about the importance of the rule of law and human dignity, it has consistently sought to deny basic due process rights to those detained in these insidious camps. From a historical perspective, detention camps like those created by the United States to fight the war on terrorism have relied on a narrative of emergency to justify the state's creation of spaces where the rule of law is absent and the subjects detained are left at the mercy of their guards. More precisely, legal philosophers like Carl Schmitt, and more recently intellectuals like Giorgio Agamben have used the notion of the "state of exception" to describe detention camps where the rule of law is absent and the detainees are left in a state of bare life, subject to the whims of their guards. The Bush administration has invoked a historical Kulturkampf narrative that is premised on the notion that the constitution need not follow the flag to uncivilized places where the inhabitants are culturally inferior. In the context of the war on terrorism, this means that the Constitution need not protect uncivilized terrorists. Additionally, while it is readily
evident that the Bush administration has used a racial double standard against so-called enemy combatants that are U.S. citizens, evident in the disparate treatment of John Walker Lind, José Padilla and Yaser Hamdi. Not enough attention has been paid to the relationship between race and the juridical status of the detention camps in Guantánamo Bay, Cuba.

Gil Gott's article addresses the link between racial subordination, national security laws and the creation of detention camps after September 11, 2001 in the United States. Drawing on current debates regarding the "state of exception," and a LatCrit approach to the study of nationalism, Professor Gott suggests that the Japanese internment precedent provides a common underpinning for the post-September 11 state security powers. Rather than appealing to a Nazi precedent, Professor Gott's argument suggests that the insidious U.S. practice of internment provides a more accurate picture of the current logic informing the U.S. national security ideology. Of course, once we accept that racial subordination is part of the equation, it is not difficult to continue to find other exceptions in the United States. More importantly, this argument challenges the claim that this war on terrorism is so different from other wars, that it requires exceptional policies, including policies that undermine basic due process principles.

Professor Gott's critique also raises important questions about the ideological foundations of the neo-conservative voices within the Bush administration. As Anne Norton and Nicholas Xenos have demonstrated, the neo-conservative cadre of advisors to the Bush administration identify with a particular school of thought and tradition that identifies with the historical persecution of Jews. As Hannah Arendt noted, some of the worse atrocities committed against Jews were legitimated on the grounds of racial supremacy and national security. It is ironic, to say the least, that neo-conservatives of a Straussian orientation would permit this administration to endorse policies that reproduce racist and racialist national security ideologies.

Conservative and neo-conservative ideologues have invoked the Kulturkampf narrative to reject the influence of international law or norms on constitutional interpretation by arguing for the superiority of U.S. law over that of other countries. More importantly, this narrative represents international law as a collection of sovereign laws, while ignoring the hybrid and distinct character of international agreements. An example of these misrepresentations can be readily discerned from Justice Scalia's recent dissenting opinion in Roper v. Simmons where he states:

More fundamentally, however, the basic premise of the Court's argument-- that American law should conform to the laws of the rest of the world--ought to be rejected out of hand. In fact the Court itself does not believe it. In many significant respects the laws of most other countries differ from our law--including not only such explicit provisions of our Constitution as the right to jury trial and grand jury indictment, but even many interpretations of the Constitution prescribed by this Court itself.

Ironically, Justice Scalia, like many conservative ideologues, neglects to recognize the language of the Supremacy Clause in Article VI of the Constitution and its effect on interpretation. More importantly, this ideological narrative misrepresents international law as a conflict between the laws of the United States and that of other countries, while ignoring the distinctive character of international treaties and agreements. Stated differently, an international treaty, a convention or an agreement generally represents the influence of competing national laws and their constitutive influences. To this extent the international law has the potential to offer innovative, refreshing and creative laws, norms and interpretations that could enhance competing domestic or national legal systems.
Berta Esperanza Hernández-Truyol offers an important and innovative argument for a global citizenship that is not held hostage to the will of the most powerful sovereign and that simultaneously challenges conservative efforts to reduce international law to a mere collection of national laws. [FN103] The main objective of her argument is to offer an alternative conception of citizenship "grounded on a human rights model [that] will strengthen personhood, [while] denationalizing states' claims on individuals' rights." [FN104] This argument also challenges the idea of dual nationalities [FN105] in that it provides for a more expansive, cosmopolitan and nuanced interpretation that challenges national conceptions of citizenship that may be contingent on the status of the sovereignty of the nations in question.

Hernández-Truyol's argument builds on some of her earlier LatCrit work, [FN106] and engages the abusive policies adopted by the United States under the excuse of the war on terrorism. Her argument is especially interesting because it posits a possible form of citizenship that could not only provide a more humane source of rights and protections, but could also contribute to erode the repressive state apparatus that continues to provide obstacles for the realization of a more humane global society. [FN107] Of course, the assumption is that this narrative of human rights and citizenship will also be self-critical and endeavor to address the ideological foundations of empire which are at the core of a human rights narrative. [FN108]

F. Law, Politics and Culture in an Age of Double Standards

Jerome McCristal Culp, Jr. had a reputation for leading an ethical life and committing himself to a life long struggle for social justice. The essays included in this symposium share an ethical conviction for social and political justice. More importantly, they affirm a continued conviction for democracy and equality in the face of a political environment that undermines these principles in the name of Kulturkampf and the war on terrorism. The LatCrit project aims to create an intellectual environment that not only nurtures critical and progressive exchanges, but also strives to create the conditions that will enable scholars and activists to engage in social, political, legal and economic change.

Kulturkampf narratives invoked by conservatives in the legal, as well as the political, realms have sought to narrow the categorization of traditionally subordinated identities in ways that enable the continuation of various forms of subordination, marginalization and outright oppression. As the essays in this symposium have consistently demonstrated, conservatives have capitalized on and exploited the liberal fragmentation of the subject, an ideology that creates artificial demarcations between the private and the public self, the social and the economic, race and culture and in general, the multiple dimensions of subjectivity. Conservatives' use of the notion of Kulturkampf enables them to strategically construct artificial dualities in order to recast the issues within a context that permits them to perpetuate their agenda. Stated differently, the Kulturkampf narrative creates the conditions that enable conservative ideologues to perpetuate desired hierarchies and inequalities.

One of the underlying threads among the essays in this symposium has been a cautionary warning to subordinated groups to become aware of the ways in which their collective self-defining narratives reproduce and perpetuate conservative ideologies. Most of the contributions to this symposium have explored the ways in which subordinating practices within communities with traditionally marginalized members ultimately prevents coalition building. More importantly, the reproduction of conservative narratives within subordinated populations forestalls the possibilities of organizing effective challenges to the anti-democratic and un-egalitarian forces shaping the contours of the ideological state apparatus. In response, most of the contributions included in this symposium argue for more encompassing and expansive conceptions of culture and identity. To be sure, the essays call for more complex legal and political conceptions of culture and identity.
that consider multidimensional and intersectional aspects of subjectivity. In a sense, the articles are making a call for broader conceptions of culture, namely ones that accommodate the multidimensional character of subjects and groups, and that can accommodate contingent identities in ways that undermine conservative narratives of subjectivity and further challenge the rollbacks of conservative ideologues.

Footnotes:

[FNa1]. Assistant Professor, Politics Department, Ithaca College. Ph.D., University of Massachusetts at Amherst. This year's conference was made possible by the generous support of the Villanova University School of Law, the Villanova Law Review, Seton Hall University School of Law, University of Denver College of Law, University of Miami School of Law and the Center for Hispanic & Caribbean Legal Studies. The LatCrit IX Conference coordinators were Beth Lyon, Frank Rudy Cooper. I want to thank Audrey Sorokach, Beth Lyon and Frank Valdes for their patience and thoughts.

[FN1]. For a general introduction and overview of LatCrit projects and the organization's history, please refer to the LatCrit webpage at http://personal.law.miami.edu/~fvaldes/latcrit/overview.html (last visited May 10, 2005) or the LatCrit Informational CD.


[FN4]. See Grutter v. Bollinger, 539 U.S. 306 (2002) (holding that colleges may consider race as factor as part of narrowly tailored admissions process); Gratz v. Bollinger, 539 U.S. 244 (2002) (holding that Fourteenth Amendment is limited to protection of individuals and not groups prohibiting classifications based on race in most circumstances).


[FN6]. See Duckworth v. Eagan, 495 U.S. 195 (1989) (police not required to give complete or precise Miranda warnings to suspects).


[FN14]. Romer, 517 U.S. at 636 (Scalia, J., dissenting).


[FN19]. See id. at 8-9.


[FN21]. See generally Leo Strauss, What is Political Philosophy? And Other Essays (1959). The reader may be required to engage in an esoteric reading between the lines of Strauss' argument in order to better grasp some otherwise obscure passages meant for the masses, or more correctly written in an exoteric style. For the best discussion of the Straussian suspicion of democracy, see Nicholas Xenos, Leo Strauss and the Rhetoric of the War on Terror, 3 Logos 2 (2004).

[FN22]. See Kirk, supra note 18, at 8.

[FN23]. Id. at 58-59.

[FN24]. See id. at 9.

[FN25]. Goldwater, supra note 20, at 64 (emphasis added).

[FN26]. Id.


[FN29]. See generally Leo Strauss, Natural Right and History (1965).

[FN30]. See Roy P. Basler, Abraham Lincoln: His Speeches and His Writings 372-81 (2001). Ironically, while many Straussians and neo-conservative pay lip service to
Lincoln’s conception of natural equality, they also affirm ideologies that perpetuate a wide variety of inequalities, such as the discrimination against gays, immigrants and the poor. See, e.g., Newt Gingrich, Winning the Future, A 21st Century Contract with America XV (2005).


[FN34]. Id. at 603 (Scalia, J., dissenting).


[FN36]. Id. at 330 (O'Connor, J., concurring).


[FN38]. The articles in the Seton Hall Law Review focus on three related areas. The first cluster of essays contains a series of papers that look at contemporary racial realities from multiple perspectives. These essays explore racial ideologies from different positions and with refreshing lenses. The second cluster engages the question of culture wars directly and collects various poignant critiques addressing the central theme of this year's conference. A final section collects various articles that engage traditional questions of immigration from a contemporary standpoint and in light of the recent debates over immigration law and policy in the United States.


[FN40]. See generally Angela P. Harris, Under Construction, 50 Vill. L. Rev. 775 (2005).


[FN43]. See id. at 777.

[FN44]. See id. at 778-79.


[FN49]. See Roberto L. Corrada, Familiar Connections: A Personal Re/View of Latino/a Identity, Gender, and Class Issues in the Context of the Labor Dispute Between Sprint


[FN53]. See Romero, supra note 51, at 824.

[FN54]. Id. at 826.


[FN56]. See id. at 800-01 (examining subordination effects in context of Raza Womyn student organization).


[FN61]. See id. at 602.

[FN62]. 140 Cong. Rec. H3861 (daily ed. May 23, 1994) (restricting federal funding to law schools that deny access to military recruiters to their campuses).


[FN64]. See, e.g., Campus Watch, Monitoring Middle East Students On Campus, Survey: Institutions, at http://www.campus-watch.org/surveys.php/cat/Institutions (listing numerous institutions that are members of "policing club") (last visited Feb. 1, 2005).


[FN66]. See Ann Coulter, Treason: Liberal Treachery from the Cold War to the War on Terrorism (2003) (defending Senator Joseph McCarthy's persecution of communists and defending this practice today); Kate Sheppard, Coulter's Hypocrisy Threatens Free Thought, at http://www.ithaca.edu/ithacan/articles/0502/24/opinion/2coulter.htm (last visited May 10, 2005).


[FN70]. See id. at 857 (commenting on traditional civil rights study).


[FN72]. See Alex Callinicos, Toni Negri in Perspective, 92 Int'l Socialism J. P 69 (2001), available at http://pubs.socialistreviewindex.org.uk/isj92/callinicos.htm (suggesting that "nearly all of humanity is to some degree absorbed within or subordinated to the networks of capitalist exploitation").


[FN75] See Kirk, supra note 18, at 8-9.


[FN77] Id. at 918.


[FN79] Id. at 925.

[FN80] Id. at 937-38.

[FN81] For an alternative perspective, see Martha T. McCluskey, The Politics of Class in the "Nanny Wars": Where is Neoliberalism in the Kulturkampf?, 35 Seton Hall L. Rev. (forthcoming 2005) (arguing that progressives can do more to reframe cultural debates so that economic equality no longer appears antithetical to cultural freedom).

[FN82] It is clear that conservatives were not complaining about U.S. interventionism during the Cold War, including the destabilization of democratic regimes like those of Allende's Chile, and more recently Hugo Chavez' Venezuela.


[FN84] See generally Mark Danner, Torture and Truth, America Abu Gharib, and the War on Terror (2004); Seymour M. Hersh, Chain of Command, The Road from 9/11 to Abu Gharib (2004).

[FN85] U.S. Const. art. VI, cl. 2 ("This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under authority of the United States, shall be the supreme law of the land ....") (emphasis added).

[FN86] See Xenos, supra note 21, P 18.


[FN90] See id. at 1063-69 (self-determination is "craving, manifested by certain cultural communities, to establish their own form of political representation").


[FN92] See generally Pedro A. Malavet, America's Colony: The Political and Cultural
Conflict Between the United States and Puerto Rico 13, 100-16 (2004) (offering "a pluralistic communitarian proposal to reform the construction of citizenship in traditional liberalism in general and American constitutional liberal theory in particular").


[FN97]. In the case of John Walker Lind, a white wealthy kid, the Bush administration quickly prosecuted him and sentenced him to twenty years in prison. In contrast, José Padilla, the so-called Puerto Rican Al Qaeda, continues to languish in a military facility without having been charged for more than two years, and Yaser Hamdi, also a U.S. citizen of Saudi heritage, was deported and stripped of his citizenship despite the fact that he was born in the United States. One only has to wonder when white U.S. citizens and convicted terrorists like Terry Nichols and John Walker Lind will be subject to the same standards.


[FN99]. See Norton, supra note 15, at 181-200 (acknowledging presence and examples of neoconservatives in Bush administration); Xenos, supra note 21, PP 35-49 (discussing presence of "Straussians" and neoconservatives in Washington politics for many years, including in current administration).

[FN100]. See Hanna Arendt, The Origins of Totalitarianism 238-43 (1976) (discussing Schoenerer's and Hitler's philosophies that Jewish people were homogeneous group who presented threat to security and decisions to use propaganda to show inferiority).


[FN102]. Id. at 1226 (Scalia, J., dissenting).


[FN104]. Id. at 1009.

countries grant dual citizenship to people who leave their native country to find work in United States).


JEROME McCristal Culp, Jr., Professor of Law at Duke University and founding member of LatCrit, died in Durham, North Carolina on February 5, 2004, of complications associated with kidney failure. The essays in this cluster-- written by people he loved--celebrate his many gifts.

Adrienne Davis and Bob Chang reflect upon Jerome as scholar, mentor and friend. Adrienne discovers that an emergent theme of Jerome's later writing was 'love.' Bob remarks on Jerome's willingness to do the hard political and personal work of engaging with those who are not us. Both advert to the closing line of Walter Dellinger's powerful remarks at Jerome's memorial service: 'Oh, how he fought.'

He did fight. Those who knew him will remember hearing the spiraling cadences and rising volume of Jerome's voice as he worked himself into a rant over some fresh outrage. Jerome fought against racism, against homophobia, against bigotry and stupidity all his life, as hard as he could, holding nothing back. But the power and purity of his anger, I think, lay in the way it came from the same place as his love. Scott Lee, quoting from Derrick Bell, notes that Jerome was one of the most ethical people he has ever known. Jerome's standards were high, and he applied them across the board: to himself as well as to others, with no concessions to ego, status or expediency. He was able to do battle without reservation because he was fighting in the defense of things he loved without reservation.

Jerome always looked for the honorable path, not the easy path. But his love, his empathy, his anger and his ethical ambition were always rooted in an awareness of how deeply fallible humans are. Jerome recognized the fact that we are all under construction. In the time I was privileged to spend with him, he and I discussed our self-hatred as well as our aspirations, our inability to meet the standards we set for ourselves, our moments of vanity, delusion, and self-importance, and we laughed at them and at us. We laughed at the imperfect parts, the unfinished parts, the things we could not articulate, the things we tried and failed at: Jerome had a laugh that encompassed disaster that was bigger than catastrophe.

I will miss his laughter most of all.

Footnotes:

[FNa1]. Professor of Law, School of Law, University of California, Berkeley; Executive Committee Member, Center for Social Justice.
DRIVING to Philadelphia from North Carolina for this conference, I was emotionally wrung out by the thought of these remarks. This was a terrible semester for us in North Carolina, losing two guiding lights in distinct yet complementary constellations in our profession, Professors Jerome Culp and Marilyn Yarbrough. Yet, as I drove, reflecting on Jerome's work, I in fact found myself emotionally sustained. Initially, I heard the compositional voice formulating my comments, "There was the early Jerome, then there was Jerome's work on identity . . . ." But then, I found myself mentally correcting my own verb tenses from past to present. And I was immensely comforted as I mused on the enormous stack of his articles I had left on my desk, realizing Jerome will always be with us through his passion, his politics, and his intellectual power.

Whatever our perspectival and methodological differences, one thing we can all agree on about Jerome as a scholar: the man was prolific. He published over twenty articles, plus book chapters and a book, all penned with eloquence and what we now recognize as quintessentially "Jerome-esque" passion. He published in major symposia as well as the most prestigious law reviews. For those who do not know Jerome's work as well, and for those of us who do but are still taking in the volume of it, I thought I would offer three snapshots of Jerome's writing career, hoping to capture some aspects of his intellectual and political trajectory through the academic solar system.

The first snapshot surprised me: there, in 1987, leading a symposium on law and economics and judicial decision-making in Duke's faculty-edited journal, Law & Contemporary Problems, is what I have come to think of as Economic Jerome. Jerome had done graduate work in economics and directed Duke's John M. Olin Program in Law and Economics. This was one of his first large-scale legal projects. Jerome wrote the foreword and also a piece entitled Judex Economicus, in which he argued an anti-instrumentalist vision of economics and law. [FN1] Caution, deference--this was not his métier. But nor was he arrogant or rude. Rather, with what came to be typical fervor, Jerome took on Judge Richard Posner from within the law and economics discipline, laying waste to unstated assumptions, economic and legal, of the Chicago School. [FN2] Two things stand out from this early piece: first, that Jerome's unrelenting passion was already cognizable, even when he was a baby law professor. In addition, while many of us remember Jerome primarily as a leading scholar in critical race theory, a careful reading of his work, especially his symposium piece on the 1991 Civil Rights Act, reveals an ongoing concern with economic justice and, from his quantitative training and mastery of markets, a deftness with legal economic discourse. [FN3] Although efficiency remains the holy grail of law and economics, Jerome's was a powerful voice in the chorus calling to incorporate other norms--including justice--into the discipline.

The second portrait of Jerome was more familiar to me. One that might be thought of as Jerome the Founding Father, or Elder of the Tribe, the Jerome who was an architect of two of the primary branches of critical race theory and, relatedly, black legal scholarship. Founding Father Jerome's work initially takes on the "voice" debates of the early nineties. In a stunning number of articles published between 1991 and 1993, Jerome tackles the
still perplexing and divisive question of a voice of color in legal scholarship. [FN4] By distinguishing a "black voice," which all blacks, from Justice Clarence Thomas to Thomas Sowell to Randall Kennedy (then at the center of the maelstrom), have, from a "black perspective," which embodies the justice concerns and cultural backgrounds of the majority of the black community, Jerome's articles move away from essentialist stereotypes to intelligent discussions of political commitments and communities. [FN5] He also lays claim to a distinctively black tradition that shaped so much of our contemporary legal landscape, while consciously avoiding defaulting into *779 a black/white paradigm. [FN6] In one exceptionally beautiful essay in the Virginia Law Review, Jerome discusses the varying racial role of autobiography, noting that "[t]here is a reason for this use of autobiography black writers. Black people feel the need to justify who they are and to describe where they come from as a part of the description of where they want to go." [FN7] In this essay, Jerome articulates "how to include humanistic concerns in legal discourse," bravely using his own black, male body as example. [FN8] In this and other work, Jerome conducts a sustained consideration of mainstream responses to black legal storytelling to expose the exclusionary politics underlying scholarly calls for neutrality and "a canon." [FN9]

The second arc of Jerome's star in critical race theory is his engagement with the state's relationship to race: whether and to what extent the government has a generative or prohibitory role to play in racial identity and equality. He takes on in detail the doctrinal formations generated by Title VII in particular, but also, constitutional legal moments more generally, deconstructing them using a thick, finely ground racial lens. For instance, in his masterful account of the government stance towards race, The Michael Jackson Pill, he brings together several fictional black commentators in an imaginary setting of conferences and hearings to consider whether Massachusetts should compel people to take said pill, one that would make them white. [FN10] He employs as his interlocutor Derrick Bell's protagonist, Geneva Crenshaw, whom Jerome uses to interject gender into the conversations. This piece, published in 1994, also was one of his first *780 to grapple in a sustained way with intersectionality and multiple oppressions, a topic to which he ultimately devoted significant thought and attention.

Bringing these two trajectories of writing about identity--"voice" and prohibitory versus generative visions of addressing race--into convergence is Jerome's commitment to expose the false promise and artificial pedigree of color blindness. Of critical race theorists, he was one of the most adept and unflinching in interrogating liberal discourses of race. His scholarship is replete with thoughtful readings of judicial opinions, scholarly articles, and key moments in political and popular culture. Exploring racial moments ranging from legal scholarship [FN11] to the anniversary of the Brown decision [FN12] to trials of the police officers who brutalized Rodney King [FN13] to Woody Allen's movies, [FN14] he deconstructs the equation of racial justice with color blindness [FN15] and the growing unspeakability of racism in contemporary American culture. [FN16]

Most recently, and perhaps most intriguingly, a new, third, Jerome emerges, one whose primary interest is in the intersection of race with other forms of oppression and other intellectual formations, most notably Latino Critical Theory and Queer Theory. While this portrait was still very much one in progress when Jerome died, I am tempted to label it Jerome the Phoenix, for, unlike some of his cohort, who retired after the bitter identity wars of the nineties, or kept jousting with the same ghosts, Jerome moved forward, rising from the ashes of battles rigorously and elegantly fought, many but not all won, to take on new and necessary struggles. The dominant attribute of this portrait is the presence of others in the picture, and, in a testament to Jerome's generosity, in the foreground. Most notable among his collaborations, he and his intellectual comrade Bob Chang wrote several germinal pieces together, of particular note, Nothing and Everything: Race, Romer & Gay/Lesbian/Bisexual Rights, which brilliantly uses the architecture of Justice Harlan's dissent in Plessy v. Ferguson to demonstrate an emergent...
sexuality-blind rubric in Romer v. Evans. [FN17] He also offered *781 one of the most simultaneously self-reflective and incisive engagements generated by the troubling question of the role of black scholars in debates about the politics of race and Latino identity. In the Seventh Aspect of Self-Hatred he argued:

The seventh aspect of self-hatred is my description of society's support for people to reject our race, reject our sexual orientation, and reject our gender. This seventh aspect of self-hatred is a sister of the fear of opposing the status quo. . . . By getting racial minorities and sexual minorities to help enforce their own oppression through the seventh aspect of self-hatred, the cost of enforcing these oppressions are minimized, perhaps making possible what otherwise would be an unsupportable system. [FN18]

Jerome was rightly and righteously proud of his role in LatCrit, the cultural and the intellectual movement. [FN19] He contributed to meetings and resulting conferences his immense academic prowess; he also nurtured the movement and took on many of its junior members as his personal protégés and mentees. His embrace of more nuanced and fluid notions of identity and community is reflected in the Yale conference he co-organized and subsequently published with Professors Angela Harris and Frank Valdes in Crossroads, Directions, and a New Critical Race Theory. [FN20]

Reflected in each of these three Jeromes is the man who penned the words. I was struck by how the Jerome in all three portraits did not believe in sacred cows and shibboleths. Recountings of exchanges with his white colleagues, particularly at Duke, populated his work. Careful readings of these encounters demonstrates that Jerome took seriously the obligation to perform his politics within his own institution while simultaneously manifesting deep care and respect for his colleagues, in the end embracing a position of sustained critical tension, exhausting and yet fulfilling to him. [FN21] He was generous to other scholars, even when subjecting their work to unrelenting critique. Jerome remained remarkably open to interrogating and rethinking old positions, even if it meant giving up scholarly privilege or center stage.

There is a fuzzier snapshot out there on the horizon, too, one slowly coming into focus for me. Taking seriously his own injunctions to autobiography, Jerome was tackling new genres in writing and scholarship to consider love, intimacy, and transgression. I did not fully understand the thrust of his new work at the time. But now, I think, I do. As I look back, Jerome and I spent hours discussing all things wonderful and strange about our lives: the passion and pain of our work; the girls on Sex & the City; the boys on Queer Eye for the Straight Guy; how our dear families of origin grounded us in a rich black tradition of love and laughter and support; how our families of choice had encouraged us to grow spiritually and culturally; his hopes and dreams for his nieces and nephews and Rachel Harris who he loved like a daughter; the wonders and irritations of teaching and students who both challenged and enriched us; our close yet tumultuous relationships with our colleagues and the profession. As I thought about this mishmash of stuff, this melee of seemingly random thoughts and dishing, I realized, finally, that Jerome talked incessantly about love. He never gave up on the power of love in its many incarnations: not just romantic fairy tales; but also political passion; and Christ-like agape; and that loving people and institutions does not always mean making them like you, sometimes it means loving them enough to help them be better. Because I realize now that Jerome's new work reflected his belief in the transformative power of love. Walter Dellinger concluded his remarks at Jerome's memorial service at Duke with poignancy: "Oh, how he fought." I would add, "Oh, how he loved."

Which brings me to my final thought. An appropriate place to end is to say that Jerome did not isolate himself within an ivory tower. Although one of our most prolific writers, Jerome would be the first to urge us not to privilege written texts as the sine qua non of
academic success. I suspect he would be at least as proud looking around this room with so many of his protégés in attendance and thriving as he would be of the stack of his articles on my desk. Jerome took his obligations as mentor incredibly seriously. I would see him at conferences and critical race theory events, typically surrounded by folks: he was either listening intently; telling a great story; giving soft-spoken yet incredibly wise counsel; or laughing that big belly-laugh. Like so many of us who started teaching in the early nineties, I was always drawn to Jerome as a guiding star—he was an immensely comforting person. And he left a big Jerome-size hole in the wall of an exclusive, elitist legal academy through which many of us followed more easily. He modeled powerful and incisive intellect and humility; pull no punches politics and incredible graciousness and compassion; leadership for fledgling intellectual movements and an at times troubled profession; and an almost egoless generosity. He was comforting, he listened, he took us seriously, he gently chastised us with his humor, and he supported our every intellectual and political step and misstep. At the beginning, that was the Jerome I first encountered from my seat in the audience; the Jerome I grew to know, often from my perch in the conference-hotel coffee shop or bar; and the Jerome I came to love, the comforting voice on the other end of the phone and the gentle yet persistent editor. At the end, I will always remember the drafts of my work he asked me to bring by his house in October, a couple of months after his kidney transplant. Through that fall and winter, they sat on his dining room table, as he moved back and forth between doctors in Durham and Pittsburgh, in and out of hospitals, finally to the hospital bed he had brought to his home. I thought about taking the articles home, to tell Jerome that reading them was utterly unnecessary under the circumstances, but, somehow, those drafts sitting there, kept us both up, and reflected my own hopes for one more round with Jerome.

As long as we are here, staying true to Jerome's academic norms and intellectual values, he will always be here, not just in ground-breaking texts, but in institution-shattering bodies. We, the third, fourth, fifth generations of RaceCrits, FemCrits, LatCrits and QueerCrits are Jerome's legacy, too.

Footnotes:

[FNa1]. Reef C. Ivey II Professor of Law, University of North Carolina School of Law.


[FN2]. As Jerome Culp noted:

The strength of Posner's judicial perspective, indeed of all of law and economics models of judicial decisionmaking, is the simplicity of its assumptions. It is this simplicity which is most seductive to those jurists who are attempting to formulate a post-realist judicial tradition by adopting a law and economics approach. Posner's failure to understand his judicial role as regulator of a macroprocess is at the heart of the strength and weakness of his views and judicial opinions. He is likely to make assumptions about the judicial world which are not supported by known facts and to view his role as judge as simply one of a participant in a microeconomic system and not as regulator of macroeconomic judicial powers. Paradoxically, it is this assumption, that the judicial process should be viewed from a microeconomic perspective, that provides Posner with verifiable answers and confidence in asserting the superiority of wealth maximization rather than equity in his judicial decisionmaking.
Culp, Judex Economicus, supra note 1, at 100-01 (footnotes omitted); see also Culp, Foreword, supra note 1, at 12 (arguing that advocates of judicial economic reasoning may fail to provide "blueprint for costs" to make such reasoning meaningful).


[FN4]. See infra notes 5-9.


[FN8]. Culp, Autobiography, supra note 7, at 544.


[FN11]. For sources addressing the issue, see supra note 9.


[FN20]. Crossroads, Directions, and a New Critical Race Theory (Francisco Valdes et al. eds., 2002); see also Jerome M. Culp, Jr. et al., Subject Unrest, 55 Stan. L. Rev. 2435 (2003) (in replying to symposium featuring reviews of their book, distinguishing critical race theory and liberal anti-discrimination project through three uses of "the subject": discrimination versus subordination as subject of analysis; objective versus subjective accounts of world; and extent to which identity itself is seen as subject of analysis, i.e., production of subject).

ON Monday, a week before this Conference, my cell phone rang. My caller-ID said that it was Jerome. My heart began racing. For a split second, I thought that his passing back in February was a bad dream from which I was about to awaken. For a split second, I thought I was being rewarded for not deleting Jerome's entries from my phone, which I had considered doing just days earlier. For that split second, relief and joy washed over me, only to be replaced by bitterness over what I could only imagine was a cruel joke being played on me. I pressed the talk button. I said 'Hello.' The voice that answered was not Jerome, but it had his cadences. It took me back in time.

I first saw Jerome in the halls of Duke Law School, where I was a student. Often as not, he would be in shorts and knee pads on his way to or from a pickup basketball game. I had heard about him, but did not get to take his courses because he was away on protest visits half of the time I was there. [FN1] I used to bug him about this, telling him that I could have really used his mentoring when I was a student. But even in his absence, he was always there. A Black law professor! On an otherwise all-White law school faculty. Showing me what was possible. Showing me what I could aspire to.

Even in his absence, his written word was there. When he declared in Toward a Black Legal Scholarship, an African-American Moment, the time when darker voices will remake legal doctrine, [FN2] he gave me the courage to announce a similar Asian American Moment. [FN3] His work on race and autobiography, in which he struggled to find the 'me' in the legal academy, [FN4] allowed me to imagine a place for myself. His voice helped me to find mine.

Those who have heard him speak or read his words know that he had a calling, which compelled him to look racism in the face and call its name. This often got him in trouble, especially with his colleagues at Duke, [FN5] which Jerome sometimes called 'The Plantation.' Some of his colleagues, in hiring him, perhaps expected different from the field Negro that they had moved into the big house. But Jerome quickly let them know that he was no house Negro. He was not about to keep the Master's secrets. In his Water Buffalo piece, he wrote about some of the hiring practices at his institution, about how pools were created and manipulated and excuses generated. [FN6] But do not think for a moment that he made his way by just telling stories or airing dirty laundry, as some critics charged. [FN7] His work during this middle period of his scholarship was a sustained critique of the use of neutrality to oppress certain groups. [FN8] It was in this way that *787* he was raising his Black voice to remake legal doctrine and transform institutional practices.

His involvement with LatCrit marks what I would describe as his later scholarship, where one emphasis was on the hard work of building coalitions. At LatCrit I, in 1996, Jerome emphasized the need for groups working together in solidarity to make sacrifices. [FN9] As an African-American speaking at an ostensibly Latina/o-oriented conference, he recognized that his taking up space on the conference program meant one less slot for a
Latina/o voice. He recognized and honored that sacrifice, and emphasized that a working coalition of different groups with different histories must include a willingness of the different groups to incur costs or forgo benefits that will then accrue to other groups in the coalition. It is like giving up your seat so that someone else can sit for awhile, as all of you work together toward expanding the number of seats. It is this willingness to make this kind of sacrifice that ultimately fosters the kind of trust necessary to sustain a coalition.

Jerome also asked, ‘How do we come to participate in the struggles of those who are not us?’ [FN10] For Jerome, the answer lay in part in learning the histories of those who are not us. He saw it as a responsibility for someone doing coalition work to read the histories of other groups--to gain a sense of their struggles and aspirations--in order to find some common ground. [FN11]

Jerome was a voracious consumer of books. I think a number of people in this room have had the experience of being out of town at a conference and going to a bookstore with Jerome. I was fortunate to have shared many such trips. I would walk out of a bookstore with one bag of books. Jerome would walk out with three bags. I used to wonder about how he got them home, how heavy his luggage must be. But Jerome never felt the weight of books. Books, and the knowledge they contained, lifted him up.

In reading the histories of those who are not us, at least two things become evident. First, you learn that the other is no longer a stranger. Second, that the oppression of one group is not an isolated phenomenon that can be addressed separately, but is part of a larger system of group stratification that requires a broader, deeper, multifaceted response.

I think that Jerome's words at LatCrit I, emphasizing sacrifice and developing and deepening our knowledge of those who are not us, along with his continued involvement in LatCrit, helped shape the rotating centers concept that animates much of the LatCrit endeavor. [FN12]

His more recent work in LatCrit urged us to take a hard look inward. I think that this shift in emphasis stemmed from the way that his body had begun betraying him. He began thinking about how we sometimes work against ourselves despite our best intentions. His article, The Seventh Aspect of Self-Hatred, [FN13] is an unfinished meditation on this idea. In his author's footnote, he blames Angela Harris and me for making him publish it. [FN14] I have been puzzling over this article for a while now. Brilliant as he was, his work sometimes requires a bit of puzzling in order to tease out the layers of meanings.

The 'Seventh Aspect of Self-Hatred' is the name Jerome gave to a pernicious phenomenon that he saw at work in individuals and groups, whereby the dominant society has taught us to hate ourselves in non-obvious ways. We end up working against ourselves without being aware of it. Here, he was not talking about what he had seen in Black communities, such as the unfortunate misguided strategies used to attain good hair. This is probably captured in one of the other aspects of self-hatred. By the way, if you are wondering about the other six, you will not find them in his article. Apparently, they were self-evident in ways that did not merit discussion beyond one cryptic footnote. [FN15] The broader lesson of this piece is the importance of taking a hard look inward, something the Jerome increasingly did as his body failed him.

Jerome did me the honor of being his co-author on a number of pieces. [FN16] When he passed away, we were working on two articles examining the legacy of Brown v. Board of Education. [FN17] It has been very difficult to work on them. I miss him terribly.
With the one article that I have managed mostly to complete, [FN18] I have been struggling with the ending. How would he have wanted us to end?

*789* Jerome had trouble with endings. A typical article of his might have a false ending or two followed by an epilogue that often as not started the article in a new direction. For our Brown article, he might have wanted to talk about his nieces and nephews and Angela's daughter. He might have wanted me to talk about my son. He cared so much about the next generations. He might have wanted us to end on a message of hope for them. Or, he might have wanted us to end on a note of anger on their behalf. One thing, though, that he would have wanted us to avoid is bitterness.

I can imagine him reading about the shenanigans going on around the San Francisco gay marriage controversy and wanting us to announce a Queer Moment, a time when legal doctrines and society will be transformed and the rights of sexual minorities will be recognized, advancing the social justice vision of Brown. I can imagine him laughing as he bangs out those words on his keyboard. I can imagine the gleam in his eye as he prepares for the next struggle.

At Jerome's memorial service, Walter Dellinger ended his brief remarks by saying, 'Oh, how he fought.' Let us learn from Jerome and put aside the bitterness that can wither the heart. Let us fight. With hope. With anger. With laughter, and humility.

We may no longer hear Jerome's voice on our phones, but we can still answer Jerome's call.

**Footnotes:**

[FNa1]. Professor of Law and J. Rex Dibble Fellow, Loyola Law School, Loyola Marymount University. These are lightly footnoted remarks that were delivered at LatCrit IX, in Philadelphia, on April 29, 2004.

[FN1]. This notion of a protest visit is taken from Derrick Bell, and may be understood as visiting another school in protest over policies and practices at one's home institution.

[FN2]. See Jerome M. Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings, 1991 Duke L.J. 39, 40 (1991)* (discussing African-American Moment as remaking legal conceptions). The more complete quote is as follows:

> For the legal academy, this is such a moment in history, an African-American Moment, when different and blacker voices will speak new words and remake old legal doctrines. Black scholars will demand justice with equality and nonblack scholars will understand. Such moments, whether mere seconds or whole decades, sweep away the unprepared and the recalcitrant with the necessity of the instant. Those in the legal academy who cannot speak the language of understanding will be relegated to the status of historical lepers alongside of Tory Americans and Old South Democrats. Id.


[FN4]. See generally Jerome M. Culp, Jr., *Autobiography and Legal Scholarship and

[FN5]. See, e.g., Paul D. Carrington, Buffaloes and a Straw Man, 26 Conn. L. Rev. 295, 295 (1993-94) (disagreeing with Culp's "selective recitation of facts regarding events antecedent to the admission of black law students to [Duke Law School]"); Jerome M. Culp, Jr., Reply: 'Real' Men and History, 26 Conn. L. Rev. 297, 300 (1993-94) (claiming Carrington has two faces, one of which 'just doesn't get it').


[FN7]. In one interesting misreading of his work, Daniel Farber and Suzanna Sherry claim that Culp makes a defense of storytelling that 'implies that ordinary scholarly standards impose a 'herculean task' on black legal scholars.' Daniel A. Farber & Suzanna Sherry, Telling Stories Out of School: An Essay on Legal Narratives, 45 Stan. L. Rev. 807, 841 (1993) (positing that Culp's argument assumes 'that the work of women and minority scholars is different--so different that it cannot be judged by conventional standards of merit'). Farber and Sherry's criticism is typical of their failure to engage with the scholarship of those they critique. Jerome makes this point and many others. See Jerome M. Culp, Jr., To the Bone: Race and White Privilege, 83 Minn. L. Rev. 1637, 1640 (1999) (arguing that Sherry and Farber aim to 'distort and destroy, not engage').


[FN10]. See id. at 481 (stressing importance of working together). The quote, as I remember it from the conference, is as stated above. In published form, it appears as: '[H]ow do we deal with each other? How do we as African-Americans, we as White-Americans, we as Asian-Americans, we as Latino/Latina Americans participate together in struggles that involve people who are not ourselves?' Id.

[FN11]. See id. (maintaining that group work can facilitate reduced racial oppression).


[FN14]. See id. at 425, n.*.

[FN15]. See id. at 427 n.3 (stating 'The first six aspects of self-hatred remain offstage.').


THE most powerful lesson Jerome taught me was that there are times in life when you should be strong. Avoiding confrontation by compromise was something I thought was preferable to standing my ground, but Jerome taught me that it is not always the best tool for communicating with adversaries. Sometimes you must stand up for what you believe in order to garner respect from people with whom you do business. One personal issue in which Jerome really provided wisdom was how to work with people who disagreed with my sexual orientation and who were especially uncomfortable with my openness about it. Jerome asserted that being openly gay in medical school was an opportunity for me to show people who had never met a gay person before, or who had but wished they had not, to reevaluate their prejudice independently. Jerome encouraged me not to 'hide' myself for anyone, but to be strong, even when some people at school not only disagreed with my sexuality but made it their job to try to prevent me from reaching my professional goals. I was not always as strong as Jerome--or I--had hoped, but he supported me through this difficult time. During our last year, when my anti-gay classmates wanted to smooth things over with me knowing they had failed to intimidate me or to stop me from finishing school, Jerome provided wisdom by reminding me that I had the option not to make up with them. Sometimes a stronger message is sent by ending with a clashing sound rather than with a harmonious resolution.

I am truly amazed and pleased with how much impact Jerome had on this world. His path has made my path, and paths taken by others in the future, easier and more comfortable. I will always remember Jerome telling me soon after we met that when he started his career as a law professor, you could fit all the African-American law professors in the nation in his living room and still have space for some furniture. What accomplishment and bravery to have achieved what Jerome and few others did.

One scholarly law professor and civil rights activist at New York University Jerome really respected was Derrick Bell, author of many books, including Ethical Ambition: Living a Life of Meaning and Worth. [FN1] Jerome gave an autographed copy of this book to me for my birthday, and I love it! 'I truly believe that in making honorable choices about our lives, we can acknowledge sacrifices we make and the risks we take and recognize that *792 what others view as losses and foolhardiness are the nourishment upon which our spirits thrive,' [FN2] Bell writes--a message Jerome encouraged me to return to when faced with challenging situations, especially ones where others view honesty and openness as foolishness. Jerome was one of the most ethical people I have met, always searching for the potential for goodness in others and not settling for the easy solution during times of struggle. My favorite passage in Bell's book reminds me of my relationship with Jerome and his caring, kindness and wisdom, and how thankful I am he was a part of my life:

Our relationships serve as our ethical barometers, and the ability to participate in meaningful personal relationships, intimate relationships, and relationships with family, friends and colleagues is the cornerstone of ethical living. After all, what
binds us is not blood, marriage license, or formal commitment, but pleasure, caring, and the trust that ethical behavior has earned. [FN3]

Jerome, thank you so much. We will keep your spirit alive.

**Footnotes:**

[FNa1]. Scott Lee is a resident in Family Medicine at the University of Massachusetts and attended medical school at the University of North Carolina in Chapel Hill. He has a Master of Science in Pathology from Duke University.

[FN1]. See generally Derrick Bell, Ethical Ambition; Living a Life of Meaning and Worth (2002) (discussing how one can live ethical life).

[FN2]. Id. at 11.

[FN3]. Id. at 125.
THE three selections in this Community Organizing and Direct Activism Cluster move the thinking and practice of antisubordination to a new level, recognizing the dangers of internalizing insidious, invidious values, and envisioning and describing new organizational models, principles and processes without them.

The LatCrit movement has long recognized antisubordination as a constantly evolving core. [FN1] As a first principle, this requires awareness of *794 the intellectual legacy of the eighteenth, nineteenth and twentieth centuries of colonial domination, centuries in which indigenity, Africanity, sexuality and the female were all demonized, targeted for all manners of oppression, coercion and domination. [FN2] The shared mental model or paradigm [FN3] created by three centuries of this message, delivered in public policy through and including the most intimate of private forums, cannot be easily confronted or undone without recognizing how deeply it is entwined in our contemporary consciousness, even those consciousnesses which reject this paradigm consciously. These articles carefully expose the seeds of subordination inculcated into contemporary thinking and the practice of coalition and community organizing as they critique the principles of self-interestedness, and models of organizing inherited from white radicals such as Saul Alinsky. [FN4] Beyond this, they articulate and describe a theory and practice built on other foundations, out of other cultural realities. In the tradition of LatCrit practice, these articles move us through a state of awareness of the dangers of unexamined privileging and the corrosive effects of unconscious racism, [FN5] a state sometimes referred to as 'conscious (cultural) incompetence' reflecting recognition and acceptance of one's own limited, partial, imperfect state of knowledge about the complexity and nuanced nature of racism. Beyond simple criticism, they offer positive visions and prescriptive guidance about how to consciously reweave our network of relationships without the strands of colonial domination, a state of conscious competence reflecting studied, intentional efforts at transformation. Once internalized as a paradigm, it becomes *795 possible to see the outlines of a different shared mental model based upon mutuality, respect and inclusion that might yet have the power to self organize even as the current model does, a state of unconscious competence. These are the steps in consciousness from which liberating and liberated choices about acts of coalition and community building may be made.

The struggle not to internalize values that have oppressed us is deeply reflected in the histories and challenges of coalitions between peoples of color, and other subordinated/demonized groups including Jewish people, Lesbian, Gay, Bisexual, Transgender and Transsexual (LGBTT) people, and others. Victor Romero asserts:

Self-sacrifice, stewardship and the commitment to anti-subordination provide a visionary center and alternative to the self-interested, individualist and capitalist viewpoint that governs most decision making surrounding whether or not to coalesce and join forces with others. [FN6]
His proposal rejects self-interest, individualism and capitalism as a model guiding coalition building, and urges allies united by the principles of antisubordination to consider how these alternative values might come to form the basis of new coalitions. He challenges us to reject the tenet of self-interestedness as a principle of coalition work. He movingly recounts how self-interestedness inevitably has led to the disintegration of effective coalitions, and the loss of anti-subordination gains when power concedes limited (and in the larger sense trivial) gains to some members of an effective coalition while denying it to others. Then, the previous ally is too often willing to assume the accouterments of power vis-à-vis former allies. This is the mechanism by which invidious privilege recreates itself even among those formerly disadvantaged by it, for internalized self-interestedness will inevitably replicate privilege and lead to reassertion of subordination as an organizing principle. Internalized self-interestedness can subordinate without the need for intentional expressions of self-hatred or hatred of others, and without the need for an explicit plan. That is the power of a shared mental model or paradigm to self-organize.

The manipulation of self-interest to defeat effective coalitions among subordinated groups is, of course, well known and documented by scholars from Machiavelli to Sun Tzu. What remains elusive about this phenomenon is its ability to effectively divide even those who intellectually recognize the dangers of divisiveness. Victor Romero's work attempts to sever this phenomenon from its source of strength by rejecting the validity of self-interestedness. In its place he argues the ideals of self-sacrifice and stewardship in the conscious pursuit of anti-subordination.

While acknowledging that the world we live in is organized on the basis of power, he cautions coalitions about the pursuit of access to power as a goal, and its corrosive influence when that goal is conflated with the goal of anti-subordination. These two goals are not the same, he warns. Coalitions in pursuit of power end when power is gained without questioning whether the power will be used to care for those who are worse off, whether they are in the newly empowered group or outside it. This is the corrupting force that limited and ended powerful cooperation between ethnic groups and others in the past. Care for those who are worse off may be based upon the recognition of sacrifice for the gains achieved, as in the case of 'elders' who led the struggle but have not benefited from its tangible victories. Care may be based upon the recognition of others who are suffering or are oppressed by the same demonization that victimized the now victorious allies. Regardless of the beneficiaries, care for those who are worse off keeps a coalition based upon anti-subordination functioning together even when some members of the coalition gain while others do not. Professor Romero provides a contemporary example of such a caring-based coalition in the case of the University of Michigan's affirmative action programs challenged in Gratz v. Bollinger and Grutter v. Bollinger in which Asian Pacific Islander groups joined in the amicus briefs in support of an affirmative action program which did not benefit them by its terms.

He bravely asks how we might get 'there' from 'here.' He posits three steps on the path, in an occasionally lyrical account of how to implement his vision. First, he discusses the importance of faith, not in a limited religious sense but as a transcendent structure bridging reason and epistemological uncertainty. He urges that we cultivate 'faith in faith.' Next, he returns to the importance of individual responsibility, the obligation to examine our gains, our compromises, our achievements and those we have left behind in the pursuit. Last, he counsels us to celebrate our victories, all of them. There is pragmatic wisdom here, although it may sound like preaching to the choir. Sometimes the choir needs encouragement, especially in times of vicious re-entrenchment of the privileges and powers of the colonial era.

The final contribution documents struggles against internalized and external forms
of subordination of women and GLBTT communities. Anita Tijerina Revilla, in Raza Womyn Mujerstoria, tells a complex story of the struggles within el Movimiento Estudiantil Chicana y Chicano de Aztlán (MEChA) and outside of that group which led to the founding of a separate group of women adopting the name 'Raza Womyn.' The story of women and lesbian womyn's efforts to take action against subordination led over time to a complex dance of inclusion and exclusion in solidarity with the Raza movement. This story, intimately told, compares to a family story of alternately close and distant embraces within the fold. It prompted me to reflect on Professor Romero's guidelines, and how they might have influenced the leadership of these different organizations at different times in the account.

This account also demonstrates how organizations built around women's leadership and the experiences of previously marginalized groups have rejected hierarchical styles and methods which replicate subordination in favor of different rules of organizing. For example, in discussing whether to try to increase membership or not, one of the founding organizers of Raza Womyn observed:

And I remember at one point I was like 'We need to get more people involved.' Because I felt that it was a bad reflection on us. And then I had to go through my own process and be like, "You know, we have to deal with a lot more of these issues, taboos that all these other organizations don't. They don't have the deep connections or the spaces and conversations that we do. Because half of our meetings would be check-ins with everyone's drama and supporting each other. And other organizations just did business, like 'This is what's going on. Thank you. Bye.' So we learned about all of our issues. We talked about our fears in a candid manner. And that's what I think is the beauty of Raza Womyn, but it was also why it was so small because all of people are afraid of that. [FN11]

These works share a common thread in their unblinking look at the forces which unite and divide us in struggles against a colonial past. They name these forces and follow their iterations into intimate realms, and into our own organizing assumptions. In looking backwards, these authors help us to embrace a far richer account of our struggles and achievements, when it includes women, GLBTT people and other allies. In looking forward, they provide a vision of relationships, in the process of liberation, and perhaps free at last from the internalized demons of a colonial, imperial past.

Footnotes:

[FNa1]. Professor of Law, Willamette University College of Law. J.D., 1980, Arizona State University; B.A., 1976, The Colorado College; graduate studies in African Languages and Literature at University of Wisconsin, Madison, 1977. The author would like to thank Professors Gil Carrasco, Carmen Gonzalez and Eileen Gauna, and Robert W. Collin, Senior Scholar at the Willamette University Public Policy Research Center for for their comments on this work.


The four functions of LatCrit theory (and similar efforts) posited early on are: (1) the production of knowledge; (2) the advancement of social transformation; (3) the expansion and connection of antisubordination struggles; and (4) the cultivation of community and coalition, both within and beyond the confines of legal academia in the
United States. For further discussion of these four functions and their relationship to LatCrit theory, see Francisco Valdes, Foreword, Under Construction: LatCrit Consciousness, Community and Theory, 85 Cal. L. Rev. 1087, 1093-94 (1997) (noting relationship between listed functions and LaCrit theory).

The seven guideposts accompanying these four functions are: (1) Recognize and Accept the Political Nature of Legal 'scholarship' Despite Contrary Pressures; (2) Conceive Ourselves as Activist Scholars Committed to Praxis to Maximize Social Relevance; (3) Build Intra-Latina/o Communities and Inter-Group Coalitions to Promote Justice Struggles; (4) Find Commonalities While Respecting Differences to Chart Social Transformation; (5) Learn from Outsider Jurisprudence to Orient and Develop LatCrit Theory and Praxis; (6) Ensure a Continual Engagement of Self-Critique to Stay Principled and Grounded; (7) Balance Specificity and Generality in LatCritical Analysis to Ensure Multidimensionality. For an early assessment of LatCrit 'guideposts' as reflected in the proceedings of the First Annual LatCrit Conference, see id. at 52-59.

These guideposts (and the functions described earlier) of course are interrelated and, in their operation, interactive. Ideally, they yield synergistic effects. They represent, as a set, the general sense of this project as reflected in the collective writings of the symposium based on the First Annual LatCrit Conference. In addition to the seven guideposts noted above, an eighth was originally presented as a 'final observation' based on the preceding seven: 'acknowledging the relationship of LatCrit to Critical Race theory' and, in particular, the 'intellectual and political debt that LatCrit theorizing owes to Critical Race theorists.' Id. at 56-59. As this symposium illustrates, these four functions and seven guideposts have helped LatCrit theorists to mine substantive insights and benefits that deepen, broaden and texture existing understandings of law and policy. See Francisco Valdes, Theorizing 'OutCrit' Theories: Coalitional Method and Comparative Jurisprudential Experience--RaceCrits, QueerCrits, and LatCrits, 53 U. Miami L. Rev. 1265, 1266-68 (1999) (describing inroads made by LatCrit theorists to expand understanding of existing law and policy).


[FN3]. A paradigm is a model, a lens and a grid through which our perception of reality is achieved; a set of assumptions, concepts, values and practices that constitutes a way of viewing reality for the community that shares them. Paradigms are multi-dimensional, that is, they make use of all available senses (all 'cultural antennas'). They enlist all of our ways of knowing, seeing, hearing and feeling without the requirement of conscious agreement.


[FN7]. See generally Niccolo Machiavelli, Art of War (Ellis Farneworth trans., Bobbs-
Merrill rev. ed.) (1965) (noting manner in which to keep down organizing attempts); Sun Tzo, Art of War (Samuel Griffith trans., Oxford University Press 2d ed.) (1971) (noting manner in which organization of underlings can be defeated).

[FN8]. 539 U.S. 244 (2003) (holding that university admission policy which granted significantly extra 'points' for race was not narrowly tailored to achieve respondents' asserted compelling interest in diversity, thus, violating Equal Protection Clause).

[FN9]. 539 U.S. 306 (2003) (holding that flexible assessment of applicants' talents, experiences and potential to contribute to learning of those around them that considered diverse race to be 'a plus' did not violate Equal Protection Clause because it was narrowly tailored and met law school's compelling interest in diverse student body).

[FN10]. Romero, supra note 6, at 18.

[FN11]. Anita Tijerina Revilla, Raza Womyn Mujerstoria, 50 Vill. L. Rev. 799 (2005) (quoting Interview with Cristina, Member, Raza Womyn, in Los Angeles, Cal. (June 2002)).
Raza Women was born out of a struggle. The struggle was for equal rights and recognition for the women who were members of a Chicano/Chicana group at UCLA but who did not receive the same rights and benefits as the male members. Instead of continuing to be pushed aside and having their specific Chicana issues ignored, in 1981, these women created their own organization, and Raza Women was born. [FN1]

I. Introduction

THIS piece is based on my research, which examines social justice practices and perceptions of Chicana/Latina student activists who are or were members of Raza Womyn de UCLA. [FN2] Using participant observations, surveys, document examination and interviews, I conducted this research with Raza Womyn over the course of five years. I joined them at two to four hour evening meetings once a week for four years, participated in on- and off-campus scheduled activities, and assisted with organizing events. Most of my contact with them took place during weekly meetings in their office, but was not restricted to this location. The mujeres [women] [FN3] welcomed me into the space and urged me to document their experiences. They shared their personal and academic lives with me, and I am indebted to them for this.

To guide this work, I used both Critical Race Theory ("CRT") and Latina/o Critical Theory ("LatCrit") research methodologies in education, that embrace social justice as an integral element of the research process. By transforming the role of the researcher and the researched, *800 CRT and LatCrit challenge objectivity and positivistic research traditions. CRT and LatCrit research methodologies necessitate revisioning research as a more equitable process. [FN4] Those of us that use CRT and LatCrit to develop our research methodology recognize the danger of focusing on dichotomies and realize that students' life experiences are affected by many different factors. As researchers, we avoid one-dimensional analyses of students' lives; that is, we carefully examine the ways that different aspects of people's lives intersect (e.g., ethnicity, gender, class, sexuality, culture, language, nationality and religion). Education research must undertake careful examination of these intersections in order to make appropriate recommendations for the improvement of educational conditions of all students. Furthermore, researchers must push themselves to recognize the centrality of the voices of the researched. I see the participants of this work as part of my research team. They have helped me to name the study and to recognize the immense contribution and need for this kind of research. At their request, I share this testimonio and counter-narrative offered by the mujeres of Raza Womyn.

On the evening of February 10, 2000, after a weekly Raza Womyn meeting, I walked from Kerckhoff Hall to Bunche Hall with five mujeres to a Raza social mixer for undergraduate students hosted by the César Chávez Center for the Interdisciplinary Study of Chicanas and Chicanos. After the gathering, a discussion commenced about previous experiences between Movimiento Estudiantil Chicana y Chicano de Aztlán
According to the mujeres, Raza Womyn formed in response to the sexism and homophobia that many Chicanas and Latinas encountered in MEChA. They shared their own experiences and their belief that their encounters with sexism and homophobia in Chicana/o organizations were part of a recurring problem within the organization. In dealing with the sexist and/or homophobic incidents, the mujeres had no idea that these were shared experiences that other women and Queer people had gone through. But as they left the organization and were able to reflect on their experiences, they came across other mujeres who had been through similar struggles. As these mujeres shared their stories, the more they heard and collected new ones. They came to identify these stories as the "herstory" of mujeres in the movimiento [movement]. At the end of our conversation, they said that this herstory needed to be documented because they were sure that other mujeres would one day be faced with the same issues in male and female activist organizations, and they did not want others to go through it thinking that they were alone. They urged me to include their stories in my research. The following is a collection of Raza Womyn cuentos [stories] or "mujerstorias," narratives and interviews--written and oral, formal and informal--it is a mujerstoria of Raza Womyn collected from and by the mujeres that I have studied in the organization for the past five years.

II. The Early Years (1979-1981)

A. Growing out of MEChA

In 1979, a group of women who were involved in the UCLA student organization MEChA created a subcommittee for the female members of the organization to focus on women's issues. They felt they needed a "space" where they could address these issues separately from the entire membership of the organization. As a subcommittee, the desire to speak openly and consistently about women's issues became more pronounced. Consequently, they began to consider the creation of a separate women's organization. As these women approached the male membership of MEChA to advise them of the need for this space, they were met with harsh resistance. The men were against the creation of the new space and argued that these issues could be addressed within MEChA. According to one of the founding members, Isabel, the men said that they wanted to learn about women's issues as well. "We want to be sensitive to your needs . . . We wanna figure out what this women issue is about, so let us participate," they argued. Isabel felt that the men were not "evil, super duper macho" men, but rather they were men that wanted to be taken care of and taught by women while still refusing to focus on the issues that women found most pertinent. She said that "the women felt a strong need for an independent organization of Latina women." A narrative that has been passed down through oral mujerstoria was that in the early days of the organization, the men in MEChA were so opposed to these separate meetings that they continuously showed up to meetings to disrupt them. In frustration, the mujeres began meeting in the women's restroom, knowing that this was the one place the men could not follow them and invade their space. Eventually, the women made their first break from MEChA to become their own organization. They struggled over what to call the newly formed Chicana and Latina group. While many of them had a strong Chicana or Chicano identity because of their participation in MEChA, at least one member was Puerto Rican and another one was South American. The Chicanas and Mexicanas in the organization wanted the name to reflect their background, but they did not want to exclude the other Latinas. Furthermore, they were aware of the small, but growing populations of Central Americans and children of mixed heritage (Mexican and Central American) in Los Angeles. Although the mujeres were already beginning to redefine the terms "Chicana" and "Chicano" to incorporate others besides people of Mexican background, recognizing that the term signifies a political identity and solidarity
with the movimiento [movement], they also wanted to give Latinas the right to define themselves and not feel forced into a Chicana identity. After many discussions, they decided on Raza Women because they felt that "Raza would encompass the spirit of the organization." [FN13] While Raza also had Mexican origins and was widely used throughout Chicana/o communities, it was a term that could symbolize a Latina/Chicana community or a united "race."

B. Raza Womyn Seeking University Recognition

In 1981, the women decided to go through the university for recognition, but they were met with yet another obstacle—the university's resistance to the name of the organization. According to their advisor, the university felt that calling the group Raza Womyn "was a discriminatory practice because it sounded like [they] were being an exclusive organization." *803 [FN14] This was an unfounded accusation, considering that other "ethnic/racial" organizations such as MEChA or women's organizations already existed at the time. The mujeres stood by their decision and were able to maintain the name they chose and still receive recognition. At the time, the members had no critique of the word "women," spelled with an "e." Thus, the official name on all organization and university literature read "Raza Women." The change from Raza Women to Raza Womyn did not occur until twenty years later, during a Raza Womyn meeting, when everyone decided that they would write Raza Womyn with a "y" rather than "e" to make a feminist statement against being male-identified--taking the word "men" out of the word "women." [FN15]

After splitting organizationally from MEChA, the women were able to concentrate on their internal development. They wanted an informal setting for their meetings, a space free of "rigid structure with motions, seconds and Roberts Rules of Order" because that "was a very oppressive way to run meetings." [FN16] They avoided strict voting procedures and instead concentrated on "talking, dialoguing, and consensus building." Isabel says that:

[T]he goal was raising the consciousness of the women in the group, especially about why [they] needed [their] own space and why it was important to talk about [their] own issues, and for [them] to reflect, as women, on what [they] wanted out of the *804 university and for [them]selves in [their] lives and on [their] identities as Latinas as Chicanas, as mujeres. [FN17]

From its inception, the organization developed in opposition to oppressive practices that they experienced in other organizations, particularly in MEChA. Nonetheless, a strong link between MEChA and Raza Womyn would last until the late 1980s, when a second symbolic and physical break occurred.

III. Raza Womyn During the Late 1980s

A. Latinas Guiding Latinas, a Community Service Branch of Raza Womyn

In 1987-88, Raza Womyn members created a community service branch of Raza Womyn. It was a group that would allow the mujeres of Raza Womyn to become mentors and reach out to the young Latinas in selected schools. Their vision was to empower young Latinas in public schools. The tutoring and mentoring program for high school and middle school students was called Latinas Guiding Latinas ("LGL"). Other organizations had created these kinds of programs for Latino and Latina students, but the mujeres felt the need to provide mentorship and assistance in college planning for Latinas by Latinas. According to an ad in La Gente de Aztlán (the people of Aztlán), a Chicana/Latina/o university student newsmagazine:
In response to the under education and high school dropout rate of Chicana and Latina students, Latinas Guiding Latinas was implemented by UCLA students with the intention of motivating young women to pursue higher education by:

- providing a network in which LGL volunteers serve as mentors and resource aids for young Chicanas and Latinas,
- providing professional women in varied careers as speakers, guests and role models, [and]
- ensuring that participants and volunteers are exposed to educational goals and opportunities. [FN18]

The need for a mentoring and tutoring program for mujeres by mujeres was immense. Hence, while it had its origins as a Raza Womyn project, LGL also developed into an independent organization that continues to bring together college, high school and middle school mujeres toward the goal of increasing the numbers of Latinas in higher education.

B. Establishing a Separate Identity and Physical Space at the University

At around the same time that LGL was founded, Raza Womyn was met with another obstacle with regards to space. On paper, they were still a branch or extension of MEChA, and as a result they were being asked to share office space with MEChA. Isabel notes:

Knowing how important the organization was for Latinas at UCLA as a support group and the importance to have its separate identity from MEChA, which was male dominant for awhile, we fought to have our own office space. Unfortunately, that landed us in the second floor of the men's gym. However, with much struggle and resistance, the following year Raza Women became an independent group with its separate budget and thanks to Lisa, our office became 324 Kerckhoff Hall. [FN19]

This would not be the last time that the Raza Womyn's office and physical space would be threatened, but it was the last time that Raza Womyn was forced to move.

As the leadership of the undergraduate student government (USAC) changes yearly, their politics change and student advocacy organizations are always amongst the first to be targeted in terms of funding and space changes. As recently as the 2000-01 school year, a white female (sorority-affiliated) student became the president of USAC, and she began talking about taking away certain privileges from student advocacy groups, namely office space. She felt that there was no distinction between the chess club and the ethnic and women-identified organizations on campus and that neither of these organizations should have offices. And if the student advocacy organizations did not occupy the office space, then the long-desired space that the Greeks requested of the university would become available. Luckily, she was not successful in her campaign against the advocacy organizations.

There is a long history of tension and hurtful politics between the sororities and fraternities and the student of color organizations on campus, which I learned by way of organizations that primarily serve students of color. Essentially, the leadership of the undergraduate student government largely determines what organizations and events will be funded and supported by the university. As early as 1980, students of color at UCLA created a coalition and ran a slate of students for the USAC positions against "the
Greek machine" that dominated student government prior to 1980. The coalition has undergone several name changes, including the Third World slate, Students First, Praxis and Student Empowerment, all of which have been focused on improving the educational environment for underrepresented students at the university. These coalitions were a result of increased student organizing and raised awareness around issues of social justice and change, coupled with the support of ethnic studies programs and race-based student organizations. I learned about students' election politics from candidates on the Praxis slate. They defined Praxis as reflection and action, and their vision statement was a call for collective action:

We believe that education is a right, not a privilege. This is why we believe that a student issue is anything that prevents a person from enrolling in or graduating from higher education. We are committed to working on all fronts to increase access by organizing students to represent themselves. As students, our power lies in our ability to act collectively for change, not through student government titles.

The students of color that participated in this slate were self-identified, critically conscious students who sought to implement their theoretical foundations of social justice into practice; hence the name of the slate-- Praxis. For five years Praxis successfully ran their candidates and won the elections. The slate of students that was in opposition to the students of color was made up primarily of members from Pan-Hellenic Greek organizations on campus. According to the narrative of campus politics, the Greeks felt that as Praxis gained leadership of the student government, Greek social events and access to office space suffered. Many students of color, who often came from nonprivileged backgrounds, opposed student funding of Greek-organized social activities because of the enormous privilege and wealth of most Greek organizations (especially those with large alumni endowments) and their members. In general, funding for Greeks meant increased spending on social events predominantly attended by white students, while funding for color organizations resulted in an increase in community service and consciousness-raising activities on and off campus primarily for students of color. This dynamic resulted in a tug of war between the two groups. It became a struggle for funding and university support on both sides, but for very different agendas. In 2001, the students involved with the Praxis slate decided to change the name of the slate to Student Empowerment because of internal conflicts, shifting politics and possibly the defeat of Praxis the previous year.

Raza Womyn has fluctuated in their level of involvement and support of the slate. Raza Womyn has usually endorsed Students First/Praxis/Student Empowerment, but they have consistently had serious concerns about the levels of sexism and homophobia exhibited by some of the members of the slate and/or the organizations represented in the coalition that makes up the slate. Raza Womyn has not always been a key participant in these types of campus politics. At times, this has been due to Raza Womyn's refusal to become involved in on-campus,"drama." Other times, Raza Womyn has been excluded or tokenized by the slate as the women and/or Queer representatives on the slate.

IV. Raza Womyn in the Early 1990s

Throughout the years, participation in Raza Womyn has fluctuated, usually remaining in the area of ten to twenty, but sometimes decreasing to only a couple of members. At times, there were no members, but the group always revitalized as the need for a woman and Chicana/Latina space returned. The individual goals and political inclinations of Raza Womyn members have basically defined the goals and politics of the organization. Early on, the organization was believed to be extremely political and even radical. Isabel indicated that Raza Womyn: "was more about raising consciousness. We
were very militant. We were very anti-racism, anti-classism, anti-sexism and it was threatening to a lot of people;" she says:

We were militant in our approach. We wanted to push people's buttons. We wanted to make people feel uncomfortable. We wanted to be in people's faces . . . . We wanted other Latinas to feel uncomfortable and to think about stuff, to do things to challenge this whole idea of what success means, what being Latina means, and what a woman is. And I think we did that. We did it to ourselves and to other people. [FN21]

Consciousness building or conscientización [FN22] has been a central focus and goal of Raza Womyn, but the definition of consciousness has shifted based on the different identities and politics of the members involved. Conscientización indicates that a person is aware of the historical/herstorical social and political implications of a particular aspect of a human being's life/identity, particularly in terms of the discrimination, subordination and oppression of a person based on that aspect of their life. It should, however, also include a critical assessment of the power dynamics, in terms of privilege and oppression, involved with that aspect of life/identity. The roots of conscientización are in life experiences--that is, people develop their consciousness as a result of their life struggles, but consciousness and awareness can also be learned or developed from theory shared in academic classes or amongst communities, families, friends and other allies. This is the case in Raza Womyn and many other student organizations.

*808 The four primary areas of conscientización that I was concerned with in this research are race, class, gender and sexuality. The members of Raza Womyn have come into the organization at different levels of conscientización. Some Raza Womyn have had an awareness of race, but no awareness of gender, class/labor and sexuality issues or vice versa. But as the mujeres have come together, they have often engaged in Raza Womyn pedagogy, which is the process of sharing knowledge and increasing understanding through dialogue, hermandad [sisterhood], organizing and activism; thus creating conscientización on different levels about different "isms," phobias and other aspects of subordination and oppression.

Even though the early days of Raza Womyn and the more recent years of Raza Womyn have been defined as radical with a focus on raising consciousness, this was not always the case. Raza Womyn has also been a very social space with members that had no political affiliations on or off campus. At one time, Raza Womyn members were primarily sorority members, in which case Raza Womyn funds were primarily used to organize social activities. In 1994 (as well as other years), even men were involved in Raza Womyn. At one point, men from the Iranian Student Group ("ISG"), who share the office with Raza Womyn, were actually coordinators of Raza Womyn! This occurred because one of the female members of Raza Womyn had a boyfriend in ISG; consequently the boyfriend and some of his friends participated in Raza Womyn events and meetings. [FN23]

A. The Resurgence of Radical Mujeres in Raza Womyn; The Late 1990s

In 1994, the "Raza Women" members offered a scholarship to a woman named "Janie." [FN24] After being awarded the scholarship, she began attending the Raza Womyn meetings and learned about the men involved. Because she was unhappy with the dynamics of the space, in particular with the male membership, she asked her friend, "Gina," [FN25] and some of the other mujeres from MEChA to come to Raza Womyn. Gina and the other women had major conflicts with the male membership and even with the male-identified women in the organization. Gina says that her purpose in Raza Womyn was solely to "kick the men out" of the organization. [FN26] Soon Gina was left
alone in Raza Womyn, and she worked to recreate it by outreaching to new mujeres. Because the new members were members of both Raza Womyn and MEChA, the link between the two organizations was reconnected. Gina was the internal coordinator for MEChA and Raza Womyn in the 1994-95 school years; thus, her leadership in both organizations served as a direct link for collaboration between the two.

*809 V. Raza Womyn and MEChA Working Together

Because members of Raza Womyn continued to participate as members and leaders of MEChA, the connection and allegiance to the organization was strong despite the reoccurring breaks between the two organizations. In the 1994-95 school year, two students cofounded the Raza Youth Conference ("RYC"), a conference that today draws over a thousand Chicana/Latina/o youth throughout Southern California. Gina, a Raza Womyn, was one of the cofounders of the RYC. Gina had been a member of MEChA since 1989 when she became involved with the San Diego chapter in her community college. But even while Gina was still a member of MEChA, she struggled with sexist politics in the organization. Since her early involvement in MEChA, she was outspoken and assertive about women's issues and refused to succumb to male dominance. As a result, in her final year at UCLA, as a MEChA coordinator and RYC co-chair, she had a falling out with the other leaders of MEChA.

The governing body of the organization, called the Mesa Directiva [Directive Table], met secretly to discuss whether or not to dismiss Gina from the organization. A vote was officially taken, and they decided to allow her to remain in the organization. She was extremely unhappy in MEChA; however, she made the choice to continue working within them because of her strong commitment to the youth and the conference. Gina's participation in MEChA came to an end soon after. Although MEChA was the place where much of her activism and consciousness first began to flourish, she could no longer support what she came to regard as a hypocritical movement for social justice.

Gina reports that after she came out as a lesbian, she was "deleted from MEChA history as a co-founder of the conference," implying that her omission from this history was not an accident at all. [FN27] In fact, she believes that because of their homophobia, MEChA members did not want to acknowledge her contributions to the RYC. The year after she graduated, she worked to rebuild Raza Womyn. Because most of the earlier members of Raza Womyn had graduated, Gina decided to continue working with the organization to mentor the two mujeres that she helped recruit, Nena [FN28] and Cristina. When Gina was still a member of MEChA, she made a proposal to the women of the organization to create a conference similar to RYC but solely for women. The group voted on the proposal, but due to the lack of interest, preparation and commitment to women's issues, the conference was voted down.

A. The First Annual Chicana/Latina Conference

In 1996, Gina's vision of a woman's conference organized by and for women became a reality, but it was planned by the mujeres of Raza Womyn *810 rather than MEChA. Unfortunately, there were only two other active coordinators in Raza Womyn at the time, Nena and Cristina; but between the three of them, they were able to recruit a handful of mujeres who offered their support. They organized the first annual Chicana/Latina conference on February 24, 1996, which was called "La Liberación de Nuestras Mujeres" [The Liberation of our Women]. Although the conference was held on the UCLA campus--and targeted a Chicana/Latina population off-campus comprised of young women in middle school, high school and community college--the conference drew women of all ages. Raza Womyn received little or no funding for the conference from the university that year, but they sought donations from people off-campus and
used their own money to fund it. Less than a hundred women attended the first annual conference, but every year since, the numbers have doubled and the program has reached 600 participants. The first conference program indicated:

The theme of this year's conference is entitled, "La Liberación de Nuestras Mujeres". It is our belief that as Raza Women, we educate and motivate our hermanas to fight against the continuous attacks on our mujeres and our community. We will begin our step towards liberating ourselves through becoming aware and taking action in our struggle against the oppression that we face on a daily basis. However, we must first support each other in order to strengthen ourselves in nuestra lucha. We mujeres carry that determination and corazón that is necessary for the betterment of ourselves and our communities. [FN29]

The women clearly felt a strong sense of attack taking place against mujeres and their wider communities. Thus, increasing consciousness amongst women and ultimately struggling for liberation were high priorities for the conference. Although the Chicana/Latina conference was held on the university campus, the presenters were from off-campus communities, including Chicana/Latina activists, artists, performers, resource centers and students. The information shared specifically addressed the struggles of Chicanas/Latinas and various aspects of Chicana/Latina lives and was delivered in small group workshops, which allowed for discussion and sharing. Furthermore, Raza Womyn expressed their desire to come together and struggle against assaults on them and their communities through consciousness-raising, dialogue and activism. Every year since, the mujeres have organized an annual conference, which includes over twenty workshops, keynote and closing speakers, entertainment and other activities--all in hopes of raising consciousness and awareness against the subordination of mujeres.

*811 In 1996, MEChA (both men and women) were supportive of the Raza Womyn conference, but later that year, Nena and Cristina had a very negative and traumatizing experience as they helped organize the Raza Womyn Conference for MEChA. Although Gina had left MEChA earlier, the younger mujeres had not. They continued working with the organization. Janie (Nena's sister and also a member of Raza Womyn) became the coordinator for the women's unit of MEChA, and eventually she became the MEChA chair.

B. The Most Recent Break Between Raza Womyn and MEChA and La Familia

Nena and Cristina volunteered to organize the Raza Youth Conference for MEChA in 1996 and were responsible for organizing and confirming all of the workshop presentations for the conference. Nena and Cristina were asked to read the evaluations from the previous Raza Youth Conference and to derive a list of recommendations for workshops for that year. Amongst the recommended workshops was one called "Queer Aztlan," which was conducted by La Familia de UCLA, the Queer Latina/o organization on campus, but when Nena and Cristina presented it as one of the tentative workshops, they were told that they should reconsider the presenters. In other words, MEChA did not want La Familia to do the presentation. When the mujeres asked why, they received mixed messages. Eventually, Nena says that they were told that, "some members from La Familia [had] spoken out against MEChA and condemned [them] of homophobia and [MEChA felt that they were] not homophobic." [FN30]

Nena believes that because there were a few openly gay people in MEChA, the organization was tokenizing those members and using them as "proof" that they were not homophobic. When Nena and Cristina argued that the participants of the conference specifically requested in their evaluations that La Familia return to conduct the
workshop, the Mesa Directiva of MEChA called an emergency meeting to discuss the workshops. Nena recounted the event. [FN31]

*812* Nena and Cristina were caught in a very difficult situation because they were feeling pressure from the MEChA leadership to throw out all workshops that were conducted by people who spoke critically about MEChA, but their conscience would not allow them to feel comfortable knowing that these were valid experiences and perspectives that needed to be shared. This was an especially trying time for Nena because her sister, who had also been a member of Raza Womyn in the past, was now the MEChA chair, so both sisters were caught in a bind because of the politics of the organization. According to Nena, there was no space for self-criticism or balance--"either you were for MEChA or against MEChA." [FN32] Consequently, Janie seemed to side with MEChA and Nena seemed to side against MEChA. Nena and Cristina felt that they were blacklisted for challenging the decisions and advice of the Mesa.

The drama continued to build until the day of the conference. "Mundo" [FN33] (a member of La Familia and the previous coordinator of the gender and sexuality component of MEChA) approached Nena to protest that La Familia was not going to be allowed to conduct the "Queer Aztlán" workshop. Nena was under the impression that La Familia was still going to present the workshop, but someone else from MEChA told Mundo that they were not. When Mundo went to MEChA to complain, another emergency meeting was held between MEChA and La Familia to discuss the issue. The Mesa Directiva, however, did not ask Nena and Cristina to attend this meeting. It was supposed to be a closed meeting, but the mujeres showed up anyway. During the meeting, the MEChA chair (Janie) told Mundo that the workshop committee had decided not to ask La Familia to present at the conference--she essentially placed the blame on the workshop committee of Nena and Cristina. Nena and Cristina were devastated. On one hand, they had MEChA refusing to allow them to invite La Familia to present, and on the other hand, they had La Familia angry with them and accusing them of being homophobic.

After trying to argue their side of the story, Nena and Cristina were excluded from another meeting that consisted of only the members of the Mesa Directiva. At this meeting, the members of the Mesa Directiva decided to have a 'Queer Aztlán' workshop led by the gender and sexuality component of mECHa at California State University, Northridge. This was a closed meeting and the mujeres were purposely excluded, but La Familia continued to blame Nena and Cristina for their exclusion from the conference. As a result, on the day of the conference La Familia showed up to protest the whole incident. Nena describes the day's events:

N: So we're at the day of the conference . . . . And La Familia comes up with all their flags and everything . . . . They're all Queered out. And then they go, "Are we doing the workshop?" I go, "What are you talking about?" I go, "Well you're doing whatever *813* you guys discussed at the thing." He's like, "Well did Terry tell you we were doing it?" I go, "Yeah, but MEChA didn't say anything about it. They wouldn't listen to me" . . . . And they were videotaping me. They have a videotape of everything that went on, to document it . . . . And when it came down to the workshops, I guess security ends up going to the room where the Queer Aztlán workshop is at. And La Familia goes to where the workshop is at and they're like, "You know what, we were supposed to do this workshop . . . ." starting all kinds of shit. And they had their signs for the workshop too . . . . I passed by them and they had their sign, "Queer Aztlán" workshop. They were going to take them to workshop, no matter what . . . . And so they got security . . . .
A: So what happened at the workshop?

N: I wasn't there. I didn't want to go there. I go, "No because they're going to point it at me," so security ends up coming in, kicks them out--kicks out La Familia, and the other people proceeded with the workshop. So La Familia's just sitting there like, "fuck this shit." Videotaping everyone. Saying shit about them.  

After the Raza Womyn Conference, Nena and Cristina had no choice but to distance themselves from MEChA. They felt that they were blacklisted for questioning the Mesa Directiva authority and for not remaining silent. Nena says that she went back a couple of times, but she never felt comfortable again amongst them. One of the last times she went to a meeting, she told the members that she was a lesbian. She felt more distant from them than ever. She remembers their reaction to her coming out: "So after that, no one said anything. You know when people come out, you need to give them a hug, you need to show them love, that I'm so proud of you.' No . . . ."  

Still, her commitment to MEChA was difficult to sever, and she tried going one more time, but that was her final visit to MEChA:

And I think I went back one more time, and I knew it wasn't going to happen. I was stared at. Like, "Why are you here?" Like I had those looks, the "Why are you here" looks. Besides I had nothing that I could grow from. There was nothing there that I could grow from anymore. It was just bitter, trying to be the best, really machismo shit. The sad thing was that it was embraced and reciprocated by all the women. So everyone eventually left MEChA and came out.

Eventually Nena completely left MEChA, and she rebuilt a space for herself within Raza Womyn. Raza Womyn allowed her to be herself, which was something that she was struggling with because she was trying to come out as a Queer woman as well. As Nena indicated, several students who were active in MEChA (both male and female) left the organization and soon after came out as gay, lesbian, bisexual or transgender. A handful of them became members of Raza Womyn, and others became members of La Familia. They felt a strong need to feel accepted, supported and understood based on all of their identities, including sexuality. Although these former MEChA members were unable to fulfill their needs within MEChA, other Queer people in MEChA had better experiences.

VI. A Queer Mujerstoria: Coming Out in Raza Womyn

The person who was most responsible for opening the conversation of sexuality in Raza Womyn during the time that I arrived in 1998 was Nena. Nena made me feel safe enough to discuss my own sexuality in the safety of Raza Womyn. Before I came to Raza Womyn, I was not out as bisexual to anyone but my family. Likewise, many of the mujeres were unable to speak about sexuality freely before Raza Womyn for fear of using the wrong words or sounding uninformed and unaware, but Nena engaged in extensive dialogues with all of us. We finally developed a sense of comfort with regards to sexuality. This was a powerful and liberating experience. Even after Nena graduated, the precedent that she set led to many more encounters and dialogues about sexuality with future mujeres of Raza Womyn.

"Queer" is the most commonly used term amongst the mujeres in Raza Womyn because it is viewed as all-encompassing and as politically charged. "Queer" includes lesbian, gay, bisexual and transgender ("LGBT") people, and it is connected to a social political movement against sexual subordination. Other mujeres prefer terms such as "lesbiana," "jota," "two-spirited" or "tortillera," which are more closely linked with their identities as Latinas, Chicanas, Mexicanas or indigenous women.
Lesbiana is preferred because it is in Spanish, and the mujeres feel that the word "lesbian" is more closely identified with white women. Jota is a derogatory term used in Latina/o communities to identify lesbians and bisexual women, but it has been redefined by those women who choose to use it as a means of empowerment and to reject the negative use of the term. "Two-spirited" is a term that is intricately connected with an indigenous identity. Indigenous people who house and can love both male and female spirits are referred to as two-spirited. Tortillera (tortilla maker) is a term that has gained popularity within lesbian and bisexual communities in Los Angeles (and other places). A professor at UCLA, Alicia Gaspar de Alba, has used the term, and several of the women in Raza Womyn and the Los Angeles community have also taken it on as an identifier.

When I *815 asked delia (a Raza Womyn) where the term tortillera originated, she replied:

I've heard it before when I was younger, but it didn't really mean anything to me, but then I started hearing it through Gaspar [FN37] and then through Claudia because she's taking that term too. The other day I was talking to my mom . . . and she was telling me, "O, si mija, [Yes, my daughter,] the other day I was talking to the lady that works in the tortilleria [tortilla factory]." And my mom asked the lady, "Quien sabe como sera que las lesbianas hacen amor si no hay nada hay [Who knows how lesbians make love if there's nothing there]," meaning that there's no penis involved. The lady told her, "Pues, sera asi como haciendo tortillas, como tortilleras. [Well, it must be like this, like making tortillas, like tortilla makers]."

And that's where it actually comes from . . . . Tortillera meaning two vaginas, two women's bodies making love. That's where Gaspar got it. It's not something that she came up with or that Adelina came up with. [FN38] It's something that she learned through her comunidad [community], and she brought it into her academics and made a theory out of it. It is actually a term that is used within our colonias [neighborhoods] and our comunidad [community] to define our gente [people], to define tortilleras, to define lesbians. [FN39]

Hence, tortillera was a term that originated in Mexican and Latina/o communities that was used in derogatory ways as well, but that has been redefined and embraced by Chicana/Latina lesbians and bisexual women in the same manner that the word Chicano was redefined during the movement. "Queer" has a similar trajectory--it was once used in a demeaning manner to signify that lesbian, gay, bisexual and transgender people were odd or abnormal, but today it is used frequently, especially amongst academics and activists, to signify an LGBT political movement. Still, many people active in these communities do not want to limit people *816 to specific terms, and they want to honor people's decision to identify as they wish. At the first ever Queer Youth of Color Conference held in Los Angeles in April 2002, the student organizers referred to their community as LGBTQ; again this simultaneous use of lesbian, gay, bisexual, transgender and Queer signifies that every term is just as important as the other. [FN40] They have also used the umbrella label "LGBTQI" to include intersexed individuals. [FN41]

Because members of Raza Womyn have dealt with different social, political and economic issues internally, their events have reflected these issues. For example, the area of conscientización that was least developed by early participants/members of Raza Womyn was Queer sexuality. Raza Womyn founders and members during the eighties and early nineties, for the most part, did not deal with Queer sexuality; in particular, they did not address homophobia. Several Raza Womyn alumnae have remarked that sexuality was never an issue that they dealt with or that they felt comfortable discussing. Naturally, this resulted in a homophobic and sexually repressive environment. To develop a sexually liberated and Queer-friendly space--that is,
conscientización with regards to sexuality—dialogue, questioning and educating must take place around that issue. Most often, these women came from homes, communities and friendships where sexuality was also taboo. Thus, this aspect of identity and life experience was sorely unexplored or ignored in dealing with issues that related primarily to race, class and gender, including issues of family, immigration, religion, politics and education.

Although the mujeres felt more comfortable in Raza Womyn than they did in MEChA, this did not mean that Raza Womyn was free of some of the same oppressive issues that they fled. Nena admits that much of the "chingon politics" that she learned in MEChA followed her into Raza Womyn, and that she and the other mujeres had to consciously work to create a different environment within Raza Womyn. [FN42] Cristina notes that both she and Nena were growing inside and outside of Raza Womyn, especially with regards to sexuality. Nena was in a relationship with Gina, although she was not out to everyone about it. [FN43] Cristina was slowly beginning to *817 question her own sexuality. She recalls that she was attending several conferences through her role as a member of the student government. Within these conferences, the discussion of LGBT issues was common. Cristina says, "It's natural that when you start talking about these issues, you begin to question. We're socialized to never consider these things by the environment that we're in, but once you start hearing people talk about it, you start thinking about it." [FN44] She remembers discussing the issues with others at the conferences, then bringing these issues back to Raza Womyn. Eventually, they created a space where they could openly talk about sexuality, and where they began to connect sexuality to their Chicana experiences. It is not clear to me who came out first, but what is clear is that their coming out distinctly changed the Raza Womyn space.

The intimacy and closeness between the women that allowed them to discuss such private issues was not always welcomed by other women who came to the organization. Cristina believes that Raza Womyn has always had a small number of participants for this reason—because of the closeness and because it is a Queer-friendly space. She remembers being envious of the large membership of other organizations and thinking that Raza Womyn had to increase their numbers.

She adds that Raza Womyn was different because although they knew it was important to organize against Proposition 209, immigrant backlash in Los Angeles, sexual abuse from the Greek men on campus and many other injustices, they also knew that it was even more important to provide support and understanding to each other. [FN45] Cristina thanks Nena for helping accept the small size of the organization and for helping her make sense of it. She remembers Nena telling her, "Yeah, our organization is small, but we're dedicated to one another one hundred percent. We're workers, we're there to support each other, and we may not be able to do that if the organization is big." [FN46] Cristina believes that especially because Raza Womyn dealt with the issue of sexuality directly and because they had open discussions about their own sexuality, many women may have been scared of the Raza Womyn environment. Cristina reconciles this issue saying, "[t]he women were there definitely because they wanted to be there. Our group was not about building a resume at all . . . . We got the really dedicated women." [FN47]

Cristina and Nena began taking classes in LGBT studies and Chicana/o and women studies, and brought the issues that they learned about in class to their meetings. They connected several things that they *818 read about to their own traumatic experiences within MEChA. They realized that what they experienced was not abnormal at all; rather, it was a historical reoccurrence in terms of the way that women and Queer people have been treated in Chicano organizations. Nena says that coming out in Raza Womyn was a natural process for her, and she distinctly remembers the night it happened:
With Raza Womyn, it wasn't like "let's have a meeting, I want to come out to you." It was more like if you were there in our crying session [you knew]. One time we were just going through madness . . . . We were in a meeting, and I go, "I think we're all going through a lot of shit and I think it'll be good if we close the meeting right now and we just talk about what's going on in our life." So it must have been about 7 or 8 of us, and we sat around the round table and we were holding hands, going around, crying, everyone was crying. I was crying. I was telling them about me trying to come [out] to my mom, how hard it is, and that's when I came out to every one else. No one judges me. No one treated me different. No one ignored me. We all gave each other a hug, then we did the cinnamon roll hug, all these little things that we did. I felt loved. And if you want a revolution, that's what you need. You need love. [FN48]

Once Cristina and Nena came out, several other women followed. Cristina says she is not sure why that was, but she has some theories on the issue:

Once you start talking about [sexuality] and you are open about it. The process of questioning in that safe space is just catchy. You start doing it with every thing. "Am I really political? Am I really down?" . . . it's a natural process. Everyone starts questioning themselves . . . . Sometimes we would just get really excited; we would just want everyone to be out. If we thought they were going through what we went through. We were like, "you need to just come out." But it wasn't their time. Everybody has to go through their own process. And so it was just like, "We're going to keep talking about it. We're going to go to straight places, gay places. We're going to dance with whoever we want." And people just started slowly questioning themselves.

I don't know if people that are questioning were particularly drawn to the organization, like subconsciously maybe they were drawn to it, or if it's just a natural thing that if you're in this kind of space that you just start questioning yourself. It could be two different things. But from what I've noticed is that everyone that really questions themselves, they become open to loving all sorts *819 of people. They kind of release that barrier. And then it even transcends sexuality and just becomes the ability to love people at a different level. [FN49]

Again and again these sentiments that Cristina voiced have resonated and recreated themselves within Raza Womyn. Women that have never met Cristina, but have experienced the same thing she did years later, have voiced the same theories. Over the past six years, there have been at least three different waves of women coming out as Queer in Raza Womyn. Cristina and Nena were the first in 1997, and there were at least three other women in their cohort that followed. For some of them, it took place after they graduated. In 2000-01, five women came out and three who were already out joined Raza Womyn. In 2001-2002 a woman who adamantly identified as straight was in a relationship with a woman by the spring quarter. In 2002-03, no new women came out, but a woman who identified as two-spirited found a welcoming environment in Raza Womyn. And throughout the years, there have been many, many more women who have questioned their sexuality, but have not yet come out as Queer.

In 2001, four of the mujeres who had defined themselves and believed themselves to be "straight" or heterosexual before they became involved with Raza Womyn came out. At the same time, there were three women that were "out," meaning they already identified as bisexual, transgender and/or Queer before they arrived at Raza Womyn, but were drawn to Raza Womyn because of the safety they felt in being out in that space. Two of them indicated that they did not feel safe in La Familia, the Queer Latina/o organization on campus, because they felt that their Queer politics and
identity were questioned by members of La Familia, often while they were still in the process of coming out and still unready to deal with those issues.

Women who identified as bisexual were accused of being imitators by other Queer people, of being afraid to be out as lesbians and wanting to continue to be privileged because of their relationships with males. This issue has been discussed often by Raza Womyn members; especially amongst the women who came out in 2001, there was a general consensus that forcing bisexual women to choose heterosexuality or lesbianism was oppressive. These women have supported each other and been able to discuss their sexuality in the way that Cristina spoke of--they feel that they could transcend sexuality and love people at a different level. One mujer described her bisexual identity in the following manner:

*I don't want to or expect to identify as a lesbian today or ever because although I think it's politically strong for women to do so and I support that, my experience lately has been that it can be just as limiting as the identity of being heterosexual. And I have a problem with limits and I think it's time that we start embracing ambiguity and that gray space. We live in such a dichotomous world, where we're like, "You're A or B and that's it," and there's a space between A and B that we need to embrace. And like even the term bisexual, it's ambiguous enough, but honestly, in all honesty I fall in love with people, not with a guy or girl. And I want to embrace that. And just being a lesbian is being like, "oh I can't be with men," like why? What if I were to meet this guy that was great or that could understand me with my crazy ideals. [FN50]*

Similarly, other mujeres have indicated that they respect people's desires to love whomever they choose. They indicate that their sexual identities are in line with their visions of social justice as they resist oppressing themselves and others based on sexual identity as they do with regards to race, class and gender.

VII. Conclusion

Student activism has historically been a tool of resistance and transformation for students in higher education who voice discontent with a particular aspect of society, governmental regulations or their educational institutions. Students have protested things such as war, sexism, patriarchy, heterosexism, homophobia, racism, capitalism, exclusion, xenophobia and other aspects of subordination. Women have especially focused their activist goals on the liberation, education and self-empowerment of women. Reproductive rights and sexual liberation have also been key factors of the women's struggle. Even the right to gain entry and inclusion into institutions of higher education has come as a result of activism and struggle.

This research shows that students who come from marginalized or disadvantaged backgrounds and go to the university can engage in a process of resistance to oppressive practices and environments within those institutions, while continuing their education. While a higher education has proven to be a form of liberation for many of these students, it has simultaneously been oppressive to some. As these students learn how to negotiate both privilege and oppression in the college setting, they develop tools for understanding their conditions. These tools are political and social consciousness, which are often internalized and acted upon in the form of student activism.

As people of color involved in social justice movements, we are often struggling with "speaking secrets," as Chicana feminist scholar Deena Gonzales indicates. [FN51] As I wrote this article, I wrote it with much apprehension because I recognize that activists and progressive people in this country *are currently under attack. Often, women of
color activists have been urged not to publicly denounce or criticize the men in their communities. Likewise, gay, lesbian, bisexual and transgendered people have been silenced as they have voiced their concerns of homophobia and heteronormativity within social justice movements. This tendency has led to the demise of many of our political struggles and coalitions. Many of us want to believe that internal struggles with discrimination are in the past and that we have learned from the mistakes of the 1960s to the present, but, as the Raza Womyn mujerstoria shows, our communities unfortunately repeat their mistakes. I write this article and do this work not to criticize particular Chicana/o organizations or people within those organizations, but to urge us to learn from these lessons. We must do the work of bridging the older generation of activists with the newer generation of activists. Everyday, young people are joining our progressive moves for social change and there must be a process of education that they engage in to help them move toward social justice rather than away from it. We know that working in coalitions is the most effective means for change. Therefore, it is absolutely necessary to be able to be self-critical in order to make real change.

Footnotes:

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[FN1]. See Christie Lafranchi, Viva La Raza ... Women!, Web Mag. Online (Fall 1997), at http://www.ssnet.ucla.edu/~aasc/classweb/fall97/M163/lafr.html (explaining origins of Raza Womyn women's movement at UCLA).

[FN2]. In 1979, the organization was called Raza Women. It was created as an organization for women of Chicana/Latina ancestry on campus. In the 2000-01 academic year, they decided to change the name of the organization to Raza Womyn--taking the "e" out of the word women and replacing it with a "y" to remove the word "men" in "women." This was done as a feminist statement to reinforce a woman-centered ideology for the organization.

[FN3]. The words "mujer" and "mujeres," meaning "woman" and "women," are generally used by the participants of Raza Womyn to refer to women of Chicana, Mexicana, and Latina ancestry, but beyond that these words imply a connection and a sense of identity between Chicanas/Latinas. I use these words to refer to the women in the organization, as is common amongst Raza Womyn.


[FN5]. MEChA is a national organization that exists at many colleges, universities and high schools throughout the nation. MEChA is an acronym for el Movimiento Estudiantil Chicana y Chicano de Aztlan, which roughly translates to the Chicana and Chicano student movement of Aztlan. Aztlan refers to the land, a sacred ground, of the Southwest that was appropriated from Mexico by the United States. MEChA was founded in 1969, when students, faculty and community leaders came together at the University of California at Santa Barbara to create El Plan de Santa Barbara, which was considered a Chicano plan for higher education.

[FN6]. "Queer" refers to lesbian, gay, bisexual and transgendered people. It is the most
commonly used term amongst the mujeres in Raza Womyn because it is viewed as all-encompassing and as politically charged.

[FN7]. Delia, a member of Raza Womyn, often reconstructs language to create words that she can identify with and that she feels comfortable using to describe her experiences. In an email, where she was referring to the herstory of Raza Womyn, she used the word "mujerstoria" as a Spanish equivalent of herstory. But the significance of replacing "her" with "woman" is meaningful because it literally means woman-story or women's stories. This term has a direct connection to delia's feminist/mujerista politics. I purposely do not capitalize delia's name because she does not do so. She asserts that rules and regulations, especially in the act of writing, are conformist and oppressive. She feels that in order to freely express herself she must break all the rules of writing. Therefore, in the tradition of Black feminist scholar bell hooks, she chooses not to capitalize her name.

[FN8]. There will be some glaring gaps and fragments in this herstory, as is usually the case in the retelling and recollecting of silenced women's stories, but this is an attempt to begin piecing it together.

[FN9]. Indeed, today many MEChA chapters throughout the country have created gender and sexuality components that specifically deal with gender and sexuality discrimination. At the time, however, these issues were not being adequately addressed by the membership of the organization according to the women who decided to create Raza Womyn.

[FN10]. Interview with Isabel, Member, Raza Womyn [hereinafter Interview with Isabel]. I only use the first names of the participants of the study as was agreed during the interview process.

[FN11]. Id.

[FN12]. Id.

[FN13]. Id.

[FN14]. Id.

[FN15]. See E-mail from delia, Raza Womyn Member to Anita Tijerna Revilla, Assistant Professor, University of Nevada, Las Vegas (Dec. 11, 2001) (explaining why organization uses "y" instead of "e" in "women" (on file with author)).
engage in self love, embrace our voice and existence and collectively empower and respect one another to fight and speak out against any injustice.
Id.

[FN16]. Interview with Isabel, supra note 10.

[FN17]. Id.


[FN19]. Interview with Isabel, supra note 10.

[FN20]. Drama is one of many terms that has become a part of Raza Womyn linguistic expressions. Drama signifies a multitude of things, but mostly it refers to things that are considered inappropriate, especially in terms of politics or consciousness. Sexism and homophobia are excellent examples of the "drama" that many of the women choose not to deal with in co-ed student organizations. For example, a lack of consciousness about women's and Queer people's social justice or equity issues is considered dramatic or drama.

[FN21]. Interview with Isabel, supra note 10.


[FN23]. Based on lists of members that I found in Raza Womyn archives, there may have been male members at other times as well, but this is unconfirmed. They may have been male supporters rather than members.

[FN24]. "Janie" is a pseudonym.

[FN25]. "Gina" is a pseudonym.

[FN26]. Interview with Gina, Member, Raza Womyn (May 2002).

[FN27]. Id.

[FN28]. "Nena" is a pseudonym.


[FN30]. Interview with Nena, Member, Raza Womyn (Aug. 15, 2001) [hereinafter Interview with Nena].

[FN31]. See id. (recounting events of meeting). They ended up calling an emergency meeting with me and Cristina. They sat us down, my sister was there because she was chair, then you had "Lisa" and "Enrique" who were the chairs of the conference and you had "Emilio" there, who was the "founder," or some shit like that, co-founder with Gina of RYC. So we had to justify for three hours why we needed every workshop. Three hours girl! We were going off. I was arguing with him the whole time. My sister just sat there. [Afterward,] I go "Janie I can't believe you put me in here." And she was like, "Well we're here as MECistentas." I'm like, fuck you man. You're still my sister. So it went personal. It went home .... So after justifying for three hours,
we came out of that meeting crying. We were like, "What the fuck was that? That was fuckered up!"

Id.

[FN32]. Id.

[FN33]. "Mundo" is a pseudonym.

[FN34]. Interview with Nena, supra note 30.

[FN35]. Id.

[FN36]. Id.

[FN37]. According to several of the mujeres of Raza Womyn, Alicia Gaspar de Alba ("Gaspar") has been their only professor at UCLA to deal with issues related to Chicanas/Latinas, feminist and Queer issues. She has been key in raising many students' feminist and Queer consciousness. In class, she popularized the term/identity "tortillera," which is used in Mexico and other Latin American countries to identify lesbians. See generally Tortilleras: Hispanic and U.S. Latina Lesbian Expression (Lourdes Torres et al. eds., 2003) (collecting articles about gender, sociological and lesbian issues for Latinas).

[FN38]. Adelina is a producer, playwright and actress who is pursuing a Ph.D. in performance arts at Stanford University under the mentorship of Cherrie Moraga. She is a long-time Raza Womyn supporter and her partner (Coral) is a Raza Womyn. She wrote and performed a Chicana lesbian show called, "How to be a Tortillera 101."

[FN39]. Interview with delia, Member, Raza Womyn, in Los Angeles, Cal. (Nov. 28, 2000).

[FN40]. The Queer Youth of Color Conference was created by high school and middle school students from Los Angeles and by Raza Womyn members, Gina and Nena. It was held at Manual Arts High School in south central Los Angeles.


[FN42]. Nena defines "chingon politics" as "tough guy politics." She says, "Those are terms from Betita Martinez. 'Yo soy mas chingon.' Like, I'm the one who you can't fuck with because I'll fuck with you .... It's very penis-driven, phallic-driven, patriarchy-driven, and it is embraced and expected in many organizations." Id; see also Elizabeth Martinez, De Colores Means All of Us 172-81 (1998) (describing chingon politics).

[FN43]. Interview with Cristina, Member, Raza Womyn (June, 2002) [hereinafter Interview with Cristina].

[FN44]. Id.

[FN45]. The text of Proposition 209 can be found at http://vote96.ss.ca.gov/Vote96/html/BP/209text.htm. On its face, Proposition 209 seems favorable to the Raza Womyn, as it prohibits the state of California from discriminating on the basis of "race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Id.
[FN46]. Interview with Cristina, supra note 43.

[FN47]. Id.

[FN48]. Interview with Nena, supra note 30.

[FN49]. Interview with Cristina, supra note 43.

[FN50]. Interview with Coral, Member, Raza Womyn (June 27, 2001).

Community Organizing and Direct Activism

RETHINKING MINORITY COALITION BUILDING: VALUING SELF-SACRIFICE, STEWARDSHIP AND ANTI-SUBORDINATION

Victor C. Romero [FN1]

I. Dominant Principles of Coalitions: Self-Interest, Partner Accountability and Equal Access to Power

As Kevin Johnson recently noted, "[c]oalition is a fundamental tenet of the growing body of" [FN1] LatCrit Theory. Although minority group coalitions often trumpet lofty goals such as equality and justice for all, what many coalition members appear to want more than anything, individually and collectively, is their piece of the proverbial pie. It is this self-interested focus that makes minority group coalitions difficult to create and sustain. As several prominent scholars have reminded us, coalition building within and among disenfranchised groups is particularly fraught with peril. [FN2] This is a result of the inevitability of conflict stemming from different perspectives on which group has suffered the most and therefore is most in need of help, not to mention intra- and inter-group racism, sexism, homophobia and other invidious structures that strain relations. Elizabeth Iglesias has noted that short-sighted essentialism and exclusivity hindered otherwise progressive movements--for instance, the labor movement's class-based struggle or the Chicano movement's racial essentialism. [FN3]

One might characterize the dominant coalitional paradigm as focusing on three principles: self-interest, partner accountability and equal access to power. "Self-interest" refers to the desire to pursue one's goals above everyone else's, including being so focused on one's own goals that one fails to recognize others' compatible interests. [FN4] Under this view, coalitions should be pursued only to the extent individual partners perceive the coalition to advance their interests more effectively than if they proceed alone. "Partner accountability" follows from the self-interest principle. Coalition partners must be individually accountable to the others in the coalition by adding value to the collective. Otherwise, the enterprise should be disbanded in favor of pursuing goals individually. Finally, "equal access to power" seeks to ensure that each partner receives as close to the same rights and power, and assumes as close to the same responsibility as the others in the coalition. If an employer discriminates against all people of color and each minority group that wants a job is equally represented among qualified applicants, equal access to power demands that the employer hire the same number of each group--e.g., one African American, one Asian American, one Latina/o American and so on. Equal access to power thus becomes an outgrowth of self-interest and partner accountability--partners know that their interests are being protected and that their colleagues are accountable if the coalition seeks to increase the power of each partner on an equal basis.

These three dominant principles might appear theoretically sound and pragmatically desirable. One might be concerned, however, that the overemphasis on individual coalition members' interests and accountability might lead to less rather than more trust, especially when pursuing equal access to power becomes elusive in the face of rather complex real world policy issues.
how **825** partners can help each other strengthen coalitions more than those principles that primarily pursue self-interest?

To put into perspective the difficulty of coalition-building among minority groups, Bob Chang and the late Jerome Culp point to the conflict between African Americans and Asian Americans over immigration and citizenship. [FN5] Often, African Americans, because of their long-held U.S. citizenship, find immigration issues of little relevance unless they know of a relative or friend who is not a citizen. Immigration and citizenship are, however, often at the top of many Asian American interest group agendas, especially given the large influx of Asian immigrants into the United States post-1965. Chang and Culp concluded that in such inevitable and difficult situations, sacrifices must be made and trust must be engendered. They wonder, however, whether true trust can develop among different individuals and groups absent any formal method of accountability. Richard Delgado is perhaps even less sanguine:

[T]oday’s outsider groups need to ponder what tasks are best accomplished in concert with others, and which are better undertaken individually. For some projects, justice turns out to be a solitary, though heroic, quest, and the road to justice is one that must be traveled alone, or with our deepest, most trusted companions. [FN6]

Conventional wisdom seems to suggest that the complexity of bridge-building requires a return to the principles of self-interest and partner accountability in order to ensure that access to power is equally available to all. Perhaps more to the point, coalitions that hold as their paramount objective the advancement of group members’ individual self-interests may see their successes short-lived as partners disengage or desert once they perceive that their continued participation conflicts with their individual goals.

Nicolás Vaca’s recent book, The Presumed Alliance, highlights the ways in which African Americans and Latinas/os in Los Angeles have long struggled over access to political power and employment opportunities. [FN7] Vaca attributes this conflict to the growth in the Latina/o population that has not led to proportional gains elsewhere, in part because of opposition **826** by African Americans. [FN8] The authors of Black Power, Stokely Carmichael and Charles Hamilton, would have approved; they believed that coalitions between African Americans and other groups could be formed only to the extent that these furthered the self-interests of each. [FN9]

Might there be a worthwhile alternative to the prevailing paradigm that may help address the practical obstacles raised by Vaca, or the appeals to self-interest articulated by Carmichael and Hamilton? In the next section, I argue that there might be a better alternative to the current approach to coalition building. I advocate an approach that centers on anti-subordination as a core value, reinforced by commitments to self-sacrifice and stewardship.

II. Alternative Principles: Self-Sacrifice, Stewardship and Anti-Subordination

How does an informal, voluntary out-group coalition go about engendering trust without establishing a way to ensure accountability apart from insisting on formal equality (which, in turn, might erode trust)? Perhaps one way out of this dilemma would be to re-center minority coalition-building around three concepts—self-sacrifice, stewardship and anti-subordination. Put differently, this coalition paradigm would hold as its paramount objective the promotion of anti-subordination through self-sacrifice and stewardship.
Anti-subordination as a focus of coalition-building is not a new idea. Early on, LatCrit co-founder Frank Valdes noted the need for LatCrit theory to “reference other anti-subordination theories and struggles.” Valdes also articulated that LatCrit theory must attend to "more than immediate self-needs" --suggesting the need for self-sacrifice and compromise that Chang and Culp also recognized. My modest contribution is to suggest that a firmer embrace of these two principles, along with the notion of stewardship, might lead to a sustained and reinvigorated commitment to coalition building lacking perhaps in the conventional form.

Under this model, the purpose of coalition building would shift from self-interest to self-sacrifice, and from the desire to gain access to political power to the alleviation of oppression in all its forms. Instead of viewing sacrifice as an inevitable, unfortunate consequence of coalition-building, it should instead take center stage as the main strategy for promoting anti-subordination. Coalition conflicts arise when individuals and groups become more concerned with advancing their own agendas by preserving hard-fought gains rather than promoting anti-subordination. This should come as no surprise given that minority group progress often results in both more political power and the alleviation of oppression. The key, however, is to ensure that promoting anti-subordination remains the top priority and that any political power that results from this project is used only to further the goal of anti-subordination, rather than to accumulate more power. Along with sacrifice, therefore, comes stewardship--the idea that any political gains made by the group are channeled back into promoting anti-subordination rather than the group's aggregation of power.

The most familiar example of self-sacrifice and stewardship in the name of anti-subordination might be the parents' relationship to children and grandparents in an extended family. This is often a hallmark, though not exclusively, of Asian and Latina/o cultures. Parents hold positions of socioeconomic power in the family, with children and elders as relatively less powerful figures. Although they are usually financially and physically superior to their children and their elders, parents in the family coalition willingly practice the twin concepts of self-sacrifice and stewardship for the benefit of their less powerful kin. From voluntarily getting up in the middle of the night to attend to a sick child, to taking their children to school, to providing food, clothing and shelter, to absorbing verbal abuse and disrespect, good parents sacrifice physical and material comforts to benefit their dependents, often without concern for any tangible economic or political return on their sacrifice.

Skeptics might summarily dismiss the family analogy because families are often small, cohesive units, and even then are usually dysfunctional. But many are big and diverse (think of the Kennedy clan, from Teddy to Arnold Schwarzenegger), and many are fully functional precisely because of the parents' (and in the case of larger clans, adults' and elders') commitments to self-sacrifice and stewardship. More importantly, self-sacrifice, stewardship and the commitment to anti-subordination provide a visionary center and alternative to the self-interested, individualistic and capitalistic viewpoint that governs most decision making surrounding whether or not to coalesce and join forces with others. The anti-subordination concern to support those in society who suffer for their self-sacrifice finds a voice in feminist scholarship. In the realm of family law, for example, some scholars have advocated greater public support for mothers, who, because of their commitment to child care, are often poorer than women who have chosen careers over families.

As Robert Greenleaf, a pioneer in the concept of "servant-leadership" has written:

> Becoming a servant-leader begins with the natural feeling that one wants to serve, to serve first. Then conscious choice brings one to aspire to lead. That
Working for others first provides a check on the tendency to self-aggrandize, or the temptation, at the margin, to pursue one's self-interest at the expense of those who may be worse off than you.

III. Comparing the Dominant and Alternative Visions

As always, the devil is in the details. These principles may sound good, but may not be practical given that we live in a self-interested, individualistic and capitalistic society—perhaps not world. Critics might contend that ensuring equal access to power and anti-subordination are essentially the same goal: both involve the systemic closing of the gap between have and have-nots. The only difference between the two, it is argued, is that the first chooses as its means the elevation of all subordinated groups on an equal basis, while the second aims to divest the mighty of their power rather than seek its accrual among the less privileged. There might be more than a semantic difference, however, especially at the margin, where most difficulties arise. A coalitional effort premised on pursuing anti-subordination rather than equal access to power will not focus principally on expanding its influence; rather, it will extend aid to the worse off whether within or without the coalition. An anti-subordination coalition will therefore concern itself less with the number of jobs or congressional seats its members occupy, but more with the idea that whoever occupies those jobs or creates laws for society's welfare does so with an eye toward benefiting the less-privileged, socioeconomic or otherwise.

A. Comparing the Models, Part 1: The Affirmative Action Debate

Using the example of affirmative action, let me illustrate how the model I suggest—focusing on self-sacrifice, stewardship and anti-subordination—might be better than one that appeals to self-interest, individualism and capitalism. First, the typical "appeal to self-interest" strategy of coalition building: Sumi Cho recently wrote about coalition building strategies to advance the cause of affirmative action in the fight against state initiatives seeking their demise. She recounts one meeting with professional consultants who advised that, in the fight against anti-affirmative action Initiative I-200 in Washington State, the best strategy would be to appeal to women voters rather than minorities. Focus groups revealed women as key swing voters who, when informed that they were the primary beneficiaries of affirmative action, would likely vote against I-200.

This appeal to women's self-interest backfired: I-200 passed because most of the women voters were white and identified with the harm done to their white sons and husbands, rather than with the benefit to them. Although one might characterize these women voters' motives as products of both self-sacrifice and stewardship, their decision to approve I-200 furthered oppressive ends. Specifically, it perpetuated white privilege at the expense of educational opportunities for people of color. Put differently, the white women voters might have been concerned about ensuring "equal access to power"—guaranteeing that all people, regardless of race or gender, have the opportunity to benefit from government programming. Wittingly or not, these voters neglected to consider that people of color and women often begin the race a few feet behind the majority, and that voting against I-200 would have helped narrow the gap between the classes, effectively promoting anti-subordination. In the end, their devotion
to family trumped appeals to these women's self-interest; as Cho noted in her account, "[e]xit polling and post-election interviews suggest a consistent pattern of white women's articulated concerns about affirmative action's negative impact on their male (and sometimes female) family members." [FN17]

More consistent with the proposed model is the action of the National Asian Pacific American Legal Consortium (NAPALC), which, throughout the infamous affirmative action litigation involving the University of Michigan, consistently supported the university against the claims of the white plaintiffs who were denied admission. In the suit involving Michigan's law school, [FN18] Asian Americans were specifically excluded from the affirmative action program, which included only African Americans, Latina/o Americans and Native Americans. Another group, the Asian American Legal Foundation, joined the white plaintiffs in arguing that affirmative action programs acted as an artificial ceiling, limiting the number of admitted Asian Americans in favor of other "less qualified" minority groups. [FN19] Instead of succumbing to this "divide and conquer" strategy, NAPALC decided to side with the other minority groups in coalition, filing an amicus brief before the United States Supreme Court in support of the university. [FN20]

Like the white women voters who acted in selflessness and stewardship by voting in favor of I-200 to support their white husbands and sons, NAPALC took a position contrary to many of their constituents' apparent interests. What was to be gained by an Asian American interest group advocating an educational program that specifically excluded them from consideration? While perhaps not immediately apparent to some, NAPALC acted in furtherance of the anti-subordination ideal. Arguably, *831 NAPALC knew that it could not support a position that, while perhaps furthering many of their constituents' interests, would not advance the principle of ending de facto segregation in higher education. [FN21]

Some may balk at the two prior examples as not being grounded empirically. Put differently, how do we know that successful coalitions can be built on grounds other than appealing to self-interest with the promise of greater power? In the social sciences, social movement theorists have studied various coalitional movements--from environmentalism to feminism to the civil rights movement to gay rights coalitions--and have concluded that appeals to self-interest and emotionalism do not accurately explain these successes. In his plea that law professors pay more attention to the study of social movements, Edward L. Rubin observes that aside from the fact that many members of these coalitions were "outsiders" --whites among blacks, men among women, straights among gays--"[a]t a deeper level, [social scientists] perceived, and were willing to take seriously, the desire of these movements to effect larger social transformations that were more closely linked to their members' beliefs than to their interests or immediate dissatisfactions." [FN22] Thus, some whites joined the civil rights movement not because it was in their interests, but because it was the right thing to do. Pursuing anti-subordination as the touchstone of a coalitional effort embodying the principles of self-sacrifice and stewardship is a similar enterprise.

B. Comparing the Models, Part II: The Immigration Debate

There are, of course, more difficult scenarios than the two I describe above, one of which was posited by Chang and Culp earlier. How do Asian Americans convince African Americans to support more immigrant-friendly policies, possibly contrary to their self-interest, amidst fears that Asian American immigrants will take jobs away from African American U.S. citizens? How might selflessness, stewardship and anti-subordination work in this instance? United States citizenship and residence is a privilege--increasingly so in this post-9-11 world. [FN23] As such, those who possess this privilege have a duty
to wisely steward the benefits that this status conveys. Non-U.S. citizens are
disadvantaged because of their immigration status. Despite their unenviable position at
the bottom of the American racial hierarchy, African American U.S. citizens are
privileged vis-à-vis non-citizen Asians and should be stewards of that privilege—not to
maintain its luster but to benefit those without it. Recognizing citizenship status as
a privilege and, therefore, a source of oppression, African Americans should share that
privilege and support immigrant-friendly policies Asian Americans advocate. In return,
Asian Americans should take seriously African Americans' concern about job
displacement and should develop partnerships with the African American community to
provide appropriate opportunities. Asian Americans' motivation should not be guilt or
self-interest arising out of the commitment to support their immigration policies, but
rather the selflessness and stewardship that come from the privilege of a higher
economic status that many African Americans lack.

Perhaps most importantly, Asian Americans and African Americans should welcome this
paradigm shift. Instead of approaching the coalition with caution and suspicion, both
groups should view the relationship through the lens of self-sacrifice, stewardship and
anti-subordination, rather than self-interest, partner accountability and equal access to
power. This new approach should appeal to Asian Americans and African Americans as a
means of expanding family values that both cultures hold dear, hopefully engendering
trust without creating formal channels of accountability.

IV. Implementing the Alternative Model: How to Begin and Sustain These Three
Principles

But how does one get there from here? Even if we were to assume that two groups
embarking on a prospective coalition embraced the three principles of self-sacrifice,
stewardship and anti-subordination, what assurances might they have that all will go well
in the absence of some prior, long-term trust relationship between the parties? I argue
that there are three component parts that mirror the three principles of self-sacrifice,
stewardship and anti-subordination, and these are (1) walking by faith in anti-
subordination, (2) self-sacrifice and stewardship start with the individual and (3) small
steps are O.K.

A. Walking by Faith in Anti-Subordination

As an overarching approach, I believe coalition partners need to have faith that pursuing
anti-subordination is a goal worth fighting for, regardless of short-term costs and long-
term obstacles. In his recent book, A Stone of Hope, David L. Chappell argues that during
the 1960s, northern white liberals believed that appeals to reason would eventually bring
Jim Crow segregation to an end—that liberal education would convince the segregationist
South of its immorality. In contrast, black civil rights leaders held out no such hope:

Like the Hebrew Prophets, these thinkers believed that they could not expect the
world and those institutions to improve. Nor could they be passive bystanders.
They had to stand apart from society and insult it with skepticism about its
pretensions to justice and truth. They had to instigate catastrophic changes in the
minds of whoever would listen, and they accepted that only a few outcasts might
listen. They had to try to force an unwilling world to abandon sin—in this case,
"the sin of segregation." The world to them would never know automatic or
natural "progress." It would use education only to rationalize its iniquity. [FN24]

One less-emphasized legacy of the civil rights movement just might be the coalition's
faith in faith rather than reason—that the moral foundation of their enterprise could
solidly sustain them despite some resistance from their allies (the northern whites who
relied on reason rather than faith) and massive opposition from their enemies (the
southern segregationist whites). In the end, members of this interracial, interclass movement kept their eyes on the prize and promise of racial and economic justice for all. They nonviolently pursued that goal in the face of daunting physical, psychological, legal and social, often violent, obstacles.

I do not suggest that the fight for equality is over, despite some observers' belief that we now live in a post-Civil Rights age. Rather, I agree with many that the fight for anti-subordination is made more complex by intersecting identities,[FN25] complicated further when one tries to take individuals and put them into groups and then coalitions of groups. That should not, however, dissuade minority coalition groups from taking the plunge if everyone keeps in mind the ultimate goal of anti-subordination.

B. Self-Sacrifice and Stewardship Start with the Individual

Often, the task of forming a broad-ranging, eclectic coalition appears so daunting that prospective coalition partners view the project as an endless Prisoner's Dilemma or, if you like, a game of "chicken." That is, a group leader may feel compulsion to get his or her group out first before getting taken advantage of by the other group or by some bigger outfit. Many times this analysis leads to an inability to get off square one.

That is why I think it is incumbent upon individuals who have been blessed with gifts to share to step up and lead by example. Put differently, self-sacrifice and stewardship start with the individual. In her exhortation to comfortable law teachers and law schools to restore to their rightful place practical service and teaching alongside the oft-preferred scholarship mission, Deborah Rhode has written, "law professors who are now churning out unreadable and unread tomes could instead be actually helping someone. Or more effectively teaching students to do the same. Or educating general audiences on legal problems and assisting policymakers on responses. Not every academic has the talent or taste for grand theory."[FN26] I do not suggest that we abandon our quest for better coalition group theorizing, but in that quest, let us not forget that praxis is important.

And there are many individuals who have taken the twin principles of self-sacrifice and stewardship seriously. Like Mahatma Gandhi before him, Dr. Martin Luther King, Jr. was a nonviolent servant. In his Pulitzer Prize-winning biography, Bearing the Cross, David J. Garrow argues that King would have preferred the quiet life of a clergyman-academic, but chose instead to take up the jeremiad against segregation at great personal cost to himself.[FN27] Unlike King's white, northern liberal allies, he did so without placing undue reliance on the power of reason to effect long-term change. In King, we see the juxtaposition of the faithful steward and the servant-leader: a charismatic intellectual answering the call to fight for the rights of the poor and people of color, despite the personal abuse he had to endure because of it.

Aside from King, there were and are many different individuals whose stewardship and self-sacrifice underscored their commitment to anti-subordination. Less well-known in the popular media than King is Bayard Rustin, a gay black man who, despite being a key strategist and speechwriter for King, was nonetheless marginalized by the black establishment because of his sexual orientation.[FN28] Some may criticize Rustin for not having pushed the gay rights agenda enough; more might question the hypocrisy of a black Civil Rights movement that might embrace a Loving v. Virginia but not a Lawrence v. Texas.[FN30] Both points are well-taken. I merely want to emphasize that in King and Rustin we see individuals who shared their gifts to pursue anti-subordination at a high personal cost to themselves. As conservative columnist Andrew Sullivan has written admiringly of Rustin:

[A]mazingly, Rustin never showed bitterness. He had every right to be inflamed...
against the white establishment, which at one point sentenced him to hard labor on a chain gang as punishment for his early civil rights protests. And he had every reason to be embittered by his black allies, for their acquiescence in the gay baiting. Yet somehow he rose above both. In one telling incident, he completed his sentence on the chain gang by writing a conciliatory letter to the sadistic white officer who ran the prison. Somehow, Rustin never succumbed to the anger that was his right; his spirit remained as light and as positive as his beautiful tenor voice. [FN31]

C. Small Steps Are O.K.

Finally, a word about outcomes. Starting small is O.K. Every victory, no matter how minor or symbolic, is worth celebrating if it furthers the goal of anti-subordination. Not too long ago, our little town of Carlisle, Pennsylvania saw the naming of its newest public high school building after a prominent African American schoolteacher from the days of segregation. It was the first time any school building had been named for a woman or an African American. A broad coalition of mostly white school board leaders, the black churches, the local NAACP branch and many concerned citizens worked tirelessly to achieve this important milestone. [FN32] While critics may question whether this symbolic victory has yielded measurable benefits to Carlisle's African American community, this was clearly a move in the right direction and should be celebrated as such. As Voltaire has said, "[t]he best is the enemy of the good." [FN33] Not that we should be satisfied with mere symbolic victories when material conditions have not changed, but we should recognize that these symbolic victories may form the basis for changes in material conditions. Conventional principles of coalition building suggest that in numbers, there is strength. With that I agree. I would only add though that strength should not be pursued for its own sake, but for the elimination of oppression and the promotion of anti-subordination.

In closing, I would note as a final example that LatCrit embraces many of the principles of coalition building I have emphasized here. [FN34] Its founders are to be congratulated for their energy and vision.

Footnotes:

[FNa1]. Professor of Law, Penn State University, vcr1@psu.edu. I thank Beth Lyon and Frank Cooper for their hospitality and invitation to participate; my co-panelists and the audience at LatCrit IX for their useful remarks during my oral presentation; Tanya Hernandez and Kevin Johnson for their detailed, thoughtful and insightful comments on an earlier draft that greatly improved this piece; Dean Phil McConnaughay for his commitment to my work; and, most important, my family in the Philippines, and Corie, Ryan and Julia for their constant love and support.


[FN2]. See, e.g., Eric K. Yamamoto, Interracial Justice 8 (1999) (illustrating through examples how conflicts between minority groups contribute to failed efforts to sustain minority coalitions); Robert S. Chang & Jerome McCristal Culp Jr., After Intersectionality, 71 UMKC L. Rev. 485, 490-91 (2002) (concluding that more research is needed to solve problems relating to multiple identities, political accountability and inter-group conflicts in order to strengthen coalition building); Richard Delgado, Linking Arms: Recent Books on Interracial Coalitions as an Avenue of Social Reform, 88 Cornell L. Rev. 855, 871 (2003) (theorizing that self-interest in assimilating to white culture has been factor in minority coalition struggles); Johnson, supra note 1, at 771 (stating that limited conceptualizations about what "civil rights" means and inter- and intra-minority racism stand as roadblocks to effective coalition building); Adrien K. Wing, Civil Rights in the Post 9-11 World: Critical Race Praxis, Coalition Building, and the War on Terrorism, 63 La. L. Rev. 717, 728 (2003) (commenting on reports that indicated African Americans and Latinas/os were in favor of law enforcement targeting Muslims post 9-11).

[FN3]. Elizabeth M. Iglesias, International Law, Human Rights, and LatCrit Theory, 28 U. Miami Inter-Am. L. Rev. 177, 181 n.4 (1997) (noting how these movements failed due to their inability to look beyond needs of their specific constituencies and cooperate politically).

[FN4]. I thank Tanya Hernandez for this important insight. One might think about this strand of self-interest as being akin to the unintentional tort of negligence--one should know that one's actions might cause harm to another.

[FN5]. See Chang & Culp, supra note 2, at 491 (describing cultural differences that prevent African and Asian Americans from being able to form effective coalitions).

[FN6]. Delgado, supra note 2, at 884.

[FN7]. See Nicolás C. Vaca, The Presumed Alliance: The Unspoken Conflict Between Latinos and Blacks and What It Means for America 52-61 (2004) (presenting this situation as one where zero-sum conflict worked against African American and Latina/o cooperation). For a thoughtful response and argument regarding the limitations of Vaca's thesis, see Ed Morales, Brown Like Me?, The Nation, Mar. 8, 2004, at 23, 27 (arguing that while Vaca identifies initial steps needed to build interracial coalitions, he also reinforces counterproductive notions, including that estrangement from African Americans is essential to Latina/o success).

[FN8]. See Vaca, supra note 7, at 52 (reporting that African Americans were unwilling to lose control of municipal jobs even when they were over-represented and Latinas/os were under-represented).

[FN9]. See Stokely Carmichael & Charles V. Hamilton, Black Power 79-80 (1967) (stating that inter-group coalitions can form only when groups recognize their respective self-interests, believe that they stand to benefit from coalition, accept their relative independence and realize that they have specific, not general, goals).


[FN11]. Id. (arguing that LatCrit is fighting all forms of oppression, so focus on individual
needs is too narrow).

[FN12]. Certainly, one could argue that an adult's decision to care for an elderly parent may be motivated by a belief that it is her obligation to care for her parent just as her parent cared for her in her youth; still, such an act would not be selfish in any economic sense--unless the adult child expects that she will receive an inheritance or some material benefit as payment for her efforts. This conception of selflessness finds support in cultural feminist literature that seeks to reflect and celebrate the differences between the roles of mothers and fathers. Martha Fineman, for instance, has sought to recapture the positive aspects of traditional understandings of motherhood with respect to nurturing and child-rearing that are lost in either a patriarchal or gender-neutral re-formulation of family law and policy. See, e.g., Martha Albertson Fineman, The Neutered Mother, 46 U. Miami L. Rev. 653, 655 (1992) (decrying "transfiguration of the symbolically positive cultural and social components of parenting typically associated with the institution of motherhood into the degendered components of the neutered institution of 'parenthood'"); see also Martha Albertson Fineman, The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies 9 (1995) (arguing that society places practical and ideological burdens on mothers who choose to be "caretakers").

[FN13]. See, e.g., Mary Becker, Caring for Children and Caretakers, 76 Chi.-Kent L. Rev. 1495, 1527 (2001) (noting financial and cultural advantages that working women have in contrast to women who are "only" mothers); Martha Albertson Fineman, Contract and Care, 76 Chi.-Kent L. Rev. 1403, 1406 (2001) (advocating that society should support caretaker needs because caretaking labor is essential to society's perpetuation); Katharine B. Silbaugh, Accounting for Family Change, 89 Geo. L.J. 923, 968 (2001) (stating that children should be viewed as "public good"). Although a detailed exploration of the different strands of feminist legal theory is beyond the scope of this essay, those interested in a clear and thoughtful exposition of the literature should see generally Martha Chamallas, Introduction to Feminist Legal Theory (2d ed. 2003) (providing overview of feminist legal theory and its different perspectives).


[FN17]. Id. at 410.


. See Brief of Amici Curiae National Asian Pacific American Legal Consortium, Asian
Law Caucus, Asian Pacific American Legal Center, et al., in Support of Respondents,
400140 (noting that mandated diversity was used to limit Asian American students
because they qualified for admission in numbers that exceeded their percentage of
population).

I do not discount the argument that some NAPALC constituents (Filipino
Americans, for example) would benefit from an affirmative action program, although they
clearly would not have benefited from Michigan's program unless these constituents self-
identified as part of another group.

Edward L. Rubin, Passing Through the Door: Social Movement Literature and
Legal Scholarship, 150 U. Pa. L. Rev. 1, 10 (2001) (commenting on fact that movements'
leaders were often not movements' primary beneficiaries).

See, e.g., Wing, supra note 2, at 728-31 (discussing post-9-11 legislation that
adversely impacts interests of noncitizens).

"prejudices and superstitions" fueled African American civil rights movement).

See generally, Darren Lenard Hutchinson, Identity Crisis: "Intersectionality,"
"Multidimensionality," and the Development of an Adequate Theory of Subordination, 6
its impact on subordination).

Deborah Rhode, The Professional Responsibilities of Law Professors, 51 J. Legal

See David J. Garrow, Bearing the Cross 17-48 (1986) (recounting King's
apprehensive involvement in Montgomery bus boycott and his educational background).

that marginalization forced Rustin into invisibility).

388 U.S. 1 (1967) (holding Virginia's anti-miscegenation statute
unconstitutional).

539 U.S. 558 (2003) (holding Texas's criminal anti-sodomy statute
unconstitutional).

Sullivan, supra note 28, at 41 (remarking that Rustin's positive demeanor
persisted despite treatment he endured).

See, e.g., Elizabeth Gibson, Groups Propose Diversity Tribute; Carlisle School
Board Urged To Name Building After Black Teacher, Harrisburg Patriot, Apr. 3, 2002, at
A01, available at 2002 WL 2989363 (listing groups and individuals who advocated
decision to name school after Emma Thompson McGowan).

Justin Kaplan, Bartlett's Familiar Quotations 306 (16th ed. 1992) (quoting
Voltaire).

For example, the concept of "rotating centers" of focus ensures that each yearly
conference emphasizes different issues of subordination so that all members of LatCrit
LAST year, I became Associate Dean for Academic Affairs at my law school. As I learned, the Associate Dean position is a near impossible job requiring absolute support from the Dean and others in the administration simply to allow one to face the day to day challenges of the position. As a job, it hardly compares to my regular gig of teaching and writing--being a law professor. I agreed to assume the Associate Dean post because, despite the challenges, I thought I could learn some things about the running of a law school (which I did) and might also be able to help direct and improve the course of the law school (which I did not really, at least not in the ways I imagined). At bottom, as I found there was little I could do to help transform the school, the only reasons for staying in the position were status, pay and pure service. These are good reasons for many, but were not satisfying or adequate enough for me in the end. My stint as Associate Dean though has caused me to question and reflect on a great many things I do, including why I teach. Do I teach for pay and status? Do I teach because it is a calling? Do I teach because it is satisfying to see students learn, and do I think that I can help them learn better than most? Who am I as a teacher, and how do I fit into the world?

The three articles in this cluster challenge the consumerist, product-oriented notion of teaching in American society today. As such, they provide some answers to my dilemma. They suggest that I should follow core ideals of community, caring, teaching and learning. They suggest, especially Darder's article, that the consumerist path fulfills neither the self nor the community ultimately. They all have at their core a notion of teaching more effectively for the challenges of today's society by breaking down artificial classroom walls and barriers and urging a pedagogy of community engagement. Professor Antonia Darder's article, Schooling and the Empire of Capital: Unleashing the Contradictions, sets the tone for the article cluster by challenging capitalism's not-so-subtle hold on both the structures and goals of American education. Darder argues for a pedagogy focused on eliminating the challenges posed to primary education by poverty and its vestiges. In doing so, Darder makes a substantial challenge to critical race theory, claiming that its focus on race as one of the underlying causes of educational problems in this country can often obscure how race and poverty are inextricably linked. According to Darder, for example, the focus on race has led to improvements in the wealth status and prospects of racial minorities in the middle and upper classes, but has proved hollow for the sizable numbers of minorities in the lower class.

The other contributions to the cluster all independently suggest a community engagement pedagogy as a way of increasing access to justice by those in oppressed communities. Professor Fran Ansley and Librarian Cathy Cochran, in Going On-Line with Justice Pedagogy: Four Ways of Looking at a Website, have provided a living, breathing instance of the value of collaborative, experiential work for enhancing student learning and providing value to society on a grander scale. Ansley and Cochran document how learning takes place in Ansley's service learning offering at the University of
Tennessee Law School in which students work with community-based partners on various projects aimed at resolving community issues and problems. [FN6] Ansley and Cochran also demonstrate how the Web can be integrated as a tool for furthering the goals of the class, creating connections to other communities and as a means of disseminating scholarship of teaching and learning (SoTL). [FN7] Finally, Professor Nelson Soto, in Caring and Relationships: Developing a Pedagogy of Caring, [FN8] argues that a holistic concern for students beyond pure academic focus, but also social, psychological, and cultural concerns (including understanding the starting place of each student in these) is the key to effectively integrating newcomer (im)migrant students into a world of education and success in America. A caring pedagogy necessarily involves community engagement and a more expansive notion of education.

In addition to the benefits of justice and equality in integrating community and schooling, all of the authors suggest community engagement pedagogies hold the promise of better learning and deeper understanding for students. Professor Darder states the fundamental disharmony for poor children in our public schools between the Jeffersonian ideal of educating citizens for participation in a democratic society and the harsh reality of a system that falls far short of that ideal for them. [FN9] The disappointment created by this hypocrisy may well have a substantial impact on student confidence, empowerment and, therefore, learning. According to Darder, "[t]he dissonance that exists between [students'] lives and the culture of schooling is often ignored and dismissed." [FN10] Professor Ansley and her collaborator Librarian Cochran echo this in citing to recent research on cognition indicating that knowledge is constructed by learners, not transmitted by teachers. [FN11] Both Ansley and Cochran talk about reflection on experiences as being the grist for the mill of deeper meaning and understanding by students. The community, therefore, is critical as a canvass for effective learning. Professor Soto explains that one key to a pedagogy of caring is an acknowledgement first that a student's life outside the school is important to learning and persistence. [FN12] A pedagogy of caring is not just directed at a student's academic growth, but at their social and emotional development as well. [FN13]

While Darder and Soto discuss the benefits to student learning and empowerment by connecting community and school in a way that facilitates integration and understanding between the two, Ansley and Cochran advocate enhanced student learning in law school through community projects that pose substantial problems in meaningful ways that both help students to better understand community issues and to apply legal rules and methods to particularized problems. This notion of understanding education as best serving society when it is connected with community is not new. Parker Palmer, for example, in his book The Courage to Teach, emphasizes a teacher ethic of connection and community that leads to better mutual understanding and learning by teachers and students. [FN14] Palmer argues that the traditional hierarchical model of the teacher as an authoritarian figure placed between students and that which is the object of learning must melt away for true understanding by students. [FN15] It is certainly no leap to suggest that students are more engaged, responsible self-learners when they are effectively plugged into their communities in powerful and meaningful ways. Duncan Kennedy makes the case in the context of law learning. In Legal Education as Hierarchy, [FN16] Kennedy shows how legal hierarchy is served by mystifying the process of legal reasoning. Partly, he maintains, this is done by eliminating any connections between law school and the real world, emphasizing the secrecy of knowledge and staying away from skills training that would empower students themselves. [FN17] Kennedy emphasizes that if law schools engaged in more skills training, requiring more connection to society and community, students would be more empowered, would know more about how to be a lawyer and would not be deluded into thinking their only path after law school is a continuing apprenticeship with a large law firm. [FN18] All of the authors/teachers and their articles in this cluster show specifically how Duncan Kennedy's suggestions might be undertaken in legal academia today. And, Darder's article reemphasizes the need for
paying attention to class and oppression and continuing to unveil the capitalist structures at work in education. [FN19] Professor Jane Aiken makes similar arguments in maintaining that students have a great potential to learn about social justice while learning to be excellent attorneys in the context of a justice based clinical program. [FN20] Professor Margaret Montoya stresses the importance of community connection in law learning; however, she maintains that voicing differences and helping students to understand their own role in racism and class domination is critical to making a pedagogy of community engagement meaningful. [FN21] This would seem critical to any emerging LatCritical/ OutCritical or other emancipatory pedagogy. Montoya's writing supports the argument made by Professor Soto regarding the limitations imposed on students by teachers from privileged backgrounds who do not in some meaningful ways connect to the cultural communities of their most oppressed students. [FN22] Other LatCrit scholar/teachers have made the same or similar points about a praxis of community engagement in the context of legal education and law practice. [FN23]

Another common point of the cluster pieces is an emphasis on an ethical and moral impetus for connecting school and community for the betterment of society and student learning. Professor Darder invokes Paolo Freire in suggesting that a truly emancipatory pedagogy focuses on the oppressed, both as individual people and as community. [FN24] Ansley and *842 Cochran discuss their goals for pedagogy and the dissemination of their SoTL in the context of promoting colleges and law schools as centers for civic learning where knowledge and learning do not exist separately from concern about students' past, present and future lives and concerns about access to education and educational opportunity. [FN25] Finally, Professor Soto forwards a notion of culturally responsible pedagogy centered around an ethic of care that focuses not only on academic growth, but on social and emotional development as well. [FN26]

These authors and their contributions to this symposium strongly suggest an anti-atomistic, expansively focused view of the educational mission. But what do they suggest to us individually as professors in colleges, law schools and even high schools? The challenge of embodying and carrying out a progressive emancipatory LatCritical/OutCritical pedagogy is daunting. In the short term, it requires reaching out to community alone or with just a few others, it requires the commitment of extra substantive and psychic time, it requires the risk of failure without internal institutional support. Since this type of pedagogy does not typify (nor is it even grossly tolerated in) the current academy, the sacrifice comes surely without institutional reward. It is much easier, no, to be an Associate Dean for example. Effort is required, but it is also rewarded in the form of status, pay and teaching loads.

Professor Darder says, however, "[w]e need to surrender the penchant for chasing after new intellectual experiences for the mere sake of obtaining personal fulfillment, recognition, or reward." [FN27] Surely, she is right but it is not that simple. The ability to implement and nurture the service and community based learning efforts discussed by these authors/teachers is greatly enhanced from the position of Associate Dean. Darder herself suggests that "transformation can only take place when educators, scholars, and cultural workers, working in solidarity, take ownership of institutions." [FN28] I can only imagine she means full ownership not petit ownership, the kind that an Associate Dean might possess in some small way. The Associate Dean's ability to foment any transformation exists only within the grander economic enterprise; it does not exist in any real way, and certainly not in any moral or ethical way. [FN29] Tradeoffs and accommodations exist only within institutional rules and are precedent bound, at *843 least if the job is approached ethically and with integrity. That means only, however, that you bring a very small level of fairness and justice to what is ultimately only a constant repetition of the economic oppression that characterizes many educational, and, I suspect, especially professional (law/business/medicine), institutions of higher learning.
These articles by Professors Antonia Darder, Fran Ansley and Cathy Cochran and Nelson Soto all give glimpses into what an emancipatory, OutCritical and LatCritical pedagogy might look like. As examples of what might be achieved within the academic status quo, they are squarely engaged in race critical work; that is, work that encompasses both a critique of current pedagogic practice but that also suggests a positivistic or prescriptive agenda as well. [FN30] All these authors demonstrate the promise of a pedagogy of community engagement, and that might well be the cornerstone of any OutCritical or LatCritical pedagogy. Professor Francisco Valdes, in his article Outsider Jurisprudence, Critical Pedagogy and Social Activism: Marking the Stirrings of Critical Legal Education, [FN31] begins to draw connections between pedagogy and practice in the context of reviewing various syllabi produced for classes on "Asians and the Law" taught in a variety of law schools. Valdes begins generally with the main purpose of any emancipatory pedagogy to "provide students with the tools necessary to de-colonize themselves, and then their social relations and spaces, across multiple axes of identity and difference." [FN32] The examples and arguments presented by Professors Darder, Ansley and Cochran and Soto all show glimpses of this. Darder makes the arguments outright, but the others all forward pedagogies that, through community connection, indeed provide students with these kinds of tools.

In his conclusion, however, Valdes synthesizes from the various syllabi five points which are intended to provide a contextualization and structure useful to developing a critical legal education. [FN33] These are: (1.) Connecting the Past to the Present, (2.) Connecting the Personal and the Structural, (3.) Connecting the Social and the Legal, (4.) Connecting the Particular and the General and (5.) Connecting Knowledge and Practice. It might be useful for those engaged in constructing an OutCritical or LatCritical pedagogy to think about how these particular contributions fit within Valdes' rubric. Professors Darder and Soto's contributions to the *844 symposium are not explicitly aimed at a law audience, and Darder's is more theoretical and general than the others, but certainly nothing they suggest is inconsistent with the markings of critical education put forth by Professor Valdes. Professor Soto's arguments for a pedagogy of caring seem to fall squarely within all five points while Darder's article hews most closely to the descriptions found in point 1 (connecting the past to present: Darder explicitly draws a comparison to the politics of globalization at work in the period from 1875 to 1914, for example [FN34]), point 2 (connecting personal and structural: Darder makes the point that specific personal experiences must be connected to the greater structural causes of those experiences, and calls for an increasing attention to the grounded experience of the physical versus the structural [FN35]) and point 3 (connecting the particular and the general: Darder explicitly discusses local issues related to schooling and connects those to the global context [FN36]). Professors Ansley and Cochran's contributions fall solidly into point 5: connecting knowledge and practice. They expressly discuss the connection between "education and action" in a pedagogy of community engagement. Ansley and Cochran further explore the effective dissemination of service learning experience as a way of connecting with other communities of learning through the Internet. All of these contributions serve strongly to help LatCrit reawaken one of its central tenets--praxis--in the context of forwarding emancipatory pedagogies.

On a final note, I feel it important to address Professor Darder's challenge to LatCrit and other Race Critical scholars about the impoverishment of class dialogue that comes with a focus on just race. [FN37] At times I have been extremely sympathetic to this kind of argument. For example, I felt at some point that all of the scholarly energy devoted in recent years to reparations had the effect of lessening the vigor with which defense of affirmative action was carried out.

Ultimately, however, it seems entirely counterproductive to blame a lack of one progressive dialogue on another possibly more emergent dialogue. There may be more
important, larger causes that stand in the way of a broad range of progressive critique. As Kennedy has noted, for example, rights discourse in law schools crowds out discourses focused on justice that would allow for more robust discussions of social classes, races or sexes. [FN38] Anita Tijerina Revilla has also made the same argument regarding emerging competition among progressive discourses. [FN39] As for me, my interest is oriented toward working together with a variety of groups in a common anti-subordination enterprise. That is the promise of LatCrit, and, at this point in time, I have severe doubts about the ability to do this through formal hierarchies, like Deanships and other administrative positions, existing within American law schools. To me an emancipatory pedagogy is one that is expansive, in the sense of including concern for students beyond the walls of a school or the boundaries of a school district, collaborative, in the sense of connecting to and working with people beyond our teaching peers or our faculty and whole, in the sense of engaging both mind and body--a traveling out to and communicating with people. A pedagogy of community engagement resonates with all of these ideas.

Footnotes:

[FNa1]. Professor of Law, University of Denver Sturm College of Law. I dedicate this introduction to the memory of Jerome McCristal Culp. Jerome was a friend, mentor and fellow LatCrit Board member. Jerome believed very strongly in the "critical" part of the movement and, invariably, presented his critique in the form of narrative. I believe Jerome understood the power of narrative to pose complex, nuanced questions at the heart of our society in meaningful and accessible ways. I think Jerome also understood narrative as the best way of posing honest, sincere and complete scholarly questions. Jerome's article Autobiography in Legal Scholarship and Teaching: Finding the Me in the Legal Academy, 77 Va. L. Rev. 539 (1991), continues to inspire me as I constantly seek to strive for my own betterment and the betterment of society. To learn more about Jerome Culp, please see the tributes to him at http://www.law.duke.edu/fac/culp.


[FN2]. See id. (arguing for mentioned pedagogy). Darder maintains that the U.S. is ostensibly a democratic republic that functions as an empire. See id. (arguing that conditions in education deny students freedom and autonomy). An emancipatory pedagogy must recognize that the politics of globalization are economic ones leading to the colonization of life and the commodification of "everything." See id. (discussing role of emancipatory pedagogy).

[FN3]. See id. (discussing focus on race in education). According to Darder, racism and the focus on racialization gets in the way of questioning the "phenomenon of racism and hence, the hegemonic forces at work in the construction of segregation." Id. at 848. At heart, according to Darder, the real villain in the story of failed public schooling is class: "well-meaning teachers use their authority and privilege to, wittingly or unwittingly, invalidate students when they are involved in constructing their own knowledge." Id. at 850.

[FN4]. See id. at 848-49 (discussing impact of focus on race in education).


[FN6]. See id. (discussing service offering at author's law school). At the time of their article, students were involved in three different campaigns aimed at spousal rape, Individuals with Disabilities Education Act ("IDEA") inclusion and Tennessee Immigrants
and Criminal Justice. See id. (discussing projects).

[FN7]. See id. (discussing advantages of Web).


[FN9]. See Darder, supra note 1, at 849 (differentiating between Jeffersonian ideal and present day education). Students from oppressed communities are "tested, labeled, sorted, and tracked." Id. However, there is little engagement in this process with who they actually are, how they learn and what potential may be realized in them.

[FN10]. Id. at 850.

[FN11]. See Ansley & Cochran, supra note 5 (citing How People Learn: Brain, Mind, Experience, and School (John Bransford et al. eds., National Academy Press 2000)).

[FN12]. See Soto, supra note 8, at 861-64 (discussing importance of out of class experience in education). "[C]are ethicists focus on conditions and relations that support moral ways of life rather than on the inculcation of virtues in individuals." Id. at 863. Caring includes an acceptance of students' cultural background and values. See id. (discussing pedagogy of caring). All of this suggests a much stronger engagement with community in order to deepen learning and understanding.

[FN13]. See id. at 865 (discussing importance of emotional and social growth).

[FN14]. See Parker Palmer, The Courage to Teach: Exploring the Inner Landscape of a Teacher's Life 11 (2001) ("Good teachers possess a capacity for connectedness. They are able to weave a complex web of connections among themselves, their subjects, and their students so that students can learn to weave a world for themselves. The methods used by these weavers vary widely: lectures, Socratic dialogues, laboratory experiments, collaborative problem solving, creative chaos. The connections made by good teachers are held not in their methods, but in their hearts--meaning heart in its ancient sense, as the place where intellect and emotion and spirit and will converge in the human self.").

[FN15]. See id. at 28-43 (discussing authoritarian nature of most teachers). Palmer cites to Jane Tompkins to illustrate his point: "Tompkins says that her obsession as a teacher had not been with helping students learn what they wanted and needed to know but rather with '(a) showing the students how smart I was; (b) showing them how knowledgeable I was; and (c) showing them how well prepared I was for class. I had been putting on a performance whose true goal was not to help the students learn but to act in such a way that they would have a good opinion of me." Id. at 28-29 (citing Jane Tompkins, Pedagogy of the Distressed, in College English 52 (1991)). Palmer says himself: "When I devote myself to something that does not flow from my identity, that is not integrated to my nature, I am most likely developing the world's hunger rather than helping to alleviate it." Id. at 30.


[FN17]. See id. at 42-45 (discussing problems of having no connection between law school and real world).

[FN18]. See id. at 49-50 (listing benefits of integrating law school education and real world work).

[FN19]. As Duncan Kennedy asserts, "[t]here are contracts, torts, property, criminal law,
and civil procedure. The rules in these courses are the ground rules of late-nineteenth-century laissez-faire capitalism. Teachers teach them as though they had an inner logic, as an exercise in legal reasoning with policy ... playing a relatively minor role." Id. at 44. And, he asserts, the focus on rights discourse in law school serves as a barrier to speaking of justice: "Rights are by their nature 'formal,' meaning that they secure to individuals legal protection for as well as from arbitrariness--to speak of rights is precisely not to speak of justice between social classes, races, or sexes." Id. at 46. But see generally Patricia J. Williams, The Alchemy of Race and Rights (1991) (suggesting rights discourse can be powerful for achieving transformational change).

[FN20]. See generally Jane Harris Aiken, Striving to Teach 'Justice, Fairness, and Morality,' 4 Clinical L. Rev. 1 (1997) (discussing benefits of clinical programs).


[FN22]. See Soto, supra note 8 (discussing problems of difference of social status of teachers and their pupils).


[FN24]. See Darder, supra note 1, at 853 (discussing Paulo Freire and his views). "Accordingly, any form of emancipatory pedagogy must function to revive a politics of collective self-determination in our teaching, research, and politics." Id. at 855. The Freirian notion of emancipatory pedagogy is that it is ethical in the sense that its goal is to allow people to excel at being human, and no one can do that in isolation. Id. at 853 (discussing Freirian notion). See generally Paolo Freire, Pedagogy of the Oppressed (Myra Bergman Ramos trans., Continuum 1970) (discussing modern education and how it reacts to oppression).

[FN25]. See Ansley & Cochran, supra note 5 (discussing goals for pedagogy).

[FN26]. See Soto, supra note 8 (discussing pedagogy of caring). In the Freirian tradition, Professor Soto discusses the critical nature of a care ethics for our most oppressed, including specifically (im)migrant newcomers. See id. (discussing pedagogy of caring in context of immigrants).

[FN27]. Darder, supra note 1, at 855.

[FN28]. Id.

[FN29]. A person's very soul can be sacrificed to waiting silently for some sort of empowerment that will lead to institutional transformation. See, e.g., Pamela J. Smith, The Tyrannies of Silence of the Untenured Professors of Color, 33 U.C. Davis L. Rev. 1105 (2000) (discussing untenured professors' fear of speaking out).

[FN30]. I would simply note here that Darder's work is different and less prescriptive than the others, but nonetheless even Darder grapples with what an emancipatory pedagogy might look like towards the end of the article. Her point might also be that without first understanding pedagogical structures that oppress peoples, it may be
impossible to forge anything with promise for emancipation.


[FN32]. Id. at 86.

[FN33]. See id. at 94-96 (discussing methods of developing critical legal education).

[FN34]. See Darder, supra note 1, at 851 (comparing politics of globalization today with that of 1875 to 1914).

[FN35]. See id. at 852-53 (discussing importance of personal experiences in global world).

[FN36]. See id. at 847-53 (discussing education).

[FN37]. See id. at 847-49 (discussing challenge to race critical scholars).

[FN38]. See Kennedy, supra note 16, at 46 (criticizing rights discourse in law school).

[FN39]. See generally Revilla, supra note 23 (criticizing rights discourse in law school).
CONTEMPORARY notions of democratic schooling are historically linked to the civil rights struggles. At that time, a small cadre of African American and Latino political activists passionately believed that the civil rights movement should be linked to anti-imperialist struggles around the globe--that is, struggles to challenge capitalism through embracing a politics of class struggle and anti-racism. Instead, a rights-centered politics prevailed as the common orthodoxy of the period. The strategy to retain a civil-rights approach to organizing with a predominant focus on legal intervention was to represent a significant political juncture--a political juncture that may have, unwittingly, helped to open the door for the unfettered advancement of globalization, in the final decades of the twentieth century.

During the 1970s and the 1980s, movement efforts in schools were driven by repeated demands for multicultural curriculum, bilingual education, ethnic studies programs and affirmative action efforts to diversify students and faculty. Social movements principally anchored in identity politics aggressively pushed against the boundaries of traditional institutional policies and practices. Although such efforts most certainly served to initiate and marshal a new population of "minority" professionals and elites into a variety of fields and professions, it did little to change the structural conditions that reproduce the oppressive material conditions prevalent in poor, working class and racialized communities. As such, the civil rights ideal centered on representative participation based on "race," despite its gains, failed to challenge the fundamental contradictions at work within schools and society that functioned to perpetuate relations of power linked to class formations.

For example, a study conducted by Gary Orfield and the Harvard Civil Rights Project found that although progress toward school desegregation *848 peaked in the late 1980s, it is now on the decline. [FN1] A third of a century after Brown v. Board of Education, [FN2] the Supreme Court's resegregation decisions began to reverse the trend, as "segregation began to intensify again." [FN3] Thus, our continued concern over segregation in this country still holds significance, particularly with respect to questions of academic achievement and the failure of U.S. schools to educate Latino, African American and other racialized and working class student populations. Ironically, as Latinos become the largest U.S. minority population, Latino students find themselves more segregated today than their African American counter-parts.

There has always been an inseparable link between racism and economic inequality. As such, contemporary theories of segregation as an outcome of racialized and class reproduction must be firmly tied to the politics of class struggle. Racism, as an inherent political strategy of exclusion, domination, marginalization, violence and exploitation cannot be separated from its economic imperative. For instance, it should be no surprise that ninety percent of segregated African American and Latino neighborhood schools are located in areas of concentrated, abject poverty. Or, that students who attend segregated
minority schools are eleven times more likely to live in areas of concentrated poverty than do students (of all ethnicities) who attend desegregated schools.

So, although much good can be attributed to the impact of Brown v. Board of Education, there remain many, seldom discussed, issues that beg reexamination, particularly given the lessons of the last fifty years. In the past, most solutions were anchored in the "race relations" paradigm of the civil rights era. But there are researchers who would argue that the race-relations paradigm actually obscures the phenomenon of racism and hence, the hegemonic forces at work in the construction of segregation. [FN4] Moreover, it is argued that the process of racialization, with its reified commonsense notions of "race," fails to challenge fundamental structural inequalities inherent in the modes of production of capitalist societies.

As a consequence, U.S. society has become entrenched in the language of "race" as destiny, with an implicit dictum that membership in *849 particular "races" enacts social processes rather than ideology and material conditions of survival. Accordingly, this approach has effectively fueled identity politics, through which political discourses of every kind are now structured by attaching deterministic meaning to social constructs of physical and cultural characteristics. The outcome is the racialization of all social and political relations, infusing every conflict of interest with an ethnic dimension, so that "race" becomes a way of explaining all group conflicts. [FN5] Meanwhile, the malignant ideology of racialized class formations, which sustains conditions of segregation and other exclusionary practices in the first place, remains solidly entrenched.

A case in point is the busing solution of the 1970s, one of the predominant solutions utilized for the remedy of school segregation and clearly anchored in the "race relations" paradigm. To the apparent chagrin of many African American and Latino communities, this solution actually functioned to destroy the strength, cohesion and coherence of community life in many regions. Some would argue that it was, in fact, the already more economically privileged minorities who made the greatest gains. This can be linked to the fact that almost forty years later, the class composition of U.S. society based on control of wealth has failed to improve, and, in fact, has become more polarized between the rich and the poor across all population groups.

Members of the ruling class in this country, of all ethnicities, are wealthier today than they were in the 1960s. Hence, solutions grounded in "race relations" did little to fundamentally alter the practices of racialization and the hierarchical class structure of inequality upon which U.S. institutions have always functioned. Thus, the expansion of an elite class of African American and Latinos ultimately did little to alter the fundamental economic and racialized policies and practices of the capitalist state.

While public education today continues to invoke the Jeffersonian ideal of educating citizens for participation in a democratic society, poor, working class and racialized student populations often experience a multitude of difficulties in their relationships with schools that result in a negative impact on their academic achievement. As teachers continue to buy into the belief that schooling is a neutral and benevolent enterprise, students from oppressed communities are tested, labeled, sorted and tracked, while notions of justice and equality are touted within U.S. schools, particularly within poor racialized communities. Yet such rhetoric has done little to shift the basic fact that public schooling continues to function in the interest of capitalist accumulation and class formations rather than cultural, political and economic democracy.

There is no question that both the construction of knowledge and the control of knowledge are at the heart of this phenomenon. Despite democratic*850 claims, conditions within the enterprise of education are fundamentally authoritarian and deny most students their freedom and autonomy to be themselves without undue fear of
retaliation and to express the power of their knowledge in ways that build on their personal histories of struggle and survival. Moreover, the difficulties faced by students are seldom engaged seriously and the dissonance that exists between their lives and the culture of schooling is often ignored and dismissed. Student complaints regarding the curriculum or classroom life are seldom regarded as worthy of deeper analysis and are more likely to be seen as simply individual resistance by a student who lacks rigor.

Consequently, even well-crafted programs which claim to be committed to social justice tend to sabotage student autonomy and compel them to adopt particular constructions of knowledge which ring false within their daily lived experience. [FN6] As such, well-meaning teachers use their authority and privilege to, wittingly or unwittingly, invalidate students when they are involved in constructing their own knowledge. Unfortunately, educators who are able to recognize injustices within instructional settings are less willing to accept that they have a responsibility to make needed changes in their own practice.

Given all this, I want to consider two questions: What should be the role of an emancipatory pedagogy? And, how do we, as cultural workers committed to social justice, human rights and economic democracy, articulate our pedagogy and politics during these difficult times? There is no question that critical pedagogy must be fundamentally linked to the construction of a new culture. This new culture must be built within the existing culture of a capitalist state where, more and more, an extremely conservative notion of social justice is being embraced; that is, a view in which as long as everyone is treated the same, then justice prevails--irrespective of context or conditions. This is a perspective that categorically ignores the historical and contemporary disparities that exist in material social conditions across populations, as well as the ideological, and structural inequalities that shape and reproduce all forms of human oppression.

Moreover, with the dismantling of the welfare state, the liberal idea that the State should provide for the needy has also been supplanted by a neo-liberal, conservative notion of social justice, which permeates the nation's health, education and welfare agencies. With unbridled fervor and shameful disregard of the masses, neo-conservatives and liberals alike have busily channeled massive expenditures toward the military and prison industrial complex, while poverty worsens across the nation. As an aside, it is significant to note that a similar dynamic is at work in the international arena of globalization, where Keynesian-inspired policies have been displaced [851] by the neoconservative philanthropic policies of the International Monetary Fund (IMF) and the World Bank.

In the development of an emancipatory pedagogy, we must recognize how schooling functions within an untenable contradiction--to respond, on one hand to the needs of hierarchies associated with the capitalist workplace and the free market, and on the other hand, to create equality of access to rights and opportunities for the nation's citizens. This is the promise of an ostensibly democratic republic; a republic which, in fact, functions as an empire, given its impact on current global affairs, whether that be the war on terrorism, the occupation of Iraq, U.S. foreign economic policies in Latin America or the control of global markets.

Here, I want to suggest that the politics of globalization today are not too dissimilar to those at work from 1875 to 1914, a period characterized by historian Eric Hobsbawm as the "age of empire"--a significant moment in the consolidation of the capitalist state. [FN7] Unfortunately, then as today, many scholars rejected economic explanations, concentrating instead on psychological, ideological, cultural and political explanations divorced from political economy, in order to avoid the minefield of domestic politics. This served to counteract explanations of working class struggle and appeals to class consciousness. Of course, the disadvantage here is that it fails to explain the inseparable conjunction of the economic and political, national and international and public and personal spheres.
Then, as today, the empire of capital sought global conquest, through a singular political economy. While in an earlier time, conquest was focused on raw materials and natural resources for the expansion of industrial capabilities, global conquest today is tied to the control of labor, natural resources and the marketplace. This occurs with little regard for the creation of deep economic dependency, ecological devastation, the dismantling of sovereign nations and, at times, even the genocide of human populations.

Critical educators and community activist engaged in a liberatory pedagogy, must also come to terms with what Henri Lefebvre calls the colonization of everyday life--where every aspect of life, including birth, death, marriage, family, work, leisure, parenthood, spirituality and so on, is disconnected and compartmentalized and placed at the mercy of economic imperatives. The consequence is a deep sense of personal and collective dissatisfaction, which results because of the inability of the marketplace to meet or satisfy authentic human needs--human needs that can only be met through conditions that break the alienation and isolation so prevalent in educational institutions today. Thus, we need to establish a new decolonizing culture within schools and communities that cultivates human connection, intimacy, trust and honesty.

Within a critical perspective, the central role of schools and the construction of knowledge should be in the interest of self-determination and collective participation in democratic life. But, as educators and activist, we must contend with what Richard Brosio identifies as the two major forms of curricula that sustain the Capitalist State. That is, the marketing of hegemonic ideology through 1) television and popular culture and 2) the enterprise of public schooling. Both are informed by a hidden curriculum that, unfortunately, functions to destroy historical memory and imposes an official (often apolitical and ahistorical) public transcript of events that is in concert with the imperatives of capitalism. As such, another role of critical pedagogy must be not only the unveiling of the hidden curriculum in schools and society, but the reinstitution of a multiplicity of historical memories tied to the everyday lives of the disenfranchised.

In our work, the realm of schooling represents an essential political project in the interest of both engaging questions related to racism, sexism, class inequality, compulsory heterosexism, homophobia and disabilitism and challenging the politics of empire. This requires noting in our work the exclusionary consequences of heightened productivity and economic structural changes on working-class populations in this country and worldwide, especially in terms of constructing economic dependencies, reserve armies and incarcerated subjects.

To accomplish this in our educational efforts, we must cultivate a critical understanding of how the politics of globalization have functioned to perpetuate increasing material inequality and human suffering, in the name of economic development, democracy and social progress. The consequence of this imposed modernity--the reordering of society in ways that increase the efficiency of capitalist production and the accumulation of wealth, while replacing independence with new forms of exploitation--has been a new wave of massive immigration to the center of the empire. As a consequence, a revival of alarmist rhetoric and vicious attacks against immigrants has ensued, particularly against immigrants from Mexico and other parts of Latin America. In turn, racialized conjectures of Latino immigrants have gradually seeped into public policy debates related to schooling, language, immigrant and worker rights as well as the heightened surveillance and control of immigrant populations in the U.S.

This calls to mind the recent article by Samuel P. Huntington where he argues that:

* The persistent inflow of Hispanic immigrants threatens to divide United States into two people, two cultures, and two languages. Unlike past immigrant

* The persistent inflow of Hispanic immigrants threatens to divide United States into two people, two cultures, and two languages. Unlike past immigrant
groups, Mexican and other Latinos have not assimilated into mainstream U.S. culture, forming instead their own political and linguistic enclaves . . . and rejecting the Anglo-Protestant values that built the American dream. The United States ignores this challenge at its peril. [FN12]

Undoubtedly, the reactionary scholarship and politics generated by changing demographics constitutes an important arena of interrogation for the future of both Latino politics and epistemology. As Latino populations continue to expand, we are conveniently poised to become the scapegoats for the backlash of the increasing economic restructuring resulting from neo-liberal economic policies in this country and abroad. Disconcerting as this may be, this phenomenon also provides Latino educators, scholars and community activists a ripe opportunity to rethink our notions of politics and pedagogy, in order to reconstitute our efforts through greater ethical and moral solidarity, within and across all communities of struggle.

There is no question, as Paulo Freire repeatedly argued, ethics must occupy an increasingly significant role in our pedagogy and scholarship. [FN13] As critical educators and community activists committed to democratic principles of everyday life, ethics must be understood as a political question--that in the final analysis constitutes a moral question. [FN14] For without morality, as Terry Eagleton reminds us, politics becomes an instrument of oppression. [FN15] Here, we must not mistake morality for moralism. Instead, being moral means exploring deeply the texture and quality of human behavior, ideas and practices, which cannot be done by abstracting men and women from our social surrounding, from our culture or from our histories of survival. [FN16] This requires "the interwovenness of the moral and political, of power and the personal . . . [for] ethics is about excelling at being human, and nobody can do this in isolation." [FN17]

Along the same vein, the pernicious legacy of racism--the multiplicity of ideologies, policies and practices that result in the racialization of populations--must be understood in the context of everyday struggles and the conditioning of student identities. Here, identities are often well conditioned by a capitalist-inspired curriculum, fueled by fabricated consumer sensibilities of gendered, racialized, homophobic and patriotic notions of "the good life." Moreover, it is this core ideological process that sustains the ravages of globalization and that must be challenged and dismantled, if poverty and human suffering are to be eradicated.

In light of this, critical educators and community activists must come to terms with the fact that injustice, as Sam Gindin argues, "is not an unfortunate aberration under capitalism, but an inescapable outcome and an essential condition of its successful economic functioning. Capitalism is--and this is surely as clear today as it ever was--a social system based on class and competition." [FN18] Capitalism functions as a globalized system, which requires as its prerequisite, the deep impoverishment and exclusion of three-quarters of the world's population.

Given this reality, it is unfortunate that the theories and practices adopted by many educators and scholars in this country function conveniently to deaden and annul opposition to the capitalist order, while existing social controls are conserved, even in the wake of increasing impoverishment and incarceration. Meanwhile, the marketplace continues to move people away from few, modest needs to the creation of many false needs, through the use of advertising and the belief that consumption equals happiness. [FN19] Such an ideology results in the deceptive belief that money is everything, capital rules and that all aspects of life are open for the making of profit.

Additionally, capitalism disembodies and alienates our daily existence. As our consciousness becomes more and more abstracted, we become more and more detached from our bodies. For this reason, it is absolutely imperative that critical educators and
scholars acknowledge that the origin of emancipatory possibility and human solidarity resides in our bodies. For it is "the moral, fragile, suffering, ecstatic, needy, dependent, desirous, compassionate, body which furnishes the basis for all moral thought." [FN20] It is, in fact, moral thought that places the body back into the political discourse.

Eagleton also argues that it is the material body that we share most significantly with the rest of our species. [FN21] And, although we might say that our needs, desires and suffering are culturally determined, "our material bodies are such that they are, in principle, completely capable of feeling compassion" [FN22] for all others. And it is precisely upon this capacity for shared subjectivity and knowledge that moral values are founded, that emancipatory knowledge is constructed and that human solidarity is established.

Accordingly, any form of emancipatory pedagogy must function to revive a politics of collective self-determination in our teaching, research and politics. But, to do this requires that we acknowledge that self-determination requires available free energy that is not committed to paid labor, household problems and our enmeshment with non-fulfilling personal relationships. Inherent in this function is the need for a personal community of colleagues and comrades with whom we labor and struggle in our efforts to establish coherence between our words and our deeds. For, "what we say must be rooted in what we actually do; otherwise it will lack all force." [FN23]

This is a particularly salient issue as we work together to develop our teaching, scholarship and activism, in an effort to challenge the politics of empire with its legacy of oppressions and to construct a common public dialogue across our differences. This must encompass a sphere or network of relationships that is not anchored in repressive interpretations of reality or the unrelenting drive for acquisition and accumulation. There is a need to surrender the penchant for chasing after new intellectual experiences for the mere sake of obtaining personal fulfillment, recognition or reward. Instead, we must link, rigorously and with perseverance, our labor within schools, universities and communities to actual conditions and events, with the clear purpose and intent of transforming these conditions collectively in very concrete and meaningful ways.

If we believe that a new world is possible, then we must begin by constructing that new world within the spheres in which we currently live, work and teach. In so doing, we must not forget that even when we work together in small groups or communities, we are always in danger of the oppression that resides within and enacts itself in undemocratic ways. As such, we must not forget that any context of civil society can also function to veil the reproduction of inequality in the larger body politic of the society in which we reside.

In fact, at times by disaggregating society into fragments (particularly among those who are working to resist the hegemonic relations of the larger body politic), structural inequalities are conserved, as emancipatory efforts are severely curtailed and weakened. This is to say that our collective work cannot stop at the boundaries of Latino communities. Instead, our work must conscientiously engage with the liberatory vision and work of the many excluded Others, to ultimately intervene and alter the very structure of the organizations and institutions, which so strongly impact our everyday lives as educators and cultural workers.

As we contend today with the ravages of globalization and its destructive impact on three-quarters of the world’s population, we must remain cognizant that the transformation of schools and society can only take place when educators, scholars and cultural workers, working in solidarity, take ownership of institutions. And, more importantly, struggle to radically change the political and economic structures of power that perpetuate violence and war in our neighborhoods, our nation and the world.
By redefining politics as pure expediency, neo-liberal conservatives hide from ethical questions with slogans of patriotism, the fright of terrorism and the power of capital. We are living in what Eagleton calls "the post-ethical epoch, in which world powers no longer bother to dress-up their naked self-interest in speciously altruistic language, but are insolently candid about it instead." [FN24] As a consequence, we are facing a dangerously aggressive and violent global condition. Our government is in the hands of extremists and fundamentalists. On the world's stage, we are seeing that the more predatory and corrupt capitalism becomes, the more urgently the U.S. empire spins a web of distortions in its defense. Nowhere is this more evident than in the rhetoric used to justify the war in Iraq.

Our struggles against racism in schools and communities must be linked to an international, anti-capitalist struggle. As citizens of the world, we must oppose all national and international actions that defile our revolutionary dreams and that make the world an unsafe and frightening place for all the world’s children. Our courage must show itself in our teaching and our scholarship and in our willingness to love one another, despite our differences and disagreements.

Love, here, means to comprehend that the moral and the material are inextricably linked. And as such, any critical pedagogy must recognize love as an essential ingredient of a just society. Eagleton again sheds light on this concept by defining love as a political principle through which we struggle to create mutually life-enhancing opportunities for all people. [FN25] It is grounded in the mutuality and interdependence of our human existence--that which we share, as much as that which we do not. Such a love is then nurtured by the act of relationship itself. Love finds in such relationships the freedom to be at one’s best without undue fear. Such an emancipatory love allows us to realize our nature in a way that allows others to do so as well. Inherent in such a love is the understanding that we are not at liberty to be violent, authoritarian or self-seeking.

There are those who would have us believe that the world has changed and that these are new geopolitical conditions, very different than those of another time. But the truth is that little has changed with respect to the have and the have-nots. Once more the world’s people are at the mercy of an empire and capital rules. U.S. economic interests continue to dictate who lives, who eats and who dies. These are the same capitalist interests that colonized the world, enslaved populations and have been, directly or indirectly, responsible for the genocide of millions in Northeast Asia, Africa, Latin America and the Middle East. A case in point, the genocide in Rwanda was permitted because the U.S. had no particular economic interest in the region that would motivate its intervention. This scenario is, once again, being repeated in Darfur.

If we, as citizens of the empire do not use every opportunity to voice our dissent, we shamefully leave the great task of dissent to our brothers and sisters around the world who daily suffer greater conditions of social, political and economic impoverishment than we will ever know. If we do not stand up, who will? For how long will our teaching and politics fail to address the relevant and concrete issues that impact people's daily life? How many more of our children will have to be doomed to meaningless education? How many more of our youth will have to be incarcerated? How many more people will have to suffer the ravages of war and poverty? How much suffering must we witness before we finally remove the blinders of complacency and step into the courage and humility of a truly revolutionary love--a love with the power to awaken us fully to a new meaning of shared kinship, self-determination and social justice.

Footnotes:
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Gary Orfield, Schools More Separate: Consequences of a Decade of Resegregation 2 (July 2001), available at http://www.civilrightsproject.harvard.edu/research/deseg/Schools_More_Separate.pdf ("[N]ew statistics from the 1998-99 school year show that segregation continued to intensify throughout the 1990s, ... [f]rom 1988 to 1998, most of the progress of the previous two decades in increasing integration ... was lost.").

347 U.S. 483 (1954) (overruling "separate but equal" doctrine by holding racial segregation violates Equal Protection Clause).

Antonia Darder & Rodolfo Torres, After Race: Racism after Multiculturalism 2 (2004) ("We argue that we must disconnect from 'race' as it has been constructed in the past, and contend fully with the impact of 'race' as ideology on the lives of all people ...."); Robert Miles, Racism after 'Race Relations' 1-23 (1993) (describing problems of "racism paradigm" after "race relations" paradigm).


See Russell Butson, Teaching as a Practice of Social Injustice: Perspective from a Teacher, Radical Pedagogy, available at http://radicalpedagogy.icaap.org/content/issue5_1/10_butson.html (last visited Feb. 18, 2005).

Eric Hobsbawm, The Age of Empire 1-12 (1987) (calling Age of Empire "the moment in history when ... society and civilization created by and for the western liberal bourgeoisie represented not the permanent form of the modern industrial world, but only one phase of its early development").


importance of ethics in education); Paulo Freire, Teachers as Cultural Workers: Letters to Those Who Dare to Teach (1998).

[FN14]. Paulo Freire, Pedagogy of the City, supra note 13, at 1-141 (arguing education is political); Paulo Freire, Pedagogy of Hope, supra note 13 (describing education as political process); Paulo Freire, Teachers as Cultural Workers, supra note 13.


[FN16]. See id.

[FN17]. See id. at 142-44.


[FN19]. See Brosio, supra note 9.

[FN20]. Terry Eagleton, supra note 15, at 155.

[FN21]. Id.

[FN22]. Id. at 156.

[FN23]. Id. at 198.

[FN24]. Id. at 148.

[FN25]. See id.
TACITLY, many educators neglect the social foundations of newcomer students within the confines of the school community. [FN1] There is a plausible assumption among educators that newcomer students have cultural values and foundations that are inadaptable in the classroom. Willingness to adapt pedagogy to students' cultural background is the premise of "funds of knowledge," which "refers to those historically developed and accumulated strategies . . . or bodies of knowledge that are essential to a household's functioning and well being." [FN2] Commentators further conclude that teachers can implement teaching practices that are developed from the households of their students to transmit new knowledge to (im)migrant students. [FN3] Invoking funds of knowledge within the curriculum and overall teaching practices can establish a "caring" community. As students perceive the school community as a caring institution--through the invoking of their (newcomer) home culture values--the plausible outcomes are higher levels of student engagement and academic success, which lead to student persistence.

Formal education has historically obstructed and continues to obstruct language and ethnic minority students from academic success and/or engagement within the school community. [FN4] In Gibson's ethnography *860 of Punjabi Indians' school experiences in the United States, she concluded that although Punjabi Indian boys fare well academically, they (both Punjabi boys and girls) were subjected to a hostile environment in schools. [FN5] For example, Punjabi students were ridiculed and physically abused for their dietary habits and speaking a different language. [FN6] The hostile environment demoted Punjabi students to positions of inferiority. Gibson concluded that "in one way or another Punjabi students are told that India and Indian culture are inferior to Western and American ways." [FN7]

Other contemporary scholarly works highlight the struggles and negotiations that occur for (im)migrant students. [FN8] Failing to recognize and understand the emotional impact of (im)migrating from a foreign country to the Unites States has a ripple effect on the educational adjustments of (im)migrant students. Gonzalez-Ramos and Sanchez-Nester posit that the schools' failure to comprehend the emotional experience associated with (im)migration and to assist (im)migrant students in negotiating the terrain of a U.S.-based educational system serves as a catalyst for the dismissal of (im)migrant educational performance. "[I]f schools failed to address immigrant children's traumas and emotional needs, they were contributing in some ways to the children's learning problem." [FN9]

As immigration peaks to higher records, [FN10] educational institutions must react to demographic shifts and respond appropriately to the newcomer population. These changes require educators to adopt new strategies *861 and styles to handle a more diverse student body. Demographic shifts among the U.S. population serve as a catalyst
for educators to develop teaching pedagogies and practices for this newcomer population.

The focus of this essay is to synthesize the caring literature across various philosophical and social sciences, including, but not limited to, social/cognitive psychology, educational anthropology, culture responsive pedagogy and feminist epistemology. The end goal of this piece is to advocate for the need to invoke caring strategies, which may liberate students, especially (im)migrant students, from school-wide policies and teaching practices that maintain a cycle of educational poverty.

II. Definition of Caring

The discourse on caring is multifaceted, which leads to a variety of interpretations and beliefs. A universal definition of caring will not be purported in this essay because of the inability to accurately represent the voices of all groups of people. Thompson warns that "if theories of care are not to be essentialist, they cannot be modeled on one social group and then applied to (or modified for) others." [FN11]

Caring theory is primarily constructed within feminist epistemology, which tacitly places this theoretical framework outside of perceived "mainstream" research. [FN12] Carol Gilligan, a pioneer of caring, critiqued Kohlberg's theory of moral development for failing to promote both males' views of individual rights and rules and women's views of caring and relationships on equal levels. [FN13] Gilligan purports that:

Some people base ethical decisions on principles of justice, equality, impartiality, and rights. This is the justice perspective. But others base their decisions on a care perspective, which the need to preserve relationships and minimize hurt takes precedence over considerations of justice and rights. The care perspective places special significance on attachment and compassion. . . . [FN14]

The care theory recognizes the relationship between the care giver and receiver, by which Noddings concludes that the caregiver and receiver enter into a mutually satisfying relationship. [FN15] Embedded in the care theory is an inherent need to do what is "right" for the individual by using an ethic of care that "employ[s] reasoning to decide what to do and how best to do it." [FN16] The goal is to "strive for competence because we want to do our best for those we care for." [FN17] Implementing caring practices within institutions, such as schools, will promote student engagement. [FN18] According to Gay, students who are engaged in school develop an affinity to learning, maintain emotional stability and succeed in their academic work. [FN19]

The care theory, in its purest form, assumes that the actors are willing to develop relationships with each other and that care will emerge from those relationships. Care may fail to emerge, however, as Noddings summarizes:

A relation may fail to be one of caring because the carer fails to be attentive or, having attended, rejects the "I must" and refuses to respond. Or, it may fail because the cared-for is unable or unwilling to respond; he or she does not receive the efforts of the carer, and therefore caring is not completed. Or finally, both carer and cared-for may try to respond appropriately, but some condition prevents completion; perhaps there has been too little time for an adequate relation to develop and the carer aims rather wildly at what he or she thinks the cared-for needs. A relational interpretation of caring pushes us to look not only at moral agents but also at the recipients of their acts and the conditions under which the parties interact. [FN20]
The literature on caring portrays unification among teachers and students, where teachers support and accept students as viable members of the classroom community. Hult's perspective of caring involves teachers recognizing their students as members of the human race, individuals and role-occupants. [FN21] To develop an understanding of student-teacher relationships requires a theoretical framework that upholds the implicit value of unity among educators and students. Caring is a deliberate and action-oriented event that occurs between actors who willingly promote and develop this phenomenon. [FN22]

Scholarship in feminist caring reveals an incorporation of intentional acting toward one another. As Noddings states, "[c]are ethicists depend more heavily on establishing the conditions and relations that support moral ways of life than on the inculcation of virtues in individuals." [FN23] Korth also posits that caring is an action-based phenomenon, requiring critical awareness and understanding. [FN24] Under that theory, "[i]nequalities became visible through analyses of care-in-action because inequalities and distortions disrupted the possibility of keeping dignity, authenticity, connection, and collectivity in tact." [FN25] Because immigrant students can experience emotional trauma when they first immigrate to the United States, teachers can lessen the impact of the psychological stress associated with relocation by developing caring relationships with students, rather than just being information-providers in the classroom. [FN26]

*864 In Subtractive Schooling: U.S.-Mexican Youth and the Politics of Caring, Valenzuela contrasts caring with school climates and historical practices. [FN27] In Valenzuela's ethnography with Latina/o students, she defines two forms of caring: aesthetic and authentic. Aesthetic caring solely focuses on the instructional relationship between the teacher and students. Drawing upon the work of Fine, Valenzuela concludes that "teachers are committed to an institutional 'fetish' that views academics as the exclusive domain of the school." [FN28]

On the contrary, authentic caring fosters reciprocal relationships among teachers and students. [FN29] The domain of this caring is above the formal role of education but includes an acceptance of the students' cultural background and values encompassed in the relationship. [FN30] Valenzuela infers that "[r]elations with school personnel, especially with teachers, play a decisive role in determining the extent to which youth find the school to be a welcoming or an alienating place." [FN31] Valenzuela further posits that this form of caring promotes and validates students' cultural values and beliefs. [FN32] This is especially important for language and ethnic minority students, such as (im)migrant children. [FN33]

III. Culturally Responsive Pedagogy

The feminist development of caring is at times criticized for failing to recognize and incorporate people of color in its ideology. Thompson asserts that caring is a framework developed through a colorblind position, which upholds racist sentiments: "Politely pretending not to notice students' color makes no sense unless being of different colors is somehow shameful. Colorblindness, in other words, is parasitic upon racism: it is only in a racist society that pretending not to notice color could be construed as a particularly virtuous act." [FN34]

Research supports that as newcomer (im)migrants continue to enroll in United States schools, educators must draw upon multidimensional teaching pedagogies to embrace this growing population. [FN35] Acknowledging the limitations to caring from the feminist perspective, cultural responsive pedagogy accentuates that the pillars of caring encompass four major tenets: caring is concern for person and performance; caring is action-provoking; caring prompts effort and achievement; and caring includes
multidimensional responsiveness. [FN36] Gay promotes a caring ideology that includes the lived realities and experiences of students of color. [FN37] She states that caring is an act that "binds individuals to their society, to their communities, and to each other." [FN38] Within this context, Gay identifies "the 'community' [as] underachieving students of color and their teachers." [FN39]

The concept of caring is further elaborated as action-based, where "caring is concern for person and performance." [FN40] Ladson-Billings' work with successful African American teachers demonstrates that the teachers were concerned with both the academic growth and the social and emotional development of their students. [FN41] The research of Jones, Siddle Walker and Sowell revealed that ethnic minority students conceive that caring occurs when teachers and the school environment are identified as safe and where the students feel that the school is a home away from home. [FN42] While at the school, the students were nourished intellectually and emotionally, the teachers encouraged the students to perform to the best of their ability and the educators facilitated a setting of academic and emotional growth. In developing a caring environment, students were shown to be engaged with their teachers, highly participatory in their education and demonstrated high levels of academic scholarship and engagement.

Newcomer (im)migrant students require a teaching faculty that supports and acknowledges their potential abilities to achieve in society. Mercado's work reveals that teachers' opinions of students are reflected in their teaching practices. [FN43] Developing a culture of caring within the classroom and in the temperament of the teachers requires personal and institutional evaluations of current caring practices. [FN44] "Before a genuine ethos of caring can be developed and implemented on a large scale, educators must identify and understand current non-caring attitudes and behaviors, and how they can obstruct student achievement." [FN45] This inventory is especially vital to (im)migrant students because they are susceptible to many destructive forces such as emotional instability, yearning for family, language disconnection and discrimination.

IV. Caring and Teachers' Biographies

Academic literature posits that one in every five children enrolled in school is an (im)migrant. [FN46] The teaching workforce is comprised of primarily white, female, middle class, monolingual women. [FN47] Further, teachers prefer to educate students who represent their familiar cultural upbringing. [FN48] The question becomes to what extent is caring rooted in teachers' biographies and temperaments?

*867 Teachers' biographies and broader cultural ideologies can foster a disconnect with newcomer (im)migrant students. Nathenson-Mejia and Escamilla estimate that ninety percent of the teaching workforce is comprised of white, middle class women. [FN49] "Teachers who are born in the United States and grow up in some strata of the middle class may have little in common with students of the same ethnicity who are immigrants or who grow up in lower socioeconomic status situations . . . ." [FN50] Taylor and Nieto conclude that only ten percent of teachers have the ability or inherited background knowledge to understand constraints and barriers facing newcomer (im)migrant students and families. [FN51] This problem underscores the need to educate teachers on both (im)migrant and multicultural issues.

Changing demographics place the onus of educating the forty percent language minority population upon teachers who share different backgrounds, cultural values or social classes. The mismatch implicitly demonstrates that, regardless of the teacher's preference to teach monolingual English speaking students, teachers are charged with
educating students who are different from their personal backgrounds. Further, one author argues that educators lack the awareness and understanding of the educational experiences and previous learning systems of newly arrived (im)migrant students. [FN52]

Researchers have found that a non-diverse teacher population has led to detrimental consequences in the education of immigrant students. [FN53] Because most teachers are white, middle class women, their internalized cultural values and norms may hinder the acceptance of the newcomer's norms and values. Implicitly, the disconnect of respecting and appreciating the norms and values of a newcomer (im)migrant student can result in a lack of caring by the teacher within the learning environment. Another author concludes that teachers and school counselors are likely to treat students differently based on their perceptions of the students' academic abilities and school engagement. [FN54]

Trueba and Bartalome's work further describes how teachers' ideologies, beliefs and values are not divorced from their classroom teaching practices. [FN55] Hence, teachers' perceptions of newcomer students may affect the integration of students into the educational environment. For example:

[The] restrictive views by which some teachers view their students are usually a product of their own personal theories, internalized beliefs, and values that reflect their own formative and restricted life experiences and influences. However they do not recognize beliefs and attitudes as reflecting the dominant ideology but instead view them as "natural," "objective," and "common sensical"--in other words, the "norm". [FN56]

Failing to recognize and understand the emotional impact of migrating from a foreign country to the United States has a ripple effect on educational adjustments of (im)migrant students. By embracing students within the pedagogical focus of the classroom rather than relegating English language learners to a subordinate place in the teacher's concerns, the student will feel more included in the school. Unless students know that schools seek to include them in their educational missions, students often feel displaced. Schools that have been successful in creating welcoming climates for (im)migrants make a conscious effort to do so. Educators need to recognize the emotional needs of (im)migrant children. Doing so requires familiarity with each child's unique situation, especially because there is a great deal of diversity within the language minority communities.

Being informed of the historical, political and economic aspects of each student's country is important, as is acknowledging that family situations may vary considerably. Teachers bring into practice their own assumptions, ideologies and expectations of what are perceived as normal "best practices" to educate all children. Developing teaching practices for newcomers requires teachers to adapt to new pedagogies that can better influence the future success of ethnic and language minority students. By invoking strategies of caring and acceptance, "teachers hold the key to making the learning of young Mexican immigrant children a success." [FN57]

The changing demographics of the student population are disproportionate to those within the teaching community. Villegas warns that, as the student population continues to become heterogeneous, the teaching faculty is becoming more homogenous. [FN58] Zimpher and Ashburn suggest that having diversity among teachers is essential to students of color and newcomer (im)migrants. [FN59]
Schools have not traditionally done a good job of educating students of color. This pattern must be reversed. It is a moral issue, but beyond that, it is also an issue of economic survival. Our society cannot afford to lose the many resources we are losing by not bringing in individuals of color. [FN60]

Teacher preparation programs are ineffective in preparing pre-service teachers for the diversity of the classroom and working with parents. Glazier states that "past experiences in preparing teachers to address the needs of the diverse population they teach have proven to be less than effective in either changing individuals' perspectives towards diversity and/or multicultural education or their stances towards how to teach." [FN61] Educators often overlook the unique needs of their (im)migrant students and families. Teacher preparation programs have a vital role in remedying this situation.

V. Caring Is Critical to Newcomers

Using the Theory of Assisted Performance, Tharp and Gallimore, with the help of Vygotsky, argue that one role of teachers is to help students *solve problems that could not be solved on their own.* [FN62] Drawing upon the work of cognitive psychologists such as Vygotsky and Cole, [FN63] practical conditions can be established in an educational climate to support (im)migrant students and other oppressed populations in further developing their educational growth without negating their cultural norms and values. Because social relationships between teachers and their students are essential for learning to occur, teachers have an obligation to increase their sociocultural consciousness, which will enable teachers to understand their students. [FN64] This foundation establishes an effective instructional pedagogy that acknowledges the learner's ability to function autonomously without assistance and incorporate new knowledge through teaching practices.

In connecting theory to practice, practitioners can establish conditions within the schools that are critically important to newcomer (im)migrant students. MacGillivray and Rueda assert that five strategies may be utilized by educators to promote learning and further maintain culture sensitivity in developing curriculum. [FN65] Their five recommended strategies are based on empirical research conducted with teachers of poor second language learners:

1) Be responsible for knowing about your students' lives;
2) Expect the most; avoid deficit models;
3) Recognizing knowledge of both language and culture;
4) Beware of default curriculum: content and structure;
5) Implement curriculum that is meaningful to the children. [FN66]

Although these guidelines suggest that teachers serve as brokers in facilitating learning, the entire responsibility for successful (im)migrant education should not fall completely on the shoulders of classroom teachers. A potential long-term solution for lessening the academic deficiencies among the (im)migrant community is to foster a union between families and teachers. Parent involvement studies conclude that an alliance among parents and teachers leads to successful educational opportunities for minority children. [FN67] Christenson and Conoley recommend collaboration among schools and families to promote learning, which has been shown to increase student achievement. [FN68]
VI. Social Capital

Newcomer (im)migrant students continue to enroll in American schools. Does their minority status impact the quality of support and educational nourishment they will receive by teachers? This marginalized community must be supported in environments that are academically engaging, emotionally nourishing and culturally accepting.

Derived from the work of Putnam, social capital refers to "connections among individuals--social networks and the norms of reciprocity and trustworthiness that arise from them." [FN69] This framework allows for the examination of structural access to institutional privileges and resources, and also for the consideration of the role of individual/cultural agency. [FN70] Institutional agents can include teachers and counselors, other school personnel, social service workers and school peers. Increasing the social capital of newcomers is an example of caring. Valenzuela's ethnographic investigation supports the idea that "relations with school personnel, especially with teachers, play a decisive role in determining the extent to which youth find the school to be a welcoming or an alienating place." [FN71]

The relationships between parents and teachers can work to develop social ties for (im)migrant children. Institutional agents serve as important liaisons in the social development, school success and status attainment of (im)migrant students. Their institutional support, which refers to key forms of social support that function to help students become effective participants within the school system, influences the socialization process of (im)migrant students. [FN72] "[S]upportive ties with institutional agents represent a necessary condition for engagement and advancement in the educational system and, ultimately, for success in the occupational structure." [FN73]

VII. Conclusion

The objective of this essay was to draw attention to the importance of establishing caring relationships among all students, but especially among newcomer (im)migrants. Although some scholars claim that the caring theory fails to recognize its own inherent racism, [FN74] it provides a theoretical foundation to critically engage newcomer students within learning institutions. This piece is intended to act as an advocate for caring strategies. [FN75] *873 These caring strategies may liberate students from school-wide policies and teaching practices that are designed to maintain a cycle of educational poverty.

Because of the challenges in maintaining Latina/o (im)migrants within the K-12 educational system, a call for action to lessen the academic achievement gap is vital to the future success of the Latina/o community. A potential long-term solution for lessening the academic deficiencies among the (im)migrant community is to foster relationships among students and teachers. One way to accomplish this is to move towards authentic caring relationships in which students and teachers are in a reciprocal and nurturing environment. [FN76] Noddings advocates that teachers who develop an understanding of the inter-subjective realm of their students should promote authentic caring relationships with their students. [FN77] Nieto accentuates how teachers perceive that students' abilities, skills, language and culture have the potential to affect the academic success of language minority students. [FN78]

In my future work, I wish to further develop the caring literature to include Latina/o high school experiences with teachers in a Midwestern community. A study of that nature aims to highlight understandings and manifestations of how teacher-Latina/o (im)migrant student relationships may influence school engagement in communities that have a great deal of immigrant impact. It challenges traditional configurations of educating
(im)migrants, while also broadening our understanding of how strategies and teacher practices influence the relationships among teacher and (im)migrant students.

Footnotes:

[FNa1]. Doctoral Candidate, Indiana University School of Education and Lecturer at Indiana University, Purdue University School Indianapolis, School of Education. I would like to acknowledge Dr. Gerardo Lopez (Indiana University), Dr. Barbara Korth (Indiana University) and Ana Elisa Baratta (Doctoral Candidate at Indiana University School of Education) for their guidance and encouragement with this scholarship.

[FN1]. See Sara Exposito & Alejandra Favela, Reflective Voices: Valuing Immigrant Students and Teaching with Ideological Clarity, 35-1 Urb. Rev. 73, 73-75 (2003) (arguing that schools and educators judge student and parent behavior based on their own middle-class values).

[FN2]. See Norma Gonzalez et al., Teacher Research on Funds of Knowledge: Learning from Households 4 (1993), available at http:// www.ncela.gwu.edu/pubs/ncrcdssl/epr6.htm. Funds of knowledge can include information about trade or business, community norms or standards and any other skill or understanding.

[FN3]. See Center for Applied Linguistics, Funds of Knowledge: Learning from Language Minority Households 1 (CAL Digest ed., No. EDO-FL-94-08, 1994) (summarizing research model showing how teaching can be positively enhanced by drawing upon funds of knowledge of minority students).

[FN4]. See Margaret Gibson, The School Performance of Immigrant Minorities: A Comparative View, in Minority Education: Anthropological Perspectives 123 (E. Jacob & C. Jordan eds., 1993) (finding that when younger students arrived in America, and how long students had been resident in America, correlated strongly with higher academic achievement).

[FN5]. See id. at 120 (finding that portion of white students would verbally and physically abuse minority Punjabi students). While the majority of students would not participate in the open harassment, they would either condone the behavior or do nothing to stop it. See id.

[FN6]. See id. (observing students were spit on, had food thrown at them, "and worse").

[FN7]. Id.

[FN8]. See, e.g., Christina Igoa, The Inner World of the Immigrant Child (Naomi Silverman ed., 1995) (sharing experiences of teacher educating immigrant students and how she developed her teaching methodology based on her teaching philosophy and experiences); Laurie Olsen, Made in America: Immigrant Students in Our Public Schools (1998) (examining assimilation of immigrant students, Olsen spent two and one half years in California high school examining issues immigrant students face); Margaret A. Gibson, Complicating the Immigrant/Involuntary Typology, 28 Anthropology & Educ. Q. 431 (1997) (examining research on immigrant and involuntary minority youth and finding that "minority students do better in school when they feel strongly anchored in the identities of their families," whereas those who face greatest risk of failure are not connected to their culture and experience racial conflict).

[FN9]. See G. Gonzalez-Ramos & M. Sanchez-Nester, Responding to Immigrant Children's

[FN10]. See U.S. Census Bureau, Profile of the Foreign-Born Population in the United States: 2000, P23-206, 8 (Dec. 2001) (stating that currently 10.4 percent of U.S. population is foreign born, which is highest percentage in seventy years).


[FN12]. See Carol Gilligan, In a Different Voice: Psychological Theory and Women's Development (1993) (showing that women and men have different modes of thinking about relationships, which create disparity between women's experience and common representation of human development); Nel Noddings, Educating Moral People: A Caring Alternative to Character Education, (2002) (offering alternative to character education care ethics); Barbara Korth, Care in the Heart and Mind of Critique: A Strikingly Feminist Critique of Critical Practices 1-7 (unpublished manuscript, on file with author).

[FN13]. See Gilligan, supra note 12, at 18 (noting paradox in Kohlberg's theories; traits that are traditionally associated with virtuousness of women are same traits that make them inferior in moral development); Thompson, supra note 11, at 526 (discussing Gilligan's work and stating that "[f]rom the perspective of Black feminist ethics... neither care nor justice has the character claimed for it in mainstream theories").


[FN15]. See Noddings, supra note 12, at 14 (indicating that caring relationships require both carer and cared-for to be satisfied and relationships may fail if carer is inattentive or cared-for does not respond to caring); see also id. at 28 ("For a relationship--even a very brief encounter--to be caring, the caring must be received.").

[FN16]. Id. at 14 (noting that caring uses logic and reasoning to determine desired goals and how to achieve them).

[FN17]. Id.

[FN18]. See id. at 2 (observing that student, as cared-for, may make significant contributions to relationship with teacher, as carer); see also id. at 1 ("Indeed, we believe that children who are properly cared for by people who genuinely model social and ethical virtues are likely to develop those virtues themselves.").

[FN19]. See Geneva Gay, Culturally Responsive Teaching: Theory, Research, & Practice 55, 168 (James A. Banks ed., 2000) (discussing that class participation and other forms of classroom involvement help students learn, achieve in their academic studies and develop emotionally).


[FN21]. See Richard E. Hult, Jr., On Pedagogical Caring, 29 Educ. Theory 237, 242 (1979) ("[T]he teacher recognizes and understands the student as a unique individual self. As I have indicated, this presumes that the teacher understands the unique talents, idiosyncrasies, and perhaps the personal history of the student."); see also Karen Osterman & Stephanie Freese, Nurturing the Mind to Improve Learning: Teaching Caring and Student Engagement, in The Academic Achievement of Minority Students: Perspective, Practices, and Prescriptions 287, 293 (S.T. Gregory ed., 2000) (explaining
that caring has many definitions in classrooms, but that all approaches to caring involve teachers supporting students and providing them with sense of being cared for).

[FN22]. See Robert J. Chaskin & Diana Mendley Rauner, Toward a Field of Caring: An Epilogue, 76 Phi Delta Kappan 718, 718-19 (1995) (implying that caring is voluntary action by emphasizing that we must develop and encourage caring behavior in individuals).

[FN23]. Noddings, supra note 12, at xiii.

[FN24]. See Korth, supra note 12, at 6 ("This research also proposes that a study of caring is tightly conjoined to the critical awareness embodied in actors' understanding of their own interactions and situations.").

[FN25]. Id. at 5-6.

[FN26]. See Julia Reguero de Atiles & Martha Allexsaht-Snider, Effective Approaches to Teaching Young Mexican Immigrant Children: ERIC Clearinghouse on Rural Education and Small Schools (Dec. 2002), at http://ericadr.piccard.csc.com/extra/ericdigests/ed471491.html (noting that "[e]ntering a new class can be intimidating for an immigrant child who may be faced with social isolation and linguistic constraints"); see also Jack Frymier & Bruce Gansneder, The Phi Delta Kappa Study of Students at Risk, 71 Phi Delta Kappan, 142, 145-46 (1989) (criticizing schools' responses to at-risk students, particularly regarding teachers who know nothing about, and are not involved in, at-risk students' personal lives).

[FN27]. See Angela Valenzuela, Subtractive Schooling: U.S.-Mexican Youth and the Politics of Caring 63-66 (Christine E. Sleeter ed., 1999) (indicating that relationships between students and teachers are based on social and cultural factors in these relationships, and on schools' cultures and whether they promote caring and differences between students and teachers with regard to cultural background and language).

[FN28]. Id. at 73.

[FN29]. See id. at 61 (stating reciprocal relationships between teachers and students is part of authentic caring and serves as basis for all learning).

[FN30]. See id. at 110 (stating authentic caring dictates "a complete apprehension of the 'other' [such] that the material, physical, psychological, and spiritual needs of youth will guide the educational process").

[FN31]. Id. at 7.

[FN32]. See id. at 63 (discussing teacher embodying authentic caring by apprehending students' cultural world and structural position).

[FN33]. See id. at 61 (stating immigrant children are committed to authentic caring).

[FN34]. See Thompson, supra note 11, at 524.


[FN36]. See Gay, supra note 19, at 47-53 (describing four tenets of caring).
[FN37]. See id. at 52 (describing caring as multidimensional responsiveness that understands cultural influences on students).


[FN39]. Id.

[FN40]. Id. at 47.

[FN41]. See Gloria Ladson-Billings, The Dreamkeepers: Successful Teachers of African American Children 61-77 (1994) (discussing stories of teachers that demonstrate concern for academic learning, while also incorporating emotional and social growth).


[FN45]. Gay, supra note 19, at 53 (noting importance of teachers acknowledging and correcting noncaring behavior).


[FN47]. See A. Lin Goodwin, Teacher Preparation and the Education of Immigrant Children, Educ. & Urb. Soc'y, Feb. 2002, at 156, 158 (noting that teaching population is still very homogenous in face of changing student population because teachers of color only constitute ten percent of all teachers).

[FN48]. See Nancy L. Zimpher & Elizabeth A. Ashburn, Countering Parochialism in Teacher Candidates, in Diversity in Teacher Education: New Expectations 40, 40-44 (Mary E. Dilworth ed., 2002) (presenting idea that teachers prefer to work with children who are most like them because they relate better to children with similar backgrounds).

102 (presenting statistics relating to teachers' race); see also Schoorman, supra note 46, at 98 (noting widening cultural gap between increasingly immigrant student population and increasingly "Euro-American" teacher population).

[FN50]. Nathenson-Mejia & Escamilla, supra note 49, at 102 (discussing how teachers and students of similar cultural backgrounds face differences based on socioeconomic status).

[FN51]. See Sheryl V. Taylor, Multicultural Is Who We Are: Literature as a Reflection of Ourselves, Teaching Exceptional Child., Jan.-Feb. 2000, at 24, 25 (concluding that because only ten percent of teachers come from ethnic minorities, there is strong probability of immigrant students being taught by teachers with dissimilar backgrounds); see also Sonia Nieto, Affirming Diversity: The Sociopolitical Context of Multicultural Education 98 (3d ed., 2000) (finding that Eurocentric educational framework does not aid immigrant students who do not understand Eurocentric culture).


[FN53]. See Lilia I. Bartolome & Enrique (Henry) T. Trueba, Beyond the Politics of Schools and the Rhetoric of Fashionable Pedagogies: The Significance of Teacher Ideology, in Immigrant Voices: In Search of Educational Equity 277, 280-81 (Enrique (Henry) T. Trueba & Lilia I. Bartolome eds., 2000) (stating that ideologies held by teachers that differ from those of students lead to problems in educating immigrant student population).


[FN55]. See Bartolome & Trueba, supra note 53, at 279-83 (discussing how teachers are unable to separate their personal backgrounds and experiences from classroom, and prefer to teach children who are most like them).

[FN56]. Id. at 281 (stating how teachers might think that their personal beliefs and experiences are normal, although students may have different backgrounds).

[FN57]. Reguero de Atilles & Allesaht-Snider, supra note 26, at 2 (concluding that teachers must use "research-based, developmentally appropriate practices" to successfully educate Mexican children).

[FN58]. See Villegas, supra note 35, at 253 (noting different growth patterns of student and teacher populations).

[FN59]. See Zimpher & Ashburn, supra note 48, at 40-52 (postulating that diversity among teachers and among teacher education programs is important to minority students).


[FN61]. Jocelyn A. Glazier, Moving Closer to Speaking the Unspeakable: White Teachers Talking About Race, Tchr. Educ. Q., Winter 2003, at 73 (explaining that because teachers still tend to be white, middle-class women, traditional methods in preparing teachers for
diverse student bodies have been largely ineffective).


[FN63]. See generally Lev Semyonovich Vygotsky, Mind in Society: The Development of Higher Psychological Processes (1978) (attempting to characterize "uniquely human aspects of behavior, particularly with regard to relationships between humans and their environment, new forms of activity that were responsible for establishing labor as the fundamental mechanism by which humans relate to nature, and nature of relationship between use of tools and development of speech").

[FN64]. Ana Maria Villegas & Tamara Lucas, Preparing Culturally Responsive Teachers: Rethinking the Curriculum, J. of Tchr. Educ., Jan.-Feb. 2002, at 22 (arguing that key role of teachers is to understand that their students' ways of thinking, behaving and being are influenced by race, social class and language).

[FN65]. See Laurie MacGillivray & Robert Rueda, Listening to Inner City Teachers of English Language Learners: Differentiating Literacy Instruction 2- 4 (2003) (explaining findings derived from research which indicated that differentiated instruction is best method to improve reading and writing skills of children).

[FN66]. See id. (providing five different methods for helping elementary school children who are poor second language learners).

[FN67]. See, e.g., Nancy Feyl Chavkin, Involving Migrant Families in Their Children's Education: Challenges and Opportunities for Schools, in Children of La Frontera: Binational Efforts to Serve Mexican Migrant and Immigrant Students 337 (1996) (arguing that, to meet challenge of increasing migrant population and migrant families' search for sustenance and economic self-improvement, it will be necessary to develop and nurture partnerships between schools, teachers and parents).

[FN68]. See Home-School Collaboration: Enhancing Children's Academic and Social Competence 22-23 (Sandra L. Christenson & Jane Close Conoley eds., 1992) (arguing that students have enhanced learning experiences when collaboration between student's school and family exist). As evidence for this assertion, Christenson and Conoley noted that "countless articles concluding that parent involvement has positive benefits for students' success in school have been published." Id. at 22 (explaining that such studies indicated conclusively that home-school collaboration and parent involvement lead to higher grades and test scores, increased attendance and better attitudes about school and overall more successful schools).

[FN69]. See Robert D. Putnam, Bowling Alone: The Collapse and Revival of American Community 19 (2000) (describing differences between physical capital, which refers to physical objects, human capital, which refers to properties of people, and social capital). Putnam compared physical capital to a screwdriver and human capital to a college education; both things increase productivity in the same manner that social contacts can. See id. (explaining that core idea of social capital theory is that social networks have value); see also James S. Coleman, Social Capital in the Creation of Human Capital, 94 Am. J. of Soc. S95, S100-01 (1988) (asserting that social capital is among least tangible forms of capital because it revolves almost entirely around relationships between people and extensive trustworthiness cultivated by those relationships, rather than around people themselves).

[FN71]. See Valenzuela, supra note 27, at 7 (explaining that study of Mexican youth at Juan Seguin High School revealed that human relations are essential to students' motives to achieve and succeed).

[FN72]. See Stanton-Salazar, supra note 70, at 10-11 (arguing that institutional support enables young people, particularly students, to become consumers and entrepreneurs in mainstream marketplace and to exercise control over their lives).


[FN74]. See Thompson, supra note 11, at 527 (arguing that caring theory accepts predominately white, middle-class, heterosexual feminist ethics as basis for all feminist ethics).

[FN75]. See Gay, supra note 19, at 75 (noting importance of emergence of teachers with "expectations and interactions, knowledge and skills, values and ethics that exhibit the power of caring"); C. Gilligan, In a Different Voice: Psychological Theory and Women's Development 62-63 (1982) (explaining that experiences of inequality and interconnection give rise to ethics of caring and caring strategies); Ladson-Billings, supra note 41, at 156 (showing that methods used in study included emphasis on "caring strategies," indicating that "the ethic of caring suggests that personal expressiveness, emotions, and empathy are central to the validation process"); Valenzuela, supra note 27, at 255 (illustrating that politics of caring is first step towards establishment of relevant and authentic pedagogy).

[FN76]. See Valenzuela, supra note 27, at 109 (arguing that authentic caring is absolute necessity for schools to work for "historically oppressed subordinate groups," like Mexican-Americans).

[FN77]. See id. at 61 (affirming Noddings' proposition that authentic caring, and sustained reciprocal relationships between teachers and students, is basis for all learning).

[FN78]. See generally Nieto, supra note 51 (exploring meaning, necessity and benefits of multicultural education for students from all cultural backgrounds through investigations of how schooling is influenced by racism, discrimination, school organization and policies, ethnicity, race, gender, language and class).
I. Introduction

THE two of us work at the University of Tennessee College of Law ("College of Law")—one on the law library faculty and one as a classroom professor. When we heard that a major theme for the LatCrit IX gathering would be "justice pedagogy," we decided to submit a proposal for a joint presentation about a project on which we have been collaborating since 2001. The project seemed like a natural fit for this symposium. The purpose of the project is to create a web-based representation of a pedagogical method Fran uses in her courses, and the method is one that explicitly seeks a link with justice.

However natural the fit may have been, once our proposal was accepted, we found ourselves puzzling over how to proceed. We saw several quite different ways of conceptualizing and examining the project, but we were unsure which would prove most fruitful for the context created by LatCrit. Below, in thumbnail form, are four possible ways we imagined we might present our work.

As an instance of the scholarship of teaching and learning - Our project is part of a current movement in academia: 'the scholarship of teaching and learning.' Posted on the site is a modest resource list that provides an introduction to this movement. In addition, the site itself is an example of an emerging genre in this scholarly current, that of the web-based teaching portfolio. Such portfolios have become almost a signature feature of the scholarship of teaching and learning.

As a case study of one pedagogical method - On the other hand, one could consider equally well the site more on its own terms, as a case study about a specific teaching methodology—the use of community-based field projects in a law school setting. The site features exhibits of vivid or instructive projects carried out by law students in Fran's courses. It includes narratives and reflections from the students themselves, together with commentary from Fran as the teacher and from community collaborators who worked with the students in the field, all aimed at demonstrating and assessing the use of community-based projects as a teaching tool.

*876 As an instructive collaboration between a law librarian and a law teacher - From a third perspective, a salient feature of this project is that it represents an unusual collaboration between a law librarian and a law professor. Although law librarians and classroom professors are usually under one roof and dedicated to significantly overlapping missions, we often know very little about each other's domains, and we often miss opportunities for creating synergy between them. For the two of us, this joint project built something of an institutional bridge between these two kingdoms, and we thought that it might be noteworthy to others who see the value in such linkages.
As the story of creating a website - From yet a fourth perspective, the most interesting thing about this project might be simply that it is the saga of a website. More and more academics are interested in using the internet to represent various aspects of their work, but not so many are clear about what such a move might actually entail. We encountered numerous hands-on challenges and theoretical questions regarding web design, web production and "good web citizenship" as we struggled with this project, and those encounters might be instructive for others.

As things eventually settled out at our LatCrit IX session, we attempted to include at least something from each of these four perspectives, and we will follow the same strategy here. Fran will open with a quick history of the project and will go on to discuss the site, first, as an instance of the scholarship of teaching and learning, and second, as a case study in field placements as a teaching method in law schools. Cathy will take up the thread from there, exploring the project from the third and fourth perspectives: as a law-librarian/law-teacher collaboration and, finally, as a saga about the design and construction of a website.

No matter which perspective readers find most helpful, we hope they will visit the site. At the time of this writing in November 2004, we are truly on the verge of launch. By the time this essay appears in print, the site should be on-line and open to the public, housed on the University of Tennessee Joel A. Katz Law Library's server. The URL will be: www.law.utk.edu/library/teachinglearning/default.html.

II. History of the Project Fran Ansley

Since 1995 at the College of Law, I have been teaching classes in which law students carry out community-based fieldwork with local organizations and agencies. The projects are law-related, but they seldom involve the traditional provision of legal services. Rather, the projects tend to fall into the category of community legal education. In most of these projects, the education about law ends up flowing both ways: my students and I learn from community partners how law and the legal system actually operate in their complicated lives, and in return we work to find and communicate back to them what "law on the books" currently has to say about their rights and vulnerabilities.

In the academic year 2000-2001, I had the good fortune to join a cohort of scholars at the Carnegie Academy for the Scholarship of Teaching and Learning (CASTL). During that privileged year, I was given the chance to look more systematically and reflectively at my experience with fieldwork as a pedagogical method, and to do so within an interdisciplinary circle of fellow teachers. [FN1] In addition to carrying out our individual investigations about teaching, we were also given a crash course and immersion experience in what our hosts and sponsors were calling "the scholarship of teaching and learning."

One standard voiced early and often at CASTL was the idea that scholars should find ways to go public with their work. Private study and reflection, our hosts pointed out, can surely improve an individual professor's practice, but study and reflection do not become scholarship until shared with peers and subjected to critical review. Although CASTL's stress on peer review echoed traditional conceptions of scholarship, the staff and circle of advisers around CASTL were far from traditional in their approach to how such review might be achieved. For instance, they were particularly interested in web-based representations of teaching practices. They urged us especially to consider web-based teaching portfolios as a method of going public, and they shared with us an array of interesting examples of this new genre.
In response to these lessons and urgings, I decided at last to create a website that would feature and reflect upon my students' work in community-based field projects. The only trouble was that I had no clue how to proceed. I had no experience designing or building websites, using HTML or otherwise creating internet destinations. Certainly, I was enthusiastic. I had grand visions of how great it would be to create a site that had its own look, one that reflected my personal aesthetic, without the branded look that accompanies many course-management tools or, for that matter, my own school's institutional site. I was especially interested in some of the special capacities of internet environments, such as the hypertextual agility to link and jump--up, down and sideways--among the various cool layers, concepts, images and voices that I envisioned on my site. In my imaginings, it seemed that these amazing capacities of the internet would allow me to build a display that would track the complexity and simultaneity of my own mental landscape on the subject of community placements. Still, I knew virtually nothing about how this could be achieved. I did know that I needed a designer.

When I returned to Tennessee in fall 2001, after my second and final summer residency with Carnegie, I learned that my university's Innovative Technology Center (ITC) [FN2] had announced a grant program aimed at faculty who wanted to create instructional technology. The announcement said that professors could get design help through one of these grants. Hoping that my plans for displaying student work would count as "instructional," I decided to submit a proposal.

While I was wrestling to frame the project, I happened to schedule a lunch date with Cathy Cochran, a (then) new computer services member of our library faculty, whom I had been asked to mentor for the year. As we talked over our sandwiches that day, I told her about my project. She asked many questions to which I had no coherent answers. During this conversation, I began to realize for the first time how complex the project might be and how much more help I was going to need than that provided by a designer alone. Before we were done, Cathy had agreed not only to advise me about putting together the grant proposal, but also to serve as a consultant if the project was funded.

Eventually our proposal did in fact receive a grant. Most of the funds went to provide the services of a designer with some money earmarked to upgrade the hardware and software for the law school. What followed turned out to be an unexpectedly long and complex process, but one from which I have learned a great deal. The site that has now been created, *879 with the indispensable help of Cathy and many others, [FN3] is an open-ended platform for the display of student work together with their (and my) reflection upon it. My plan is that the site will continue to build and grow. The site currently features three comprehensive exhibits of past student projects, plus three briefer descriptions of other student work. Here are thumbnail descriptions taken from the website concerning each of the three major exhibits:

**Spousal Rape Campaign** - In this project a law student worked with the Tennessee Task Force Against Domestic Violence and other coalition members to press for an end to the spousal rape exclusion in Tennessee. She developed a letter and petition campaign, attended a citizen training workshop on grass roots lobbying and visited state legislators at the capitol. She also worked with two other students to direct, edit and produce a videotape that presented the case to legislators and other opinion leaders about why rape of a spouse should be treated as seriously as rape of anyone else.

**IDEA Inclusion Project** - In this project a law student who is also the parent of a child with Down Syndrome and a strong lay advocate for the educational rights of children with disabilities, worked with graphic designers, a choreographer and a group of young
variously-abled dancers to produce an installation and performance event where the children danced among a forest of panels arrayed with information about the Individuals with Disabilities Education Act. Both the dance and the visual display highlighted the legal rights of children with disabilities, as well as the educational value to all students that flow from fully inclusive learning environments.

Tennessee Immigrants and Criminal Justice - In this project three law students, working in conjunction with a local Latino community organization, carried out a preliminary investigation on immigrants and the criminal justice system in the Knoxville area. Using a participatory research approach, students conducted interviews to develop a broad sketch of Latino immigrant community interactions with the criminal justice system and to identify specific areas of concern for future investigative, organizing and advocacy work.

In addition to these major exhibits, there is a section called Teacher's Overview, in which I share some emerging lessons and practical tips, provide links to selected course documents and point visitors toward other relevant print and web-based resources. Another section of the site is reserved for temporary and less extensive exhibits of student work. Current temporary exhibits present text and images about the following:

- An ongoing partnership with a predominantly African-American high school where law students conduct law-related education with tenth-grade English students. Working with teams of students from the law school, students from Austin East High School explore law-related topics and eventually create narratives that include mock trial segments that they perform in one of the law school's moot courtrooms as part of a culminating end-of-semester field trip.

- A project in which a law student researched and prepared an informational brochure about various options for financing the purchase of a home. The brochure was prompted by the rising number of highly inequitable 'lease-purchase' agreements that we learned were being marketed to low-income Latino immigrants and others in Knoxville who had trouble accessing traditional lenders. It was designed to educate service providers who work with undocumented Latino and Latina immigrants, the population most at-risk for getting caught up in these arrangements.

- An effort in which a law student carried out oral history interviews and created a photo essay about a group of elderly homeowners whose property was to be taken as part of an urban renewal plan. The student worked with our local legal services office to compile the interviews and photos into a publicly-disseminated booklet. Given the absence of effective legal redress for the homeowners, the booklet proved to be an invaluable advocacy tool that helped to secure adequate replacement housing for the group of displaced elders.

The website is not envisioned as a static or finished place. Eventually, I hope to invite students to post their own exhibits in the temporary section if they and their community partners are interested in doing so. As time and resources permit, I will also continue adding new information to the Teacher's Overview section and adding new projects to the more substantial and detailed exhibits posted in the Permanent Collection. In addition, I hope that some library faculty members here at the College of Law--including Cathy herself--will be interested in creating scholarly bibliographies that could be posted in the resource sections of relevant permanent exhibits. Of course, all of these ambitions need to be tempered with reality. As Cathy will discuss in further detail below, developing a realistic and sustainable plan for the ongoing life of one's website is no menial task.
In summary, this section has recounted a brief history of our project, beginning with my CASTL fellowship in 2000-2001 and continuing (sometimes in fits and starts) until this writing in late fall 2004, when we are at last on the verge of launch. The project has taken a long time and it has often had to survive on tiny scraps of attention that Cathy and I could squeeze in between our other obligations. Nevertheless, we are feeling generally satisfied with both the product and the process at this point, and we are happy to share its existence with others.

We now want to return in more detail to the four perspectives Cathy and I considered as we thought about how to discuss our project at LatCrit. I will address the first and second perspectives, and Cathy will address the third and fourth.

III. Four Ways of Looking at this Website

A. The Project as an Instance of the Scholarship of Teaching and Learning Fran Ansley

As explained above, this website is the product of a current movement in the academy, one that seeks to promote the scholarly study of teaching and learning. [FN5] Participants see this scholarship as a way of contributing to new knowledge about learning and cognition, and also as a way of increasing the professional recognition accorded to teachers whose scholarly work focuses on the teaching process. Like others, this academic movement *882 has its patrons, [FN6] its varied monikers and acronym, [FN7] its gatherings [FN8] and its publications. [FN9] A primary engine for development of the movement has been (CASTL), created in 1998 by the Carnegie Foundation for the Advancement of Teaching. As described on the Foundation's website:

CASTL . . . builds on a conception of teaching as scholarly work proposed in the 1990 report, Scholarship Reconsidered, by former Carnegie Foundation President Ernest Boyer, and on the 1997 follow-up publication, Scholarship Assessed, by Charles Glassick, Mary Taylor Huber, and Gene Maeroff. . . . CASTL seeks to support the development of a scholarship of teaching and learning that:

- Fosters significant, long-lasting learning for all students;
- Enhances the practice and profession of teaching;
- Brings to faculty members' work as teachers the recognition and reward afforded to other forms of scholarly work.

Work toward these goals involves significant shifts in thought and practice. For faculty in most settings, teaching is a private act, limited to the teacher and students; it is rarely evaluated by professional peers. 'The result,' writes Carnegie Foundation President Lee S. Shulman, 'is that those who engage in innovative acts of teaching rarely build upon the work of others; nor can others build upon theirs.' Thus, CASTL seeks to render teaching public, *883 subject to critical evaluation, and usable by others in both the scholarly and the general community. [FN10]

The movement to promote this kind of scholarship represents a broad stream that has attracted a number of different currents, from each of which it draws intellectual and material support. The combination produces a certain tension as well, because these different strands can pull at times in different directions. Several examples of these intersecting currents follow.

1. Recent Powerful Research on Cognition.
One important stream feeding into the scholarship of teaching and learning flows from a body of diverse research into processes of human cognition. [FN11] This research includes close observation of the ways that novices differ from experts in a given field in their approach to open-ended problems. [FN12] It suggests that real learning is more constructed by learners than transmitted by teachers. It underlines the importance of creating well-designed learning environments that help students to build upon their prior knowledge, but also to uncover prior misunderstandings. [FN13] It confirms the importance of inquiry-based learning, and of assessments that track learning goals and that loop back into the process of course design and selection of teaching methods. [FN14]

2. A Move to Promote Colleges and Universities as Centers for "Civic Learning."

Calls for service to the community and to society at large have become quite common in recent years, although they are sometimes in tension with opposing pulls toward market-oriented practices in both teaching and research. This current feeding into the scholarship of teaching and learning includes those involved in the burgeoning and variegated world of "service learning," a range of thinkers working on democratic theory and a set of higher education administrators concerned about the future role of higher education in society. [FN15]

3. A Desire to More Effectively Produce Graduates Ready for Jobs in the Knowledge Economy.

One strand contributing to contemporary scholarly interest in teaching and learning is the strong motivation felt by many in higher education that schools should be better supplying the economy with job-ready leaders and workers. Many of the most important and dynamic sectors of today's economy are knowledge-centered, so it is not surprising that research on cognition and learning has attracted the interest of corporate leaders and trainers. In any event, a private sector interested in building 'learning organizations' has become both a consumer of and a stimulus for certain aspects of the scholarship of teaching and learning, and it thereby constitutes one more current feeding into the larger stream. [FN16]

*885 4. Increased Pressure for Faculty to Adopt Research-Supported Assessment Practices.

A concern for assessment is fueled in part by external pressure for educational accountability from political actors who cannot be ignored by most school administrators. In part, it is internally motivated, a response to clear demonstrations from educational researchers that effective teaching requires well-designed, well-timed assessment practices that are embedded at multiple points in the teaching and learning cycle. [FN17]

5. Abiding Questions Teachers Ask About Their Own Lives and About Their Students' Futures.

This current in the scholarship of teaching and learning is difficult to categorize. Even calling it a single current is most likely a mischaracterization. But a number of teachers who write reflectively about their work and about their students' learning seem to do so in a way that reflects a deep search for meaning. Whether or not these authors would identify with the "scholarship of teaching and learning" ("SOTL") label, their presence can be felt immediately when one steps into the literature about teaching and learning. And this should come as no surprise, I suppose. Most teachers, at least some of the time, ask deep questions about the meaning of what they do. They face difficult life
passages and confront difficult social problems or political events. Furthermore, they worry about what their students will encounter on their own journeys and how those students will respond. Teachers ask whether they are making a difference in their teaching, and to what end. The energy behind these questions moves in many directions, of course, but some of it regularly gets translated into research and writing about teaching and learning, and this writing sometimes gets taken public in a way that makes it part of the SOTL literature. [FN18]

*886 6. Concern About Broad Democratic Access to Education.

Some of the teachers and administrators active in promoting the scholarship of teaching and learning are strongly motivated by their concern for wider access to learning. A focus on the distribution of educational opportunity translates into different issues in different settings--running the gamut from affirmative action in selective college and university admissions to the preservation of adequate public funding for adult basic education. But across the board, investigators concerned about questions of access find that "unexamined teaching" tends to replicate existing systems of privilege. Those who want to move beyond such replication therefore find themselves searching for ways to create learning environments that achieve excellent outcomes for a wider range of students. These scholars form one very visible current in the larger movement around SOTL. [FN19]

I suspect that LatCrit readers will be particularly interested in this egalitarian stream within SOTL. Such readers should be aware that SOTL is a field where they can find and learn from teachers in other disciplines who are striving to make the promise of wide educational access more of a reality within real classrooms and schools. [FN20] By way of illustration, I will share *887 here a passage from Craig Nelson. [FN21]

Teaching is like other forms of loving in at least two important ways. First, different concerns emerge at different levels of mastery and maturity. And second, just as detailed knowledge of pair-wise love and love-making were more or less taboo when I was growing up, knowledge of teaching has been essentially taboo in many academic cultures. And I mean taboo in the strong sense--not just failing to teach prospective faculty about teaching and teaching resources, but pretending that there is nothing to be known that can make a major difference in teaching. Beyond the mastery of content, great teachers are born and not made, in this view. Just like Don Juan, it would seem. I have been quite lucky in my teaching career, as I have serendipitously encountered some important alternatives at pivotal moments in my development. Or, perhaps more likely, encountering the alternatives made the moments pivotal.

The extent of the change in my views is epitomized for me by the contrast between the answers I would now give to two questions and the answers that were implicit in the ways I initially taught. One of these questions is: "Should we evaluate teaching by what the teacher presents or by what the students learn?" Coming out of graduate school, I gave well-organized, dense lectures that covered a lot of ideas quickly--lectures that were just what I thought I would have learned best from at that time. Indeed, they were much better than most of the lectures that I had learned from! And they were well-received by a good portion of my classes. I assumed that the students who did not learn well from them were either dumb, lazy, ill-prepared, or, to be more generous, otherwise engaged--although I would never have put it so bluntly, even to myself.

Although I have since observed that many faculty feel this same way, I now see two main problems with it. The most fundamental is that it abdicates all power for change and makes any improvement *888 depend on getting different students. And it is not unusual to hear faculty blame the problems they have in teaching on insufficiently
rigorous admission policies. The second main problem with this approach is that it assumes that one's own experience is all the guide one needs to teach effectively, and thus takes one's self as the measure of all things. [FN22]

I hope this highly abbreviated tour of SOTL and its currents will encourage readers to further explore the various strands of the scholarship of teaching and learning. In addition, I hope that it will provide at least an entry point into the literature and the internet resources associated with this academic movement. [FN23]

For purposes of this essay, the point is that the website we have been building is an artifact of the SOTL movement, and an example of a genre--the web-based teaching portfolio--now actively promoted by leaders in the SOTL community. [FN24] I chose this genre in part through naiveté about the time demands and obstacles I was going to encounter, but I am still convinced that my mentors at CASTL were right, and that certain features of the internet make it well-suited for communication about teaching.

My site attempts to capitalize on some of these features, including the ability to post images and artifacts, to insert side comments from the teacher and to include multiple layers and linkages that allow visitors to explore and connect the site's content in different ways. The genre will also allow me to invite future students to create their own exhibits in a medium that most of them find attractive and interesting, and in which most of them feel at home. Having their work posted on the internet also puts my students before an authentic audience. Finally, it allows the representation of my teaching and my students' learning to remain a work-in-progress, open to future developments and amenable to co-construction.

B. The Project as a Case Study of One Pedagogical Method Fran Ansley

From one perspective, then, this website can be seen as an example of the scholarship of teaching and learning. However, a second way to talk about the site is that it explores a particular teaching methodology--the use of community-based field projects in a law school setting. In fact, that is the announced subject of the site, the most immediate way it explicitly presents itself. For that reason, the best evidence of what I have to share with readers about that pedagogical tool can be found on the site itself, incomplete as it admittedly may be.

Accordingly, I will not go into extensive discussion about community-based field work in this essay. I have described above the basic features of the site, and have given readers a general idea of what they can expect to find there. Here, let me simply say that over the past eight years or more I have been experimenting with the use of field projects that partner law students with organizations in the community. Some of the projects entail students doing standard legal research on questions recognizably centered on matters of doctrinal interpretation. Most of the projects, however, entail something quite different. I have encouraged students to work with community-based artists, including dancers, theater people, graphic designers and slam poets. I have urged them to bring their own passions into the project, telling them that they need to be thinking not only about how they are going to represent future clients for a fee, but how they are going to live their lives and enact their own moral commitments.

I am always on the lookout for projects in which students have a chance to work with people who are seeking to build power among those normally locked out of important decisions that affect their lives. Such placements are not always easy to find, but I keep trying because I need them in order to achieve my own teaching goals. I want law students to have opportunities to see community partnerships as a mutually
advantageous pathway toward social change, not simply as some kind of noblesse oblige opportunity for bestowing beneficence on those below.

Results of these labors have been mixed, of course. I seldom manage to complete all the scaffolding and planning to which I aspire. Nevertheless, sometimes the process or the product involved has been successful beyond even my crazy dreams.

Let me conclude this section by observing that many others in legal education have been exploring similar territories. For instance:

At the same LatCrit conference where Cathy and I presented this project, one of the early panels was devoted to "Justice Pedagogy: Experiential and Service Learning for Critical Theory Teachers." We heard from Professors Alicia Alvarez, Sumi Cho, Odeana Neal and Anne Shalleck about the ways they use field work and experiential learning in their endeavors. Professor Cho, of DePaul University, shared handouts describing potential community placements in two classes she taught. Both handouts were inspiring and suggested many ideas as to substantive work that law students elsewhere might undertake. They also provided examples of structured assignments that help students navigate the fluidity and chaos that often characterize field placements of this kind.

*890 LatCrit and Depaul University have recently announced an international summer Community Development Externship Network that will place law students from the global South and North in community placements in various locations in the Americas. It will be led by Professor Thomas Mitchell of DePaul University and will offer exciting new opportunities for fieldwork less constrained by rigid semester rhythms and competing demands than are courses like mine that are taught during the regular school year. [FN25]

Professor Lani Guinier of Harvard University and Professor Susan Sturm of Columbia University (previously colleagues and collaborating teachers at the University of Pennsylvania) have created a web site that features fascinating work they and their students have done in the classroom and in the community. The work displayed focuses largely on issues of race and racism and on creative approaches to addressing these resistant and deep-seated problems in collaboration with community-based groups and agencies. [FN26]

Professor Linda Smith of the University of Utah recently published an article that compiles information about a range of community-linked course offerings now taught by clinicians and non-clinicians in law schools around the country. [FN27] She urges law professors to learn more about the service-learning activities and community-based research that may be going on in other disciplines at their schools. [FN28]

Professor Rebecca Cochran at the University of Dayton urges legal writing teachers to follow her lead in assigning work for community partners as a regular component of legal writing courses. [FN29]

*891 Several of my colleagues here at the University of Tennessee have combined substantive course work with community placements in innovative ways. [FN30]

Professor Deborah Maranville of Seattle University has written about linking experiential learning to the traditional law school curriculum. [FN31] She makes the claim that this kind of learning promotes better standard skills training and encourages greater student engagement with the world and its problems. [FN32]
Many legal scholars in multiple venues have discussed ways of lawyering that allow productive partnerships between lawyers and community-based organizations. Some of these scholars are also teachers who have found ways to expose their students to these opportunities. [FN33]

All of the above experiments are exciting. As an avowed convert to the scholarship of teaching and learning, I hope that many more teachers who are engaging in this kind of practice will find ways of sharing what they are learning with others. Field projects are fraught with both possibility and danger, and those of us using this method surely need to aggregate our experiences and subject them to critical review and assessment.

Having now looked at this website in two ways--as an example of the scholarship of teaching and learning and as a case study of one pedagogical method--this essay will now address two other ways one might decide to examine our website project, two other perspectives from which readers might find it to be of interest.

C. The Project as an Instructive Collaboration Between a Law Librarian and a Law Teacher Cathy Cochran

At the College of Law, like many other law schools, there is sometimes a tendency for the library and the rest of the school to function as separate entities, each with its own culture and its own sorts of boundaries. This tendency is also reflected in the relationship between the College of Law and the rest of the campus. The College of Law makes regular efforts to bridge both these divides, and sometimes it succeeds. For instance, the opportunity for Fran's and my collaboration came about because of our mentoring program. That program pairs law librarians not only with other library faculty, but also with members of the teaching faculty.

I was hired several years ago to be the library's first 'Computer Services Librarian.' The title comes with a broad set of responsibilities--everything from maintaining and managing content and design of the library's website, to teaching other faculty, staff and students how technology can help them find, assess and manage information. When I first arrived, knowing that I was one of the few faculty members without a J.D., I felt a bit overwhelmed; I had a sense that everybody else had a common knowledge and vocabulary about the law that allowed them to "think like a lawyer." I wondered whether my own language, centered more in technology and information services, could be heard in community conversations.

During my second year on the library faculty, Fran was assigned to serve as one of my mentors. She asked if I could help her with an application for a grant that was available from the ITC, a program that promotes the creative use of technology on our campus. Fran asked if I would agree to be a technical advisor on the grant application; I jumped at the opportunity for several reasons. First, I was pleased that someone was finally speaking my language (or at least was interested in learning something about it). Second, some of the topical areas that she intended to cover resonated with my Women's Studies background. Third, the project related overall to the field of instructional technology, which was of growing interest to me. [FN34] The fourth reason was a typical librarian trait: I wanted to help.

In retrospect, I would say that our expectations at the beginning of this undertaking were remarkably unclear. We thought that we would provide primary materials, which some vague "they" would then turn into a website. After we were awarded the grant and waded into the actual project, we learned that the help we could obtain from the ITC was both more limited and more important than we imagined. The process of building a
website from scratch is a highly complex and demanding task, and we have had to take on much of the work ourselves. Although a framework of pages was in place by the end of the grant assistance period, at that point the basic structure of the website was turned over to us for completion. We have labored on our own since then, solving problems and making decisions about matters large and small, and have finally gotten the website to the point where it is almost ready to launch.

On the other hand, what we received from the ITC, through the help of the University's excellent 'Faculty First' program, was invaluable. We secured the services of an instructional technologist, plus a graphic designer who also doubled as project manager and our hands-on teacher. The designer consulted with us and with the technologist and then translated Fran's initial ideas into a functional and aesthetic structure. It was a treat to have a graphic designer establish the look and feel of the website, and it was a great help to have other ITC folks who could suggest many of the technical and navigational solutions.

In addition to the services of the ITC, other items--including software, hardware and other equipment--were provided by the grant. In deciding what we would ask for, I was able to offer recommendations about cameras, external hard drives and similar matters about which Fran had little or no idea. As an information specialist, I was also aware of the synergy afforded by an embedded campus program like the ITC, and was in a position to help Fran gain access to other web and media specialists.

For instance, we received help from a digital production facility called the Studio, located at the main campus library. The Studio allows faculty and students to check out electronic equipment and use computers on site for doing all kinds of multimedia projects. The Studio staff helped us digitize our primary materials--including documents, still photographs and video footage--into a variety of appropriate formats. For one of the website's permanent exhibits, we wanted to use excerpts from a VHS tape. [FN35] Based on advice from the Studio, we decided that we could save some bandwidth by foregoing the moving image and simply using stills from the video (grabbed with the help of the Studio's Macintosh-based 'I-Movie' software) together with an audio track of the quotes we had selected. We later added text transcripts of the audio files for visitors who wanted to read rather than listen. [FN36]

Working with services such as those provided by the Studio fit well within my job as the Computer Services Librarian, where one of my roles is to promote within the law school the services related to instructional technology that are available across the campus. In the meantime, Fran's experiences with these groups through our project has helped spread the word among other College of Law teaching faculty about these services.

During this entire process, Fran and I were learning about working together, project management and the importance of coordination and organization. For instance, handing over original documents to folks in other departments for scanning and the like meant that sometimes the documents would be lost. We had to develop organizational schemes to track original documents and revisions. Because we were stumbling along through self-taught crash courses on such skills as scanning documents and capturing images, it seemed that multiple "not-quite-the-same" versions of various files were sometimes flying back and forth at dizzying speed.

We also developed an editorial relationship that worked well for us. Sometimes we sat together in front of a monitor using trial and error to figure out some of the more arcane features of HTML protocol. At other times, hardcopy mark-up was our method for communicating about changes that needed to be made to draft pages.
As we entered into a big final push to get the initial content mounted and the website ready for launch, Fran had the good fortune to hire a research assistant with a basic knowledge of HTML and some familiarity with DreamWeaver, the editing software we were using for the project. Having a research assistant on the team gave me an opportunity to experiment with delegating some tasks to her. Some of the tasks I assigned were obvious (i.e., 'Take this brochure and scan it.'), while others were more difficult to delegate. For instance, in order to have the research assistant put content into different segments of the website, I had to figure out how to give her enough information to get something done, but not so much *895 that it would crash the whole website if a mistake was made. I finally figured out what she needed in order to work on a specific section and how to manage file exchanges. Nevertheless, I still had the files and information come through me for integration into the website as a whole and for transmission to the server. (I had learned from observation of a prior bad example to limit direct access to the web server.) This procedure allowed me to be the gatekeeper to the server, but also made me responsible for the interior links and consistency on the server.

Looking back on the project now that we are almost ready to launch the website, I am glad that I decided to get involved, even though the process has been longer and more demanding than we anticipated. It has been a fruitful collaboration for me, in part because we have been able to move forward in a way that takes into careful consideration my pre-tenure faculty status. Although CASTL may be enthusiastic about web projects, I have read advice suggesting that "review committees may not take technology work seriously, so stick to traditional academic activities, like publishing journal articles." [FN37] While there are some attempts to develop peer review mechanisms for web and other technology work, these products and activities often do not fit easily into the traditional categories of research, teaching and service. [FN38]

So even in my case, where technology is so central to my job description, we saw the need to be careful about how project-related activities could help me build a strong tenure portfolio rather than detract from it. We felt that truth was clearly on our side. The various segments of the project were all closely related to the core responsibilities of my job. As noted above, for instance, building productive liaisons with campus technology groups and making the availability of their services better known to the rest of the law faculty are important parts of my job description. Supporting law professors with their teaching mission is also a part of the law library's mission. This project gave me an opportunity to do that for Fran, and to become better prepared to do that for other members of the faculty as well.

Of course for tenure purposes, doing scholarship of a public kind is also an important goal. For this project, we decided going public should include not only launching the website, but also writing and speaking about it. For instance, jointly presenting this project at the LatCrit IX Conference and contributing this essay for the symposium have been wonderful opportunities to build my tenure portfolio. I was also able to use *896 my work on this project to make myself more locally visible, by co-presenting with Fran at a faculty forum for the College of Law. I believe that presenting in these venues helped us to communicate to other legal educators at home and elsewhere the potential advantages of collaboration between law librarians and classroom professors.

Our collaboration will continue in at least two ways. First, I will retain ultimate control over changes that actually appear on the server. Based on my own and others' experiences, I do not want to risk creating a problem on the server by letting this duty out of my hands, at least for now. The website is planned as an ongoing format into which new student projects can regularly (or irregularly) be inserted, so we will deal with the creation of new exhibits in the future. Because Fran is gradually becoming more
adept at using design and development software, she should be able to do larger portions of the work herself, but, of course, all this remains to be hammered out in practice.

The second way we plan on future collaboration is that Fran has invited me to contribute an annotated bibliography to the permanent exhibit on spousal rape. [FN39] Bibliographies are a traditional form of scholarship for law librarians, one that tenure review committees can understand, and I am excited about developing one on this topic. My plan is first to seek publication in a print journal, but to negotiate with the publisher to secure my right to post the bibliography on the website after it has first come out in print form. Fran has also mentioned to other library faculty members that she would be open to similar contributions from others if they see an exhibit on her website whose subject matter is of sufficient interest to them.

D. The Project as the Story of a Website Cathy Cochran

There are many stories we could tell about what we have learned; some of the stories are tedious, while some are interesting. In fact, that contrast mirrors the world of issues that can arise in the course of making a website. In this section I will try to touch on a number of issues that I think might be of interest to readers who are considering the creation of a similar website.

1. A Lot of Words

Our website is a text-heavy website. In fact, most web design guidelines advise against using so much text. Fran was not ready to abandon the plan she had already developed, although she will be trying to get feedback from visitors once the website is launched, and her approach to future exhibits may well be less dominated by text. In the meantime, the large amount of text posed many challenges. Our advisers at the ITC have *897 told us convincingly that web users do not read lengthy texts online. Therefore, a text-heavy website requires thought about how people read (or rather tend not to read) large amounts of text from a computer monitor. If visitors find a website with items they find worth reading, they tend to print out hard-copy versions of the text to read off-line. These predictable reactions push us to take seriously the need for printer friendly versions of text.

a. How Many Layers Is Too Many?

Information about visitors' likely behavior carried other implications as well. For instance, one implication related to the question of pop-ups. Fran had been enthusiastic about the use of hypertext. She wanted to be able to embed 'Teacher's Comments' and other bits of 'Additional Information' within the text of students' descriptions of their projects or their reflections on those projects. At the click of a mouse, she wanted this supplementary information to appear, shedding a different light on the main text. We developed little pop-up windows that provided these Teacher's Comments and Additional Information inputs.

Working with the designer, however, we eventually realized there were a few problems. First, Fran wanted to have multiple layers of pop-ups. That is, she wanted there to be a pop-up window, which would contain another link (or even a second pop-up) embedded in the text of the pop-up. She backed off this original plan, however, when the designer indicated the complexities of such a task and pointed out how difficult it would be for visitors to continue feeling oriented to the website as a whole as they bounced around from level to level. Eventually, we decided to limit ourselves to using only one level of pop-up windows. Our slogan was 'no pop-ups on pop-ups.'
b. Printing Issues

We also realized that having a lot of substance stashed away in a series of side comments would make life difficult for those who wanted to 'print out the whole page.' To accommodate this known tendency of website visitors, copies of the teacher's comment pop-ups for each exhibit were collected on pages that could be printed out separately. Having addressed that problem, however, we discovered that it was more complex than we thought. Therefore, much work has yet to be done to improve the printing functions.

Each combination of operating systems and browsers handle printing issues differently. Unfortunately, we have found that the most popular platform (Personal Computer, or PC) and the most popular browser (Internet Explorer, or IE) do not allow for elegant printing from the web pages as they currently exist. Windows-based PCs with IE account for approximately eighty percent of the browsing traffic on the internet. [FN40] Our experience has been, at least with this website, that the combination of PC and IE often prints pages where the right margin cuts off the text. If this is true, then perhaps all our efforts to make it easy to print pages will be foiled.

Some other combinations of operating systems and browsers handle these printing issues more elegantly. One of our future goals is to make printer friendly versions of the text on the website. Hopefully, our computer services technologists can help to identify scripts, or other techniques, that will be able to create printer friendly versions of these pages on the fly. In the alternative, we might find that posting a parallel, text-only version of the website will be preferable because it would be more printer friendly and could help to satisfy accessibility requirements.

2. Overall Structure of the Website

I have worked on many websites in different capacities; nevertheless, this is the most complex project on which I have worked to date. Our understanding of formats, file sizes and general web design was forced to grow in (sometimes painful) leaps and bounds. Additionally, working with a graphic designer on this website was a new experience. Our designer developed the layout in a graphics program, such as Photoshop or Fireworks, and then imported the design files into an 'HTML editor' (DreamWeaver in this case), where she could flesh out content and hyperlinks. We have not altered the basic layout the designer provided. Fortunately, the designer has graciously continued to provide brief consultations on design matters. We sometimes get nervous about what would happen if she ever moved away or changed her mind, but so far we have not had to face any kind of departure or withdrawal.

In any event, even as to the parts of the structure that we fully control, the complexity of the project poses many challenges. Because we have only been able to work on the project intermittently, we have spent many hours retracing and remembering how the pieces fit together when we return to the work after a period of inactivity. We now know that we need to document the processes we develop along the way, thereby making it easier to pick up where we left off.

3. Structure of Individual Files

File structure is important to many web-builders. File structure provides the outline of the website, the invisible organizational scheme that supports the system--and this structure can make life easy or hard for people who are constructing, revising or fixing the website. [FN41] The file structure of Fran’s website deviates from conventional guidelines that place all images in one folder. [FN42] Instead of this conventional
approach, I developed a file structure where each exhibit's artifacts and images are placed in a subfolder. This approach separates the design images that are used to create the basic look of the website, with its navigation bars and frames, from the images that we used to illustrate the different projects featured on the website. [FN43]

4. Naming Conventions

Another technical matter with a highly practical impact is conventions for naming files. As the website grew, I developed naming conventions for files that related to each of the different student exhibits and to the other portions of the website. The file names start with a two or three-letter sequence that identifies the exhibit. The initial sequence is followed by names that identify the subsections of each exhibit. [FN44] These naming conventions satisfied a need to identify page sequences and linking patterns. Naming conventions eliminate the time spent opening files to ensure their contents, thus reducing a step in an already tedious procedure.

5. Branding

'Institutional branding' has become a buzzword at colleges and universities these days, and the College of Law is no exception. Currently, Fran and I are adding ownership content to the website that identifies who we are, including the fact that we are at the College of Law. We are trying to make sure our institutional affiliations are clear but, at the same time, we want to retain our website's distinctive look and feel. I am using my growing design and image manipulation skills to cut and paste some banner images from existing web templates provided by our university.

Questions about institutional branding have required me to function as something of a buffer. On the one hand, Fran and I want to be responsive to people in our institution who are interested in good public relations for the College of Law and who may be somewhat invested in the school's existing logos. On the other hand, Fran is highly protective of the look created by our web designer and she resists any move to put some kind of big "University of Tennessee" stamp in school colors on the opening page of her website. We believe we are close to a final proposal that should meet everyone’s desires and aesthetic sensibilities.

6. Good Web Citizenship

Good web citizenship demands many things. For instance, we must be sure to include Webmaster and other contact information on a contact information page or perhaps on every page. [FN45] Another feature of good web citizenship is to provide a clear indication of when updating or modification of the website occurred. Clear dating is a difficult feature for a website like Fran's because the site is open-ended and anticipates future growth. One web guide cautions designers to "[d]ate every Web page and change the date whenever the document is updated. This is especially important in long or complex online documents that are updated regularly but may not look different enough to signal a change in content to occasional readers." [FN46] I know from my own and others' experiences that the activity of keeping a website updated and fresh can be a demanding chore. For this site, we have chosen to include with each student project a notation about when the project itself was carried out and when the exhibit was developed. This information is necessary to prevent confusion because in some cases there was a significant lapse of time between the project and its exhibition. In general, the basic design of the page provides that original portions will generally stand as they are, clearly dated, while new materials get added with new dates of their own. We hope this will prove to be a workable solution that allows continued growth without the need
for extensive revision and updating. But we know we will need to stay alert about this problem if we want the website to continue to feel like an integrated whole.

An additional feature of good web citizenship is compliance with intellectual property rules. In simple terms, "[f]air use ends when the multimedia [or any other type of media] creator loses control of his product's use, such as when it is accessed by others over the Internet." [FN47] Of course, copyright laws work both ways. We will probably copyright the website, although Fran will make it clear that viewers are free to copy many items. In the meantime, however, we are seeking permission to reproduce certain items or links to other sources where permission is required.

*901 7. Accessibility

Accessibility is a matter of good web citizenship, and it is complex enough to merit some discussion of its own. Accessibility issues may involve helping people to understand and obtain any software they may need to review and use all features of a particular website. For instance, we have included many documents in a PDF format, so we need to add links to the Adobe PDF reader software; and we have a few audio clips that require Quick Time, so similar links will be needed there. The same process will be used for any other software and plug-ins needed, as we include additional media types to the website. [FN48] We probably need to add advisories and explanations about these software matters for novice users, as well as warnings about file sizes and formats.

Of course, there are many accessibility issues that go far beyond software. Many people lack access to the web entirely, while others have slow computers or narrow bandwidth. Others have disabilities that may create barriers, most of which can be overcome, but only with planning and additional time investment.

Some of the exhibits on this website raise pointed accessibility questions themselves. For instance, one exhibit features a report on Latina/o immigrants in Tennessee and explicitly mentions language access for low-English-proficiency immigrants. Another exhibit focuses on the rights of children with disabilities. Accordingly, we believe we at least need to consider steps such as translating some or all sections of the website into Spanish. We also think we either should mirror the website in a text-only version or provide other mechanisms to comply with relevant sections of the Rehabilitation Act. [FN49] (The Rehabilitation Act requires that individuals with disabilities be provided comparable access to electronic information and data. [FN50] Although not all websites are legally required to comply with these provisions, these rules have generally been viewed as guides for good web citizenship).

The World Wide Web Consortium ("W3C") has also developed guidelines and checklists for web content accessibility in collaboration with various organizations. [FN51] The checklist from W3C contains items such as "provide a text equivalent for every non-text element" and "ensure that equivalents for dynamic content are updated when the dynamic content changes." [FN52] In addition, there are software tools available that check how well web pages comply with such standards. [FN53]

Finally, good web citizenship also deals with issues regarding consent, that is, with obtaining consent from people who are featured in some way on the website. Consent could be an issue for any website, but because this one is a form of scholarship that includes research on human subjects, it involves special concerns and particularly rigorous guidelines. Fran submitted a successful application to our university's board that deals with research involving human subjects. As a result, there are consent forms that are now given both to students and to their community partners if the partners are going to be featured on the website in some way. [FN54]
8. Future Maintenance, Promotion and Growth

There are many things that we need to do to preserve and enhance maintenance, promotion and growth of our website. For instance, we need to develop guidelines for reviewing and updating content and verifying resource links, and resources must be secured to carry out these guidelines. We need to promote the website. A set of "meta tags" can be developed that will provide descriptions and keywords that assist discovery by web search engines. [FN55] We might also manually submit the website to search engines for inclusion in their index. Obviously, we will want links to point to our website from the college, law library and university levels.

Another task is to protect ourselves against catastrophic data loss. This will require help from the network manager and computer services technologists to assure regular backup of the website and to avoid server problems that could destroy the only copy of the current website. One commentator advised:

[A]rrange to collect and store the files of the site periodically or contract with your Web service provider to set aside a backup version at regular intervals so that it can be stored for long-term use. We take for granted the 'paper trail' of history left by conventional business and work practices. Without a plan for preserving our digital works, our collective history may vanish without a trace. [FN56]

A more substantive dream for the future is to buy some programmer time (perhaps through another technology grant from the university) so that we can facilitate the process of adding text, artifacts and images to the temporary exhibits area. A template could be constructed that would allow a student to upload text and images into a relatively simple and preset exhibit space, perhaps as part of an end-of-semester assignment. Such automation would enable more students' work to be visible and also provide more exposure for community partners. In addition, automation would certainly ease the burden of future website development, allowing us to concentrate faculty time on the site's more comprehensive, permanent exhibits.

Another hope is that we will be able to incorporate some "born digital" multimedia to the website. Through the grant that started the project, the College of Law was able to acquire digital video equipment that is now available to students. It would be great if the website could include more video that students make in the future.

IV. Conclusion

When the two of us presented our project at the LatCrit IX Conference outside of Philadelphia in the Spring of 2004, we were able to show participants the website, on the spot and in the flesh, by projecting pages from the website onto a screen and navigating among its parts. Here, in this essay, we are constrained to print on the page, so we want to remind *904 readers that much of what we are saying can best be evaluated and understood by visiting the website itself. Nonetheless, we have done the best we could to share here what we have learned from the project so far. We did so by taking four different perspectives on the project, examining it (1) as an example of the scholarship of teaching and learning, (2) as a case study of the use of community-based field projects in law school, (3) as an example of a law-librarian/law-professor collaboration and (4) as the saga of a website. We hope others will be encouraged to use the internet for sharing what they are discovering about teaching and learning, perhaps avoiding some of our mistakes and taking inspiration from our successes.
I learned a great deal from the members of my cohort (some of whom, coincidentally, have also been active participants in LatCrit events and activities over the years). For an incomplete sampling of some of their scholarship on teaching and learning, see Orville Vernon Burton, Computing in the Social Sciences and Humanities (2002) (showing how development of new technology has shaped social sciences); Roberto L. Corrada, On Teaching Goals, Education Theory, and the Law School Classroom, at http://www.law.du.edu/corrada/castl/on_teaching_goals.htm. See also Robert Bain, Into the Breach: Using Research and Theory to Shape History Instruction, in Knowing, Teaching and Learning History 331-52 (Peter N. Stearns et al. eds., 2000); Craig Nelson, On the Persistence of Unicorns: The Trade-Off between Content and Critical Thinking Revisited, in The Social Worlds of Higher Education (Bernice Pescosolido & Ronald Aminzade eds., 1999); Mary Romero et al., Beyond These Walls: Teaching Within and Outside the Expanded Classroom - Boundaries in the 21st Century, in Handbook of Teaching in the Social Sciences 282-597 (Ron Aminzade & Bernice Pescosolido eds., 1999); Jane Harris Aiken, Striving to Teach Justice, Fairness and Morality, 4 Clinical L. Rev. 1 (1997) (discussing law professors duty to promote justice); Alison Grey Anderson, Lawyering in the Classroom: An Address to First Year Students, 10 Nova L. Rev. 271-88 (1986) (discussing lawyer's role as storyteller); Roberto L. Corrada, A Simulation of Union Organizing in a Labor Law Class, 46 J. Legal Edu. 445 (1996) (indicating students' past life experiences affect students' ability to understand unionized setting); Lucie White, The Transformative Potential of Clinical Legal Education, 35 Osgoode Hall L. J. 603 (1997); Emily van Zee & Deborah Roberts, Using Pedagogical Inquiries as a Basis for Learning to Teach: Prospective Teachers' Reflections upon Positive Science Learning Experiences, 85 Sci. Educ. 733, 733-57 (2001) (analyzing factors that foster science learning); Gerald E. Schenk & David Takacs, History and Civic Participation: An Example of the Scholarship of Teaching and Learning, Perspectives (Apr. 2002), available at http://www.historians.org/Perspectives/Issues/2002/0204/0204teach2.htm (discussing effectiveness of pedagogies based on analysis of evidence gathered from author's class).

The ITC defines its mission as providing "the leadership, the support, the resources, and the training necessary to help University of Tennessee faculty, graduate teaching assistants and academic staff make effective use of technology in their teaching, both online and in the classroom." See The Link Between Technology and Education, at http://itc.utk.edu/ (last visited Mar. 12, 2005).

Many people and organizations provided crucial support to the site. In addition to Cathy, some key sources of inspiration and material support include Spring Miller, my research assistant in Summer 2004; the Carnegie Academy for the Scholarship of Teaching and Learning; and UTK's own Innovative Technology Center whose Faculty First grant provided the talents of graphic designer Joan Thomas and instructional technology consultant Kathy Bennett. The Studio, a multimedia center at the University's main library, was also a lifesaver, in large part because Michelle Brannen and other staff there are so patient and accommodating, even during the high-stress meltdown moments that seem to occur so predictably with digital media. Jeff Groah, Jody Whisnant, R.G. Smithson and Pat McNeil at the law school have also helped out in various ways--with equipment, text preparation, visuals, etc. Meanwhile, Dean Tom Galligan and the University of Tennessee College of Law have stood solidly behind the effort along the
way, in more ways than can be recounted here.

[FN4]. These "permanent" exhibits require substantially more input from the teacher and more heavy-lifting from the producer because they feature lengthier narratives and reflections than do the projects mounted in the temporary collection. There are also more extensive exhibits of images and artifacts and a series of comments from the teacher embedded as pop-up items in the student's narrative and reflection.

[FN5]. See K. Patricia Cross & Mimi Steadman, Classroom Research: Implementing the Scholarship of Teaching (1996) (providing general overview of research being done in classrooms under this banner); see also Ernest Boyer, Scholarship Reconsidered: Priorities of the Professoriate (1997) (serving as germinal text in this field).

[FN6]. Perhaps the movement's most visible patron is the Carnegie Foundation for the Advancement of Teaching, www.carnegiefoundation.org, with its Carnegie Academy for the Scholarship of Teaching and Learning (CASTL), http://www.carnegiefoundation.org/CASTL/index.htm, described in more detail in the text. Another organization that is an important supporter of the movement is the American Association for Higher Education, www.aahe.org/.

[FN7]. The acronym is SOTL, or sometimes SoTL. Although the phrase "scholarship of teaching and learning" has a lot of currency, other usages are common and the boundaries between SOTL and concepts such as educational action research, reflective teaching and many others are far from rigid.

[FN8]. The City University of London hosted its fourth International Conference on the Scholarship of Teaching and Learning (SoTL) on the grounds of Goodenough College in June 2004. The Inaugural Meeting of the International Society for the Scholarship of Teaching and Learning was held in October 2004 in Bloomington, Indiana. Beyond these sorts of "fully dedicated" conferences, there are many SOTL-heavy panels and workshops that take place within other academic meetings, both disciplinary and cross-disciplinary. For instance, I have been invited to present my work on field placements at annual meetings of LatCrit, the Law & Society Association and the Association of American Law Schools.


[FN12]. See generally id.

[FN13]. See generally id.

[FN14]. See generally id. For other resources from this cognitive research strand, see Jacqueline Brooks & Martin Brooks, The Case for Constructivist Classrooms (1993); The Law Teacher (Gonzaga University School of Law, Institute for Law School Teaching), available at http://law.gonzaga.edu/ilst/ilst.htm (last visited Mar. 12, 2005) (injecting cognitive research into legal academy; providing link to newsletter); The Institute for Learning Technologies, at www.ilt.columbia.edu/about/index.html (last visited Mar. 12, 2005); The National Teaching & Learning Forum, at www.ntlf.com (last visited Mar. 12,
(injecting cognitive research into teaching community in practical, usable chunks); The Visible Knowledge Project, at www.georgetown.edu/crossroads/vkp/index.htm (last visited Mar. 12, 2005).


[FN19]. For some helpful resources representative of this democratic access strand, see Mary Romero et al., supra note 1, at 282-597. See also Marc Chesler & A Malani, Perceptions of Faculty Behavior by Students of Color, 16 Mich. J. Pol. Sci. 54 (1993); Craig Nelson, Student Diversity Requires Different Approaches to College Teaching, Even in Math and Science, 40 Am. Behav. Scientist 165 (1996) (indicating that bias in traditionally taught courses perpetuates social class differences); Francis Schrag, From Here to Equality: Grading Policies for Egalitarians, 10 Good Soc'y 44, 44-47 (2001); Uri Treisman, Studying Students Studying Calculus: A Look at the Lives of Minority Mathematics Students in College, 23 C. Mathematics J. 362 (1992) (discussing experiences as calculus professor).

[FN20]. Of course, access-minded law professors have been producing scholarship for years now about the challenges of teaching and learning that confront outsider teachers and outsider students. In effect, they have created a whole genre in the scholarship of teaching and learning within the legal academy, though until fairly recently the SOTL label was not known or used much. Many in LatCrit are doubtlessly familiar with much of this literature on pedagogy and access, and a full review would be the subject of a whole separate inquiry, but a few memorable contributions include: Kimberlé W. Crenshaw, Foreword: Toward a Race-Conscious Pedagogy in Legal Education, 11 Nat'l Black L.J. 1 (1989); Lani Guinier, Becoming Gentlemen: Women's Experiences at One Ivy League Law School, 143 Penn. L. Rev. 1 (1994) (describing women law students' experience at elite law school); Natsu Saito Jenga, Finding Our Voices, Teaching Our Truth: Reflections on Legal Pedagogy and Asian American Identity, 3 Asian Pac. Am. L.J. 81 (1995); Charles R. Lawrence III, Doing the 'James Brown' at Harvard: Professor Derrick Bell as Liberationist Teacher, 8 Harv. BlackLetter J. 263 (1991) (noting Professor Derrick Bell's call to students to test law's responsiveness to their experiences); Lawrence, supra note 18 (attempting to frame paradigm for legal education for use by other scholars of color); Margaret Montoya, Mascaras, Trenzas, Y Grenas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse, 15 Chicano-Latino L. Rev. 1 (1994) (exploring how transculturation creates new options for expression, personal identity, cultural authenticity and pedagogical innovation); Francisco Valdes, Outsider Jurisprudence, Critical Pedagogy and Social Justice Activism: Marking the Stirrings of Critical Legal Education, 10 Asian L.J. 65 (2003) (comparing structure of legal education with instrument of social hierarchy).

[FN21]. Craig Nelson is a nationally recognized scholar of teaching and learning, distinguished professor of biology and teaching mentor--now emeritus--at the University of Indiana, and a member of my cohort at CASTL.


[FN23]. For those who are interested in viewing a resource list, the website itself provides additional links and citations to this literature see http://www.law.utk.edu/library/teachinglearning/overview/resources.html (last visited Mar. 13, 2005).


[FN25]. For more on the new externship program, see LatCrit, at http://


[FN28]. See id. at 753-54 (emphasizing importance of clinical faculty becoming involved in various disciplines).


[FN30]. For instance, Professor Dean Rivkin often has students do research projects for local environmental and community groups as part of his course on Environmental Justice and Community Lawyering. Professor Deserée Kennedy has developed a structured service-delivery component through which law students work for survivors of domestic violence in her Family Law course. Professor Joan Heminway has students in her class on Animals and the Law assigned to projects providing legal assistance to a number of animal welfare initiatives underway in Tennessee, educating the general public about legal issues involving animals and exploring legislative solutions to problems identified during other course-related activities. Professor Neil McBride teaches the law of nonprofit corporations using a "legal check-up" module in which his students work with local nonprofit organizations to conduct prophylactic audits of their legal affairs, a process that regularly identifies issues whose discovery and resolution are of great benefit to the groups in question.


[FN32]. See id. at 58-62 (arguing experiential education generates passionate and better prepared students).


[FN34]. Instructional technology focuses on the use of technology to support teaching and learning, usually in the setting of an educational institution. One of the best known organizations involved in this field is EDUCAUSE. See EDUCAUSE, at

[FN35]. The tape was created by a law student as part of a campaign aimed at educating state legislators about the partial spousal rape exemption in Tennessee and why it should be repealed.

[FN36]. The Studio staff also helped by providing a training session about digital cameras and library policy for students in one of Fran's classes. See University of Tennessee, The Studio, at http://www.lib.utk.edu/mediacenter/studio/index.html (last visited Oct. 23, 2004) (displaying comprehensive information about services and policies).


[FN38]. One example of such an attempt is Multimedia Educational Resource for Learning and Online Teaching (MERLOT). See Multimedia Educational Resource for Learning and Online Teaching, at http://www.merlot.org/Home.po (last visited Oct. 23, 2004) (displaying information and services provided by website). MERLOT acts as a repository and exchange for online learning materials as well as a peer review mechanism. See id. (explaining purpose of website).

[FN39]. My bibliography would supplement the list of resources now posted on the website as part of the exhibit on the spousal rape campaign.


[FN42]. See id. (explaining methods for organizing folders).

[FN43]. This may sound boringly trivial to some readers, but it really made my life easier when I figured it out.

[FN44]. For example, a file in the spousal rape exemption campaign exhibit starts with the two letters 'sr' followed by '_p_story1.html.' This sequence indicates that the file contains page one of the project story for the spousal rape exemption campaign exhibit.


Currently, we have a few audio clips that use a Quick Time format. We plan to provide alternative versions in Real Audio formats, and maybe other formats such as mp3 or Flash.

See Rehabilitation Act of 1973 §§ 504, 508, 29 U.S.C. §§ 794, 794(d) (2004) (describing requirements for providing access to individuals with disabilities). Section 504 imposes rules on educational institutions regarding access to services by the disabled and Section 508 imposes rules on the federal government itself regarding the use and procurement of electronic and information technology. See id. (stating requirements placed on educational institutions and federal government).

See id. § 508 (delineating requirements for federal government to provide accessibility to electronic and information technology for disabled persons).

See W3C, Fact Sheet for "Web Content Accessibility Guidelines 1.0," at http://www.w3.org/1999/05/WCAG-REC-fact.html (last visited Oct. 23, 2004) (providing guidelines for website accessibility for persons with disabilities). This site states: W3C's Web Accessibility Initiative [WAI] provides a forum for disability organizations, accessibility research centers, and government to participate with industry representatives under W3C process. Participation in the Web Content Accessibility Guidelines has included representation from all of these areas, with extensive international participation. As a W3C Recommendation, this specification has undergone formal review by W3C Member organizations and all comments raised have been addressed. Id. WAI is supported in part by the United States Department of Education's National Institute on Disability and Rehabilitation Research. See id. (listing sponsors of program).


Probably the most widely known software of this type is Bobby. See watchfire, Bobby, at http://bobby.watchfire.com/bobby/html/en/about.jsp (last visited Oct. 23, 2004) (explaining Bobby and its uses). This software was first developed by Center for Applied Special Technology, at http://www.cast.org/products/ (discussing development). Individual web pages can be submitted to verify how well they adhere to various accessibility guidelines. See watchfire, supra (explaining how Bobby works). The software can be purchased to evaluate whole websites. Id.

Fran discusses this matter in greater detail on the website itself, in the Teacher Overview section. See Fran Ansley & Cathy Cochran, Teaching Learning, at http://www.law.utk.edu/library/teachinglearning/default.html.

A meta tag provides information about a web page. Some search engines use these tags when they index a website.

IN introducing the following cluster essays, I find it appropriate to paraphrase the political slogan made famous by the 1992 Bill Clinton presidential campaign: "It's the method, stupid." Both authors emphasize the centrality of method in any critical project seeking to transform present inequitable social structures. The goal of liberating society of its hierarchies, subordinations and oppressions can only succeed if critical scholars have the appropriate methods of inquiry. Specifically, if we have methods of inquiry that help us to rethink and reconceptualize seemingly intractable social problems, we then can create and develop novel and innovative solutions to effectively confront such problems. The authors in the following cluster pieces argue forcefully and convincingly that LatCrit scholars need to pay serious attention to developing critical legal methods to achieve this transformation of society.

First, Professor Mary Romero's essay is a call to LatCrit scholars to take method seriously. She critiques what she believes is the propensity among critical scholars to engage in analyses that are "overly psychological" and that fail to "illuminate circumstances or issues, but rather distort material realities and legal structures that exist." Professor Romero characterizes the focus on psychological answers to problems of subordination as one of "psychological reductionism." Under this approach, racism is reduced to a phenomenon created by the individual state of mind. Thus, scholars employing that method focus on concepts such as unconscious racism, and interrogate how human cognitive processes "reveal and illuminate unconscious racism" in white people. Moreover, such scholars tell narratives describing the personal biographies of socially marginalized persons, giving personal accounts in rich detail without linking their struggles to the larger structural forces creating the conditions for their struggles.

For Romero, the psychological method is problematic because it focuses our critical attention solely on issues of individual motivation, personal identity and personal empowerment and self-esteem, and diverts our attention away from the larger structural, political, economic and cultural circumstances that cause and contribute to subordination. Her answer to the pitfalls of psychological analysis is the "sociological imagination." Drawing on the theories of sociologist C. Wright Mills, Professor Romero urges critical scholars to adopt a sociological imagination, a method that seeks to locate personal stories of social struggle within the larger structural transformations taking place in society. A sociological imagination would help scholars link "biography to history," and aid them in "identifying the causes of subordination and developing anti-subordination praxes." A sociological imagination would also divert our focus away from the narrow issue of unconscious racism and onto the broader issue of institutional racism. The move from analyzing unconscious racism to analyzing institutional racism, argues Romero, "brings us back to the central issues of power and privilege." A focus on institutional racism gets away from the useless attempt to change "the hearts and minds of white folks," and
puts our emphasis back on "the consequences of bureaucratic and other everyday practices that transcend hateful attitudes and individual racist acts. Institutional racism gets us out of the psychological swamp of white guilt and lets us focus on the irrationalities built into supposedly rational institutions." [FN10]

Professor Imani Perry boldly asserts that "[f]or scholars, method is paramount. How one asks the question and pursues the answer are perhaps the two greatest choices to be made . . . ." [FN11] She then argues that LatCrit theorists should incorporate cultural analysis into their critiques of race and the law. [FN12]

*907 For Professor Perry, the cultural method is one in which the "world is read as a series of texts." [FN13] She contends that all aspects of cultural production and practices can be viewed as text, and that critical scholars ought to "read" social practices as texts and relate them to structural aspects of law and racism to show how culture and structure reinforce one another. Specifically, Professor Perry argues that reading social practices as text is a useful method for understanding how values and messages are transmitted and reproduced through various social practices, and how those transmitted values and messages then shape and influence the ideological underpinnings of law, which in turn shape and influence social practices. [FN14]

In her essay, Professor Perry provides a brief but illuminating example of her cultural method at work. She analyzes ("reads") one particular cultural text, the television talk show topic of "paternity tests." On these shows, young women of color go on national television, reveal to the audience that they are not sure who the father of their children are and then proceed to invite men on the show and subject them to paternity tests to try to identify the real father of the child. Professor Perry notes that each individual "paternity test" show is "no more than a personal saga, interesting, heartbreaking, compelling." [FN15] Upon repeated viewings of countless talk shows that repeat the same theme with different women of color, she contends that these shows are evidence of a larger cultural narrative that rationalizes the plight of impoverished single mothers. This narrative justifies the subordination of poor, single mothers who "deserve" their plight because their problem has been caused by their own "licentious and promiscuous" behaviors--by having sexual relations with so many different men that they cannot even be sure who is the real father of their child. [FN16] Thus, based on her cultural analysis of "paternity test" talk shows, she concludes that "it is in the systematic observation, in the cultural fabric, that we see how the shows affirm and recodify stereotypes already existing in American culture." [FN17]

Utilizing Professor Perry's cultural analysis can help to uncover and reveal social patterns, values and beliefs embedded within seemingly, minor, discrete, individualized, personal and isolated acts of individuals. In keeping with Professor Romero's call to LatCrit scholars to link the personal to the political, Professor Perry's cultural analysis links the personal issue of sexual relations to the larger political-economic issue of the subordination of poor, single mothers of color. Both essays require attention, as they emphasize the importance of thinking critically about how we engage in our critical analysis. To put it another way, the essays call on us to think critically about our critical thinking.

I want to conclude this introduction by re-examining the issue raised by Professor Romero regarding the need to move away from analyzing unconscious racism and instead towards analyzing institutional racism. [FN18] While I agree generally with her call to locate personal struggles within the larger structural context, I believe, consistent with her call for critical scholars to adopt a sociological imagination, that there is a way to link unconscious racism with institutional racism. I do not view the phenomenon of unconscious racism as something separate and distinct from that of institutional racism. Instead, I view unconscious racism as an integral aspect of the institutional structures
that reinforce and perpetuate racial subordination. To explain this connection, I will briefly discuss the issues of unconscious racism and institutional racism in the context of employment discrimination law.

Professor Michael Selmi wrote a recent essay entitled Why Are Employment Discrimination Cases So Hard to Win? [FN19] He notes statistics showing that only about fifteen percent of claims filed with the Equal Employment Opportunity Commission (EEOC) result in some sort of relief being provided to plaintiffs. [FN20] A substantial number of employment discrimination claims filed in federal court are dismissed at the pretrial litigation stage, and of those cases dismissed by pretrial motion, ninety-eight percent are won by defendants. [FN21] Those cases that do make it to trial suffer lower success rates when compared to other civil cases. [FN22] Although in his essay he examines the difficulties inherent in bringing any employment discrimination claim, whether based on race, sex, age or disability, he emphasizes that race discrimination claims are the most difficult cases to win. [FN23]

The question arises: why are claims of employment discrimination on the basis of race so difficult to win? In larger measure, the reason is because the courts are simply hostile to race discrimination claims and apparently believe that claims of racial discrimination are presumptively *frivolous.* [FN24] When it comes to race cases, "courts often seem mired in a belief that the claims are generally unmeritorious, brought by whining plaintiffs who have been given too many, not too few, breaks along the way." [FN25]

Are courts and employers right? Are plaintiffs unsuccessful because they raise unsubstantiated, frivolous claims of racial bias? The answer is no, and I argue the reason why courts and employers fail to see racism in the workplace, and instead blame victims for essentially playing the race card, is because they use an outmoded conception of discrimination to analyze employment discrimination claims. To use Professor Romero's terminology, they fail to see the unconscious and institutional biases at work in the employment context because they are operating under the premises of "psychological reductionism," and thinking of racism solely in terms of intentional psychological motivation. [FN26]

Thus, in deciding Title VII claims, the courts miss and obscure the racism taking place in the workplace because judges continue to use a formalistic, psychologically simplistic and unrealistic model of intentional discrimination that fails to address the subtle or unconscious racism operating in the workplace. Under the psychologically reductionist view of racism, the assumption is that there are certain people in society who are racists by nature and who, if they had the chance, would invidiously discriminate against people of color and would deliberately exclude them from the workforce.

The reductionist view, therefore, assumes that racism is a character trait, and the people who possess this trait then are categorized as "racists." Like an aspect of personality, an actor's racist characteristic is believed to be stable and to express itself consistently over time and in different situations. [FN27] Under this model of racism, racist decision-makers are conscious of their racism, and if permitted, would openly discriminate against persons of color based on their race. However, given that Title VII employment discrimination law prohibits explicit racial discrimination, the racist decision-makers, if they want to act on their racist impulses, must engage in covert racism to avoid legal liability. In other words, racist employers, when they act upon their racism, in order to avoid Title VII liability, must hide their true racist motives under a facially neutral rationale.

*910 Thus, relying on this conventional model of racism, Title VII legal doctrine has been constructed in order to uncover the "true" racist motives of an employer. Under the disparate treatment test from McDonnell Douglas Corp. v. Green, [FN28] when an
employee seeks to prove that his/her employer racially discriminated against him/her using indirect or circumstantial evidence, the plaintiff's claim is determined through a three part analytical framework. [FN29] First, the employee must make out a prima facie case of racial discrimination or disparate treatment. Once the employee makes out a prima facie case, then an inference of racial discrimination will arise. [FN30] Second, once the plaintiff makes out a prima facie case, the employer then has the burden of production to produce evidence of a legitimate, nondiscriminatory reason for the adverse employment decision. [FN31] Third, the employee has the burden of proving that the legitimate reason proffered by the employer is merely "pretext," a false reason given to hide the real or true racist motive for the adverse employment decision. [FN32] Under Title VII disparate treatment doctrine, a plaintiff's prima facie showing of racially differential treatment can be overcome by an employer who proffers a legitimate, race-neutral reason for the adverse employment decision. [FN33] Therefore, under the doctrine, the presence of a legitimate reason for the adverse employment decision is proof that racial discrimination did not occur.

What is the problem with the conventional model of racial discrimination and the disparate treatment test that is based on that model? The conventional model of racism just does not seem to square with or explain the acts of racism occurring in the workplace. Deliberate, self-consciously aware racists are not the norm in today's workplace. There is widespread public and social consensus that racial discrimination and bigotry is wrong, and most people desire to maintain an "egalitarian, nonracist self-image."

The problem today is not the existence of deliberate racists in the Jim Crow segregationist mold. Instead, the problems in today's workplace are unconscious racial bias and subtle racism, which actually operate outside of the conscious awareness of the "racist" actor. [FN34] In today's post-civil *911 rights world, racism operates not through deliberate acts of racial discrimination, but through seemingly facially race-neutral acts. [FN35] Thus, because courts and employers fail to recognize and understand how racism really operates today, they dismiss allegations of unconscious or subtle racism as meritless and frivolous.

Social psychologists contend that today, much racism takes the form of what they call aversive racism. Aversive racism "represents a subtle, often unintentional, form of bias that characterizes many white Americans who possess strong egalitarian values and who believe that they are nonprejudiced." [FN36] People who engage in aversive racism do not wish to discriminate against people of color; rather, they honestly and consciously believe and affirm notions of racial equality, and often act positively upon their egalitarian beliefs. [FN37]

Many studies have been conducted to show aversive racism at work. A number of experimental studies have focused on examining the helping behavior of people. In these studies, researchers create scenarios to see how people respond to others in need of help and whether or not their helping responses are affected by the race of the victims. Studies on helping behavior have found that white people would discriminate against black victims and refuse to help them when it appeared that the black victims created their own problems. [FN38] On the other hand, the studies showed that white people treated and helped black victims favorably or even more favorably than white victims when it was perceived that the black victims' plight was caused by factors outside of their control. [FN39]

What implications may we draw from these studies? One critical finding is that the studies show that aversive racism is a situational phenomenon. In other words, contrary to the conventional model of racism, a person does not possess and act upon racist impulses consistently in different places and times. Rather, studies show that certain
situations and contexts trigger aversively racist behavior in white people, while certain situations and contexts actually promote race-neutral, egalitarian behavior in white people. In other words, whether a person acts in a racially biased manner depends, not so much on his/her personality, ideology or beliefs, but on the nature and circumstances of the situation.

Specifically, social psychologists suggest that unconscious racial biases are triggered in situations that are normatively ambiguous. [FN40] A normatively ambiguous situation is one in which morally appropriate behavior has not been clearly identified. [FN41] In such a context, negative behavior against a person of color can be justified on some other basis besides race and thus provides a legitimate, nonracial reason for the negative behavior towards a person of color. Thus, under certain situations, even such persons with conscious egalitarian beliefs may unknowingly act on unconscious stereotypes and negative beliefs.

Numerous social psychology studies have demonstrated the power of the normatively ambiguous situation to induce persons to act upon unconscious biases. In one helping study, whites would help black victims in situations of normative clarity when it was clear that in order to avoid the perception of racism they needed to help the black victim. [FN42] In these normatively clear situations, whites are not likely to act upon their unconscious biases, and instead, they may act in ways more favorable and helpful to persons of color. [FN43] On the other hand, whites would not help black victims when the situation was normatively ambiguous--when they could refuse to help the black victim, and in doing so still maintain their egalitarian self-image by attributing their decision not to help another, nonracial, neutral reason.

Second, the situational nature of aversive racism has enormous implications for Title VII specifically, and for anti-discrimination law in general. As discussed earlier, under Title VII disparate treatment doctrine, a plaintiff's prima facie showing of racially differential treatment can be overcome by an employer who proffers a legitimate, race-neutral reason for the adverse employment decision. Under the doctrine, the presence of a legitimate reason for the adverse decision-making is proof that racial discrimination did not occur; and thus, an employer can escape liability by putting forth a legitimate reason for a decision adversely affecting a racial minority.

The social psychology findings, however, strongly suggest that the disparate treatment doctrine has it completely backwards. The McDonnell Douglas disparate treatment test is based on the conventional model of racism. Under the conventional view of racial discrimination, the racist employer first decides to act on his/her racial bias, and then comes up with a nonracial, pretextual reason to "cover up" the true, racist reason for firing a person of color. The racist motive precedes the pretextual reason.

According to the research on aversive racism, however, the causal relationship between the racist reason and the pretextual reason is reversed. When aversive racism is in operation, the presence or existence of a legitimate, nonracial reason for an adverse employment decision exists prior to the racially biased action. The legitimate reason triggers or "causes" an otherwise egalitarian decision-maker to be influenced by his/her unconscious racial biases.

Counter-intuitively, then, the situational research hypothesis suggests that the presence of a legitimate reason for an adverse employment decision makes it even more likely, not less likely, that racial bias was a factor in a negative decision against a person of color. The helping studies discussed above actually suggest that racially biased treatment and legitimate, nondiscriminatory justifications are likely to coexist with allegations of racism because the presence of a legitimate reason may have produced a normatively ambiguous situation which then triggered unconscious biases in the decision-maker.
Thus, Title VII might actually be encouraging employers to construct workplace situations that promote rather than deter racially biased decision-making. If employers can avoid Title VII liability by proffering a legitimate reason for an adverse employment decision, they are likely to continue to structure decision-making in such a way that employers can always assert a legitimate reason to justify an adverse decision. To the extent that such situations actually encourage racially biased decision-making, Title VII doctrine is actually giving employers an incentive to construct racially biased workplace situations that produce biased decision-making. The law itself, in other words, may be playing a significant role in producing the sort of behavior it is purportedly seeking to eliminate. [FN44]

In addition to having implications for rethinking Title VII doctrine, the aversive racism studies have implications for the general discussion of critical method concerning the analysis of racism and the law. First, aversive racism and social psychology research in general may provide the link in connecting unconscious racism with institutional racism. To confront unconscious racism, social psychology informs us that it is not useful to try to "change the hearts and minds of white folk." Rather, the key is to focus *914 on changing the workplace situations and contexts that facilitate and encourage people to act upon their unconscious racial biases. [FN45] A focus on workplace situations necessarily requires an examination of the institutional practices that structure workplace situations that produce racially biased decision-making and interactions. In other words, from a social psychology perspective, to deal with unconscious racism requires directly confronting and challenging the institutional structures of the workplace, and challenging how legal doctrine itself may be reinforcing racially biased institutional practices.

Second, it is also necessary for critical scholars to heed the call of Professor Perry and interrogate the cultural narratives that reinforce and perpetuate racially biased workplace situations. The unconscious biases that are triggered by normatively ambiguous workplace situations do not come from thin air, nor are they the product of internal cognitive processes of various individuals. Rather, unconscious biases and stereotypes are transmitted through ubiquitous cultural practices, and it would be enlightening and informative to be able to link the workings of unconscious bias in the workplace to the transmission of values, stereotypes and biases through cultural texts.

The critical engagement with method is a crucial endeavor for critical scholars. In a postmodern world where all that is solid seems to instantly melt into air, it is even more vitally important that we continually think and rethink our methods of critical analysis in order to ensure that our work effectively establishes "the connections between the micro level of personal narratives, the institutional structures and historical circumstances." [FN46]

**Footnotes:**

[FNa1]. Associate Professor of Law, Texas Wesleyan University School of Law. B.A., Oberlin College; J.D., Boston College Law School; LL.M., Georgetown University Law Center.

[FN1]. See Gwen Ifill, The 1992 Campaign: Political Memo; Clinton's 4-Point Plan to Win the First Debate, N.Y. Times, Oct. 9, 1992, at A21 (discussing then-candidate Bill Clinton's campaign strategy for 1992 presidential election, which was centered around slogan "It's the economy, stupid.").

[FN3]. Id. at 925 (criticizing overly psychological analysis of LatCrit).

[FN4]. Id. (arguing "[i]ndividual focus and psychological explanations to racism contradict proposals for structural change and undermines the significance of collective action in the struggle against inequality").

[FN5]. Id. at 933 (identifying shift in critical race theory from institutional to psychological).

[FN6]. See id. (indicating that racism is "so underground and subtle" that it becomes unconscious).

[FN7]. See id. at 926-28 (arguing sociological imagination is more consistent with LatCrit's commitment to inclusiveness).

[FN8]. Id. at 931.

[FN9]. Id. at 936 (identifying concept of institutional racism).

[FN10]. Id. at 937 (citing Mary Romero, Brown is Beautiful, 39 Law & Soc'y Rev. 211 (2005)).


[FN12]. Id.

[FN13]. Id. at 916 (noting cultural production is text read in relation to other texts).

[FN14]. See id. at 915 (identifying LatCrit as scholarly movement that emerged from political movement, which is designed to encourage individuals to critique ideological underpinnings of injustice and marginalization).

[FN15]. Id. at 916 (describing how subjects on television talk shows create discourse about sexuality of young women of color and arguing such shows reinforce racial stereotypes).

[FN16]. See id. at 917.

[FN17]. Id. at 918.

[FN18]. See Romero, supra note 2, at 933-37 (discussing pitfalls of using psychological foundation).


[FN20]. See id. at 558 (comparing success rate of employment discrimination plaintiffs to that of other civil plaintiffs).

[FN21]. See id. at 560 (collecting statistics for employment discrimination, insurance and personal injury claims and success rate of plaintiff at various stages of litigation).

[FN22]. See id. at 560-61.
[FN23]. See id. at 562 (discussing reasons why race discrimination claims are more difficult to win than other types of employment discrimination claims).

[FN24]. See id. at 556 (outlining reasons for plaintiffs' difficulties in employment discrimination claims in general, and in those based on race specifically).

[FN25]. Id.

[FN26]. See Romero, supra note 2, at 925 ("Individual focus and psychological explanations to racism contradicts proposals for structural change and undermines the significance of collective action in the struggle against inequality.").


[FN28]. 411 U.S. 792, 802-04 (1973) (establishing test by which all Title VII employment discrimination claims based on theory of disparate treatment are analyzed).


[FN30]. See id. at 506 (discussing first step of burden-shifting structure applied to Title VII cases).

[FN31]. See id. at 506-07 (discussing second step of burden-shifting structure applied to Title VII cases).

[FN32]. See id. at 507-08 (discussing final step of burden-shifting structure applied to Title VII cases).

[FN33]. See id. at 507.


[FN35]. See Wang, supra note 27, at 1045 (describing situations that seem racially neutral, but can be affected by subconsciously-held racial stereotypes).


[FN37]. See id. (explaining that aversive racism is not conscious, but rather results from unconscious negative feelings).

[FN38]. See Wang, supra note 27, at 1039 (describing results of studies conducted to
research behavior of people in racially-neutral situations).

[FN39]. See id.

[FN40]. See id. at 1036 ("[S]ocial psychologists who study contemporary discrimination have discovered, much as Milgram did, the power of ambiguity or the lack of definitional clarity in a situation to open a channel to behavior that otherwise would seem clearly wrong.").

[FN41]. See id. at 1035-36 (discussing normatively ambiguous racial situations).

[FN42]. See id. at 1037 (describing results of social psychology experiments involving situations when it was clear what moral, egalitarian people should do).

[FN43]. See id. at 1037.

[FN44]. A recent Supreme Court decision on Title VII may have significantly altered the Court's disparate treatment doctrine. See Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) (holding direct evidence is not required to trigger the Price Waterhouse mixed motive analytic framework). Some commentators suggest that the Desert Palace test has supplanted the McDonnell Douglas test and that it has created a unitary mixed motive framework for all disparate treatment cases. See, e.g., Michael Zimmer, The New Discrimination Law: Price Waterhouse is Dead, Whither McDonnell Douglas?, 53 Emory L.J. 1887 (2004).

[FN45]. See generally Green, supra note 36 (arguing for disparate treatment theory that takes into account workplace situations that create racially discriminatory employment decisions).

[FN46]. Romero, supra note 2, at 938 (summarizing how sociological imagination can assist LatCrit).
FOR scholars, method is paramount. Outside of choosing the subject of inquiry, how one asks the question and pursues the answer are perhaps the two greatest choices to be made. Before I was a legal academic, I was a student and scholar of cultural studies. Because I was trained by professors educated in the Birmingham School, the tastes, politics, challenges and products of communities of peoples, defined by class, race, nationality, region and the like, provided the methodological roughage for my intellectual development. And when I, through my experience as a law student of color and later as a legal academic, was introduced to Critical Race Theory and LatCrit, I immediately began to envision new possibilities for my methodology.

This methodology was the examination of race in the law that understood both (race and law) as part of the fabric of culture, subject to the kinds of cultural inquiry pursued in the cultural studies method.

In this piece I will reflect upon the usefulness of cultural studies to studies of race and the law, and then make several methodological arguments about how to approach such work. The parallels between the movements, cultural studies, Critical Race Theory and LatCrit, are suggestive of their appropriateness for interdisciplinary sharing. All emerged as scholarly movements out of political movement. These scholarly movements encourage scholars to reflect upon the significance of their work with respect to the material conditions of people's lives. These movements are penetrating, concerned with critiquing the ideological underpinnings of injustice and marginalization, and interpreting the relationship between belief and how people live.

In cultural studies, interpreting the relationship between belief and the material conditions of people's lives is best exemplified by the theoretical canonization of Antonio Gramsci and his notion of hegemony. It is in fact through Gramsci that we find one of the most powerful early unions of cultural studies and law. Further, in Eugene Genovese's classic work, Roll, Jordon, Roll, Chapter 22: The Hegemonic Function of the Law, Genovese is one of the earliest scholars to bring Gramsci to bear on United States race and culture. Genovese exposes how race and racism were codified in ante-bellum slave law, and how racism dizzyingly echoed back and forth between law and the popular culture. The ideology crafted by the planter class evolved into a set of hegemonic structures (law, family culture, religious institutions) which reinforced the belief in black and slave inferiority. For me, as an undergraduate, reading this chapter opened my eyes to the application of cultural studies to law for the first time, something that would become a professional fixation. My dedication to such issues is demonstrated in my dissertation, Dusky Justice: Race in U.S. Law and Literature 1878-1914, and in my first book, Prophets of the Hood: Politics and Poetics in Hip Hop, that includes a chapter on the Glorious Outlaw, and on to the present moment with articles and a forthcoming book on metanarratives of race in law and culture. Law, as I have come to understand it, is not simply a set of rules through which power is exercised, but a cultural and epistemological institution.
But let us begin with the cultural studies method. In cultural studies, the world is read as a series of texts. Every piece of cultural production, a song, a film, a ditty, a style of dress, is a text. We read these texts, not simply alone, but in context, in relationship with other texts. We also read them intertextually, that is to say, we are concerned with how texts "speak" to each other. What is the cultural conversation being had between and within different sorts of texts?

Amongst the myriad subjects of inquiry for cultural studies scholars, there is law. Law is but one, particularly powerful, arm of cultural production* 917 and life. For legal scholars, to adopt the cultural studies method is almost to step outside one's field to see it with fresh eyes, and in broader context. The Working Group on Law, Culture and the Humanities, a collective of academics, has fostered such an understanding of how law operates. In this vein, one way we legal academics can continue to use textual analysis and social theory, effectively, is to read social practices and forms of consumption (television, church, film, games) as they relate to the structural power of law, and the underlying ideologies of constitutional and private law.

Importantly, in reading social practices we must not simply read them anecdotally, but systematically. This is necessary in order to understand what values and messages have been transmitted through these social practices and forms of consumption and how these impact the ideology present in law (opinions and legislation), or shaped by it. Reading social practices in this fashion marks a departure from the legal academic proclivity in recent years of adopting literary theory's close reading practice, in favor of readings of broad practice. I am not advocating an absolute departure from close reading per se, but rather relegateing close reading to spaces in which a legitimate case can be made, on a scholarly level, for generality, or evidence of systemic truth, at least with respect to making broad claims about race. [FN6]

For example, one of my interests is in television talk shows. In particular, I am fascinated by the "paternity test" shows. On these shows, a woman, often young, poor and of color, will invite men on the program and have these men take DNA tests in order to determine whether one of these men is the father to the woman's children. At times, there are women who test eight or more men, without ever finding "the father." My interpretation of the cultural work of these shows is that, as a discourse about the sexuality of young women of color, it argues that their plight as impoverished single women is justified because "women like that" are licentious and promiscuous.

Moreover, the shows argue that women in such circumstances are "bad mothers," in a way that reinforces the racist ideas of maternal deficit we see within the family law system. [FN7] I only come to these conclusions, * 918 however, through repeated watching of shows with this format within the context of a larger cultural framework of media and law. The individual show is no more than a personal saga, interesting, heartbreaking, compelling. But, it is with repeated watching, alongside the grotesquely painful parade of neglected brown and black children on the evening news, that the narrative emerges (widespread promiscuity, insanity, irresponsibility). And, as the show format is copycatted by more and more talk shows competing for sensational popularity, we learn that this show topic, and the picture of young women of color it shows, attracts vast numbers of people. It is in the systematic observation, in the cultural fabric, that we see how the shows affirm and recodify stereotypes already existing in American culture. Likewise, it is through the kind of empirical work done by Dorothy Roberts that we understand the racial bias as evidenced in the family law system, which is rooted in the same ideological framework as the paternity test shows. [FN8]

We must be cognizant of judiciously balancing the qualitative and the quantitative. The empirical process of collecting all cases on a given topic, which includes knowing what
happens and with what frequency, whether it be before a given judge, in a state or in the nation, in a short span or over a long one, is important. Such information is also inextricably linked to the qualitative processes of interpretation and analyses of these materials.

But the project of race, law and cultural studies is more than empirical, although the empirical is often the most immediately dramatic. If we are to conduct a kind of structural analysis in which we attempt to understand patterns present in law and culture that are part of a web, which communicates values and ideas, then we need theory too. The norms of law, articulated in our jurisprudence and our economic structure, must be revealed to see how race operates and cooperates with them. Social theorists whose work animates cultural studies also provide useful means of interrogating norms that provide bases for the structure of power.

And so, we can turn to Raymond Williams [FN9] to assist us in understanding how culture is a site of contestation as well as power. We can read Antonio Gramsci to consider how the lawyer may be an intellectual, but also how to think about the intellectual work of public lawyering. Stuart Hall [FN10] and Charles Mills [FN11] may be used to expose the operation of white supremacy within democratic theory through police power. Paulo Friere [FN12] challenges the dominant epistemology that forms our ideas about education and its policies and disserves oppressed communities. We turn to John Dewey [FN13] for thinking about political engagement, public life and democracy. We refer to Ferdinand Di Saussure [FN14] and Noam Chomsky [FN15] for the ideology embedded in language as minute as the simple phrase or individual word. Lastly, Pierre Bourdieu [FN16] (without whom any conversation on affirmative action [FN17] should be considered incomplete) contributes an understanding of the power of normativity and the status quo for replicating the status quo.

When we read the abundant texts before us, it must be with an awareness of how we are measuring the social significance of what we read. The popular is what we live, and mass culture is what we are inundated with. And so something like a Maury Povich show may have as much, if not more, usefulness for race scholars as literature. In the life of the intellectual, a great pitfall is to discredit the pedestrian, the mundane and the pulse of life. The quotidian and "low brow" are instructive, particularly when we are making arguments about how people live. So, we must put aside arrogance with respect to the texts we consider. When we read them, we ask not simply what does it say, but to whom and to what end? And, moreover, is what is heard the same as what has been said?

Even the oft discredited, postmodern moment in cultural studies offers something profound to us, as it is concerned with audience. When we, legal academics and lawyers, think of how law is produced, we often discuss judicial decision-making or the roles of practitioners (their texts), or plaintiffs/defendants (their stories). However, we often fail to adequately consider jurors, or even more so, the complicity of the public with the actions of courts, the consent of the governed and the discontent of the governed. We must critically engage the practices of the audience to law, the citizens who live under it, and see how their ideological assumptions serve to further marginalize people of color. Furthermore, we must discern how power is dispersed in such a way as to make it the case that that audience advocating our (read "people of color") oppression is sometimes us. Incidentally, that comment is said in homage to Michel Foucault, [FN18] who understood the disparate nature of power. It is a particularly important recognition now because it is abundantly apparent to those of us who study race in the law that we have a desperate need to complicate how racial discrimination is determined to exist (rarely intraracially, rarely accepted when there is a counter example of another person of color who is not being victimized). [FN19]

Simply put, this means that we are called to see how forms of knowing, ideology and
dominant epistemologies about race are spread far broader and deeper than negative intent towards someone who looks different from you. Charles Lawrence's landmark article, The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism, [FN20] heralded this movement *921 for us. We must further map the patterns and structures of unconscious racism by, amongst other things, reading cultural texts of various sorts alongside each other. For example, we should analyze film next to cases, family courts next to talk shows or music next to senate hearings.

Admittedly, I have made broadly drawn calls to the kind of work I believe should be pursued in race, law and cultural studies. Delving more specifically is perhaps best left to the actual particular inquiries. Painstakingly, I attempt to do work that meets my own methodological calls. But now, I want to very briefly turn to several suggestions about how we actually compose such interdisciplinary work.

Despite its reputation, good interdisciplinary work has rigorous practical demands. It must maintain a structure through which coherent observations can be made out of widely divergent materials. There are at least several ways of organizing such projects I can think of, the most compelling being the delineation of interdisciplinary structural analogies, in which ideological consistencies across fields of inquiry are described, or are the lens through which sites or subjects of contestation between texts and contexts can be highlighted. If one is able to make a strong case for intertextuality, that it somehow illuminates or explains in a unique way both qualitative and quantitative discoveries, the work becomes that much more compelling. For example, we might gather materials on race and rates of incarceration, media depictions of people of color and police surveillance within communities of color. But then, to produce work that is useful, we have to attempt to ask and answer whether there is a thread that connects these bodies of information. Is there a theory that makes them make sense together? Should there be a bridge text? Do we need to look at music or language to understand how the community under surveillance responds and makes sense of it?

We have to make decisions about the apparatus of these race based practices, and by that I do not mean the cop doing the cuffing (although perhaps I could). Instead, I ask where do we lay our understanding of how this all works? This is a theoretical question with enormous practical implications.

And so, these compositional questions are on the one hand aesthetic (we want clean, coherent work) and on the other hand quite meaningful (we want our work to be useful). Cultural studies, Critical Race Theory and LatCrit have all been movements that embrace a commitment to social transformation. In cultural studies, the counter-hegemonic voice, the narratives of oppressed people and identity as a site of resistance were critical means by which social transformation was imagined. The very idea of Critical Race Theory and LatCrit as movements within legal academia is counter-hegemonic. I can hear the collective sighing of the nonbelievers. They say, "a bunch of law professors as oppressed people . . . tell it to *922 someone who will buy it." But of course, we bring voices from the margins, from outlaw spaces, we are surveyed in our profession, we are marked physically, linguistically, ideologically, never normative, never able to disappear our bodies behind our objective legal minds even if we were to try to do something so bizarre. [FN21] Critical Race Theory and LatCrit have a counter-hegemonic sensibility and there is no better evidence to be found than the hostility with which our voices have too often been met in mainstream legal scholarship.

Critical race theorists are often charged with being less than objective, or theoretically sound, because we are too crudely political. But I want to end by taking the critique of the political seriously, as a methodological challenge instead of a form of personal attack because it is a similar challenge to that which has been faced by cultural studies and cultural theorists. I believe an essential way of responding to this challenge is to devote
energy to not simply cultural analyses of law, but cultural theories of law with an ethical underpinning.

Politics are of course central to Critical Race Theory, LatCrit and many other important academic movements, and with them the idea that we argue against normative standards and ideologies that serve to marginalize and oppress peoples of color. A good deal of important work is done in exposing the norms that serve to marginalize us (notions of merit, color blindness without considering privilege, wealth versus income, etc.). But I would like to imagine a movement in emphasis from politics to ethics, or to say metaphorically, to building the dancehall as well as doing a dance.

The hubris of creating theory out of the vernacular of political life is what I am talking about. John Locke [FN22] did it, as did Henry Louis Gates, Jr. [FN23] What if we built an ethical framework out of the political knowledge and experience thus far garnered in counter-hegemonic movements, a framework to guide our scholarly work and our political practice?

The move from emphasizing the political to emphasizing the ethical is in itself something of a political move. It seeks to do something which is on some level always a failing proposition, to create some objective standards about what is good and right. Moreover, on some level the move to the ethical is inconsistent with the critical posture we have taken that sees usefulness in the critical space itself, the marginal, threshold, trickster existence. *923 But ethics are essential because they allow for the creation of a community of sentiment and ideas, of values, that is not fundamentally contingent. So, in this moment, perhaps we need a split. On the one hand, we should continue modifying, correcting, revising and critiquing the status quo. On the other hand, we need to continue to devote energy to the task of articulating ethical norms around which we can extend a theory and praxis. To the extent that we do the latter, it provides a means of using our work across multiple disciplinary and even national boundaries. We need a language of thought with multiple valences.

And the right hand should monitor the left (or better yet the left should monitor the right). Even as the ethical norms are created, they should be subject to the practices of critical social theory, a self-reflexive critique, as well as maintain a critical stance towards the social reality they evaluate. And so, a language of self critique must be provided within this ethical framework. It will be important for the critique of the institutions, practices and ideologies that are constitutive of the reality it comments upon, as well as the epistemological framework in which the ethical theory has evolved.

So I conclude with a call to practice on one level, using the methods of cultural studies (text, context, theories) to examine law and make arguments that speak to an audience that is of the world of law. On another level, I am making a call for more theory, a theory that has ethical norms as a branch of Critical Race Theory/LatCrit, which intellectually structures our political beliefs in racial justice. Those beliefs do have some normative dimension. It is only logical, and it is good, for us to follow their force.

Footnotes:

[FNa1]. Associate Professor of Law at Rutgers Law School Camden. In the fall of 2005, she is serving as a Visiting Associate Professor of Law at the University of Pennsylvania Law School. Perry is the author of the book Prophets of the Hood: Politics and Poetics in Hip Hop (2004) as well as editor of The Narrative of Sojourner Truth published by the Barnes and Nobles Classics Series. She is also the author of a number of articles on race, cultural studies and the law in the post-Reconstruction and contemporary periods.
[FN1]. The Birmingham School is the designation given to British Cultural Studies, so named for its foundation at the University of Birmingham (UK) Centre for Cultural Studies. The Birmingham School has made significant contributions in a wide range of academic fields including: literary theory, historical theory, anthropology and ethnography, popular culture studies, media studies, women's studies, area studies and ethnic studies. The school, with a Marxian foundation, responded to the social movements of the 1960s and developed a set of critical approaches for the interpretation of cultural artifacts.

[FN2]. There are numerous legal scholars doing interdisciplinary work in law and culture, many of whom also do work that falls within or is sympathetic to Critical Race Theory. So while I do not mean to suggest that I am doing something new in the field of Critical Race Theory, I am arguing for a more central role for cultural studies work within the movement.

[FN3]. Antonio Gramsci (1891-1937) was a leading Italian Marxist scholar and activist. He was an intellectual, journalist and theorist who died in one of Mussolini's prisons. His most famous work, Prison Notebooks, was written during his imprisonment. Antonio Gramsci, Prison Notebooks (Valentino Gerratana ed., 1975).

[FN4]. Gramsci's notion of hegemony holds that dominant groups in a society maintain their dominance by the persuasion and consent of subordinated groups. This consent is garnered through the persuasion of nonmembers of the dominant class into the moral, political and cultural values of the ruling class. These ideas may dominate as powerfully as physical force and operate as a kind of normative cultural universe in which the dominant ideology is practiced and taught.


[FN6]. Of course, it is often useful to do close readings of an individual case that may have racial implications. However, in order to abstract from the individual case an observation about how race works or manifests, demonstration of some broader evidence may be required.


[FN8]. See generally Roberts, Shattered Bonds, supra note 7.

[FN9]. Raymond Williams (1921-1988)--critic, theorist, historian and journalist--"was an early pioneer" in, and prime consolidator of, the field of cultural studies. See Definitions & Discussions of Culture, available at http://www.wsu.edu:8001/vcwsu/commons/topics/culture/culture-definitions/raymond-williams.html (last visited Feb. 18, 2005). Williams is said to have generated the first important shift into a new way of thinking about the symbolic dimensions of our lives. See id. He argued that culture was not simply the world of arts, "high culture," but also the everyday. He deconstructed the boundaries between literature, culture and politics.
and used the concept of culture to critique mechanization. See Raymond Williams, Culture and Society (1958).

[FN10]. Stuart Hall, leader of the Birmingham School from the mid-1960s, brought questions of race and ethnicity to cultural studies, and further theorized how language use operates within institutional structures, politics and economics. He also explored the role of media in the maintenance of structures of power. A collection of Hall's essays and essays on Hall can be found in Stuart Hall, Critical Dialogues in Cultural Studies (Kuan-Hsing Chen & David Morley eds., 1996).


[FN12]. Brazilian Paulo Freire (1921-1997) was perhaps the most influential thinker about education in the late twentieth century. He has been extremely influential on critical pedagogues with his centralization of the cause of the oppressed as his focus in dialogic process. See Paulo Freire Pedagogy of the Oppressed (30th ed. 2000).


John Dewey (1859-1952) was an American philosopher and educator whose writings and teachings have had profound influences on education in the United States. Dewey's philosophy of education, instrumentalism (also called pragmatism), focused on [learning via practice and experience rather than memorization and repetition]. Id.

[FN14]. Swiss linguist Ferdinand de Saussure (1857-1913) was the founder of modern linguistics. His work described the structure of language rather than the history of particular languages and forms. The method of structuralism in literary theory is rooted in Saussure's work as well as the strategies of poststructuralism. See Ronald Schleifer, Ferdinand de Saussure, The Johns Hopkins Guide to Literary Theory & Criticism (Michael Groden & Martin Kreiswirth eds., 1997).

[FN15]. Noam Chomsky is the most celebrated contemporary linguist who has combined a career of brilliant structural analyses of language with a political critique of the social power accorded to languages of dominant nations. His role as a leftist political critic is more widely known than his linguistics scholarship; however, they are deeply intertwined. Noam Chomsky, The Chomsky Reader (1987).

[FN16]. Pierre-Félix Bourdieu (1930-2002) was a renowned French sociologist. His empirically based work was a form of cultural sociology. He importantly argued that taste and preferences were deeply aligned with social position and operate as a kind of cultural capital upon which a person can trade for social access. See Pierre Bourdieu Distinction: A Social Critique of the Judgment of Taste (1987); David Swartz, Culture and Power: The Sociology of Pierre Bourdieu (1998).


[FN19]. See the work of Rutgers-Newark law professor Tanya K. Hernandez for a brilliant discussion of some of these issues.


[FN22]. John Locke (1632-1704) was a British philosopher. For Locke's theory of the origins of property law in labor and desert, see John Locke, Second Treatise on Civil Government, Chapter 5 (1690).

I. Introduction

IN his book The Sociological Imagination, C. Wright Mills acknowledged the overwhelming sense of feeling trapped and the tendency to focus on individual change, responsibility and personal transformations. [FN1] Mills's development of the sociological imagination addressed the duty that sociologists had in making the links between personal problems and social issues. [FN2] A major component of this mission included the intersection of biography and history. [FN3] He argued that within society, the most significant form of self-consciousness is related to critical scholars' use of autobiographies, self-portraits, allegories, fables and fictive narratives. [FN4] His view resonates with the "oppositional legal canons being developed by Outsiders: people of color, feminists, Queers, the disabled." [FN5] Furthermore, his work can help reframe our understanding and worldview of the law.

In the following essay, I critique the propensity among LatCrits and Outcrits to be overly psychological in their analysis and use of various forms of story-telling. Narrative discourse has increased the use of tropes and metaphors-- many of which do not illuminate circumstances or issues, but rather distort material realities and existing legal structures. Frequently, the use of our own stories gives voice to the experiences we share with our students, but may appear to trivialize the actual circumstances encountered by persons of color outside the academy. Stories from the academy may not resonate with members of the larger community that for whom we aim to advocate.

The deference given to psychological concepts and approaches in analysis results in psychological reductionism. Individual focus and psychological explanations to racism contradicts proposals for structural change and undermines the significance of collective action in the struggle against inequality. These psychological underpinnings are quite evident *926 in the analysis of "unconscious" or "common sense" racism versus institutional racism. This essay aims to open a critical discussion between sociologists and critical legal scholars about the pitfalls of using a psychological foundation rather than a sociological imagination. I hope this essay also serves as an invitation to LatCrit scholars to incorporate a sociological imagination in their analysis.

II. The Behavioral Syndrome and Psychological Reductionism

Mills recognized that psychology is the dominant framework from which Americans view their world. He countered psychological tendencies by advocating a "sociological imagination" because theories, methods and practices to respond to a society do not usually define the troubles they endure in terms of historical change and institutional contradiction. The well-being they enjoy, they do not usually impute to the big ups and downs of the societies in which they live. Seldom aware of the intricate connection between the patterns of their own lives and the course of world history,
ordinary men do not usually know what this connection means for the kinds of men they are becoming and for the kinds of history-making in which they might take part. They do not possess the quality of mind essential to grasp the interplay of man and society, of biography and history, of self and world. They cannot cope with their personal troubles in such ways as to control the structural transformations that usually lie behind them. [FN6]

Aside from Mills's sexist use of male pronouns, I reiterate his argument that people need both information or skills of reason and sociological imaginations--"quality of mind that will help them to use information and to develop reason in order to achieve lucid summations of what is going on in the world and of what may be happening within themselves." [FN7] I believe that an emphasis on a sociological imagination is essential to combat the growing tendency of relying on personal, individual and psychological approaches to understanding privilege, oppression, subordination and domination.

Psychological reductionism both blames the victim and offers little hope for organization to change conditions--it is therapeutic, not activist. [FN8] Psychological reasoning is evident in the popular focus on "empowerment" and "self-esteem" for marginalized persons, the identification of individual forms of resistance and the fetishizing of individual "agency." [FN9] The worship of individual transformation, resiliency and empowerment is but modern-speak for the age-old American belief in "pulling yourself up by your bootstraps." [FN10] These words reflect the ideological illusions of social mobility under capitalism. I fear that under the impact of post-modernism, critical analysis is moving further away from structural explanations of inequality and the need to build social movements and organize collective political engagement.

Even among ethnographers gathering the stories of marginalized groups, individual empowerment and identity become the central point of analysis. They obscure the social, political, economic and historical circumstances that cause their subordination. [FN11] Ethnographic narratives may reveal the conditions of exclusion and how choices are rational within this context, but frequently the macro structural level of analysis is lost. [FN12] The challenge is to move from individual narratives to revealing the historical, political and economic forces that produce persistent and oppressive structures.

The law, with its emphasis on individual responsibility and intent, engages in psychological reductionism as well. Psychology is embedded in legal discourse. I find the casual use of psychological reductionism in critical perspectives of the law alarming. Legal arguments are overwhelming, personal and individual. [FN13] When Latinos and other racialized groups experience exclusion, however, it is not because they are individuals, but because they are members of a subordinated group. A major struggle in arguing group rights in the struggle against racial, class, gender, sexuality and immigrant exclusion is a legal system that recognizes only individuals and refuses to recognize the intersections of domination and subordination created by institutional, structural and historical circumstances. As with ethnography, legal analytical practices of storytelling are not always successful in moving beyond the individual to the larger critique of institutional discrimination.

III. Enough About You, Let's Talk About Me

As Latinas and Latinos confront the law in their everyday lives, they experience the dreaded sense of being trapped that Mills noted. [FN14] They are simultaneously bombarded by stories of the success and failure of individual Latinas and Latinos. [FN15] The elevation of Cesar Chávez to an icon status among educators and politicians is a prominent example. While honors are given to his union-organizing efforts, other unions
are crushed and face continuing reports of abusive working conditions toward farm workers. Public attention is focused on the heroic characteristics of a man rather than the collective action of many farmworkers who struggled to unionize agricultural workers, as well as a number of college and high school students and citizens who mobilized efforts to assist in boycotts. The significance of highlighting the "saint-like" characteristics of Cesar Chávez's non-violent tactics not only serves to delegitimize more aggressive strategies in the Chicano Movement but also functions to reinforce American values of rugged individualism, independence and autonomy rather than collective action and interdependency. Celebration of the success of Cesar Chávez as the founder of the United Farm Workers erases from our collective memory the organizing between Filipino and Mexican farm workers prior to Chávez's arrival. [FN16] Accounts of individual successes and failures, whether in the popular media or the writings of critical theorists, do not necessarily assist Latinas and Latinos in comprehending the troubles they endure. They may be even less useful in showing how to change institutions, as well as our social, economic and political circumstances. As scholars, we are in a position to provide context in terms of historical change and institutional contradiction. [FN17]

Using personal stories to give visibility and legitimacy to the Latino experience is an important goal. Nevertheless, we must do more than simply demystify the stereotypes of popular culture, or counter color-blind scripts that normalize the expectations and practices of privilege. Without a sociological imagination, they can easily leave the reader in awe of the storyteller or seeking to identify facts, but unable to connect personal troubles to larger public issues and social inequalities. Critical narratives avoid the pitfall of focusing on individual experiences and, instead, explain the conditions of exclusion and connect the legal system to economic, political and social structures. [FN18] Rather than relying solely on personal accounts or creative fiction, I argue that LatCrit analysis is strengthened when we step outside our safe and privileged positions as academics and allow the voices of the less privileged in our communities speak for themselves and then use our skills to connect these accounts to larger social forces. [FN19] The realities of injustices experienced by persons less privileged than academics are more raw and painful than most of our stories. These everyday injustices are abundant and need to gain visibility.

We must also consider the implication of popular use of narratives coinciding with the emergence of therapeutic conceptual frameworks that implicate notions of self-esteem, empowerment and resiliency. An example of giving voice through narrative is Lucie White's work on women's volunteer and work experience in Head Start programs in South Central Los Angeles. [FN20] She analyzes the significance of caring relationships and argues the need for workplace policies that nurture a caring culture to encourage emotional well-being and facilitate the personal development of workers. Here, we are given individual stories that document individual transformation without the connection to society, history and social change, not simply individual transformation. In her book, Hard Work: Life in Low-Pay Britain, Guardian journalist, Polly Toynbee, makes a pertinent point related to the emphasis on personal transformation of subordinated groups. [FN21] She wrote, "[i]t is strange that it is always the people with fewest resources, struggling the hardest against the odds, who are the ones who are expected to galvanize themselves into heroic acts of citizenship." [FN22] Later, she reflected, "[i]t is expecting a lot of people who already work so hard to take on the task of trying to organise union recognition in their workplace." [FN23]

If we move our analysis away from identity formation, healing and transformation, the historical, political and economic solutions become more apparent. We can help name and explain the pattern of injustice. As progressive scholars, our commitment should be to linking the biography to history, identifying the causes of subordination and developing anti-subordination praxes. I argue that this cannot occur if we limit ourselves to the psychological understanding of the oppressor, or the injured psyche,
empowerment or self-esteem of those marginalized. Drawing from sociological scholarship provides a broader understanding than psychological approaches of who, why, where and when groups are marginalized. A sociological imagination is also more consistent with LatCrit's commitment to inclusiveness by linking individual biography to social, political and economic historical context. More importantly, a sociological imagination is more likely to support and encourage coalition building, community organizing and political activism than psychological approaches advocating self-empowerment and self-esteem.

IV. Recognizing Pitfalls in Telling Stories

While postmodern critics, like Philippe Bourgois, have revealed some of the serious flaws in social science methodology, their alternative is not the answer:

Deconstructionist "politics" usually confine themselves to hermetically sealed academic discourses on the "poetics" of social interaction, or on clichés developed to explore the relationship between self and other. Although postmodern ethnographers often claim to be subversive, their contestation of authority focuses on hyperliterate critiques of form through evocative vocabularies, playful syntaxes, and polyphonic voices, rather than on engaging with tangible daily struggles. [FN24]

Influenced by postmodern projects, some in Chicana/o and Latina/o studies have relied heavily upon the humanities and have generated a range of metaphors and tropes to illustrate positionality and intersectionality. The most dominant is "border" --the most overused metaphor employed *932 to describe any and all forms of subordination. [FN25] "Border" now obscures more than it reveals. Thus the danger, risk and desperation of undocumented immigrants crossing the United States-Mexican border is dissolved into another--and all--group boundary crossing. As Scott Miachaelsen and David E. Johnson note in their edited collection of critiques of border theory, "[t]he idea of the 'border' or 'borderlands' has also been expanded to include nearly every psychic or geographic space about which one can thematize problems of boundary or limits." [FN26] Similar historical metaphors that obscure more than they reveal include Aztlán, mestizaje and machismo.

Critical sociologists have long engaged in qualitative research, and this body of literature is not immune from critique. They include narratives in the form of life stories, ethnographies, biographies, oral histories and interviews. In telling tales, we are faced with the challenge of writing detailed examinations of social marginalization while avoiding stereotypes and countering traditional moralistic bias and middle-class hostility. Using interviews, first-hand accounts and other narrative devices, the author's descriptive accounts of poor people have the potential to solicit empathy that may generate political action and legislative change. Alternately, these descriptions may simply titillate the prurient interest of the middle-class accustomed to viewing the poor and people of color as "other." Personal accounts and rich details can sometimes leave the reader engrossed by the drama of human life without an equally vivid comprehension of the larger forces at work. The politics of representation have sidestepped the necessity to interface structural oppression and individual action in the call for self-conscious reflexivity. Balancing agency and individual autonomy with political economic understanding of the experiences of persistent social marginalization calls for writing against the dominant discourse on poverty, crime, immigration and inequality.

The power of ethnography to illuminate the goals and values of the poor can produce counter-images of the poor as people who are no different than the middle-class. Such constructions do nothing to erode the myth of meritocracy-- that an individual's hard
work and drive are enough to eliminate poverty. In the end, ethnographic counter-images simply demonstrate that the behavior of the poor is rational and no different from the non-poor. This is multiplied by the other tendency of ethnography to portray the oppressed as agents who "resist" by choosing nonconformist behavior and at times, overcoming social and economic constraints. Sidestepping traditional moralistic biases and middle-class hostility toward the poor is difficult to accomplish while simultaneously portraying the frustration, suffering and downfalls surrounding a life of poverty. [FN27] The post-structuralist focus on agency has moved researchers away from viewing the poor as products of oppression and toward viewing all forms of action as resistance, subversion or double consciousness, rather than linking self-defeating actions to the structural conditions of poverty.

V. Unconscious/Common Sense Racism v. Institutional Racism

Charles R. Lawrence's germinal analysis of unconscious racism, which drew on psychoanalytic theory and cognitive theory, influenced critical race scholars with his argument that everyday racism resulted from practices that appeared to be facially race-neutral. [FN28] Lawrence stated, "[i]n other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation." [FN29] Unlike racism in the past that clearly indicated motive, everyday racism is now so underground and subtle that the act of racism is unconscious to the perpetrator. Consequently, Lawrence provided the following argument:

[D]ecisions about racial matters are influenced in large part by factors that can be characterized as neither intentional--in the sense that certain outcomes are self-consciously sought--nor unintentional--in the sense that the outcomes are random, fortuitous, and uninfluenced by the decisionmaker's beliefs, desires, and wishes. [FN30]

Building on his use of Freudian psychology, critical race scholars have turned their attention away from institutional racism and toward interrogating stereotypes and cognitive processing that reveal and illuminate unconscious racism. This shift in critical race legal discourse turned scholars' interests towards attitudinal studies measuring the prevalence of stereotypes, different opinions and feelings between racial groups, and acceptance of integration and interracial institutions (i.e., marriage, schools, neighborhood, etcetera). [FN31]

An updated version of unconscious racism appears in Ian Haney López's conceptualization of "common sense." [FN32] In Lopez's analysis of two court cases (known as the "East L.A. Thirteen" and the "Biltmore Six") and the challenges posed by the decision to use an Equal Protection defense in order to expose judicial bias, he applied the concept of "common sense" to explain the judges' exclusion of Mexican Americans from grand juries. [FN33] He also used "common sense" racism to explain police violence and Mexican American activists who redefined themselves as Chicanos, brown and victims of racism. Drawing from Peter Berger and Thomas Luckmann's work, [FN34] López argued that "[common sense racism] evokes the ordinariness, pervasiveness, and legitimacy of much social knowledge," [FN35] which are used by judges in selecting grand juries from their circle of friends and acquaintances. [FN36] Much like unconscious racism, the judge's actions were taken-for-granted solutions that were entrenched, scripted responses without intent to discriminate. [FN37] Three implications are: (1) "racism is ubiquitous;" (2) racism can occur even in the purest of intentions; and (3) "racism is highly intractable." [FN38] Unlike his use of institutional racism in his earlier work to explain the intractable and ubiquitous nature of everyday racism, López argued that institutional racism fails as a theory of social behavior because it is only applicable to purposeful discrimination. [FN39]
Stokely Carmichael and Charles Hamilton recognized both overt and covert racism in their introduction of institutional racism:

Racism is both overt and covert. It takes two, closely related forms: individual whites acting against individual blacks, and acts by the total white community against the black community. We call these individual racism and institutional racism . . . . When white terrorists bomb a black church and kill five black children, that is an act of individual racism, widely deplored by most segments of the society. But when in that same city--Birmingham, Alabama--five hundred black babies die each year because of the lack of proper food, shelter and medical facilities . . . that is a function of institutional racism. [FN40]

Rather than exploring individual psychology and cognitive processes of racism, Carmichael and Hamilton as critical sociologists who devoted their work to the study of institutional racism, directed their analysis toward understanding the link between everyday life and the political economic structure. [FN41]

In his study of organizations, Alberto Guerreiro Ramos noted the significance of linking cognitive systems to organizations or institutions. [FN42]

Behavior continues to be a category acknowledging conformity, a fact that is generally overlooked because conformity to socially given criteria of gregariousness has been transformed into the *936 standards of human morality in general. Men and women no longer live in communities where a substantive common sense determines the course of their actions. They belong instead to societies in which they do little more than respond to organized inducements. The individual has become a behaving creature. [FN43]

The weakness of "unconscious racism" or the "common sense" framework is that racial beliefs and practices do not become part of the unconscious or common sense without a political economy that rewards, legitimates and reproduces a particular social reality. Questions essential to the analysis are: whose "common sense" knowledge or "unconsciousness" gets represented and legitimated in the courtroom; whose "common sense" knowledge or "unconsciousness" is missing or absent from the debate; and how are all these ways of knowing related to issues of power and privilege? Conceptualizing racism as unconscious or common sense erases the individual agency of persons and the choices they make to construct their social reality. [FN44] Furthermore, the individual psychological approaches deny the choices that white people, who fought for racial equality, have made during times that others were engaged in unconscious racism. Focusing on "unconscious racism," instead of on institutional racism, separates the individual from the larger legal system.

Framing racism as "unconscious" or as "common sense" has implications for developing strategies and race politics. So, do we focus our efforts on changing the hearts and minds of white folk or on changing laws, schools and culture? [FN45] The movement toward multicultural and diversity training and workshops focuses on changing attitudes and developing racial etiquette and sensitivity to "difference." By sidestepping issues of power, we are left with a therapeutic model (or a medical model if you accept that the idea that racism is a disease [FN46]) that continues to unearth *937 stereotypes, resulting in "unintentional racism." This therapeutic model, however, does little to address racial inequalities in business, schools and neighborhoods. Institutional racism brings us back to the central issues of power and privilege. I argue that institutional racism is an absolutely crucial concept that moves analysis away from the hearts and minds of white folks and rivets attention on the consequences of bureaucratic and other everyday practices that transcend hateful attitudes and individual racist acts.
Institutional racism gets us out of the psychological swamp of white guilt and lets us focus on the irrationalities built into supposedly rational institutions. The significance of the concept of institutional racism is precisely crits’s argument that racism can be, and is, generated with or without "intent." [FN47]

VI. Summary

Mills's outline of the political task of social scientist tied the important connection between power and knowledge:

To those with power and with awareness of it, he imputes varying measures of responsibility for such structural consequences as he finds by his work to be decisively influenced by their decisions and their lack of decisions.

To those whose actions have such consequences, but who do not seem to be aware of them, he directs whatever he has found out about those consequences. He attempts to educate and then, again, he imputes responsibility.

To those who are regularly without such power and whose awareness is confined to their everyday milieux, he reveals by his work the meaning of structural trends and decisions for these milieux, the ways in which personal troubles are connected with public issues; in the course of these efforts, he states what he has found out concerning the actions of the more powerful. [FN48]

Building on a sociological imagination rather than psychological approach to questions of anti-subordination is more compatible with the critical and activist role set by LatCrit. Three areas in which sociological imagination can assist the LatCrit project are:

1. We need to draw less from our own stories and more from the inclusion of ethnographic research, which retains a structural analysis into the everyday lives of Latinas and Latinos.

2. We need to do what only the scholar can do—establish the connections between the micro level of personal narratives, the institutional structures and historical circumstances. We must identify patterns of subordination within which the individual story makes sense.

3. Similarly, we need to ground discourse analysis and popular culture studies in institutional structure, discussing ideology and hegemony. We must maintain focus on the connection between ideas and material existence.

Footnotes:

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[FN2]. See generally id.

[FN3]. See id.

[FN4]. See id.
[FN5]. See Margaret E. Montoya, Celebrating Racialized Legal Narratives, in Crossroads, Directions, and a New Critical Race Theory 243 (Francisco Valdes et al. eds., 2002).

[FN6]. See Mills, supra note 1, at 3-4.

[FN7]. See id. at 5.

[FN8]. Lee Rainwater pointed out these tendencies in psychological studies of the poor. See Lee Rainwater, Neutralizing the Poor and Disinherited: Some Psychological Aspects of Understanding the Poor, in Psychological Factors in Poverty 9 (Vernon L. Allen ed., 1970) (noting that minorities are not included in what is commonly referred to as "real society").

[FN9]. An example is Lucie White's study of women's volunteer and work experience in Head Start programs in South Central Los Angeles. The entire focus of her analysis is on identifying the significance of caring relationships. Rather than targeting workplace policies that would impact the financial and physical well-being of poor women, her analysis highlights policies that nurture a caring culture that encourages emotional well-being and facilitates the personal development of workers. See generally Lucie E. White, Raced Histories, Mother Relationships, and the Power of Care: Conversations with Women in Project Head Start, 76 Chi. Kent L. Rev. 1559 (2001).

[FN10]. Joel F. Handler cautioned researchers who aimed to understand issues from the victim's perspective against romanticization: In the celebration of the struggles and apparent successes, are we forgetting that when the day is over, the poor still are trying to cope under severe conditions, they remain in poverty, and despite acts of resistance, they continue to be very dependent? The worry is that in the celebrations, we go overboard in believing that change will come from the bottom, and that we do not pay sufficient attention to difficulties of empowerment. Joel F. Handler, Quiescence: The Scylla and Charybdis of Empowerment, in Laboring Below the Line: The New Ethnography of Poverty, Low-Wage Work, and Survival in the Global Economy 271, 272 (Frank Munger ed., 2002).


[FN12]. Robin D.G. Kelley makes this point: The vast and rich ethnographic documentation collected by these scholars is extremely valuable because it captures the responses and survival strategies hidden from economic indices and illuminates the human aspects of poverty. Of course, these materials must be used with caution since most ethnographies do not pay much attention to historical and structural transformations. Instead, they describe and interpret a particular community during a brief moment in time. The practice of giving many of these communities fictitious names only compounds the problem and presumes that region, political economy, and history have no bearing on opportunity structures, oppositional strategies, or culture. Robin D.G. Kelley, Yo' Mama's Dysfunctional!: Fighting the Culture Wars in Urban America 184 n.12 (1997).


[FN16]. As an icon, who was commemorated on a stamp, Chávez, like Malcolm X, has been sanitized for public consumption. We no longer remember that Corky Gonzalez and others pressured him to identify with the Chicano Movement, nor do we remember the struggle to get the United Farm Workers to include undocumented workers in their organizing efforts. And we never ever mention the sweetheart contract signed with teamsters, or agreements to purge the United Farmworkers of Marxists, radicals or Communists including many black, brown and white college students. See The Cesar E. Chávez Foundation, An American Hero, available at http://chavezfoundation.org/Default.aspx?pi=33 (giving biography of Cesar Chávez) (last visited June 10, 2005).

[FN17]. For instance, identifying the struggle to gain national recognition for Cesar Chávez is not linked to any specific action to improve the working conditions of migrant laborers in the United States. Attention, however, to the politicization of celebrating one individual erases our collective memory of the usefulness of boycotts and marches, as well as the political participation of college students. See id.


[FN19]. This strategy seems more consistent with the mission to examine legal issues from the victim's perspective.

[FN20]. See generally Lucie E. White, Care at Work, in Laboring Below the Line: The New
Ethnography of Poverty, Low-Wage Work, and Survival in the Global Economy 213 (Frank Munger ed., 2002) (detailing research on Head Start program in South Central Los Angeles); White, supra note 9 (discussing power of nurturing children from their youth).


[FN22]. Id. at 129.

[FN23]. Id. at 202.

[FN24]. See Bourgois, supra note 11, at 14. Michael Frisch also sums up the situation quite well:
A new generation of cultural studies and social history has centered on the complex social construction of identities, on the culturally embodied intersections of race, class, and gender, on the complexity of social memory, and on understanding the profound tensions between hegemony and agency. Yet we have paid a heavy price for these insights, mainly in the form of a scholarly discourse so relentlessly theorized as to lose touch with the people and narrative realities it deals with, much less with a wider readership. The emerging consensus is that for all its accomplishments, contemporary scholarship has effected what could be called a discursive disconnect from the very people, issues, and interests it presumes to interpret. More prosaically, such scholarship is at serious risk of a terminal case of "paralysis from the analysis."


[FN29]. Id. at 322.

[FN30]. Id.

See Ian F. Haney López, Racism on Trial: The Chicano Fight for Justice 127-30 (2003) ("[R]acism is action arising out of racial common sense and enforcing racial hierarchy."). Although López acknowledges similarities to unconscious racism, he points out that, rather than attributing common sense racism to individual psychology, he focuses on group interaction that constructs racial common sense. See id. at 131 (concluding that group interaction generates racial common sense).

See id. at 1-12 (introducing notion of race as common sense to answer why Mexican Americans were excluded from grand juries).


López, supra note 32, at 110.

See id. at 108 (noting that judges unintentionally discriminate because they select their own friends for grand juries).

López argues that the significance of understanding racism as common sense is that most racism is action stemming from taken-for-granted racial beliefs that reinforce racial hierarchy but do not necessarily intend to discriminate. See id. at 103-08 (discussing whether racism in grand jury selection is intentional).

See id. at 128-29 (listing three important implications in understanding common sense racism).

See id. at 132 (noting that common sense racism occurs when individuals act to establish racial hierarchy, not to discriminate purposefully). For a more detailed critique of López’s use of common sense racism, see Mary Romero, Brown is Beautiful, 39 Law & Soc’y Rev. 211 (2005) (reviewing Ian F. Haney López, Racism on Trial: The Chicano Fight for Justice (2003)).


The politics of knowledge is evident among sociologists influenced by Peter Berger and Thomas Luckmann and the later development of ethno-methodology and symbolic interaction. While Marxist, feminist and other critical theorists found ethno-methods useful in uncovering the common sense reality of everyday life, its failure to link everyday life to the political economic structure was rejected. See, e.g., Michael Burawoy et al., Ethnography Unbound: Power and Resistance in the Modern Metropolis 4-6 (1991) (discussing ethnographical methods); Dorothy E. Smith, The Conceptual Practices of Power: A Feminist Sociology of Knowledge 52 (1990) (noting that analyzing political economy differs from interpreting everyday life); Dorothy E. Smith, Texts, Facts, and Femininity: Exploring the Relations of Ruling 99 (1990) (discussing relationship between political economy and sociology); Dorothy E. Smith, The Everyday World as Problematic: A Feminist Sociology 90 (1987) (distinguishing between everyday world as problematic and as phenomenon).


Id. at 45.
For instance, in Philip Moss and Chris Tilly’s study of racial discrimination in the labor market, they conducted a survey of employers in Atlanta, Boston, Detroit and Los Angeles to investigate the types of jobs employers offer, the skills required, and the recruitment, screening and hiring procedures used to fill them. See Philip Moss & Chris Tilly, Stories Employers Tell: Race, Skill, and Hiring in America 17-42 (2001) (discussing scope of study). As a follow-up to these interviews, employers revealed the attitudes, motives and rationale behind their hiring decisions, selection of business sites and promotion. See id. at 43-208 (discussing skills employers seek, employer perceptions of race and skill, and employer view of inner city). By conducting interviews among employers and human resource personnel, Moss and Tilly demonstrated how individual attitudes are linked to the labor market inequalities. See id. at 215-25 (noting how racism affects hiring); see also Deirdre A. Royster, Race and the Invisible Hand: How White Networks Exclude Black Men from Blue-Collar Jobs 16-36 (2003) (explaining different employment outcomes among blacks and whites).

This is particularly important in responding to rational choice theorists and the obsession of studying racial attitudes over unraveling social dynamics, which maintain and perpetuate racial inequality.

See Lawrence, supra note 28, at 329-31 (discussing racism as public health problem).

Romero, supra note 39, at 224-25.

Mills, supra note 1, at 185.
LIMIT HORIZONS & CRITIQUE: SEDUCTIONS AND PERILS OF THE NATION

Tayyab Mahmud [FN1]

Getting its history wrong is part of being a nation. [FN1]

We make up a story to cover the facts we don't know or can't accept. [FN2]

We live in the world, like it or not, in which the national dimension of history haunts us in ways from which we are finding there is no easy escape. [FN3]

[S]ense of words like "nation," "people", "sovereignty" . . . "community" . . . are leaking out of so many cracked vessels. [FN4]

I. Introduction

THE four contributors to this cluster interrogate the nation and nationalism, and in the process open new avenues that broaden and deepen the project of critical legal scholarship. As much heralded "globalization," "harmonization of laws," "end of history" and "demise of sovereignty" appear trumped by the resurgent empire, now wrapped in a self-proclaimed right of "preeminence" and "preemption," questions of the nation and nationalism present themselves with renewed urgency. The stream of scholarship forged under the wide-umbrella of Latina/o Critical Legal Theory is well positioned to confront these questions. This movement, whose point of departure is the grounds of critique demarcated by Legal Realism, Critical Legal Studies, Feminist Legal Theory and Critical Race Theory, has over the years progressively incorporated insights of Postcolonial Studies, Culture Studies and Subaltern Studies. The contributions to this cluster should help us train this formidable critical arsenal on the persistent and renewed questions of the nation and nationalism.

II. Limit Horizons and Critique

Before addressing the four contributions to this cluster, a word needs to be said about the prospects and limits of critique itself. Critique holds the promise of laying bare foundations, scaffoldings, structures and operations of power that subordinate in order to augment the transformatory political project of anti-subordination. To remain honest to its task, however, critique must move along two tracks concurrently: relentless critique of power and on-going self-critique.

On-going self-critique is indispensable to ensure that ontological, epistemological and programmatic frameworks of critique are conducive to the attainment of its agenda. This becomes particularly urgent when the subject of inquiry forms part of the limit horizons of an age. I designate as limit horizons the hegemonic ontological categories that over time so imprint the imaginary [FN5] of an age that even critique remains imprisoned in the normalcy of these categories--an imprisonment that curtails the transformatory potential of critique. To remain vigilant about limit horizons, much less overcome them,
is a formidable task. Rather than being incidental or accidental, imprisonment in limit horizons is an ever-present predicament for critique, with the very inaugural moment of modern critique establishing this inherent vulnerability. No sooner than proclaiming the foundational injunction of the Enlightenment--"dare to know"--Kant declares that:

The origin of supreme power, for all practical purposes, is not discoverable by the people who are subject to it. In other words, the subject ought not to indulge in speculations about its origin with a view to acting upon them, as if its right to be obeyed were open to doubt . . . Whether in fact an actual contract originally preceded their submission to the states authority . . . whether the power came first, and the law only appeared after it, or whether they ought to have followed this order--these are completely futile arguments for a people which is already subject to civil law, and they constitute a menace to the state. [FN6]

Thus, legitimacy of the state and the law, grounded in the myth of a social contract, act as a limit horizon for Kant, and render knowing not so daring after all. This led Nietzsche to remark that Kant was "in his attitude towards the State, without greatness." [FN7]

The phenomena of the nation and nation-state reflect a similar basic ambivalence concerning the question of authority that prevails in modern political discourse. On the one hand, this discourse ceaselessly questions the form and content of authority, its legitimacy and proper boundaries. On the other, this discourse makes questions about the origin and ultimate grounds of the authority difficult to ask, let alone answer. The source of this ambivalence may be found in modern political discourse itself and in the critical spirit animating it. While it aspires to be critical, it imposes an inner limit to criticism--an inner limit demarcated by ontological limit horizons.

Since the French Revolution, the nation and nationalism have spread. Today, states everywhere legitimate themselves by using the ideology of the nation because the nation has become the normal, sole form of legitimate collective political existence. One implication of the nation-state furnishing the limit horizon of modern political existence is that of necessity, which circumscribes political struggles within the horizon of the state. Limit horizons, by overwhelming the present, turn all history into history of the present. Limit horizons, by overwhelming the present, turn all history into history of the present. It is no surprise that "[h]istorical consciousness in modern society has been overwhelmingly framed by the nation-state." [FN8] In the modern imaginary, the nation, while remaining a "capital paradox of universality," [FN9] continues to masquerade as a limit horizon of collective political existence. The very form of the nation-state has come to be regarded as "the indispensable framework for all social, cultural, and economic activities." [FN10] This is despite the fact that the question "what is a nation?" posed by Ernest Renan in 1882, still searches for a satisfactory answer. [FN11]

To appreciate the modern construct of nation, one needs to be mindful of the mapping order of modern History. Over the last two centuries, History, a linear, progressive, and Eurocentric history, has become the dominant mode of experiencing time and of being. [FN12] In this History, time *942 overcomes space: a condition in which the "other" of Europe in geographical space will in time resemble Europe. History enables not only the justification of the West's world mastery, but also the appropriation of the "other" as a form of knowledge. [FN13]

If History is the mode of being, the condition that presents modernity as possibility, the nation-state is the designated agency, the subject of History that will realize modernity. [FN14] This History is, of course, mindful of the racial and colonial divide that fractures humanity. [FN15] It is only nations in the fullness of their History that realize freedom. Those without History, uncivilized non-nations, have no claims or rights. Therefore,
civilized nations have the right to destroy non-nations and bring Enlightenment to them. Never was the racialized colonial script given more coherence than when inscribed in the grammar of History and nation. [FN16]

Social Darwinism is only an example of the mutually defining discourse of History, nation and race. The only justification for nationhood was whether a race could be shown to fit within the scheme of historical progress. [FN17] The universalization of History subjects other social and epistemic forms into its own overarching framework and finds them severely deficient. Levinas sees this as an effect of the concept of totality in Western philosophy, which produces all knowledge by appropriating and sublating the "other" within itself. [FN18] As Tagore diagnosed,

*943* [T]he true spirit of conflict and conquest is at the origin and in the center of Western nationalism . . . [i]t has evolved a perfect organization of power . . . [i]t is like the pack of predatory creatures that must have its victims . . . [w]ith all its heart, it cannot bear to see its hunting grounds converted into cultivated fields. [FN19]

The late eighteenth/early nineteenth century European proclivity of locating foundational legitimacy of the state in the latter's congruence with the nation inaugurated the state-nation as a limit horizon. Beginning in the eighteenth century, the relationship between history and political order underwent a profound transformation from having been the very antithesis of order, the concepts of time and history became sources of sameness. Historical time is now tied to expectations of a new and different future, but of the future in which the most cherished traits of present identities are both conserved and refined. All that was solid may well have melted into air in this process, but everything fluid and gelatinous simultaneously became petrified.

The period after the French Revolution has been noted as "a period when concepts of authority were removed from the dimension of contingency and inscribed within the dimension of continuity." [FN20] The net result of this change was that the concepts of state and history became closely intertwined. Not only was the state turned into a historical being and history interpreted as the successive unfolding of the state in time, but also the presence of the state became the condition of the possibility of history.

This historical understanding of the state and the state-centric understanding of history are closely related to another major change in the structure of social political concepts: the fusion of the concepts of state and nation. From Vico to Herder, the nation was conceptualized as grounded in and reflecting manifest and irreducible differences between people. [FN21] The evolution of specific political communities is then described as if their individual histories conformed to a general scheme in spite of their actual diversity. Each community is seen to have an individual trajectory within this universal history, because "the nature of institutions is nothing but they're [sic] coming into being, at certain times and in certain guises." [FN22] All human communities are seen to traverse the same ideal and universal pattern and time, so that ". . . every nation's history traversed in time by the history of every nation." [FN23] National history secures for the contested and contingent nation the false unity of a self-same national subject evolving through time. Status of the nation in the modern imaginary evidences that Enlightenment's "untruth . . . consist[s] . . . in the fact that for Enlightenment the process is always decided from the start." [FN24] Anderson designates this phenomenon "reversed ventriloquism," the process whereby the voice of history is orchestrated by the nation in the present. [FN25] Because History is understood as the gradual realization of reason and the rise of the modern nation-state, it takes on meaning and intelligibility only from the vantage point of the nation-state. If the present is only intelligible in the light of History, the present
also signifies that nation-statehood has become an inescapable part of the modern condition and the sole source of its intelligibility. [FN26]

It is not surprising that the idea of the nation-state was conceptualized as a natural species of being. [FN27] A conceptual limit horizon can hope for no better. As we turn to the contributions of this cluster, my vantage point will be the positioning of these interventions in relation to the nation as a limit horizon.

III. Grounding the Nation

In the first article in this cluster, Maria Clara Dias analyzes contemporary debates about nationalism to address two specific issues: the legitimacy of partiality towards co-nationals and the right to national self-determination. [FN28] She joins the ongoing debate between nationalist and human rights perspectives to explore whether nationalism's demand for special obligations towards co-nationals can be reconciled with the universality of human rights. She uses David Miller as her interlocutor by developing her argument in response to Miller's position about the nation and national identity. [FN29]

Miller's thesis is that only a particularistic moral perspective can validate nationalism. Miller locates this thesis in the divergent metapsychologies of the moral agent upon which universalism and particularism rest. Miller sees universalism as resting upon an implausible conception of the moral agent pointed as an encumbered subject. He holds that this metaphysical and abstract concept of the person is ill-equipped to acknowledge, much less accommodate, the viability and legitimacy of nationalism. In Miller's reading, only a particularistic moral perspective, one that sees situated communitarian links as constitutive of the moral agent, can acknowledge bonds of national community.

Dias questions Miller's reading of the universalist metapsychology of the moral agent. For her, the notion of "the atemporal, unencumbered moral agent . . . has never been more than a useful methodological caricature" to secure values such as "respect [of] human beings and moral equality." [FN30] She acknowledges that universalists "went sometimes beyond these rather modest methodological concerns," [FN31] but assigns the attempts to give moral principles an absolute foundation to "traditional philosophers' arrogance and their speculative vices." [FN32] By Dias's account, very few, if any, believe the metapsychology assigned to universalists by Miller.

Dias posits two premises that "we should accept in advance:" [FN33] 1) that human beings of necessity establish communitarian bonds and seek recognition as members of groups; and 2) that such bonds make humans "feel naturally justified" in adopting partiality towards other members of the group. [FN34] Dias argues that as human beings belong to multiple groups and communities, multiple corresponding spheres of obligation unfold and morality sustains human commitment to the varied spheres, albeit assisted by "different interpretations." [FN35] In order to evaluate Miller's preferred particularistic metapsychology, Dias introduces "the multiculturalist alternative and the notion of complex identity." [FN36] Because "[t]he building of identity is always a construction," Dias argues that "it makes no sense to oppose artificial and natural identities." [FN37] In her reading, "national identity does not have to be seen as something that obliterates and excludes the recognition of other forms of identification." [FN38] This appears to be a rather benign reading of the nation and nationalism's demand of the primacy of national identity.

Dias rejects Miller's critique of a universalist justification for national partiality, namely that national bonds are an efficient means to satisfy human demands in an efficient way. For Dias, the utility of such an instrumentalist view of the nation and nationalism is that,
because national obligations "*[946] are intended to promote the well-being of human beings . . . [they] lose their raison d'être as soon as they do not respond to such a task." [FN39] She is alert to the possibility of nationalism "assuming morally condemned forms, for instance by presenting real threats to the well-being of other human beings." [FN40] In such situations, Dias submits, the "pragmatic or instrumentalist argument for nationalism has the great advantage of being put aside." [FN41]

Dias then proceeds to build an argument to justify the right of national self-determination, seen as "a . . . craving, manifested by certain cultural communities, to establish their own form of political representation." [FN42] Dias sees that "craving for a form of political expression suitable to the values of a specific culture may be perfectly fulfilled inside multicultural states." [FN43] She designates federalism as an example of such a possibility and acknowledges that different settings may require different models. She sees the political structure of the nation as being responsive to the fundamental values of the community. In her reading, the political structure of a nation "mirrors the form of representation of different segments of society and the distribution of rights in the basic structure of society. It establishes the legitimate mechanisms of repairing justice . . . ." [FN44] Dias's portrayal of the political structure of the nation will come as a profound surprise to an overwhelming majority of human beings, for whom the state dressed up as a nation-state acts as the primary agency of the denial of rights rather than their repair. Even more significant is to limit the idea of self-determination to formation of nation-states. Why should self-determination not involve choices of political orders, economic systems, cultural forms and desirable futures?

Dias acknowledges that her celebratory posture towards the nation and nationalism may be met by the charge that "it does not express truthfully nationalism itself[;] . . . nationalism is often reactive, aggressive and exclusivist form[s] of expression." [FN45] Nevertheless, Dias argues that these are no more than human reactions that do not have to be associated by necessity to nationalism; some people react this way, individually or collectively, when they feel that their interests are threatened. [FN46] This is simply, for Dias, "something that we can only lament." [FN47]

For Dias, the nation is a given, a limit horizon, with only the scope of its legitimacy a question worth exploring. This is so notwithstanding the ontological ambivalence of the nation and the fact that the career of the *[947] concept of a nation exemplifies that "there is a moment in the life of concepts when they lose their immediate intelligibility and can then . . . be overburdened with contradictory meanings." [FN48] The question of the nation is, by Fitzpatrick's account, "the irresolution of nation." [FN49] Attempts at resolving the question remain remarkably elusive and contradictory. As Habsbawm notes:

Most of this literature has turned on the question: what is a (or the) nation? For the chief characteristic of this way of classifying groups of human beings is that, in spite of the claims of those who belong to it that it is in some ways primary and fundamental for the social existence, or even the individual identification of its members, no satisfactory criterion can be discovered for deciding which of the many human collectivities should be labeled in this way. [FN50]

Recent efforts by Smith, Gellner and Anderson are cases in point. Anthony Smith searches for "the ethnic origins of nations," and discovers an ethnie which furnishes the foundation of the modern nation and "determines" the nature and limits of nationalism. [FN51] He agrees, however, that ethnie may not have its own prior reality and may be invented. [FN52] The nation either takes over many of the myths, memories and symbols of pre-existing ethnie or "invent[s] ones of its own." [FN53]
For Gellner, the nation is the product of the modern "age of nationalism," an age of industrial society and the homogenized "gelded" beings that inhabit it. [FN54] Here, the nation, as set against the particular and the primordial, is posited as integrally functional to the universalizing and homogenizing thrust of modernity. Gellner acknowledges the arbitrary grounding of the nation. He states, "[t]he cultural shreds and patches used by nationalism are often arbitrary historical inventions. Any old shred would have served as well." [FN55] Curiously, he goes on to insist that, "[b]ut in no way does it follow that the principle of nationalism . . . is itself the least, contingent and accidental." [FN56]

For Anderson, the nation is an "imagined political community." [FN57] The spread of capitalism and print media are seen as the instruments of homogenization and facilitation of this community being imagined. Anderson *948 acknowledges, however, that "all communities larger than the primordial villages of face-to-face contact (and perhaps even these) are imagined." [FN58]

When it comes to the nation, becoming tangled in the debate between universalism and particularism may miss the mark. The nation is not one or the other. Rather, suspended between universalism and particularity, the nation assumes coherence only in being set against alterities. Furthermore, it is the law that constitutes the nation by "mediating between its universal and particular dimensions, between its claim to inclusiveness and its claim to exclusiveness. In doing so, law effects and affirms an hierarchical and homogenizing authority, eliminating or subordinating all that would counter the nation-state in coming between it and its subject, the modern citizen. . . ." [FN59] Given that "*[m]odern law . . . clings to nation as its epitome," [FN60] the nation cannot escape the ambivalence of law itself, suspended as the latter is between demands of the universal and the particular.

By grounding debates about the nation in alternative metapsychologies, one's point of departure appears to be a natural, self-contained, sovereign and pre-political subject who chooses to cultivate one particular social bond, namely the nation. After Freud and Foucault, one would have thought social theory would put to rest the over-worked Cartesian sovereign subject. Rather than seeking the roots of the nation in metapsychologies, we should take seriously the proposition that:

In addition to superimposing undivided rule upon its subjects, the genuinely modern state further requires that those who fall under its authority be united themselves--that they form one people, one nation, morally bound together by a common identity. . . . [T]he modern state generally requires that the represented be a moral person as well, national unity going hand in hand with the political unity of the state. [FN61]

If one function of ideology is to interpolate individuals as subjects, [FN62] nationalism as a foundational ideology of the era of the nation-state interpolates individuals as being part of a nation.

*949 Critique of the nation must render the very grounds of the nation problematic, jettison the assumption of a pre-political subject making choices, and take as its point of departure the genealogy of the modern nation-state, or more accurately, state-nation. Non-national state apparatuses progressively produce the elements of the nation-state, which in turn nationalize the society. As the political community of the nation superseded proceeding cultural systems, there occurred "a fundamental change . . . in modes of apprehending the world, which, more than anything else, made it possible to 'think' the nation." [FN63] The nation is posited to be a social and political category somehow linked to actual or potential geographical boundaries of the state.
Historically, in almost every case, statehood preceded nationhood and not the other way around, notwithstanding widespread myths to the contrary. Once the interstate system was functioning, nationalist movements in European colonies arose demanding the creation of new sovereign states; and these movements sometimes achieved their objectives. Nevertheless, a caveat is in order: these nationalist movements, almost without exception, arose within already constructed colonial administrative boundaries. Hence, a state, albeit a non-independent one, preceded nationalist movements in the colonies. This led Tagore to conclude that the entire East was "attempting to take into itself a history, which is not the outcome of its own living." [FN64]

Any analysis of the nation is often led astray because the archive relied upon to conduct the analysis is itself a product of state-sponsored efforts to create a nation. The nation is a quintessential artifact of modernity—a social creation engineered primarily through the techniques of narration and representation. The modern state exists prior to the modern nation and furnishes the field of possibility of such narration and representation. In this sense, the archive of the nation is the state archive. As a result, "[a]s long as the nation had to fight for its highest objectives, there was no room for objective historiography; after victory had been achieved it rose to predominance by itself." [FN65]

*950 As Hont described the final discursive enactment of the nation-state, it was the outcome of deliberate efforts of Sieyés and others to make sense of popular sovereignty, and to justify it by means of a particular account of popular representations within the state. [FN66] Thus, enunciations like: "The nation is prior to everything. It is the source of everything. Its will is always legal; indeed, it is the law itself." [FN67] The project was to redefine the identity of the community in such a way that it could serve as the ultimate source and locus of sovereignty. [FN68] The sovereign authority of the state becomes premised upon the identity of the nation as much as the identity of the nation becomes derivative of the sovereign authority of the state, so that the concept of the nation-state comes to express nothing more than a vaguely tautological relationship between two entities.

IV. Reforming the Nation

In the second article in this cluster, Angel R. Oquendo takes on an ambitious agenda of exploring the interface between the state and national culture in multicultural societies. [FN69] He begins by acknowledging the ambiguity of the word "national," and aims to "exploit[] the ambiguity." [FN70] The question he poses is whether the state should be fully "post-national." [FN71] His question refers to renouncing of the notion of a single national culture while concurrently refusing to support cultures of national minorities. [FN72] He first provides an overview of liberal and pluralist models of the state/national culture dynamic and then argues that, under certain circumstances, the state should give up its neutrality and support a single culture for the entire society. Designating his model "progressively nationalist," he claims it envisages not a "primitive national state, but rather . . . a post-national state of sorts." [FN73]

Reading liberalism as presented by John Rawls and Ronald Dworkin, Oquendo identifies its prescription that political and legal institutions must rest on a formal conception of rights and remain neutral with respect *951 to any substantive conceptions of the good. [FN74] Consequently, a liberal state "allows individuals to embrace the values of their respective national subgroups [and] does not take a position as to the worthiness of any." [FN75] He finds this approach "singularly attractive" in multicultural societies, and finds in liberalism an impulse "towards a post-national political paradigm." [FN76] He locates the seeds of this in the French Revolution and its further development in the United States, even though it remains "far from a full realization of this post-national
ideal." [FN77] The liberal state, he posits, "does not recognize a thick national identity . . . [and] does not force a substantive national culture on all citizens." [FN78]

He finds salutary Habermas's concept of "constitutional patriotism" and the consolidation of the European Union as a political entity as furnishing the grounds for a post-nationalist formation. [FN79] This position that commitment to the constitution is the only prerequisite to be a German is difficult to reconcile with the German interior minister's statement "[w]hoever is fluent in the language belongs amongst us." [FN80] We have to be mindful that even today, "coherence is sought in a nation through the excluding of what is thus 'other' to it." [FN81] Balibar frames this process of coherence as one of exclusion in racial terms: a division of humanity into two main groups, the one assumed to be universalistic and progressive, the other supposed irremediably particularistic and primitive." [FN82] As explicit racist divisions become politically discredited, a cultural divide is posited between the nation and its "other." Gilroy terms this "cultural racism," wherein "biological hierarchy" stands displaced by "new, cultural definitions of 'race' which are just as intractable." [FN83] At large in Europe, for example, are "new rhetorics of exclusion" founded in a "cultural fundamentalism." [FN84] The French ban on Muslim girls' head-scarves, the German refusal to give Turkish immigrants full citizenship rights, the British refusal to extend free labor movement rights to Eastern European members of the European Union and the European Union's rising immigration barriers *952 against non-Europeans are all in tune with the foundational divide between "us" and "them," between Europe and its internal "others." It should also be noted that Oquendo's focus on the Northern hemisphere leads him to assert that it is immigration that leads to the presence of national minorities. Irrespective of the validity of this assertion, in the Southern hemisphere it was not immigration, but the establishment of post-colonial states and state-nations in congruence with colonial demarcation that produced minorities within.

A pluralist model, according to Oquendo, would require that the state provide support on an equal basis to all national groupings, regard the various cultures as patrimony of the entire polity and refrain from establishing a particular national culture for the whole society. [FN85] Of course, as a starting point, a pluralist state "must undertake the formidable task of defining which national communities are legitimate." [FN86] Oquendo sees little difficulty in the state performing this function and sees the state "playing anthropologist in a small number of cases," and endorses that "the state will also disregard interpretations of ethical culture that clash with the political culture." [FN87] That anthropology in its very origin is the colonial discipline par excellence--and the "repugnancy test" was the primary colonial device to reject, and even destroy, customs of the colonized--renders Oquendo's position ironic. Pluralism, for Oquendo, will achieve the objectives of the polity as a whole, such as political participation. With Michael Walzer, Oquendo sees civic apathy, not fragmentation, as the biggest threat to modern society. [FN88] For Oquendo, the pluralist model is applicable to the United States and Europe because they "are becoming more and more multicultural as they receive citizens from other European countries, immigrants from developing countries, and asylum seekers." [FN89] If the pluralist model is warranted by the presence of multiple cultures within a polity, why the multicultural societies of the South are not found worthy of this is not explained.

Lastly, Oquendo presents the progressive model, which condones official commitment to national culture, an engagement that is "in order when that culture is in peril." [FN90] Using Quebec as an example, he argues that this model is warranted to redress past discriminations in order to place national culture in a position of equality vis-à-vis other cultures. Under this model, the state "must take a position on national cultural matters . . . [and] also commit its entire citizenry to that culture." [FN91] As the state will have to rely on political legitimacy to achieve this goal, he suggests that it must "consult citizens" and the democratic process would suffice *953 as "an effective deliberation
mechanism." [FN92] Oquendo does not address why the democratic process would not result in majoritarianism and bloc efforts of achieving multiculturalism. By assigning all tasks under this model to the state, in his model, the state appears to have a monopoly over social agency with freedom to mould the social formation as it pleases. Oquendo conditions states' intervention to protect national culture on four pre-requisites: (1) the national culture must be under threat; (2) the menace must stem from internal coordination problems or external obstacles to cultural development; (3) protective measures must be narrowly tailored to removing the identified obstacles; and (4) cultural dissidents and minorities must have the ability to live their preferred cultural life without state interference. [FN93] Individuals who believe their cultural rights have been violated by state policy should have the opportunity to seek redress from "a fair and autonomous arbiter." [FN94]

Oquendo's intervention necessitates examining the potential of the nation to accommodate difference. He appears to be in tune with progressive theorists like Hanna Arendt, for whom citizenship in a nation-state serves the limited horizon of rights. [FN95] For progressive theorists, the nation is again a given, ontologically stable and amenable to reform from within. Nationalism, however, has to be seen as a phenomenon that registers difference even as it claims a unitary and unifying identity. Nationalism is best seen as a relational identity: the nation is not the realization of an original essence, but the historical configuration designed to include certain groups and exclude or marginalize others, often violently. The modern nation, born as an imperative of the modern state, of necessity is constituted under the shadow of sovereignty. Given that at a fundamental level, "sovereign power is the very possibility of distinguishing between inside and outside," [FN96] a clear examination of the modern state-nation shows that "between the man and the citizen there is a scar; the foreigner." [FN97] Even within, the nation erases difference rather than accommodate it, no matter if it takes forever. After all, even in France, that birthplace of nation and nationalism, it took over a hundred years to beat peasants into Frenchmen, though still not quite. [FN98]

It may be that "state sovereignty is fully, flatly, and evenly operative over each square centimeter of a legally demarcated territory." [FN99] But the law, being an "infinitely extensible warrant for nation's disciplinary project," *954 [ FN100] impacts differentially upon spaces of different bodies. One must take issue with the proposition that sovereignty acts upon legally demarcated territory flatly and evenly. For example, the presence of the law, both in its operation and its impact, in the inner-city versus the suburb, the border versus the heartland, the within versus the without, is differential. [FN101] The external frontiers of the state are also its internal frontiers; external frontiers have to be imagined constantly as a projection and protection of an internal collective personality.

The ideological form that undergirds the nation-state is nationalism, produced by both force and education. Nationalism, then, becomes the religion of modern times. Nationalism constitutes people living within the territorial boundaries of the state as if they formed in a natural community an identity of origins, cultures and interests. In order to achieve that, nationalism operates within an extra degree of particularity, or a principal of closure and exclusion. Narratives of nations are constituted in a form, which attributes to these entities the continuity of an invariant subject. Through myths of origin and national continuity the imaginary singularity of national formation is constituted by moving from the present into the past. The "other" threatens this continuity and singularity. Hence, the imperative of the nation is to erase heterogeneity. Any proposals for an unproblematic multi-culturalism will have to account for the fact that after all the "nation forms through the exclusion of that which yet remains integral to it." [FN102]
V. Containing the Nation

In the third article of this cluster, Berta Esperanza Hernández-Truyol seeks to locate citizenship and the legal subjecthood beyond the canonical confines of the nation-state as the exclusive context for the resolution of these questions. [FN103] She aims at a new vision of human rights that creates a globalized citizenship movement from below, and develops in more detail propositions articulated in an earlier work. [FN104] The article aims at rendering the human rights system truly pluralistic by including voices of the marginalized, exploring the tension between human rights and national security and creating a conceptualization of sovereignty that can accommodate a proposed global citizenship model.

*955 The first part of the paper rehearses the evolution of human rights discourse and its interface with the question of state sovereignty. While she discerns a "laudable and desirable ideal of universality of rights" in this evolution, the discourse remained embedded in an "articulation [of] Western philosophy" resulting in an absence of voices and concerns of the periphery. [FN105] She sees the reconfiguration and transformation of the human rights project into a truly inclusive and pluralistic scheme that acknowledges the dignity and personhood of the subordinated as a necessary prerequisite to the development of the globalized citizenship model. Exploring the sovereignty/security conundrum, she takes as given the classical idea of social contract, whereby maintenance of security was delegated to the sovereign. She then lists the limits placed on the exercise of sovereignty by human rights norms. She turns to theories of citizenship holding the field, and finds them deficient as they fail to accommodate diversities and fractures within a political unit. She finds citizenship's assumptions and demands for homogeneity problematic and argues that the strength of citizenship has to be located in its ability to accommodate heterogeneity.

In symphony with Richard Falk, David Held and Kwami Anthony Appiah, she proposes the creation of global structures for the protection of global citizens in a global public sphere. Global citizenship is warranted by "migrations and relocations of national, ethnic, religious, sexual and racial minorities outside of clearly defined national territorial borders." [FN106] Such a model of citizenship, she posits, would "shift the concept of citizenship from a state based model to a deterritorialized rights, interests, and identity based one." [FN107] This paradigm she sees as being based on "attributes of human beings qua human beings," one that "forms part of a subaltern cosmopolitan legality that opens the door to emancipation." [FN108]

She posits the globalized citizenship as being "complementary to Westphalian citizenship . . . a counter-hegemonic project that protects persons where Westphalian state fails." [FN109] She focuses on those incarcerated at Camp X in Guantánamo Bay to highlight the predicament of those who are left entirely at the mercy of the sovereign state. She highlights that nearly all efforts made to seek redress for these prisoners have been made by organizations committed to the proposition that the writ of sovereignty must yield to directives of international human rights norms.

Hernández-Truyol aims to put in question the nation as the exclusive grounds of collective political identity. The promise of cracking open the limit horizon of the nation, however, is accompanied by a curious deferral to the grounds and interests of the nation-state: institute global citizenship, *956 but with license from the state. Notwithstanding this dissonance, the utility of her intervention is that by focusing on global exclusions rooted in the colonial encounter between the West and the rest, she brings into sharp relief the fact that the nation was not only constituted in counter-distinction to the savage, but it was endowed with "a universal mission to educate." [FN110] It emerged in the divide between "the European family of nations" and those
beyond the pail of History, and thus nationhood. [FN111] Important here is how History and nation transmitted through European colonialism were received and adopted by the colonized; how the nation forms part of "axiomatics of imperialism" that inform terminal vocabularies of modernity. [FN112]

Nationalist elites in the colonies adopted Enlightenment history as their own to animate their project of creating a national subject, which evolved into modernity. The structural imperatives of the world system, however, ensured that the colonized could only mimic the script of the colonizer. The decolonized state was nothing but a progeny of the colonial coercive administrative/extractive apparatus, with its territorial boundaries tracking colonial administrative divides. The state-nation that the decolonized state proceeded to fashion has remained a doomed project, always "becoming" other than what it is.

Sovereignty, assigned to the state and grounded in the nation, is best seen as furnishing a bridge between local and global zones of capitalism as a world system. [FN113] Beginning from the core, nation-states form part of the overall structure of the world economy. They do so as part of historical capitalism, in which the early forms of imperialism and colonialism played a foundational role. Any analyst of the nation should remember that "every modern nation is a product of colonization: it has always been to some degree colonized or colonizing, and sometimes both at the same time." [FN114]

Considering broad strands of world history since the late eighteenth century, the resilience of the nation as limit horizon is quite remarkable. Within Europe, territorial alignment of the state with the nation, a process that remains incomplete and imperfect, necessitated violence and wars on a global scale. Consolidation of the nation-states in Europe was coterminous with European colonization in non-Europe. Colonialism, based on conquest and subjugation, precluded the very acknowledgement of subjecthood *957 of the governed, much less any alignment of political order with nationhood. Colonialism and its aftermath ensure that "the willed (auto)biography of the West still masquerades as disinterested history." [FN115] Tagore diagnosed the imposition of the nation on non-Western societies well:

> This government by the nation is neither British nor anything else; it is an applied science and therefore more or less similar in its principles wherever it is used. It is like a hydraulic press, whose pressure is impersonal, and on that account, completely effective. The amount of its power may vary in different engines. Some may even be driven by hand, thus leaving a margin of comfortable looseness in their tension, but in spirit and in method their differences are small. [FN116]

He is also alert to the fact that both East and West remain in the grip of this limit horizon:

> Not merely the subject races, but you who live under the delusion that you are free, are everyday sacrificing your freedom and humanity to this fetish of nationalism . . . it is no consolation to us to know that the weakening of humanity from which the present age is suffering is not limited to the subject races, and that its ravages are even more radical, because insidious and voluntary in people's who are hypnotized into believing that they are free. [FN117]

VI. Critiquing the Nation

Gil Gott's article, the last one in this cluster, is one of the more refreshing pieces of scholarly intervention in the ongoing debates about the nature and import of recent
changes in legal regimes related to national security. [FN118] Besides a refusal of confinement within the nation as limit horizon, the merit of his article issues from its comprehensive, grounded and nuanced approach to multidisciplinary investigations. It is an ethical commitment that propels Gott's inquiry and leads him to ask the "subordination question" as it implicates national security law and policy. [FN119] His project is to examine how discursive and institutional structures attendant to national security law and policy account for the costs of the exercise of state power that accrue disproportionately to subordinated racialized social groups. This helps him put into question the very legitimacy of the nation.

*958 He first turns to how legal liberalism, the dominant approach to legal studies in the United States, has responded to and accounted for the post 9/11 "war on terrorism." Here, he discerns four distinct strands: (1) the "social learning" thesis advanced by Mark Tushnet; (2) the "institutional process" approach adopted by Samuel Issacharoff; and (3) the "emergency constitution" proposed by Bruce Ackerman; and finally, the "progressive legalism" deployed by David Cole. [FN120] Displaying a thorough grounding in doctrine, history and theories of constitutional law, Gott's close reading of these texts is penetrating and nuanced. He demonstrates how an anemic understanding of racial subordination precludes a synthesis of security and liberty that liberal approaches to the "war on terrorism" profess to achieve. For example, he shows that while the Japanese internment during World War II constitutes a thematic common denominator for all liberal post 9/11 legal analysis of security powers, such analysis is marred by the foundational assumption that the internment was an exceptional phenomenon; one that both the law and the society have transcended. [FN121] Such an assumption, Gott argues, renders everyone within the nation equally a "victim" of past evil, and accountability is purged from designs of justice. Gott's critique of David Cole's is particularly instructive. He shows how Cole's reliance on a formal citizen/alien binary is out of tune with the lived experience of "permanent foreignness" that has been the lot of many racialized minorities. [FN122]

Gott then turns to evaluate the costs of the "war on terrorism" as they accrue differentially to different racialized social groups. Masterfully deploying the conceptual and methodological teachings of critical race theory, he shows how a process of "racing" constructs Muslims, Arabs and South Asians as legitimate targets of the "war on terrorism." [FN123] He demonstrates the construction of race as contingent, malleable and purposeful. In the process, he shows how construction of race is inextricably linked with the construction of the nation and the citizen. Gott deftly deploys conceptual categories and methodological departures of critical race theory to lay bare racialization, or "racing," of targeted social groups. He recounts both the genealogy and the post 9/11 phase of this ominous phenomenon. He highlights convergences and divergences with other cases having "family resemblance," particularly internment of Japanese Americans. He offers a perceptive analysis of the phenomenon of "internalized internment" as the lived experience of besieged social groups. Here, he discusses the role of civil society in racialization, which is a welcome departure from standard legal analysis that often exclusively addresses state action when talking about questions of race and racism. In this general context, Gott highlights one crucial dimension of identity formation often overlooked by scholars and commentators; namely, that identity is constituted at the intersection of technologies of power and strategies of resistance. He sketches out how mobilization among Arab and Muslim communities in response to marginalization created spaces to build group solidarity and coalition with other groups. This is an important insight that should be instructive for studies of interest group formation and deployment.

Gott then addresses some foundational theoretical constructs of the modern state in the context of the emerging models of state violence. His assertion, based on his analysis in earlier sections of the article, that there has been a "securitization of race" and a
"racialization of security," should prove very productive to scholars of international relations grappling with foundational structural changes in the post World War II world-order. This thesis also adds to the agenda of historians and critical race theorists. Is the relationship between security and race a post-Cold War phenomenon, or can this entanglement be discerned throughout the colonial career of modernity? Is modern construction of race solely an intra-national affair, or is it unavoidably informed by international imperatives?

Lastly, Gott identifies the implications of post 9/11 security laws, which form a persistent problem for liberal political theory and constitutionalism. Namely, he identifies how liberalism and constitutionalism account for emergencies and states of exception. He expands the scope of the state of exception problem by locating it in the context of globalization and civilizational conflict. How do liberalism and constitutionalism accommodate states of exception in a context where territorial sovereignty is purportedly yielding to an age of extra-national demographics and geographies of cultures? How will the question of racial justice be addressed in this matrix? By a bold stroke, Gott has formulated a central question to be pondered by scholars, policy makers and communities for some time to come.

VII. Conclusion

LatCrit assigns us the task of deploying critique as a strategic practice, bearing in mind that "strategy suits a situation; a strategy is not a theory." [FN124] And theory itself, as Deleuze reminds us, "is exactly like a box of tools, . . . by means of which . . . to move 'obstacles' or 'blockages' and to lever open discursive space for political/intellectual work." [FN125] LatCrit aims to align with the subordinated, identifying them as our community. Community, as Nancy reminds us, "is not historical as if it were a permanently changing subject within . . . a permanently flowing time . . . . But history is community, that is, the happening of a certain space of time--as a certain spacing of time, which is the spacing of a 'we.'" [FN126] We must take seriously Nancy's challenge, namely that "history--if we can remove this word from its metaphysical, and therefore historical, determination--does not belong primarily to time, nor to succession, nor to causality, but to community, or being-in-common." [FN127] When confronted with limit horizons that preclude alternatives, we must refuse to live a life of "living without an alternative," mindful that a "world without alternatives needs self-criticism as a condition of survival and decency." [FN128] Faced with limit horizons, we should bear in mind that far from being a rigid, all-encompassing and unchallenged structure, "[a] lived hegemony is always a process . . . continually to be renewed, recreated, defended, and modified." [FN129] There are always non-hegemonic or counter-hegemonic values at work to resist, restrict and qualify the operations of the hegemonic order. If we accept that no hegemony can be so penetrative and pervasive as to eliminate all grounds for contestation or resistance, this leaves us with the question of how we are to identify and configure such grounds. One avenue available to critical theory is the construction of subjectivity through negation and the related conceptualization of experience. The project involves an effort to recover the experiences, the distinctive collective traditions, identities and active historical practices of subaltern groups in a wide variety of settings--conditions and practices that have been silenced and erased by hegemonic historiography.

The state is never quite able to eliminate alternative constructions of belonging and identity. These alternative constructions must be marshaled to fashion a counter-narrative to allocate subjection and marginalization differentially. The task at hand is to read the nation and nationalism in ways that create an estrangement effect, whereby the texts of the nation and nationalism are deprived of their seemingly natural and self-
evident air to lay bare their contrived and contingent nature. The need is to trigger alternative narratives of the nation that contest the hegemony of Eurocentric History.

The task of critique today is to question the ontological grounds of normalized practices. Here critique should be mindful that "a logic in which the answers are attended to and the questions neglected is a false logic." [FN130] In its irresolution, nation is not the only limit horizon that is vulnerable. Nancy reminds us that today, "sense of words like 'nation', 'people', 'sovereignty' . . . [and] 'community' . . . are leaking out of so many cracked vessels." [FN131]

*961 To be true to its vocation in this context, the critical project will have to posit a subject not reduced to a mere property and effect of discourse and a consciousness not equated with hegemony. We need to "think beyond narratives of originary and initial subjectivities and to focus on those moments or processes that are produced in the articulation of cultural differences." [FN132] Of great utility here is Antonio Gramsci's model of a fragmented composite subject that is constituted as an "inventory of traces" of multiple and fragmented hegemonies. [FN133] Similarly useful is to theorize a desiring subject who elides complete determination by the symbolic order by virtue of the surplus of the "[r]eal" over any symbolization. [FN134] Critical scholars should explore the ever-present tension between specific structures of domination and "lines of flight"--desires that escape hegemonic formations and thus bear the potential of transformation. [FN135] We have to plot the fault lines between domination and desire where the "individual repeatedly passes from language to language." [FN136] We may have to dig under modern technologies of power to uncover the surviving "polytheism' of scattered practices[,] dominated but not erased by the triumphal success of one of their number." [FN137] Nothing less than an "insurrection of subjugated knowledges" [FN138] will suffice as a means to "bring[ ] hegemonic historiography to crisis." [FN139] The first step in that direction is "to change the imaginary in order to be able to act on the real." [FN140] With the benefit of the interventions that comprise this cluster, the LatCrit project is well positioned to undertake this task.

Footnotes:

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[FN3]. The National Question in Europe in Historical Context xix (Mikulas Teich & Roy Porter eds., 1993).


[FN6]. Kant, Political Writings 143 (Hans Reiss ed., 1991), quoted in Slavoj Zizek, For
They Know Not What They Do: Enjoyment as a Political Factor 204 (1991).


[FN12]. See generally George Wilhelm Freidrich Hegel, The Philosophy of History (J Sibree trans., 1956) (being the most important foundation for understanding linear, and necessarily teleological, progressive history). I use "History" to designate the hegemonic linear, progressive, Eurocentric history, while "history" is taken as the branch of knowledge that records and explains past events. For Hegel, the telos of History--the structure governing its progress through time--is the unfolding self-awareness of Spirit that is Reason. See generally id. Hegel posits two moments of this self-awareness: that of Spirit embodied objectively in the rationality of religion, laws and the State, and that of the individual subject. See generally id. Progressive self-awareness of the individual subject involves not only the recognition of the freedom of the self from the hold of nature and ascriptive orders, but most importantly, the realization of his oneness with the Spirit. See generally id. For Hegel, this is true freedom, the end of History, and it culminates in the Prussian state where the real is the rational and the rational is the real. See generally id.; Michel de Certeau, The Writing of History (Tom Conley trans., 1988); Edward Soja, Postmodern Geographies: The Reassertion of Space in Critical Social Theory (1989); Robert Young, White Mythologies: Writing History and the West (1990).


[FN14]. See generally Eric R. Wolf, Europe and the People Without History (1982); Young, supra note 12.

[FN15]. See generally Samir Amin, Eurocentrism (1989); Aimé Césaire, Discourse on Colonialism (Joan Pinkham trans., 1972).


[FN23]. Id. at 349.


[FN26]. See generally Hegel, supra note 12; see also Shlomo Avineri, Hegel's Theory of the Modern State (1972); Fred R. Drellmayr, G.W.F. Hegel Modernity and Politics (1993).


[FN30]. Dias, supra note 28, at 1065.

[FN31]. Id.

[FN32]. Id.

[FN33]. Id.

[FN34]. Id.

[FN35]. Id.

[FN36]. Id. at 1066.

[FN37]. Id. at 1067.

[FN38]. Id.

[FN39]. Id. at 1069.

[FN40]. Id.
[FN41]. Id.
[FN42]. Id.
[FN43]. Id.
[FN44]. Id. at 1070.
[FN45]. Id.
[FN46]. Id. at 1070-71.
[FN47]. Id. at 1071.
[FN49]. Fitzpatrick, supra note 10, at 111.
[FN50]. Hobsbawm, supra note 1, at 5.
[FN52]. Id. at 177-78.
[FN53]. Id. at 152.
[FN55]. Id. at 56.
[FN56]. Id.
[FN57]. Anderson, supra note 25, at 15.
[FN58]. Id. at 6.
[FN59]. Fitzpatrick, supra note 10, at 111.
[FN60]. Id. at 130.

[FN62]. See Louis Althusser, Ideology and Ideological State Apparatuses (Notes Towards an Investigation), in Lenin and Philosophy and Other Essays 127, 180-81 (Ben Brewster trans., 1971) (listing functions of ideology). As Foucault puts it: This form of power applies itself to immediate everyday life which categorizes the individual, marks him by his own individuality, attaches him to his own identity, imposes a law of truth on him which he must recognize and which others have to recognize in him. It is a form of power which makes individuals subjects. There are two meanings of the word subject: subject to someone else by control and dependence, and tied to his own identity by a conscience or self-knowledge. Both meanings suggest a form of power which subjugates and makes subject to.
Michel Foucault, The Subject and Power, in Beyond Structuralism and Hermeneutics 212 (Hubert Dreyfus & Paul Rabinow eds., 1982).

[FN63]. Anderson, supra note 25, at 28.

[FN64]. Tagore, supra note 19, at 64.

[FN65]. See Wolfgang J. Mommsen, Ranke and the Neo-Rankean School in Imperial Germany: State-Oriented Historiography as a Stabilizing Force, in Leopold Von Ranke and the Shaping of the Historical Discipline 124, 129 (Georg G. Iggers & James M. Powell eds., 1990) (quoting Max Lenz, Die Großen Mächte. Ein Rückblick auf unser Jahrhundert 26 (1900)).


[FN70]. Id. at 964.

[FN71]. Id. at 965.

[FN72]. See id. (explaining idea of post-national state).

[FN73]. See id. (introducing paradigm that state should support single national culture in some circumstances).

[FN74]. See id. at 968-69 (arguing that state should ensure that all nationalities be treated as equal).

[FN75]. Id. at 969.

[FN76]. Id.

[FN77]. Id. at 972.

[FN78]. Id. at 971.

[FN79]. See id. at 972-75 (summarizing recent calls for post-nationalistic concept into Europe).

[FN80]. Id. at 974 n. 38 (quoting speech by Germany's Federal Minister of Interior, Otto Schily, before German Parliament).

[FN81]. Fitzpatrick, supra note 10, at 125.

[FN82]. Etienne Balibar, Is there a Neo-Racism in Etienne Balibar & Immanuel


[FN85]. See Oquendo, supra note 69, at 975 (describing pluralist model).

[FN86]. Id. at 976.

[FN87]. Id. at 977.

[FN88]. See id. at 979.

[FN89]. Id. at 982.

[FN90]. Id. at 983.

[FN91]. Id. at 985.

[FN92]. Id.

[FN93]. See id. at 965-66.

[FN94]. See id. at 1000.


[FN99]. See Anderson, supra note 25.

[FN100]. Fitzpatrick, supra note 10, at 133.


[FN102]. Fitzpatrick, supra note 10, at 119.


[FN106]. See id. at 1027.

[FN107]. Id. at 1032.

[FN108]. Id.

[FN109]. See id. at 1033.

[FN110]. See Balibar & Wallerstein, supra note 82, at 24.


[FN114]. See Balibar & Wallerstein, supra note 82, at 89.


[FN116]. See Tagore, supra note 19, at 18.

[FN117]. Id.


[FN119]. See id. at 1073.

[FN120]. See id. at 1077-1100.

[FN121]. See id. at 1100-27.

[FN122]. See id. at 1093-1100.

[FN123]. See id. at 1099-1100.


[FN127]. Id. at 149.


[FN131]. The Sense of Philosophy supra note 4, at 13.

[FN132]. Homi K. Bhabha, The Location of Culture 1 (1994).

[FN133]. See Selections from the Prison Notebooks of Antonio Gramsci 324 (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 1971) (describing "starting-point of critical elaboration").


[FN140]. See Gayatri Chakravoty Spivak, French Feminism in an International Frame, in In Other Worlds, supra note 139, at 145 (quoting Catherine Clément).
Nationalism

*NATIONAL CULTURE IN POST-NATIONAL SOCIETIES*

Angel R. Oquendo [FN1]

I. Introduction

THE history of nationalism has all too often been gruesome. All over the world, nationalist movements have now and again unleashed terror and unspeakable injustices. The most extreme case is perhaps that of the Nazi dictatorship in Germany. Therefore, it is not surprising that both the right and the left vehemently repudiated national sentiment as either "a pathological inflammation of wounded national consciousness" or as "a form of false consciousness," in the words of Isaiah Berlin. [FN1] This categorical attitude has changed somewhat in the last five decades. During the worldwide anti-colonial campaign of the 1950s and 1960s, commentators began to accept that national pride could be, so to speak, "politically correct" when it contributed to motivating a people to undertake a liberation struggle against imperialist oppression. In the 1980s and 1990s, the notion that in a multicultural society the protection of national identity is part of the right of minorities to "recognition" made considerable headway, particularly in the Anglo-Saxon world. [FN2] International law has also upheld both the national self-determination claim of former colonies and the right of minorities to cultivate their national heritage within the larger state to which they belong. [FN3]

Thus, political philosophers and protagonists are now ready to attribute teleological as well as deontological value to national sentiment. On the one hand, they have come to realize that national sentiment may instrumentally advance valuable ends, such as decolonization or improving a minority's self-esteem. [FN4] On the other hand, they have evolved to the view that the cultivation of national sentiment is something colonized peoples and national minorities are entitled to as a matter of right. Of course, from this standpoint, these groups not only have a right to feel, in some general way, that they constitute a nationality, but they are also entitled to act as a national group, that is, to construct a national culture.

This concept has important practical consequences not only for individuals and groups, but also for the state in which they live or which they purport to create. After all, citizens often exercise their rights against the state and almost always depend on the state for enforcement. This paper, accordingly, focuses on the obligations of the state vis-à-vis the right of individuals and groups to develop a national culture. Should the state simply adopt a policy of non-interference? Should it provide some assistance to its citizens in the exercise of this right? Or, should the state make the right its own and join its citizens in the promotion of a national culture for all?

Obviously, these questions are not just the stuff of armchair philosophy. They can give rise to enormous controversy, particularly in multicultural societies. They can not only lead to profound discontentment among minority or dissident groups; but these questions actually have the potential to rip apart even wealthy nations with a strong commitment to democracy and human rights. They have created painful divisions in countries, such as the United States, Canada and Belgium and brought insane, endemic
violence to others, such as Spain, France and the United Kingdom. In less affluent societies with precarious democratic and constitutional institutions, the virulently nationalistic state, which inspired the previously mentioned aversion to national sentiment generally, may show its face. The end result may be utter devastation. Rwanda, Yugoslavia and Indonesia provide cases in point.

Before I start the discussion of these all too consequential matters, a terminological comment is in order. This paper exploits the ambiguity of the word "national." The term often refers to a country as a whole. Mexican national traits are, in this sense, those of the people who live in Mexico. The underlying assumption is that within the Mexican borders a distinct nation exists. "National" may also point to a national subgroup within a society. For example, the Kurdish national language is that spoken by the Kurdish minority in Turkey, Iraq, Iran or Syria. Horace Kallen draws on both dimensions of the concept when he describes the United States "as a 'nation of nationalities.'" What Kallen means is that the United States is a country encompassing various communities divided by ethnicity.

In this piece, "national culture" will be used to describe both an entire country and the plurality of ethnic subgroups. Thus, it is possible to reformulate the questions posed previously as follows. Should the state be fully post-national, that is, should it refuse to support in any way the culture of its national minorities and renounce the notion of a single national culture for all citizens? Or may the state subsidize traditionally disadvantaged minorities as a way of reparation or subsidize all ethnic groups on impartial grounds? May the state, under certain circumstances, advance a national culture as that of the entire society and thus abandon, to some extent, its post-nationalism?

In this article, I will first discuss a liberal construction according to which the state may, at most, erect a framework that allows individuals to cultivate their particular national roots on their own. Thereafter, I will contemplate a pluralist model that declares that the state apparatus should value and actively promote the existence and co-existence of various national subgroups, without favoring any one of them. Finally, I will argue that under certain circumstances, the state may (and should) give up its neutrality and provide special support for a single national culture for the entire society. This last paradigm, which I will denominate (for lack of a better term) "progressively nationalist," emerges from the limitations of post-nationalism and points, not back to the primitive national state, but rather to a post-post-national state of sorts. I will, accordingly, contend that this option requires opening up space for cultural difference and dissidence.

My method will not consist in considering and discarding possibilities on an almost random basis until the true one appears. Instead, I will start with an extremely appealing concept, expose its deficiencies, and advance to a new one that both incorporates the virtues and rectifies the failings of the predecessor. The final standpoint will, in turn, dialectically include elements selected during the antecedent stages.

This last position I will also develop on a step-by-step basis, discussing the four conditions that progressive nationalism requires for an official defense of the national culture. First, the national culture must be under threat. Second, the menace must stem from an internal coordination problem faced by the citizens or from an external obstacle to cultural development. Thus, the state would lead a collective effort in cases where exclusively individual action would be insufficient. Third, the state must narrowly tailor its protective measures to the extent and kind of danger at issue. Finally, cultural dissidents and minorities must have enough room left to devote themselves to alternative cultural options.
This four-pronged test may sound somewhat unwieldy at first. Yet, it will prove to be relatively straightforward when applied to concrete cases. At any rate, it is key to have independent tribunals to determine, not only competently, but also objectively, whether the state has met these four prerequisites.

I will now raise five brief points that will help clarify my exposition or perhaps obscure it in an interesting way. First, there is no exact definition of the twin terms "nation" and "national culture". Although considerable elaboration is possible, the interpretation of both these notions must ineluctably remain loose. [FN6] I understand a nation as a group of persons who plausibly perceive themselves as a community sharing traditions, convictions, history, language, territory and/or an ethos. [FN7] None of these points of commonality are a sine qua non requirement for the classification of a group as a nation. [FN8] Nations qualify as such insofar as they display some of these convergence nodes and generally bear a "family resemblance" to other nations. [FN9] A national culture, in turn, refers to the areas of human activity that identify this kind of collectivity, such as music, art, cuisine or politics. [FN10] This most tentative understanding will suffice in order to move *967 on to the philosophical question of how far a state may go in supporting national subgroups or in embracing a national culture for the country as a whole. As my argument unfolds, the meaning of these two concepts will become more concrete.

Second, a national group normally differs from an ethnic group in that it has greater cultural convergence and territorial concentration; a national group can also formulate a more plausible claim to political autonomy. [FN11] In Belgium, for instance, Germans constitute a national group, whereas Turks are an ethnic group. Of course, this definition is somewhat arbitrary. Moreover, the dividing line is not entirely precise. Nevertheless, separating the two categories is useful when it comes to establishing the rights of these groups. This article deals primarily with national groups, but many of the arguments are also relevant to ethnic groups.

Third, one should not lose sight of the way in which the concepts of state and nation relate to each other. A state represents a political (usually sovereign) community. To take states as nations is to assume that the represented polities constitute nations. This is the underlying premise of the appellation "United Nations" for an organization in which each state purports to act on behalf of a particular nation. [FN12] Some political communities are nations only in an extremely general sense. They are collections of various and sundry ethnic subgroups, which share (at most) a political culture, a set of political principles or a broad commitment to pluralism. [FN13]

Fourth, virtually all countries are "multicultural" to some extent. [FN14] In other words, different cultural minorities subsist within the established frontiers. When the state posits a particular "thick" national culture for the entire country, it usually focuses on a particular (almost invariably majority) *968 segment of the society. Even if the state tries to be as inclusive as possible, it typically excludes certain elements in order to give some coherence to the concept of a national culture. [FN15] Claims to legitimacy will typically face a strong challenge under these circumstances. The issue is whether the state should put itself in such a bind. The narrowly post-nationalist response is simply that it should not, no matter what. In contrast, the progressively nationalist answer will be that it may put itself in such a bind so long as it meets a series of strict conditions.

Lastly, the state is the agent of its citizens and obviously must defend their "national" interests. Thus, Russia's trade officials must stand up (at home and abroad) for Russian companies and businesses, including those in the business of culture--e.g., film producers, music distributors and art dealers. My attention will focus not on this kind of endeavor, but rather on the government's specific engagement in favor of a national...
culture. Can the Russian state legitimately support, at home and abroad, what it asserts to be truly Russian cultural activity? May it discriminate between those culturally active citizens who pass the national litmus test and those who do not? Should it subsidize non-citizens, who do not even live in the country, but who contribute to what it considers genuinely Russian folklore?

So much for preliminary caveats, at least for the time being. I will now commence my examination of the three models and proceed down the anticipated path. This inquiry will force me to shed further light (and inevitably cast additional shadows) not only on my reading of what a nation and national culture are, but also on my entire conceptual perspective. The symbiotic relationship between concept and analysis thus becomes evident. I first suggested that the precision of certain key notions would render my investigation more effective. My point now is that upon their application to a concrete problem, these concepts as well as their import will become more lucid.

II. A Liberal Construction

One could interpret the national state from the standpoint of liberalism as defined by philosophers such as John Rawls and Ronald Dworkin. These liberal philosophers assert that basic political and legal institutions must rest on a relatively formal conception of the right and remain neutral with respect to the various substantive conceptions of the good. For example, the government has a duty generally to guarantee religious freedom without favoring any specific religion or vouching for its truth. The model under consideration in this section applies this same policy to nationality matters. Accordingly, the state should act impartially and create a space in which all nationalities with their corresponding visions of the good life can, in principle, survive as equals. From this standpoint, the government allows individuals to embrace the values of their respective national subgroups. Yet, it does not take a position as to the worthiness of any of these ethnic ways of life. Nor does it subsidize any of them. It is for the individual or the national subgroup in question to value and invest in them.

This approach is singularly attractive in a society within which numerous relatively segregated subgroups, divided by national origin, subsist. By refusing to side with any of its national communities, the state purports to command the allegiance of all of them. It must, consequently, stay away from any nationally and charged agenda, which might alienate some of them. The state has to move, in other words, towards a post-national political paradigm.

The liberal state thus avoids having to define the nation on a genealogical or imaginary basis. Moreover, it does not have to establish what the national culture is all about, i.e., what falls within or without the concept. Nor does it have to specify which of its national subgroups are genuine, who their legitimate members are or what their shared culture consists of. The burden is on the individuals who want to keep their particular group alive to search for definitions. They must come up with an interpretation that is persuasive on its own, because the state will allow them neither to coerce fellow citizens into joining forces with them, nor to prevent others from coming up with alternative conceptions.

The liberal state is not simply able to appease nationalist factions and escape hairy terminological disputes. More significantly, it is in a position to recognize that there is reasonable disagreement with respect to nationality matters and to grant its citizens the freedom to make their own choices. Its claim to legitimacy will be stronger to the extent that it embraces the former philosophical insight and guarantees the latter liberty.
Individuals uphold this liberal approach not simply for strategic reasons. In other words, they do not support it just because it allows them to live in peace and develop their culture. They actually are able to regard the principles of the collectivity as reasonable and as part of the comprehensive doctrine that they and their subgroup embrace. Accordingly, the polity is the seat of a Rawlsian "overlapping consensus." [FN22]

The ideology of the French Revolution already contained, implicitly, this post-national idea of the nation-state. [FN23] Yet, the notion attained a fuller development later in multicultural societies such as the United States. [FN24] The post-national ideal is an extension of the principle of separation of church and state. It postulates that individuals ought to form a *polity* as citizens, entirely independently of their particular religion or ethnicity. [FN25] These individuals should unite through a common political culture, in other words, through a series of shared political principles that generally define democracy, human rights and the rule of law. [FN26] They should build a community not of destiny, but of will that inspires constitutional patriotism instead of nationalism, to use Dolf Sternberger's terminology. [FN27]

In the United States, politicians and intellectuals have regarded the federal Constitution as the basis of social union, and the principles established therein as the core of civic identity. Within this vision, the government does not have to repress or homogenize ethnic minorities, it may reasonably incorporate them. [FN28] Political philosophy has refined these ideas, which were already part of the common ideological currency, into the liberal post-nationalism I have been reconstructing.

The liberal state distances itself from issues of nationality at two levels. At the level of the entire society, the liberal state does not recognize a thick national identity or reduce that identity to a set of political principles. Thus, it does not force a substantive national culture on all citizens. At the level of particular ethnic groups, the liberal state does not interfere with cultural endeavors. Instead, communities may devote themselves to their peculiar cultures. The communities may devote or express their culture *in public with private funds*; however, these communities should not expect state subsidies of any sort. [FN29]

Accordingly, there should be no official national music, literature or cinema. While national traditions may exist, they must fall solely within each of the subgroups. For the United States, the implication is that the government ought not to declare an official national art. At most, a truly "national" artistic genre may exist only at the level of the particular ethnic communities, such as those composed of African-Americans, Chinese-Americans, Mexican-Americans or Italian-Americans. The liberal model under consideration leaves the members of the national groups to their own devices in developing their cultural forms. It forbids state subventions as well as inculcation through the public schools.

Of course, the United States is far from a full realization of this post-national ideal. [FN30] Within the citizenry, constitutional patriotism has not yet completely replaced its nationalistic counterpart. Many citizens still believe that their civic identity is a function of their commitment not only to the Bill of Rights and the rest of the Constitution, but also to their particular language, religion, ethnic origin or race. The state, in turn, all too often embraces symbols or adopts programs that reflect a partiality toward specific linguistic, religious, ethnic or even racial perspectives. For example, dollar bills, official seals and governmental rituals still embody references to a Christian God. Moreover, even now, the government conducts its business almost exclusively in English, exercises most of its power through white Anglo-Saxon men, and has not effectively advanced the political, economic and social inclusion of disadvantaged national groups. Thus, the United States still has a long way to go.
The United States, in a sense, however, will always miss this mark, as would any other country. Liberal post-nationalism is ultimately an unattainable goal. Societies typically emerge as the people of a particular territory start imagining themselves as a coherent ethnic community. Almost inevitably, the views of society's pioneers color the political and legal institutions that emerge. [FN31] As other peoples arrive, they frequently feel like outcasts and push for change. Even if the polity reacts responsively and responsibly, attempting to purge its nationalistic biases, it will never be completely successful. Residue from its ethnic past will tend to conspicuously remain in the official language.

Will Kymlicka maintains that because state structures are ineluctably impregnated with a particular national standpoint, any attempt to analogize the issues of religious and national neutrality is highly misleading. [FN32] His core contention is that the government may be impartial when it comes to religion, but not when it comes to nationality. [FN33] Thus, legal and political institutions will have an inevitable bias in favor of the dominant ethnic group.

It would be a mistake to overdraw this point. Official impartiality is ultimately as unattainable in religious as in national matters. The cracks in the wall between church and state in the United States and other Western democracies go beyond the sporadic religious references in official emblems and rites. Furthermore, they are not merely the product of aberrations or perversions of the true governmental mission. The very idea of a secularized state originates specifically with the Reformation and the ensuing protracted debate on religious toleration. [FN34] Therefore, the state unavoidably reflects the particular religious perspective from which it emerges.

The fact that it is not entirely attainable does not automatically render non-confessional and post-national liberalism useless. Post-national liberalism may still provide a crucial benchmark. It may not establish the exact form, but rather the direction that the state may take. It may point to a horizon or a utopia, [FN35] rather than a concrete destination. [FN36] Thus, the closer the state structures come to the overarching conception, the more legitimate they will be. Just as Saint Ignatius never expected moral perfection, *974 only improvement over time, secularism and post-nationalism may not demand a full realization of their norms, but rather a gradual and constant approximation.

In the last decade, German philosopher Jürgen Habermas has been calling for the importation of this post-national concept into Germany, as well as other European countries. [FN37] During the debate on German reunification, Habermas proposed that Germans establish a popular assembly in order to write a new constitution. Through this deliberative process, Germans would attain the consciousness of a collective identity based on a common political (rather than linguistic, social or economic) culture.

Although the political world at that time never took this specific proposal seriously, the general idea has remained relevant in Germany, as shown by recent discussions on citizenship. At present, the federal government seems to accept that people may in principle be German irrespective of their ethnic background, as long as they commit to the German Constitution. [FN38] Moreover, Habermas and others have insisted on the relevance of this perspective to European integration. [FN39] Thus, the European Union would coalesce not through an imaginary common ethnicity or through shared economic interests, but rather through a future European Constitution.

A politically consolidated European Union would more closely resemble the liberal post-national ideal than the United States. It would not originate with a particular ethnic community, but rather with a multiplicity of national groups. [FN40] The union would be
vividly aware of and committed to preserving its diversity, which would allow it to speak and imagine itself *975 in various tongues, rather than a single language. [FN41] Nevertheless, it would run into the same impossibility; it could not attain complete post-nationalism. As previously insinuated, societies tend to hold on to their national origins, partly out of habit or conditioned reflex. Accordingly, the European Union's institutions would reflect too much the perspective of the white Christian men that control them and too little the viewpoint of its subgroups.

It is also difficult to achieve social integration solely on the basis of a political culture. Solidarity usually requires more than a common set of political principles. To some extent, social integration normally calls for a collective social culture--i.e., shared experiences, histories, traditions and ways of life. [FN42] Insofar as the government bows to this reality and embraces some of these unifying features as part of the entire society's national culture, it will not be post-national. If the government were able to endorse only a very minimal national culture--drawing on the various national subgroups' standpoints--it would then be in a position to stay away from nationalism on most matters and to present itself as basically post-national. For example, the Swiss government might posit a national culture made up of what is culturally shared by its national subgroups or of a few select elements from each of the national subcultures. It would be able to profess post-nationalism credibly insofar as this overarching national culture was not all-encompassing or pervasive, but rather minimal.

III. A Pluralist Model

The described liberal conception appears indifferent to the various national perspectives. [FN43] According to liberalism, national communities may devote themselves to their culture, but should not expect any government support. Pluralist critics quickly retort that the state, instead, should expressly appreciate and promote the different national cultures, as well as pluralism in general. This critique calls on the post-national state to transform or perhaps even transcend its liberal premises.

*976 The alternative interpretation formulated from this critical perspective would allow and even require the government to subsidize the plurality of national cultural manifestations. Accordingly, the state would provide support on an equal basis to all national subgroups. It would regard the various national cultures as the patrimony of the entire polity. It would not, however, establish a particular national culture for the whole of society. [FN44]

A pluralist government must undertake the formidable task of defining which national communities are legitimate or, at least, worthy of subvention. [FN45] Obviously, it would be fiscally suicidal to provide funds to all who apply. A genealogical or biological test would be not only difficult to implement, but also conceptually wrongheaded. A national group, as I intimated at the outset, consists of individuals who share not a particular genetic makeup, but rather a specific perception of themselves.

The presence of a subjective dimension does not render the definition of a national group arbitrary or imply that any categorization must blindly accept people's assertions. The pluralist state should determine whether there is any plausibility to the applicants' perception of themselves as a community having a common tradition, set of convictions, history, language, territory and/or ethos. As noted in the introduction, not all of these points of convergence have to be present. Nor is it necessary to specify how many must be at hand. The purpose of the list is to point to relevant criteria. Inevitably, there will be a judgment call determining when a group has sufficiently met enough of the criteria to receive funding.
The analysis starts with the contender’s self-description and must be extremely deferential. The aim is simply to discard preposterous claims. The state does not involve itself in endless squabbles as to who qualifies and who does not. Most cases will be straightforward. There is no need to set up a permanent commission to appraise all claims.

In the United States, for example, Italian-Americans, Chinese-Americans and Mexican-Americans would easily pass this open-ended test, so would more broadly defined groups such as Latinos, African-Americans, Asian-Americans, Arab-Americans and Native-Americans. Despite the cultural heterogeneity within any such community, the members' experience on United States soil—which has often involved estrangement and oppression—has brought them together, making them vividly aware of what they have in common.

Would there be any exclusions? One can come up with absurd cases that would carry no weight at all. An example would be an association *977 purporting to represent people who come from countries whose name begins with the letter "H," such as Hungary, Honduras or Haiti. It would also be possible to discard less ludicrous claims, such as one presented by people asserting to come from Padania, the "nation" that the Northern League in Italy has contrived as part of its quest for independence.

A more controversial case would be that of a group of "Euro-Americans" insisting on official support. There would be good reason to turn down such a demand. United States citizens whose ancestors come from Europe do not generally think of themselves as a distinct community within society. They also lack the required cultural commonality. Finally, their experience in the United States has not created any special bond among them. Usually those who invoke such a category do so simply as a maneuver to discredit the struggle for recognition by people of color and to rally support for a racist agenda.

This approach to pluralism seems to deploy an unfair double standard. It is more open to the national affirmations of the disadvantaged than to those of the privileged. The justification for this bias is that a group that society has singled out and discriminated against attains a special collective consciousness. Other individuals, particularly the perpetrators or beneficiaries of the wrong, usually do not coalesce into a community in the same way. If "misfortunes confer certain rights," [FN46] as Voltaire declares, oppression does so even more. Conversely, those who (willingly or not) benefit from the injustice thereby acquire mostly obligations.

Once the state has acknowledged a particular group, it has to deal with the specific question of whether the activities it is considering subsidizing are legitimate cultural manifestations. Thus, it will probably have to play anthropologist in a small number of cases. The state will also have to examine the group's history and current practices to determine how the culture hangs together, as well as what that culture includes and excludes. Of course, the state will also discard interpretations of the ethical culture that clash with the political culture.

These matters are eminently polemical. Even experts disagree radically. The losing side in any such controversy undoubtedly will repudiate the final decision. Yet, much governmental action is contestable in this sense. The challenge in all such highly contested official determinations is to lay out the underlying grounds as persuasively as possible. If the state acts in a principled way, many of those who disagree will nonetheless come to respect the ultimate resolution. Of course, it is key to offer these persons the possibility of revisiting the issue in the future.
Generally, a pluralist government will be equally flexible in determining both what the components of a particular culture are, and in deciding what groups of individuals constitute a legitimate national community. In most cases, it will simply accept group members' reading of what their culture is all about. The state will take a position only with respect to interpretations that are outlandish, controversial within the community or contrary to its political principles. If the state is forced to take a position, it will then have to engage in the ethnological exercise to which I have just alluded.

This kind of pluralist model raises numerous thorny questions, at least in a small number of cases. Why on earth should the state tread on such explosive terrain? Why should it risk encouraging nationalist jealousies and rivalries among its subgroups? The liberal conception thus exists as a needed alternative to the nightmarish controversies that the pluralist model creates. After all, what are the purported advantages of the pluralist standpoint? How can one justify embroiling political and legal institutions in the hairy business of cultural anthropology?

One rationalization for the pluralist approach is that membership in a flourishing national subgroup contributes fundamentally to individuals' well-being. A meaningful life often requires connection to and engagement within a solid, relatively familiar cultural context. Therefore, the government advances the common good by strengthening the various national subgroups within which citizens live. Of course, these groups enable their members to pursue not only individual, but also collective goals. For example, a thriving national community may not only render it easier for members to write and read fiction in their own language, but may also enable the collectivity to have a literature of its own.

The defenders of pluralism could also point out that, in addition to advancing both the communal and individual ends of their members, national subgroups may help achieve objectives of the polity as a whole, such as political participation. Citizens partake in the broader, societal political culture not individually, but rather through groups, such as unions, churches or national communities. Michael Walzer underscores this point. According to Walzer, it is not internal fragmentation--that is, the constant increase in the number of religious, ethnic and other subdivisions--but rather civic apathy that most threatens modern society. Walzer maintains that the proliferation of societal groups, instead of fueling, may actually help diminish this apathy.

From this perspective, the state should neither constrain nor ignore, but instead encourage societal groups. The civic engagement of individuals normally begins in their particular communities. Only later do they become active in the life of the society in its entirety. These associations thus enable their members to practice civic involvement. More importantly, it is usually groups, and not individuals, that participate most prominently in public institutions. Individuals live the political culture mostly through their collectivities, especially those based on national origin.

The state may also advance social integration by investing in diversity and in the various societal national subgroups. On the one hand, individuals with very different backgrounds may be able to identify with each other if they share a commitment to pluralism in general. This phenomenon is analogous to that of the oft-mentioned Dutch tendency to regard tolerance as a national characteristic. On the other hand, citizens may come to see the peculiar ethnic makeup of their society as a source of pride and solidarity. They may become one through the history that brought them about and the institutions that sustain their particular kind of multiculturalism. In sum, the members of a society may come together not only through a common political culture, but also through the goal of pluralism and the belief in the worthiness of their unique multiethnic experience.
From an altogether different standpoint, it is possible to view national groups reflexively rather than instrumentally when proposing state action on their behalf. In other words, one may assert not only that these national groups are means to further the specific ends of their members and of society generally, but also that they constitute a self-standing good. This does not imply that they are mystical or absolutely sacred entities. It only suggests that they produce benefits that one may assess or perhaps even understand only internally, from the perspective of the national group. Flourishing national communities, accordingly, not only allow their members to advance pre-existing goals or the society as a whole to realize its own purposes, such as social consolidation and political participation, but also enable people to fulfill aspirations that emerge and attain value within a common national life.

From this vantage point, one gets a better grasp on the second positive dimension of national sentiment, identified at the very outset of this article: strengthening an ethnic community so that it may attain recognition implies viewing it reflexively. Recognition is not merely a generic external objective, which people seek to achieve by relying on whatever instruments they may find. It is, more precisely, a state or a status that they reach by relating to each other and to the outside world with self-respect. Further, the ultimate stage and the process leading thereto may vary dramatically from one collectivity to the next. Finally, if individuals did not belong to their particular subgroup, they would probably have no use for communal recognition and would certainly have no interest in the group’s specific need for acknowledgement.

The pluralist state invokes all of these reasons to support its subvention of the national culture of existing subgroups. The state has a powerful argument if it can show that its efforts help national communities to flourish. Its claim is even stronger if the state is able to demonstrate that the very survival of some of these collectivities depends on its intervention. If so, a purely liberal strategy would entail serious social damage.

Although in this pluralistic interpretation, state structures cease to be indifferent with respect to national communities, official neutrality is not abandoned. In general, political and legal institutions act impartially with respect to different groups and promote all of them on equal terms. To invoke a trivial example, if the government were to provide funds for the parade of one national subgroup, it would have to do the same for all others.

This model allows partiality only in the context of a broader remedial effort. If a national community has suffered discrimination for a long time, compensatory measures are in order. The aim of the official intervention is to help overcome the objective and subjective harm done to that culture. All the same, this policy would not run counter to the equality principle. The equality principle demands equal treatment of equal cases, as well as a disparate approach when the underlying situations differ. The state would actually be discriminating if it supported a heavily disadvantaged group on the same terms as a privileged community.

Pluralism, like the previously discussed strict liberalism, does not embrace any of the substantive conceptions of the good associated with the various ethnic subgroups. Yet, it does value positively the existence of such communities in general and of a multiplicity of them in particular. It thus recognizes "reasonable pluralism" not merely as a fact, as liberalism does, but rather as a good. It departs from its liberal counterpart most distinctly in its plea for official engagement on behalf of the comprehensive cultural standpoints of the various ethnic groups.
It is possible to make the comparison in different terms. This pluralist standpoint, like its purely liberal counterpart, rejects the notion of a national culture for the entire society. There is, however, a difference between the two perspectives when it comes to the national cultures of the various, particular minorities. Strict liberalism supports official distance and restraint with respect to these cultures. In contrast, pluralism demands state engagement and support for them.

The pluralist project seems to be directly applicable not only in North America, but also in contemporary European societies, such as France or Germany. These countries are becoming more and more multicultural as they receive citizens from other European countries, immigrants from developing countries and asylum seekers from the various dictatorships of the world. Pluralistically interpreted, these societies have the ability to reasonably integrate all these persons.

Any group that affirms the principles of the state's constitution may become a genuine member of the society and receive official support in its cultural endeavors. Within this picture, society may not give preference to the majority's cultural perspective. It should favor only disadvantaged minority groups. By the same token, the European Union would have to promote all its nationalities equally or perhaps favor historically oppressed national groups, such as Basques or Corsicans.

The post-national project, interpreted not only liberally, but also pluralistically, is undoubtedly appealing. It offers the prospect of durable peace and an authentic integration in ethnically heterogeneous societies, particularly in those societies in which there is a potentially overwhelming majority culture. It is, therefore, not surprising that many intellectuals have sought to generalize this idea and apply it to not only all states, but also to all political units. Those who favor this position believe that political and legal institutions should focus principally on a political culture and should be neutrally supportive of all nationalities.

IV. A Progressive Paradigm

Under certain circumstances, not only a compensatory, but also a partial official commitment to the national culture may be necessary. This kind of engagement may be in order when that culture is in peril. Charles Taylor asserts that Quebec provides a case in point. Many Quebecois believe that their province's political and legal institutions should strongly support French Canadian culture in order to preserve it from extinction or from permanent damage. There is a long history of oppression of that culture and a practically irresistible assimilation pressure, which stems not only from Anglo-Saxon Canada but also from the United States. Under such conditions, the province's government has a duty to protect the national culture.

In a way, this kind of cultural policy is simply an extension of the pluralist efforts in favor of a disadvantaged group, which is now a menaced majority (rather than minority) community. A crucial difference is that the state not only provides support to redress past discrimination, but also identifies completely with and acts partially towards a particular culture. The preservation and prosperity of the relevant cultural traditions become the government's (and not just the citizens') business. As a consequence, the level of subvention will typically be extensive and the state will often take the initiative. The official aim will be to sustain not just a plurality of cultural options, but rather specifically the majority culture.

This approach is sort of post-post-national, because it emerges to address concerns left unattended by the prior two models. The approach aspires to be progressively nationalist. In other words, it seeks to place the national culture in a position of equality.
(rather than hegemony) vis-à-vis other cultures, it interprets the national culture inclusively instead of exclusively and it values the cultural autonomy of the individual.

Under this paradigm, the state must plunge even deeper into controversy than under liberal pluralism. The state must take a position on national cultural matters, not only with respect to societal subgroups, but also in regard to the society as a whole. [FN69] It must define and embrace a national culture for everybody.

*985 Within this model, the flexible and deferential approach described in the previous section is not an option. There are ineluctably going to be competing conceptions of the nation and the national culture. The state will have to pick one. It will have to completely discard all other proffered interpretations. The state will, moreover, end up using public monies to subsidize its own selection and to present its choice, both domestically and internationally, as that of the society as a whole. The state will inevitably run into strong opposition because it not only will be subsidizing a particular culture, but also committing its entire citizenry to that culture. Those who disagree with its general interpretation of what the nation is all about, or with its specific reading of what legitimately belongs to the national culture, will take exception vehemently. They will feel that their government is foisting a cultural agenda upon them in an oppressive way. [FN70]

The statement that the state simply must get into the business of cultural anthropology and do its best, which already seemed unsatisfying in the previous section, now sounds outrageous. A commission of bureaucrats would appear even more unfit to dictate on its own the nation's cultural policy than to establish which national subgroups are legitimate and worthy of official subvention. Dissidents will justifiably object not only to the ultimate cultural decision, but also to the underlying procedure.

Therefore, the progressive nationalist must now assert an argument that the liberal pluralist should have invoked in the previous section. According to this argument, the state backs up its decision on these matters with more than impeccable reasoning. The state also relies on political legitimacy. In other words, the state takes its position to its constituents and obtains electoral support, making sure that its policy embodies the citizenry's will as expressed democratically.

The point is not to achieve popular enthusiasm in order to facilitate implementation. Nor is it to organize a beauty contest on an issue with respect to which there is no right or wrong answers. Instead, the goal is to consult citizens on a question that is difficult and controversial and with respect to which no one has a privileged access to the truth. In principle, everyone has the capacity and the right to participate constructively not only in the ultimate vote, but also in the crucial antecedent debate.

The democratic process constitutes, in this sense, an effective deliberation mechanism. Additionally and more significantly, it is an enterprise through which citizens reflect upon and express how they view themselves as a collectivity. This communal endeavor is fundamental because what is at stake is essentially a function of the people's self-perception. After all, a nation is a group of individuals who coherently imagine themselves as sharing a collective life. When defining the national community or the various aspects of that common existence, it is essential to give the members themselves a say.

Hence, progressive nationalism maintains that when there is a real menace to the national culture of the entire society, the state may intervene. [FN71] It may choose to take measures only to remedy or to prevent serious damage. When the state decides to intervene, it must clearly establish the existence of a threat and act with extraordinary
caution when interpreting what the nation is all about and of what the national culture consists. It must, moreover, formulate its policy on these complex and reflexive issues based on the democratically expressed civic will.

The upshot will be a contextual approach to the issue of official neutrality. Whether political and legal institutions should act culturally in a partial manner will depend on the underlying circumstances. In countries such as the United States, in which the contention that the majority culture is in peril is manifestly unpersuasive, the state should simply remain neutral or post-national. It should stay within the bounds of the previously discussed liberal pluralism. Otherwise, the danger arises that the government might contribute to the domination of the majority culture and to the disappearance of all other perspectives. If a particular political community, such as East Timor, however, is able to point to the existence of an objective threat to its national culture, state structures may act in a culturally partial manner. Culturally discordant groups, or their members, will have no legitimate claim against the government.

The model under consideration may, of course, recognize the difficulty of assessing a particular political community's claim that there is a real menace to the national culture. Presumably, the collectivity will have to bear the burden of proving that it has indeed fulfilled this condition. As a consequence, not many states will be in a position to adopt, legitimately, the previously described cultural policy.

The acknowledgement that often only some elements of a national culture are at risk need not present major conceptual problems either. Progressive nationalists could easily accept the notion that the state may protect only those aspects of the national culture to which there is a genuine threat. They might accordingly conclude that, though the Swedish government may not subsidize its automobile industry as part of an endangered culture, it does have this prerogative when it comes to protecting Swedish films against Hollywood productions. The state, aspiring to stand up for a particular aspect of the entire society's national culture, would have to show that, in the area in question, an authentic menace exists.

In sum, the progressively nationalist state must establish not only that the national culture is generally at risk, it must additionally prove that there is a specific danger in the area in which it is operating. In other words, it must demonstrate that it is protecting only those aspects of the national culture that are vulnerable.

Nevertheless, the final goal is not to isolate the national culture from outside influences. Such artificial isolation would actually prevent the culture from growing and ultimately destroy it. [FN72] As Mario Vargas Llosa affirms, "cultures need to live in freedom, continually confronted with other cultures, in order to renew and enrich themselves and in order to evolve and adapt to the continuous flux of life." [FN73]

Progressive nationalism is merely about permitting the national culture to coexist with other cultures in conditions of equality. It goes out of its way to protect as many minority cultures as possible. It restricts only those cultures that are overwhelmingly present in the society. Yet, its objective is not to eliminate them, only to curtail their hegemony. The expected outcome is a reality in which multiple cultures can freely and equally interact and cross-fertilize. Furthermore, and as already noted, the interpretation of the national culture is not exclusive, but rather inclusive. This means not only that membership and participation are open, in principle, to any individual or group; it also implies that the conception of the national culture allows for constant change as well as a smooth incorporation of foreign cultural influences.

*988 V. Internal and External Impediments to National Cultural Development
Many political philosophers and protagonists reject such a role for the state apparatus. Their basic point is that if individuals are not willing to develop and protect their national culture on their own initiative, and if this culture would perish without state subventions, then so be it. [FN74] From this viewpoint, national cultures have no right to a guaranteed survival and, at any rate, may not be preserved like "endangered species."

On this issue, Jürgen Habermas takes a clear position. Habermas states, "[t]he ecological perspective on species conservation cannot be transferred to cultures. Cultural heritages and the forms of life articulated within them normally reproduce themselves by convincing those whose personality structures they shape, that is, by motivating them to appropriate and continue the traditions productively." [FN75] The statement is correct, at least in the following sense: if the concerned individuals are not interested in their national culture, the culture will inevitably perish regardless of what the state does. The government's actions on behalf of that culture will be to no avail and undemocratic.

The situation could be completely different. Individuals might be, on the one hand, deeply committed to their national culture, but on the other hand, incapable of protecting it. [FN76] They may need and request official assistance. Under these circumstances, they will readily support and cooperate with the government. The consequence will be not only the democratization of the official intervention, but also a considerable improvement of the prospects of success.

Citizens may not be in a position to protect their national culture on their own due to a coordination problem, like the so-called Prisoners' Dilemma. This dilemma finds expression in the following narrative. Two prisoners who stand accused of committing a crime together face separate interrogation and, therefore, do not know what their counterpart will declare. *989 If both confess, each will have to spend 10 years in prison. If one of them remains silent while the other one acknowledges their culpability, the first will receive a 15 year sentence and the second will, in compensation for his testimony, face no punishment. If both hold their peace, they will have to sit in prison for 5 years, based on the available circumstantial evidence.

For the two defendants it is rational, at the individual level, to admit their participation in the crime. Yet, what is reasonable at the collective level is not to confess. [FN77] The prisoners will remain in this bind even if they both realize that the result with the fewest years for both in total requires that the two of them refuse to cooperate with the authorities. They will probably not be able to improve their lot even if they secretly agree to keep quiet. For they will have no way of enforcing their covert pact, and the temptation to double-cross the partner will be almost irresistible.

<table>
<thead>
<tr>
<th>P1&lt;&lt;backslash&gt;&gt;P2</th>
<th>Confess</th>
<th>Not confess</th>
</tr>
</thead>
<tbody>
<tr>
<td>Confess</td>
<td>(10, 10)</td>
<td>(0, 15)</td>
</tr>
<tr>
<td>Not Confess</td>
<td>(15, 0)</td>
<td>(5, 5)</td>
</tr>
</tbody>
</table>

Figure 1. Prisoners' Dilemma Matrix (P₁, P₂)

Members of a national minority could very well find themselves in a similar situation. It may be reasonable for them to take actions on behalf of their national culture collectively, but not individually. For example, the Quebecois might overwhelmingly support the idea of having their children educated in French in order to guarantee that the language will not become obsolete in the province. Yet, an individual family may feel that its best option is to send its children to English schools, regardless of what the rest of the community does. Its thought process might unfold as follows. If very few opt for French school, the language will wane in the region and children schooled in French will
have a harder time than others surviving socially and economically. Even if most people
do their part, children educated in English will still have the upper hand. On the one
hand, they will have enough proficiency in French from home and school to profit
somewhat from Quebecois social and economic opportunities. On the other hand, they
will possess ideal English language skills to tap into what the Anglo-Canadian world--let
alone that of the United States--has to offer. [FN78]

*990 This scenario quite clearly gives rise to "free rider" issues. The following parable
helps clarify my point. A group of persons wants to take a bus ride. If a majority of them
buys a ticket, there will be enough money to cover expenses and ensure that the trip
takes place. Not only does each person know that he or she may 'free ride' if enough of
the others pay, but each person also regards such an outcome as optimal. The next best
result for an individual would be one in which he or she purchases a fare and enough
people do the same for the bus to depart. That individual's third preference would be for
a situation in which he or she, as well as a considerable number of other group
members, cheats and, therefore, there is no ride. The worst possibility would be for that
individual to pay while most others do not, so that the trip does not go forward. That
individual faces the choice matrix sketched in Figure 2. Whether there is a ride or not,
the best strategy is to cheat. Insofar as a considerable number of potential passengers
face similar option parameters, there will be no ride.

<table>
<thead>
<tr>
<th></th>
<th>Ride</th>
<th>No Ride</th>
</tr>
</thead>
<tbody>
<tr>
<td>Buy Ticket</td>
<td>1</td>
<td>-1</td>
</tr>
<tr>
<td>Cheat</td>
<td>2</td>
<td>0</td>
</tr>
</tbody>
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Figure 2. Free Rider's Matrix

In the Quebec example, the inclination of each family is to free ride on everybody else's
efforts on behalf of the community's language. Regardless of whether French survives in
North America or not, each family senses it will be better off if it sends its children to
English school. Its worst nightmare would be a situation in which it makes the relevant
sacrifices and the language nonetheless virtually disappears because not enough people
do their part.

Under these general circumstances, the progressively nationalist state steps in for
purposes of coordination. That is, it becomes involved in order to make sure that people
are able to bring about what is collectively rational. It is clearly not trying to protect the
culture as an endangered species. It is acting against neither the will nor the
indifference of its subjects. In fact, it is the instrument through which the citizens
achieve their collective goals. The official efforts probably will not be in vain. Inasmuch
as the government is doing nothing, but enabling people to do what they want to do
anyway, they will, in all likelihood, gladly play along. The state is not imposing a policy
that nobody likes, but rather implementing one that most favor and cannot carry out on
their own. The underlying premise is that the government's actions enjoy wide
democratic legitimacy.

*991 As part of this coordination effort, the state plays what Amartya Sen denominates
an assurance role. [FN79] It provides the guarantees and sanctions necessary for the
community to attain the optimal outcome. It carries out, more specifically, a
reassurance and a coercion function. On the one hand, it reassures those who want to
cooperate but are reasonably distrustful of other people's good faith. On the other hand,
it coerces those who are not particularly moved by the notion of fair play.

In addition to performing these tasks in order to solve a prisoners' dilemma or deal with
a free rider situation, the state might play a collective self-discipline role and enable
citizens to overcome a condition of "akrasia," or weakness of will. The paradigm is the case of Odysseus, who ordered his sailors to tie him up and disobey him when he later asked them to set him free and let him go to the beautifully singing sirens. Similarly, members of a national group may decide something in a particular, calm moment, but impulsively tend to do the opposite afterward. They may call on the government to help them stick to their original choice.

For example, they may deliberately determine that they want to listen to national folkloric music. Yet, upon arriving at the store, they may irresistibly gravitate towards popular imported sounds. As a consequence, they may support subvention of the national product so as to pressure themselves, in a gentle way, into consistency. Resolving to devote some of their common assets to this subsidy is, in principle, no different than making a down payment in advance, before they descend on the shopping center, in order to constrain their subsequent consumerist whims. In this scenario, state action will presumably risk neither futility nor illegitimacy.

Generally, the progressively nationalist state may rely on subsidies, taxes or regulation to perform the aforementioned coordination, reassurance, coercion and self-discipline roles. Through such means, the state becomes a vehicle of collective rational action. Thus, when it relies on subventions, the state makes a decision on behalf of its citizens to devote resources belonging to all to the national culture. It essentially sets up a public fund, compelling contributions of those who might cheat or impulsively back out later on and reassuring those who are mistrustful of their fellow citizens.

It is possible to view taxes in a similar light. One could assert that they simply increase the relative price of, say, imported music and create a situation that pre-commits the community to investing in the national folklore. Once again, this kind of taxation policy basically amounts to a collective pledge to the national culture that pressures those prone to free riding or weakness of will into compliance, and reassures those who would understandably be mistrustful of an honor system.

State officials may rely on regulation to overcome these impediments to the society's commitment to the national culture. Accordingly, in the earlier example, the Quebec government simply orders all its non-Anglo citizens to send their children to French schools. It thus expresses a commitment to the national language, coordinates the collective effort, reassures those concerned about non-compliance by others, keeps those prone to free-riding in line and bolsters the weak of will.

Of course, Quebec could use taxes or subsidies--or both--to pressure their constituents into choosing an education in French. Such an approach would be somewhat less coercive. Though forced to contribute to the financing of the French schooling system, non-Anglo families would be free to opt for the English schools. Nonetheless, the government may well conclude that a policy of taxation and subvention would not bring enough people to French educational institutions or would place the entire burden of supporting the French language on the poor. This very last point is simply that increasing the price of English schooling through taxes or decreasing the price of a French education may have much less of an effect on the affluent than on those who are less well-off.

Citizens may turn to their government to remove not just internal, but also external, obstacles to their culture's development. For instance, the Swedish public might believe that its national film industry confronts unfair competition from Hollywood and needs official protection. The argument might be that imported mass productions enjoy economies of scale and benefit from the producers’ domination of the distribution
outlets. Without government intervention--so the reasoning would go--Swedish movies will be more expensive and harder to find.

The state might expand the local industry's operation scale, within Sweden, by requiring that films in state sponsored events be Swedish or, internationally, by negotiating free trade arrangements with other countries. It might adopt measures, such as the invalidation of contracts awarding preferential treatment to foreign competition, in order to end the distributive inequities. In both cases, government officials would be attacking the exogenous obstacles--diseconomies of scale or unequal distribution opportunities--straight on.

*993 Certainly, the state might achieve its objectives indirectly through taxes or subsidies. In any case, eliminating exogenous impediments to cultural growth demands governmental action. Of course, citizens often may achieve a similar result by making private donations. In the previous example, an extremely nationally committed Swedish public could simply pay a higher price for local movies or contribute to a solidarity fund to support the domestic movie industry. The first question would then be whether the previously evoked endogenous obstacles, which call for state engagement, reappear. If so, governmental action again may be necessary and legitimate.

A further factor is relevant to the choice between a private and a public approach to removing external hindrances to cultural evolution. Through regulations, subsidies or taxes, the government may attain the same objective at a lower cost than would a group of private citizens. First, the described regulatory action might require a change in the role of existing state officials, but no additional outlays. Second, subsidization through the state apparatus already in place may be more cost-effective than private gifts when, for instance, channeling funds from the donors to the beneficiaries requires setting up an expensive infrastructure. Third, foreign companies sometimes--such as when they are monopolists--do not have the full capacity to pass on a tax to the local consumer. Under these circumstances, the community ends up with a net return from its taxation effort, which it may use to offset the high price it is paying for domestic productions.

In its struggle to have foreign movies dubbed into Catalan rather than Spanish, the government in Catalonia has relied on subvention as well as regulation to combat what it perceives as an external threat to the national culture. [FN81] I will now discuss this case in some detail to show the practical difficulties involved in this kind of effort. The example will also demonstrate how all different types of impediments to cultural development may act simultaneously in a particular context. Therefore, the example demonstrates how imprecise any categorization will be.

Since 1989, the Catalonian government has been subsidizing Catalan dubbing up to one hundred percent, as long as there is a commitment to distribute at least eight copies thus adapted to the movie theaters. [FN82] Nonetheless, few of the distributors of weight have taken advantage of these subventions. [FN83] In 1998, the Catalonian Executive or "Generalitat" issued a decree requiring the film industry to make half of all major productions available in the regional language. [FN84]

*994 The government's operating assumption seems to be not only that distributors are insensitive to Catalan linguistic sensibilities, but also that Catalan adaptations are not profitable. Because the Catalonian market is relatively small, dubbing films into Catalan might entail considerable diseconomies of scale. The Generalitat's subsidies basically eliminate any such disadvantage. In fact, now the Catalan version will be less expensive than its Spanish counterpart insofar as its costs fall on the government.
The argument that there is an exogenous obstacle to national cultural development might run as follows. The ordinarily higher cost for Catalan adaptations is due to unfair market conditions. Just because there are fewer Catalonians than Spanish speakers, the former would normally have to pay a steeper price to view movies in their own language. Therefore, the Generalitat may get involved in order to even the playing field. The rationale is that Catalonians should not have to face an economic penalty for choosing to live in their own culture and language. Naturally, a central underlying assumption is that the government has the democratic endorsement of the citizenry.

One remarkable aspect about this case is that the subsidies, which have been in place for over a decade, have been hopelessly ineffective. In part, it was this failure that subsequently lead the authorities to draw on their regulatory powers. The Generalitat thus launched its 1998 mandate upon realizing that it had been unable to attain its objectives by relying exclusively on subvention.

On first impression, however, it seems that the subsidies should have sufficed. Distributors should have jumped at the opportunity of dubbing their movies into Catalan without having to pay a single peseta. They should have done so, one would have thought, if they believed they could expand demand or, at least, maintain it at the current level. Their favor with consumers might increase not only due to the attractiveness of their new product, but also to the public relations points they might gain through their solidarity with the national culture. Even if the overall consumption level remained the same, their profits would theoretically go up as part of their production costs—i.e., dubbing expenses—went down.

Why did the subsidies miss the mark? There are many conceivable explanations. Most likely, all of them are at play to some extent. First, perhaps the larger distributors indeed do not fully appreciate the value of the national language. Second, they certainly have a product in high demand and, therefore, need not be too flexible with their customers. Third, the people who would have wanted to watch the giant film productions in Catalan are all capable of watching the Spanish version and most probably are willing to do so if there is no option. Fourth, there is a non-negligible sector of the population that does not understand Catalan and whose film consumption might decrease if fewer theaters show Spanish adaptations.

Needless to say, it may be that Catalan speakers themselves prefer the Spanish version. There are two ways of interpreting this possibility. On the one hand, these individuals simply may not value at all movies dubbed into the regional language. This reading is hardly persuasive inasmuch as these very people seem to support the Generalitat's efforts to make films available in Catalan. On the other hand, these persons may confront some of the earlier described coordination problems. Consequently, despite a revealed preference for Spanish adaptations, there may be strong (albeit impaired) popular support for Catalan adaptations and Catalanonian culture. The citizenry may thus have an individual and impulsive propensity to consume the Spanish version of a film, but a collective and deliberate commitment to the Catalan adaptation. Under these circumstances, the provincial government would have powerful reasons to intervene and help overcome the internal obstacles. It ultimately would be stepping in to empower its constituents to do what they wanted to do anyway but were incapable of carrying out on their own.

The Catalonian government ultimately gave up on its initiative and withdrew the 1998 decree. It yielded not because it doubted the legitimacy of its effort, rather it capitulated to the pressure of the distributors of Hollywood mass-productions. [FN85] These firms, along with theater owners, filed suit and even threatened to take their product off the market altogether. The latter move probably would have made the authorities extremely
unpopular. The former action was at least initially successful. The Superior Court of Justice issued a preliminary order precluding the imposition of sanctions under the 1998 law while the case was pending. [FN86] Thereafter, the Generalitat twice suspended the application of the decree before finally repealing it. [FN87]

The Catalonian Government actually entered an "agreement" with the Federation of Movie Distributors. [FN88] The former consented to abrogating its order and keeping its subsidies, while the latter "only made a vague declaration of intent to start dubbing films into Catalan." [FN89] The Generalitat thus provided only a thin disguise for its capitulation. "The joint statement [was] of a generic nature [and contained no] concrete commitment on the industry's part to launch versions in the autochthonous language." [FN90] The Secretary General of the ruling Democratic Convergence Party, Pere Esteve, essentially conceded the government's defeat when he *996 stated: "Things have not turned out the way we would have wanted, nor have we achieved what we had proposed." [FN91]

One lesson that progressive nationalism may draw from this whole affair is that the government is not necessarily an all-powerful champion of the national culture. Even when state officials decide to act against detrimental exogenous forces and even when they have solid reasons on their side, they may not be able to have their way. They may run into a resolute and effective counterattack on behalf of the status quo. The opposition may rely not only on persuasive philosophical and legal arguments, but also on economic muscle. Under these circumstances, the government may have to abandon even a thoroughly thought-out and legitimate policy.

In sum, a commitment on the part of the progressively nationalist state to the survival and well-being of the national culture is not necessarily an authoritarian and hopeless effort against the people's will. It may simply be an implementation of the citizenry's decision to combat collectively either endogenous or exogenous threats to the national culture. To be sure, the question whether government involvement is the best approach and which specific measures are the most adequate remains open for each particular case. Official cultural programs will often turn out to be ineffectual or self-defeating in practice.

Progressive nationalism, therefore, rejects the idea that the mere existence of a menace to the national culture justifies state intervention. It maintains that there must be either an internal or an external threat of the kind referenced above. If government authorities are unable to show that this is the case, they may not legitimately act even on behalf of a seriously impaired national culture. It would then be up to private citizens to take any protective action.

VI. The Rights of Cultural Dissidents and Minorities

A common contention is that any kind of official cultural partiality is illegitimate because it constitutes discrimination against members of other (usually marginal) national groups. These individuals--as well as those who disagree with the official interpretation of the national culture or with any state involvement in these matters--are not even remotely in the position of the prisoners in a dilemma, who ought to appreciate or at least understand that the assurance role played by the state is in their interest. Similarly, they do not in any way resemble bus passengers faced with a government that just wants to keep them or others from free-riding. Further, they are not at all in the position of the weak of will who need a little help or nudge from the state. Finally, they are absolutely not like a group whose collective effort to forestall a foreign threat takes the form of governmental action.
These persons are not part of and want no part in the proposed national culture. Yet, the state is embracing that culture and protecting it at their expense. They will in all likelihood take offense and feel cheated.

Freely exempting any objectors from complying with the regulations promulgated, paying the taxes levied or financing the subsidies granted is no adequate solution. Many of the protective measures will be of little use if individuals are in a position to escape easily the provided duties and penalties. The state will see its capacity to overcome the prisoners' dilemma, the free-rider challenge, or the weakness-of-will problem diminish immensely if it ends up having to rely mostly on voluntary compliance. Similarly, it will hardly be able to embody the collective will against an external danger if too many citizens refuse to endorse and finance its efforts.

The state could, of course, try to exempt only a relatively small and discrete group. Quebec has adopted this strategy in its effort to force children to attend French language schools. It has, accordingly, allowed only Anglo-Canadian students to stay in English schools. This kind of approach certainly helps keep the exception from swallowing up the rule. The downside, however, is that the government has to start yet another controversy by releasing some communities and not others, as well as by recognizing the membership in the exempt groups of some individuals and not that of others. State officials will have to make, as well as justify, these divisive determinations.

More importantly, dissenters will undoubtedly take the government to task for protecting a national culture, not just for making them contribute to the effort. They will remonstrate against the proclamation of a national culture on everybody's behalf. They will object to the symbolism and not merely to the particular measures involved. Therefore, they will protest even if the state does not make them bear any of the specific burdens saddled on the rest of the citizenry. They will then claim that the official cultural policy is in itself discriminatory and oppressive.

Charles Taylor purports to have an answer to this criticism. He believes that the government may support a national culture so long as it respects the fundamental rights of the members of minority groups and dissidents. According to Taylor, political and legal institutions may discriminate only when other rights are at stake. The state may, presumably, control the language of commercial, but not of personal, communication. It may similarly require children to learn the national history, but not a particular religion.

It is most difficult to define a catalogue of basic rights. Unfortunately, Taylor offers no concrete guidance. Procedural liberals would regard as fundamental many of the rights that he views as secondary. In addition, many of the discriminations that he would allow, these liberals would probably outlaw based on a relatively formal principle of equality as a source of inalienable rights.

It is actually misleading to assume that there is a subset of rights embraced by both liberal pluralism and progressive nationalism. In fact, there is profound disagreement on the role of the government and the prerogatives of individuals. A progressively nationalist state has to offer an alternative and yet persuasive conception of personal freedoms and the reach of legitimate governmental action.

The way to start is precisely with the presumption against official favoritism on cultural matters that I have delineating. The point of requiring the authorities to show that there is a concrete threat to the national culture and that it is of the kind described in the previous section is indeed to protect cultural minorities and dissidents. The state
demonstrates respect for these persons by refusing to embrace a culture that is alien to them unless there are compelling reasons to do so.

The further requirement that the progressively nationalist state narrowly tailor its protective measures to the specific needs of the national culture goes in the same direction. The state minimizes the extent to which it promotes the majority culture in the name and at the expense of everybody. It, thus, makes still another concession to those who do not identify with the national cultural agenda.

The state's obligations in this regard do not end at this point. Progressive nationalism imposes one final condition. The state must guarantee that those who dissent or differ culturally have enough space to pursue their own cultural options on their own. It must uphold not only these persons' rights to cultural self-determination, but also their human dignity in a Kantian sense. [FN96] It must, in other words, recognize their cultural autonomy, as well as stay clear of treating them merely as a means with respect to the end of protecting the national culture. To be sure, the state may impose burdens on them in its pursuit of that goal. Yet, it may not completely disregard their status as persons worthy of respect.

Therefore, official action that suffocates cultural minorities and dissidents is illegitimate; even when the state punctiliously limits the impact of its measures in the manner just pointed out. For example, the Bosnian government would enter proscribed terrain if it required all schoolgirls to wear a Muslim veil. It would not be able to vindicate itself, even in the unlikely event that it was able to demonstrate that the policy is strictly necessary to confront a genuine internal or external threat to the Bosnian culture, for it would be trampling upon the individual and religious liberties of conscientious objectors.

From this viewpoint, cultural minorities and dissidents should have not only substantive, but also procedural rights. They should, in other words, be specifically entitled to challenge the state's actions in an independent forum. The state would first bear the burden of showing that there is a menace to the national culture. Secondly, it would have to verify that the above referenced internal or external impediments to the national culture's flourishing are in place. Moreover, it would have the obligation of demonstrating that it has narrowly tailored its measures to the objective of removing the identified obstacles. Finally, it would have to corroborate that minorities and dissidents are still able to live their preferred cultural life on their own and without state interference. In general, an official bias in favor of the national culture without meeting these four conditions would constitute a violation of the basic rights of the members of national subgroups.

Preliminarily, the state would have the duty to assess very carefully on its own whether it has satisfied the four criteria before taking any step on behalf of the national culture. Subsequently it would have to be ready to present its reasoning and persuade a separate institution, such as a court of justice. Individuals who believed that the state had violated their rights would thus be able to bring their cases to a fair and autonomous arbiter.

Such an appeal system is crucial not just because these matters are complex and error is a real possibility. A more important reason is that the state may not always be capable of a completely impartial assessment. It may at times err too much in favor of the majority community on whose political support its survival hinges. It may, similarly, not be in a position to appreciate objectively the burdens visited upon minority cultures or on dissenters, once it has intensely committed itself to the majority culture.
Therefore, dissidents would have the right not only to petition their government, but also to go to court. They would be able to assert in litigation that there is no true threat to the national culture, that a collective defense through the state is unnecessary, that the official measures are excessive, or that they have virtually no space left to exercise their own cultural freedom. The relevant tribunal or administrative agency would make an objective determination and enforce it. The progressively nationalist paradigm thus grants cultural minorities and dissidents not only a specific right to cultural autonomy, but also a general due process right to challenge the legitimacy of the government's policy.

How would this kind of controversy play out in a concrete case? I will take the example of a law establishing that government employees must conduct all official business in the national language. [FN97] In my hypothetical, *1001 individuals belonging to a linguistic minority challenge the order in court. I will go over their arguments in a very general way. A full discussion would require much more detail and many more pages.

State officials would first have to demonstrate that the national language is at peril. In the United States, for instance, such a showing would be impossible. English is in ascension throughout the world--with ever more people using the language. Within the United States borders, virtually one hundred percent of the population speaks English. Though there is an increasing number of United States immigrants who are primarily fluent in Spanish and other languages, an overwhelming majority of whom are either already fully proficient in English or well on their way. Typically by the second generation--and invariably by the third--the newcomers communicate better in English than in their ancestors' tongue. If the English language in the United States survived the massive immigrant influx of the end of the nineteenth century and the beginning of the twentieth century, it will certainly fare well vis-à-vis the current wave, in which linguistic assimilation takes place more frequently and more quickly. [FN98]

Finally, the expansion--both within and without these ethnic communities--in the number of individuals who master a second language, is a boon rather than a threat to the national language. "For the study and knowledge of other languages," as Spanish philosopher Miguel de Unamuno points out, "advances the study and the improvement of our own." [FN99] Consequently, the United States population will probably improve its mastery of English as it becomes fluent in other languages.

Because it does not meet the first requirement (i.e., that there be a threat to the national culture), the state need not bother arguing about the other ones. As long as it does not meet any one of the conditions, it may not justify the policy on cultural grounds. The regulation, as it stands, is illegitimate and constitutes a violation of the rights of cultural dissidents and minorities.

Naturally, the state might then shift to the contention that there are administrative efficiency reasons behind the measure. Accordingly, it might assert that there would be chaos if its employees used any language other than English, or that there would be profound acrimony among the workforce if it allowed anybody to employ a language that not everybody understood. Neither of these arguments is particularly compelling. The *1002 first one exaggerates the disruption that would result from the occasional deployment of a foreign language. The second one neglects the fact that this kind of regulation does not diffuse, but rather intensifies ethnic tension.

Even if the bureaucratic rationale were minimally persuasive, it would hardly suffice to overcome discrimination allegations that members of linguistic minorities and others could raise. These individuals could argue that the state has violated their free speech
and equal protection rights. They could additionally contend that the state has an obligation not only to accommodate, but also to support minority ethnic groups. A complaint along these lines would be extremely powerful indeed.

In a different context, however, the whole analysis would change considerably. The provincial government of Galicia in Spain, for example, would be in a much better position to defend a policy of this sort than a state entity in the United States. It could maintain more plausibly that the national language, in addition to suffering historical discrimination, is still at peril vis-à-vis the dominant Spanish culture. It could readily show that in the past there were outright restrictions and in the present there are structural impediments, similar to those affecting the French language in Quebec. In other words, the region is an enclave within a larger area in which Spanish predominates; the Spanish language carries much more weight internationally than Galician; and a significant portion of the local population is not Galician.

Galician authorities would then have to demonstrate that the menace to the autochthonous culture is of the kind that would justify collective action through the state. Once again, the arguments would be similar to those adduced in the case of Quebec. There are considerable individual advantages to using Spanish that could undermine the collective commitment to the Galician tongue. In the world, in Spain and even in the Galician region, mastering Spanish is generally more in an individual's interest, both socially and economically, than acquiring advanced skills in the regional language.

By the same token, weakness of will might lead the majority to stick to Spanish instead of holding on to the regional language. Even if committed to Galician, many people might at the moment of truth lethargically gravitate towards the Spanish language, in which most of their schooling has taken place and which predominates in the mass media. They may, therefore, call on their state to keep them from slacking off.

Finally, there may be real exogenous obstacles, which only the provincial government can effectively remove, to using Galician in governmental offices. Employees may be willing to deploy the regional language in conducting their daily business, but it may be easier for them to use Spanish for external reasons. For instance, they may be in a position to produce bureaucratic forms and procedures more cheaply and less onerously in Spanish than in Galician. The explanation may be that there normally are equivalents already in use elsewhere in the country, in Spanish and readily adaptable. Switching to Galician would require a translation, which may be expensive and burdensome. The government could, in addition to requiring the employment of Galician, provide economic means to cover any extra costs.

It would be practically impossible for a United States state agency persuasively to invoke similar arguments. Even if there were a threat to the English language in the United States, it would hardly be of the kind requiring collective action through the state. There are barely individual advantages to using other languages that might undermine the collective commitment to English. In the United States, mastering the English language is generally in an individual's interest, both socially and economically.

By the same token, weakness of will might lead the majority to stick to English and not to learn a new language. To be sure, the linguistic minority might conceivably suffer akrasia. Yet, this condition would not justify any coercion by the majority. The weakness of will rationale for official cultural intervention applies only in the case in which a group democratically decides to constrain itself through the institutions of the state. Finally, there is no real external threat calling for a collective political response.
If the government of Latvia decided to adopt a policy of this kind, it would probably be better able to justify its actions than that of the United States, but less so than that of Galicia. It would, in all likelihood, have no problem demonstrating that the national language is in danger. The Latvian government clearly would be capable of showing linguistic and cultural discrimination during Soviet times. Furthermore, it could argue that it must act in order to redress these inequities as well as to uphold a national culture to which barely over 50 percent of the population belongs. As Alan Buchanan points out, "approximately 48 percent of the population of Latvia is non-Latvian." [FN100] Buchanan explains further that "the vast majority of this 48 percent are Russians, most of whom are, or are children or grandchildren of, persons who were moved into Latvia as colonists to secure Soviet control over the area after it was forcibly annexed in 1940." [FN101]

The Latvian government would have a more difficult time meeting the second requirement, that there be a coordination problem. Latvia--like its Baltic neighbors--has moved away from the Russian to the Western European zone of economic influence. In addition, ethnic Latvians presently seem to be instinctively averse to Russian culture. They would, therefore, appear not to have the previously mentioned endogenous impediments to supporting their own national culture.

*1004 Latvian authorities might fare better, nonetheless, if they claimed that there are exogenous obstacles. They could maintain that the Soviet Union created a situation in which only a bare majority speaks Latvian. They could assert, further, that Latvian, which obviously was never a world language to begin with, will not be in a position to recuperate fully its status or to develop healthily unless it has a solid place in public spaces and is the sole official language. [FN102] Of course, it is an open question whether these arguments will carry the day.

Even if it were ultimately able to meet this second condition as well as the first condition, the Latvian government would not be off the hook, nor would its Galician counterpart. The last two requirements are equally crucial and almost certainly would be decisive in the dispute. I will consider each one of them separately.

A fair decision-maker would probably find the policy overdrawn--and therefore at odds with the third criterion--if it did not grant minority personnel a reasonable adjustment period to become sufficiently fluent in the language. The reasoning could be that the state could achieve the same linguistic goals without being arbitrary with its employees. Similarly, the measure would run into difficulties if it required that the use of the national language in government offices be accent free. It would be over-inclusive because it would apply to cases in which there is no real menace to the national language, or at least not of the kind that would justify state intervention.

Even if the measure were not excessive, government employees might contend that the measure culturally asphyxiates them personally and, consequently, runs counter to the fourth principle. They ought to prevail if the regulation required them, for instance, to speak the national language among themselves, during informal situations such as their lunch breaks. For no matter how much this kind of restriction advanced the objective of protecting the national language, it would bring the government too close to acting as cultural purity police.

When considering the fourth criterion, the judiciary would have to determine whether the state has significantly impaired the capacity of individuals to make autonomous cultural choices. In a sense, the question would be whether the government has gone too far into the citizen's private sphere. Yet, this individualistic phrasing of the issue is
misleading, for there is ineluctably a public or communal dimension to (national) cultural life.

In general, the state must do more than just allow individuals to devote themselves in isolation or secrecy to an alternative national culture. They must instead have the right to become collectively involved in this kind of activity. For instance, the government must permit citizens to associate generally with each other in order to speak any language they wish. They should be able to set up instruction centers for themselves and their children, create dissemination points for their language in the communications universe--newspapers, television and Internet--and use their native tongue in their cultural and political endeavors. By the same token, they should be entitled to fraternize with their linguistic peers on a casual basis.

If the measure under consideration did not allow employees to speak the language of their choice in an informal setting, it would appear to infringe precisely upon this last prerogative. It would, in essence, preclude minority government employees from linguistically affiliating with each other while at work. At all times, they would either have to remain silent or artificially communicate in a foreign language, with the state watching over their shoulder and keeping linguistic transgressions in check. In this scenario, the state would be violating this group's cultural autonomy, as well as treating the members as means with respect to the end of promoting the national culture. Of course, the cultural priorities of minorities and dissidents are not entitled to absolute deference. Yet, they seem to have carried no weight at all in the hypothetical at hand.

I would like to raise a final point before closing the discussion. This fourth criterion--like the other three--draws no crystal clear lines. It is not a magic formula from which one mechanically cranks out specific answers; it only underscores the relevant considerations. It provides parameters for the analysis. The decision makers will inevitably have to make a painful judgment call. The principles provided do not relieve them from engaging in critical thinking, but rather invite them to reflect carefully upon the questions before them. They signal not the end, but instead the beginning of the deliberation.

There normally will be no clear-cut answer to the question of whether the state has met any one of the listed conditions. Nor will it always be evident which of these conditions is at stake. For instance, do government agencies infringe upon the third or the fourth criterion if they do not provide a translation for ordinary citizens who do not speak the national language? The third condition applies to situations in which the state's measures go far beyond what the goal of defending the national culture requires. In contrast, the trigger for the fourth condition is a scenario in which the government's actions advance this end, but at too high a cost to ethnic minorities.

Minority individuals who are not on the government's payroll may contend that the official refusal to translate for them does not serve the underlying purpose, inasmuch as they probably will not learn the national language anyway. They will--so their argument would go--bring in their own interpreter, try their best to communicate at whatever level they can with their present linguistic skills or simply do without the state services. Alternatively, they could concede that a substantial number of them will yield and that the government would come closer to its goal. Their contention could then be that the state is furthering its purpose too much at their expense. They could claim that there has been a flagrant violation of their right to collective self-determination and human dignity.

Therefore, the deliberation in court--just like that within the state, in civil society or in academic circles--will not only be generally open-ended, it will defy any rigid
compartmentalization. It will constantly challenge (and at times overwhelm) the categories. Sometimes examining the same issue from two different criteria will yield the same result. On other occasions, the outcome will vary and a second look at the case--or at the whole conceptual framework--will be necessary. The aim of the test I have formulated is not to straitjacket the discussion, but simply to guide it and to organize it, to the extent possible.

There is no way of avoiding an intense and contentious debate on these matters. The most one may hope for is a serious and transparent argument that comes to an end with either some kind of consensus or, in the worst case scenario, a truly honest disagreement. Under such circumstances, cultural minorities and dissidents will feel that the polity is treating them with due consideration, even if their claims do not ultimately carry the day.

VII. Conclusion

State support of a national culture is dangerous business. The danger is not simply that in extreme cases political and legal institutions may degenerate into instruments of nationalistic terror. Even a rather moderate official bias in favor of the national culture can be unfair and oppressive vis-à-vis cultural dissidents and minorities. This kind of injustice can lead to profound disillusionment and even widespread resistance, particularly in societies pervaded by pluralism in ideological perspectives and ethnic backgrounds.

The inevitability of reasonable divergence on matters of national culture and substantive ethics accounts, to a significant extent, for the temptation of liberalism. The liberal model I have described purports to prevent polarization and a breakdown of the social contract. Presumably, citizens with very different backgrounds and beliefs will be able to regard a liberally constituted government as not only disinterested, but also legitimate. Accordingly, the underlying political principles rest not on any of the various competing and controversial conceptions of the good, but rather on a notion of right capable of attaining a broad (overlapping) consensus. These norms thus define a political culture that makes social union or integration possible.

I started with liberalism precisely because it offers a straightforward and appealing answer to the question of what the governmental policy should be on matters of nationality. This order of presentation not only enabled me to begin with an option that is clearly worthy of consideration, but it also brought me to the issue of nationalism on a very cautious note. Therefore, I arrived at the issue fully aware of the need to impose limits on the state. In the model I entertained at the end, the state must thoroughly justify every step it takes towards a national culture policy.

Hence, I have consciously refused to proceed by defining a nationalistic outlook and confronting potential objections. Instead, I showed how, under certain circumstances, a liberal pluralist model raises issues that call for an official defense of the national culture. Legal and political institutions must, under these conditions, endorse a particular (national) substantive conception of the good. It will not be sufficient to remain neutral with respect to the various competing national perspectives or affirm the value of having a multiplicity of such standpoints. The state must view the national culture as, in itself, valuable and irreplaceable.

This article has discussed the prerequisites for this kind of policy. First, the national culture must be at risk. More precisely, the threat must be specific to those aspects of the national culture that the state seeks to protect. Second, there must be one of the
mentioned internal or external obstacles to cultural development. Third, the government must narrowly tailor its measures to the existing danger. Finally, it must respect the sphere of cultural autonomy of individuals and groups.

I argue that these four requirements give a procedural dimension to the rights of cultural dissidents and minorities. In other words, people who disagree with or feel oppressed by the official cultural policy are entitled to demand that the state meet all of these conditions. In particular, an independent tribunal should have the authority to arbitrate the dispute.

The sketched reflections are, at best, only the beginning of wisdom. As already conceded, the postulated parameters do not delineate a magic formula that will do away with controversy altogether. They only underscore relevant considerations. They simply provide some guidance for societies called on to engage in this complex exercise of deliberation and self-examination.

Footnotes:

[FNa1]. Professor of Law, University of Connecticut. Ph.D., 1995 M.A., 1995, A.B., 1983, Harvard University; J.D., 1986, Yale University. The author would like to thank the Fulbright Foundation for its support of the research and writing of this piece. Gratitude is also due to Margarita Aguirre, Rolf Foester, Hans Gundermann, Richard Kay, Javier Lavanci, Kent Newmeyer, Alan Ritter, Steven Utz and Jorge Iván Vergara for their extremely helpful comments on an earlier draft.


[FN2]. Within analytic philosophy, Isaiah Berlin was already employing the Hegelian notion of "recognition" to formulate a right of groups back in 1969. See Isaiah Berlin, Four Essays On Liberty 157-58 (1969) ("I may feel unfree in the sense of not being recognized as a self-governing individual human being; but I may feel it also as a member of an unrecognized or insufficiently respected group ...."). Yet, it was Charles Taylor who popularized this use in his 1992 essay The Politics of Recognition. See generally Charles Taylor, Multiculturalism and the Politics of Recognition (1992).


[FN4]. See Yael Tamir, Liberal Nationalism 4 (1993) (arguing nationalism has inspired struggle against colonialism and imperialism).


[FN6]. See Kymlicka, supra note 3, at 83 ("Cultures do not have fixed centres or precise
boundaries."); David Miller, On Nationality 85 (1995) ("Nations tend to attribute to themselves a greater degree of cultural homogeneity than their members actually display."); Tamir, supra note 4, at 58 (claiming "concept of 'nation' is [ ] elusive").

[FN7]. See Obras Escogidas de Guillermo Bonfil, Identidad nacional y patrimonio cultural: los conflictos ocultos y las convergencias posibles (IV) 397, 398 (Mexico City: Instituto Nacional Indigenista, 1995).

[FN8]. See Tamir, supra note 4, at 65 (arguing there is no set number of shared characteristics necessary to classify group as nation).

[FN9]. See Ludwig Wittgenstein, Philosophische Untersuchungen § 67 (1967); Ludwig Wittgenstein, Philosophical Investigations § 67 (G.E.M. Ansombe trans., Blackwell Pub. rev. 3d ed. 2001) (1953) (characterizing similarities within concepts as "family resemblances"). The various nations--like the various games examined by Wittgenstein--do not share one essence, there is no particular characteristic or a group of characteristics they all would share. On the contrary, one nation may have some aspects in common with a second one but not others, while the points of convergence and divergence with a third one may be different. These different nations are thus like the members of a family. As Wittgenstein points out, not all family members have the same nose or the same build, some resemble others in the smile, and still others in the personality. See id. (same). They are thus all interrelated without converging on a particular feature, "for the various resemblances between members of a family: build, features, colour of eyes, gait, temperament, etc., etc. overlap and criss-cross...." Id.

[FN10]. See Obras Escogidas de Guillermo Bonfil, supra note 7, ("definitions of ethnic groups, peoples, or nations ... include in one way or another a reference to a common culture as a necessary condition for the existence of those longstanding collectivities"); see also Miller, supra note 6, at 85 (defining national culture as "set of overlapping [ ] characteristics"). Geertz identifies culture with "webs of significance." Clifford Geertz, Thick Description: Toward an Interpretive Theory of Culture, in The Interpretation of Cultures 5 (1973) (introducing new concept of culture). He explains that "culture is not a power, something to which social events, behaviors, institutions, or processes can be causally attributed; it is a context, something within which they can be intelligibly--that is, thickly--described." Id. at 14.

[FN11]. See Kymlicka, supra note 3, at 10-26, 63-64, 67-68, 79-80, 95-98, 101 (drawing distinction between ethnic and national groups).

[FN12]. See Dieter Henrich, Nach dem Ende der Teilung: Uber Identitäten und Intellektualität in Deutschland 72 (1993); Tamir, supra note 4, at 58-59 (asserting that using "nation" and "state" interchangeably often leads to confusion).

[FN13]. These communities actually are not communities in a Rawlsian sense, inasmuch as their members do not share a comprehensive conception of the good. See John Rawls, Political Liberalism 40 n.43, 42, 146 n.13 (1993) (rejecting political society as within definition of community).

[FN14]. Will Kymlicka is right to point out that ever-increasing multiculturalism is part of the experience of virtually all modern societies. See Kymlicka, supra note 3, at 1, 6, 10 (noting cultural diversity throughout countries around world); see also Jürgen Habermas, The Inclusion of the Other: Studies in Political Theory 117-20 (Ciaran Cronin & Pablo De Greiff eds., MIT Press 1998) (suggesting that increasingly pluralistic societies can be held together by political culture); Hannum, supra note 3, at 26, 50 (claiming that few and only smallest states are homogeneous); Tamir, supra note 4, at 3, 10 (arguing homogeneous states are not possible); Michael Walzer, On Toleration 25 (1997)
(asserting rarity of homogeneity in modern societies).

[FN15]. See Geertz, supra note 10, at 17. ("Cultural systems must have a minimum degree of coherence...").


[FN18]. Rawls contends that liberalism emerged as a response to the issue of religious pluralism. See Rawls, supra note 13, at xxiv ("[T]he historical origin of political liberalism (and of liberalism more generally) is the Reformation and its aftermath, with the long controversies over religious toleration in the sixteenth and seventeenth centuries.").

[FN19]. Rawls insinuates that, although he focuses primarily on the issue of religious tolerance, his political liberalism bears on other basic problems such as "race, ethnicity, and gender." Id. at 154-58 (arguing that political conception of justice need not be comprehensive); see also Kymlicka, supra note 3, at 3 ("Many post-war liberals have thought religious tolerance based on the separation of church and state provides a model for dealing with ethnocultural differences as well."); id. at 30-31 (addressing concerns of minorities in protecting their cultural practices); Michael Walzer, Pluralism in Political Perspective, in The Politics of Ethnicity 1, 6-11 (Stephan Thernstrom et al. eds., 1982) (discussing evolution of pluralism in America); Michael Walzer, States and Minorities, in Minorities: Community and Identity 219, 219-27 (C. Fried ed., 1983) (examining coexistence of minority groups in various political structures).

[FN20]. This conception overlaps with what Charles Taylor denominates procedural liberalism, as well as with Joseph Raz's liberal policy of non-discrimination. See Joseph Raz, Ethics in the Public Domain: Essays in the Morality of Law and Politics 158 (1994) (discussing toleration and non-discrimination); Charles Taylor, Reconciling the Solitudes 125 (1993) (discussing modern societies' need to balance government as "service institution" as well as institution of identification). Raz explains that "under a regime of scrupulous non-discrimination a country's public services, its education, and its economic and political arenas are no longer the preserve of the majority, but common to all its members as individuals." Raz, supra, at 158.

[FN21]. See Rawls, supra note 13, at 135 ("[P]olitical liberalism supposes that there are many conflicting reasonable comprehensive doctrines with their conception of the good, each compatible with the full rationality of human persons.").

[FN22]. See id. at 133-72 (justifying possibility of political liberalism on existence of overlapping consensus of reasonable comprehensive doctrines).

to respect by thinking of the social body as a guaranteed hierarchy of private rights").

[FN24]. Habermas himself identifies the post-national model with the United States, as well as with Switzerland, stating: As the examples of multicultural societies like Switzerland and the United States demonstrate, a political culture in which constitutional principles can take root need by no means depend on all citizens' sharing the same language or the same ethnic and cultural origins. A liberal political culture is only the common denominator for a constitutional patriotism (Verfassungspatriotismus) that heightens an awareness of both the diversity and the integrity of the different forms of life coexisting in a multicultural society. Habermas, supra note 23, at 500; see also Habermas, supra note 14, at 113 (describing United States as example of successful republican nation-state without culturally homogenous population).


[FN26]. See Habermas, supra note 23, at 500-01 (providing that democratic state citizenship need not be rooted in national identity of people, but demands socialization of all state citizens in common political culture, independent of various diverse social cultures); see also id. at 506, 508, 514-15 (explaining that political acculturation does not demand complete socialization within national culture); Habermas, supra note 14, at 117-18, 144-45, 176-77, 225-26 (explaining that political integration of citizens ensures loyalty to their common political culture); Kristeva, supra note 23, at 40 (stating, “[T]he French Republic, is achieved [through] a legal and political pact between free and equal individuals.”); Kymlicka, supra note 3, at 23-24 (“National membership should be open in principle to anyone, regardless of race or colour, who is willing to learn the language and history of the society and participate in its social and political institutions.”).

[FN27]. It is Dieter Henrich who attributes the term constitutional patriotism to Dolf Sternberger. Dieter Henrich, Nach dem Ende der Teilung: Uber Identitäten und Intellektualität in Deutschland 74 (1993). Jürgen Habermas popularized the expression. See Habermas, supra note 14, at 118-19, 225-26 (describing creation and use of "constitutional patriotism" within Germany and United States); see also Kymlicka, supra note 3, at 13 (distinguishing "patriotism,' the feeling of allegiance to a state, from national identity, the sense of membership in a national group"); Francesc Carreras, Patriotismo sin tribu, El País Digital (Nov. 11, 2001); Guillermo Hoyos Vásquez, Multiculturalismo y democracia en América Latina, Congreso latinoamericano sobre filosofía y democracia 289, 302-03 (Santiago, LOM 1997).

[FN28]. See Kymlicka, supra note 3, at 23-24 (suggesting that United States' governmental system allows immigration and incorporation of "national minorities ... regardless of race or colour").

[FN29]. See id. at 4-5 (describing liberal state's treatment of minority groups when they outwardly express their cultural allegiance to greater society). The members of ethnic and national groups are protected against discrimination and prejudice, and they are free to try to maintain whatever part of their ethnic heritage or identity they wish, consistent with the rights of others. But their efforts are purely private, and it is not the place of public agencies to attach legal identities or disabilities to cultural membership or ethnic identity. Id. at 3-4.

[FN30]. See Kristeva, supra note 23, at 8 (suggesting that past United States'
"nationalism established [lasting] hierarchies within itself").

[FN31]. See Gonzalo Aguirre Beltrán, Obra Polémica 74 (Mexico City, Sepinah 1975); Walzer, supra note 14, at 25 (stating that national groups seek statehood solely to use political apparatuses in order to control means of production).

[FN32]. See Kymlicka, supra note 3, at 111 ("[L]iberals say that just as the state should not recognize, endorse, or support any particular church, so it should not recognize, endorse, or support any particular group or identity ... [b]ut the analogy does not work.").

[FN33]. See id. (explaining that state may choose not to recognize particular national religion, "[b]ut the state cannot help but give at least partial establishment to a culture when it decides which language is to be used in public schooling, or in the provision of state services").

[FN34]. See Rawls, supra note 13, at xxv-vi, 154 (describing development of secularized state).

[FN35]. Utopia, according to Eduardo Galeano, "lies on the horizon.... I walk ten steps and the horizon slips away ten steps. No matter how much I walk, I will never reach [the utopia]. What is the utopia for? It is just for that: for walking." Eduardo Galeano, Las Palabras Andantes 310 (1993).

[FN36]. When Rawls argues against the contention that an overlapping consensus is Utopian, he only suggests that "there are not sufficient political, social, or psychological forces ... to bring about an overlapping consensus." See Rawls, supra note 13, at 158 (depicting steps required to meet constitutional consensus). He appears ready to concede that "a full overlapping consensus is never achieved but at best only approximated." Id. at 165 (recognizing that several social factors exist in creating full consensus, thus shared political culture will not create complete consensus).

[FN37]. See generally Habermas, supra note 23, at 500-15 (presenting arguments for nation-state democracy in unified Europe); Habermas, supra note 14, at 105-61 (discussing future of nation-state in Europe).

[FN38]. See Otto Schily, Speech of Federal Minister of the Interior Before the German Parliament to Introduce a Draft of a Bill to Reform the Citizenship Law (Mar. 19, 1999), available at http://www.otto-schily.de/reden/reden_g.htm (stating elements of German citizen). "Whoever respects the Constitution and its fundamental values and complies with our laws belongs amongst us. Whoever is fluent in the language belongs amongst us. Whoever wants, in his own way, to bond with the social life in Germany belongs amongst us." Id.

[FN39]. See Walzer, supra note 14, at 48-51 (arguing that shared political policy amongst European nation-states would enhance integration amongst Europeans). See generally Habermas, supra note 23, at 500-07 (asserting that political integration within Europe would lead to unification of European nations); Habermas, supra note 14, at 150-53 (reasoning that people of Europe could become "European people" through integration if there existed "a European-wide political public sphere embedded in a shared political structure").

[FN40]. See Habermas, supra note 23, at 502 ("[N]ation-states present a problem along the thorny path to European Union not so much on account of their insuperable claims to sovereignty but because ... the political sphere has been fragmented into national units.").
See id. at 501 ("The United States ... is a multicultural society united by the same political culture and (at least for now) a single language, whereas the European Union would represent a multilingual state of different nationalities.").

See Ernesto Garzón Valdés, Pluralidad étnica y unidad nacional: Consideraciones ético-políticas sobre el caso de México, 46 Iberamericana 4, 20 ("In fact, a certain degree of social homogeneity has always been considered a necessary condition for representative democracy.").

See Rawls, supra note 13, at 150, 172 (rejecting allegation that political liberalism is indifferent to value of comprehensive doctrines). Political liberalism envelopes comprehensive religious, political or moral doctrines through its public nature, which is congruent to the considered convictions of the citizenry. See id. (advocating idea that shared political ideals will be shaped to run parallel with comprehensive doctrines).

For an interpretation of liberalism that affirmatively values national groups, see Tamir, supra note 4, at 3 (noting that "[n]ational movements are regaining popularity, and nations that had once assimilated and 'vanished' have now reappeared").

This model corresponds to what Michael Walzer terms immigrant societies. See generally Walzer, supra note 14, at 30-35 (illustrating nation-state tolerant of all groups and autonomous in its purposes).

The complicated and controversial certification process of Native American tribes in the United States provides a case in point.


See generally Kymlicka, supra note 3, at 61 ("The belief that minority rights are unfair and divisive was confirmed, for many liberals, by the ethnic revival which rocked the United States and elsewhere in the 1960s and 1970s.").

See Richard Falk, The Rights of Peoples (In Particular Indigenous Peoples), in The Rights of Peoples 17, 23 (James Crawford ed., 1988) (noting that flourishing indigenous groups improve overall enlightened self-interests of entire culture); Kristeva, supra note 23, at 42 (arguing that national unity allows for sharing of cultures and abilities among subgroups to benefit all); Kymlicka, supra note 3, at 102-05 (presenting idea that minority groups can pick and choose what they like from surrounding cultural groups, further enhancing good for all persons within that group); Miller, supra note 6, at 85- 86 (arguing in support of national self-determination); Raz, supra note 20, at 174 ("While incorporating policies of non-discrimination, liberal multiculturalism transcends the individualistic approach which they tend to incorporate, and recognizes the importance of unimpeded membership in a respected and flourishing cultural groups for individual well-being."); Tamir, supra note 4, at 35, 73 (noting that individuals view protection of distinct national identity they have chosen as important aspect of their well-being); Rodolfo Stavenhagen, Los derechos indígenas: nuevo enfoque del sistema interacional, en Etnia y Nación en América Latina 141, 167 (Héctor Díaz Polanco ed., Mexico City, CNCA 1995) ("Collective rights, such as a people's right to self-determination, are a necessary condition for the full enjoyment of individual rights...."); cf. Raz, supra note 20, at 159 (arguing, similarly, that "policy of multiculturalism" finds support in "the belief that individual freedom and prosperity depend on full and unimpeded membership in a respected and flourishing cultural group"). But cf. Jeremy Waldron, Minority Cultures and the Cosmopolitan Alternative, 25 U. of Mich. J.L. Reform 751, 762 (1992) ("The collapse of the Herderian argument [that human beings need, rather than simply enjoy being part
of a particular culture] seriously undercuts any claim that minority cultures might have to special support or assistance or to extraordinary provision or forbearance."

[FN49]. See Miller, supra note 6, at 87-88 (illustrating need for individuals to work for benefit of collective goals of nation, at times, in order to produce common culture). In the next section, I will discuss further the idea that national groups may have collective goals, such as protecting their national culture.

[FN50]. See Walzer, supra note 14, at 101-12 (contending that involvement within internal subgroup will actually create stronger person, more involved with society as whole). But Cf. Kristeva, supra note 23, at 2-3 (asserting that accentuation of sexual, national and religious identities undermines personal freedom and increases divisiveness).

[FN51]. See Michael Walzer, Pluralism and Social Democracy, 45 Dissent 47, 53 (1998) ("The singular, universal political community requires a particularistic associational life; the associations require the political framework of state power.").

[FN52]. See id. at 51 ("We learn to be citizens in many different associations: neighborhoods, churches, unions, professional groups, parties and movements, societies for mutual aid, and so on. The more intense our participation at this level, in these settings, the more engaged we are likely to be as citizens of the larger community."); see also Walzer, supra note 14, at 104 ("For it is only in the context of associational activity that individuals learn to deliberate, argue, make decisions, and take responsibility.").

[FN53]. See Raz, supra note 20, at 173 ("Cultivation of mutual respect and toleration, of knowledge of the history and traditions of one's country with all its communities, will provide one element of common culture."); see also id. at 176 ("[L]iberal multiculturalism leads not to the abandonment of a common culture, but to the emergence of a common culture which is respectful towards all the groups of the country, and hospitable to their prosperity."); Walzer, supra note 14, at 94, 100, 102 (discussing conflict in United States between "manyness of groups and of individuals," as opposed to conflicts between different cultures); Charles Taylor, Shared and Divergent Values, in Options For a New Canada 53, 76 (Ronald Watts & D. Brown eds., 1991).

[FN54]. Michael Walzer believes that it is not the survival of these communities, but rather their capacity to promote civic engagement, that depends on state support. The groups will survive in any case, for they answer to profound human needs. But they won't flourish, expand, draw more people into everyday participation, help the excluded help themselves, unless there is a political decision on their behalf, unless the universal state enters into a social alliance with particularity and difference. Walzer, supra note 51, at 47, 53; see also Walzer, supra note 14, at 111 ("Group life won't rescue individual men and women from dissociation and passivity unless there is a political strategy for mobilizing, organizing, and if necessary subsidizing the right sort of groups.").

[FN55]. See Walzer, supra note 14, at 31 (noting in immigrant societies, "the state is, in the current phrase (and in principle), neutral among the groups, tolerant of all of them, and autonomous in its purposes").

[FN56]. This pluralism corresponds to Raz's "multiculturalism," which "requires a political society to recognize the equal standing of all the stable and viable cultural communities existing in that society." Raz, supra note 20, at 159; see also Walzer, supra note 14, at 34 ("Given the logic of multiculturalism, state support must be provided, if it is provided at all, on equal terms to every social group."); id. at 32 (acknowledging that in immigrant societies, "the state is supposed to be perfectly indifferent to group culture or equally
supportive of all the groups”).

[FN57]. See Walzer, supra note 14, at 34-35 (discussing states trying to equalize resources available to each group).

[FN58]. See Tamir, supra note 4, at 11 (discussing compensation as method to reduce problems faced by national and cultural minorities).

[FN59]. See Kymlicka, supra note 3, at 31 (“Some people believe that public funding agencies have traditionally been biased in favour of European-derived forms of cultural expression, and programmes targeted at ethnic groups remedy this bias.”); id. at 108 (“Many defenders of group-specific rights for ethnic and national minorities insist that they are needed to ensure that all citizens are treated with genuine equality.”); id. at 113, 126 (concluding that all national groups need opportunity to remain distinct cultures and be afforded same protections as all other groups); Bruce Ackerman, Should Opera Be Subsidized?, 46 Dissent 89, 90 (1999) (providing example of appropriate unequal state subsidy).

I can imagine cases in which selective cultural subsidies may be justified without disparaging the equal standing of others. Consider, for example, the case of a subordinated minority, which has been condemned for generations to crushing injustice and cultural suppression. In such a case, there is everything to be said for a special state fund aimed at restoring grievously damaged cultural institutions. Rather than offending the equality of citizens, such a fund reaffirms this core commitment of the liberal state.

[FN60]. Rawls explains that "political liberalism assumes the fact of reasonable pluralism as a pluralism of comprehensive doctrines, including both religious and nonreligious doctrines." Rawls, supra note 13, at xxiv; see also id. at 24 n.27, 36, 135, 144 (explaining nature and concept of reasonable pluralism).

[FN61]. See Hoyos Vásquez, supra note 27, at 300 ("[In Rawls,] the recognition of diversity is reasonable--I would say happy--because we can consider such pluralism as a good, not as a lesser evil.").

[FN62]. Michael Walzer believes that his immigrant society model applies to France. See Walzer, supra note 14, at 37-40, 62-63, 73-74, 78 (discussing model in relation to France). "But American liberalism is culturally neutral in a way that French republicanism cannot be." Id. at 74. It is perhaps due to this limit on cultural neutrality that Walzer believes France is not a fully pluralist society. See id. at 38 (discussing France as non-pluralist society).

[FN63]. See generally id. at 48-51 (acknowledging oppression of several European minority groups).

[FN64]. See generally Habermas, supra note 14, at 111-17, 129-40, 159-60 (discussing nature of this new form of social integration).

[FN65]. In fact, when Habermas proposes extending post-nationalism to Europe and to other parts of the world, he has a pluralist version in mind, along the lines I have sketched in this section. For a discussion of the extension of post-nationalism, see supra note 64 and accompanying text.

[FN66]. See Taylor, supra note 20, at 55 ("In Quebec during the last two centuries," its culture has been "menaced"); id. at 56 (referring to Quebecois as "small people whose language and culture have been so beleaguered for so long"); see also Walzer, supra note 14, at 44-47 (discussing Quebecois problems in securing their culture).
Buchanan, however, maintains that it is "quite controversial" to assert that Quebec's "culture is really in peril." Allen Buchanan, Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec 161 (1991).

[FN67] Taylor believes that French Canadians as well as aboriginal peoples were involved in a similar quest for cultural survival within the constitutional scheme proposed in 1982. "Here what was at stake was the desire of these peoples for survival, and their consequent demand for certain forms of autonomy in their self-government, as well as the ability to adopt certain kinds of legislation deemed necessary for survival." Taylor, supra note 2, at 52; see also Taylor, supra note 20, at 126 ("It is clear, at least in our society, that one cannot conceive of a Quebec state that would not be called on to defend and promote French language and culture, whatever the diversity of our population.").

[FN68] See Taylor, supra note 20, at 126 ("A people who defined themselves by their language, and in the past also by religion, and who were subjected to strong pressures in North America left it up to their institutions not only to supply them with services but also to defend--and, at the same time, define-- their identity."). Whether in this case, or in any other involving national groups within a larger society, the protection of national culture requires secession, is a question that I leave open. Allen Buchanan believes that "the need" of a group "to preserve its cultural identity ... can, under certain highly constrained conditions, supply sound justifications for secession." Buchanan, supra note 66, at 136; see also id. at 161. With respect to Quebec, however, Buchanan argues that it can already afford its national culture sufficient protection under the existing arrangements: Quebec already enjoys important group rights, including language rights, and a limited veto right over constitutional amendments. Further, like every other province, Quebec has the right to reenact within its own jurisdiction legislation that has been shown to be in violation of the Federal Charter of Rights and Freedoms. (This limited right of nullification is provided by the so-called "notwithstanding" clause of the current Canadian Constitution.) Each of these powers can be employed by Quebec to help preserve its cultural identity. Id. at 61; see also id. at 161 (discussing methods of protecting Quebec's culture). Charles Taylor has also spoken against Quebec's secession. See Taylor, supra note 20, at 56-58, 102, 199 (same).

[FN69] The Quebecois' case raises cultural policy questions both at the levels of society as a whole and societal subgroups. What is first and foremost at stake is whether a government--i.e., that of Quebec--may devote itself completely to furthering a substantive national culture. In other words, is progressive nationalism legitimate? The second issue is whether a state--viz., Canada--should allow particular national communities, such as the French-Canadians to take over a federated political unit for their own cultural purposes. That is, should it not only subsidize national subgroups, but also grant them cultural self-government rights?

[FN70] See Kymlicka, supra note 3, at 107 ("On [the liberal] view, giving political recognition or support to particular cultural practices or associations is ... unfair ... because it subsidizes some people's choices at the expense of others.").

[FN71] See id. at 83 ("The survival of a culture is not guaranteed, and, where it is threatened with debasement or decay, we must act to protect it."); see also Dworkin, supra note 16, at 230 (discussing need to protect language from debasement or decay).

[FN72] See Arditi, supra note 25, at 99, 116 ("Essentialism and the 'hardening of the frontiers' among the various dialects hinders permeability as well as mutual contamination and facilitate separatism by creating worlds closed upon themselves.").
Mario Vargas Llosa, Las culturas y la globalización, El País Digital, Apr. 16, 2000 [hereinafter Vargas Llosa, Las culturas]; see also Habermas, supra note 14, at 222-23 (discussing how majority cultures take parts of minority cultures and make them their own); Kymlicka, supra note 3, at 102-05 (noting that cultures evolve as result of choices of members); Waldron, supra note 48, at 783-85 (discussing composition of culture's members as making up what is seen as culture). Vargas Llosa is categorically against all state intervention on behalf of the national culture.

The most admirable lesson that cultures teach us is that they do not need to be protected by bureaucrats or commissioners. Nor do they have to be put behind bars, or isolated by the customs authorities, in order to stay alive and preserve their vitality. On the contrary, they thus wilt and become folkloristic.

Vargas Llosa, Las culturas, supra; see also Mario Vargas Llosa, Cuando París era una fiesta, El País Digital, Mar. 19, 2002 (arguing that "the only way in which cultural protectionism translates into an effective policy is through a rigorous system of discrimination and censorship against cultural products, which would be intolerable for an adult, modern, and free public"). Vargas Llosa does not see that the state's effort may be not reactionary and isolationist, but rather creative and enabling in the sense referenced in the next section. See Kymlicka, supra note 3, at 105-06 (noting benefits of state intervention). Interestingly enough, Vargas Llosa has recently endorsed "policies that support and promote the Spanish language, which is a great legacy of all Spanish speakers, so as to enable it to acquire not just cultural, but also political and economic importance." M.J.D. Tuesta & J.R. Mantilla, Las academias de la lengua española celebran con Fox medio siglo de historia, El País Digital, Oct. 16, 2001 (quoting Vargas Llosa).

See Kymlicka, supra note 3, at 107 ("Every way of life is free to attract adherents," according to many liberals, "and if some ways of life are unable to maintain or gain the voluntary adherence of people that may be unfortunate, but it is not unfair.").

Habermas, supra note 14, at 222; compare Kymlicka, supra note 3, at 107 ("On [the liberal] view, giving political recognition or support to particular cultural practices or associations is unnecessary ... because a valuable way of life will have no difficulty attracting adherents."), and id. at 107-108 (explaining why some view support as unnecessary), with Walzer, supra note 14, at 27 ("As internal controls weaken, minorities can hold their members only if their doctrines are persuasive, their culture attractive, their organizations serviceable, and their sense of membership liberal and latitudinarian."), and id. at 31, 33 (discussing difficulties minority cultures face).

See Miller, supra note 6, at 88 ("The role of the state should not be to impose some preformed definition of national culture on people who may resist it, but to provide an environment in which the culture can develop spontaneously rather than being eroded by economically self-interested action on the part of particular individuals.").

Figure 1 illustrates their predicament. The prisoners, $P_1$ and $P_2$, land on the collectively worse outcome whereby justice demands a sentence of ten years for both individuals.

"Prior to Law 101, [the Charter of French Language] it was in the best interests of the children of Quebecois and the children of new immigrants to be schooled in English since this was viewed as the language of opportunity." Rosemary A. McCarney, Language Politics: Doing Business in Quebec, 17 Int'l Law. 553, 561 (1983). This measure is in stark contrast to the Charter's goal of making the French language an economically viable tool for Canadians living in Quebec. See id. (highlighting connection between language preservation and cultural stability).

(describing community or government pressures becoming marginalized by assurances that individuals will perform their respective duties). In subsequent papers, he develops the concept of an "assurance game." See Amartya K. Sen, Choice, Welfare and Measurement 74, 78-80 (1982) (illustrating hypothetical game in which problems of community compelling individual inaction become curtailed by individual awareness of potential failure of community-driven duty); Amartya K. Sen, On Economic Inequality 98 (1973) (stressing principle of "reciprocity" as potential solution for work motivation); Amartya K. Sen, Goals, Commitment, and Identity, 1 J.L. Econ. & Org. 341, 350-51 (1985) (describing "assurance game" in context of individuals' choice and consequent, cooperative outcome of decision-making process).


[FN82]. See id. (discussing facts).

[FN83]. See id. (same).

[FN84]. See id. (same).

[FN85]. The Secretary General of the ruling Democratic Convergence Party, Pere Esteve "defended the Autonomous Executive's earlier decision to approve the dubbing decree in response to the limited presence of Catalan in Catalonian movie houses. In his opinion, there should be an attempt to modify the current situation, which he referred to as 'incorrect.'" Id.

[FN86]. See id. (stating facts).

[FN87]. See id. (same).

[FN88]. Id.

[FN89]. Id.

[FN90]. Id.

[FN91]. Id.

[FN92]. McCarney notes that:
Beginning with the education provisions, the Charter stipulates that instruction in kindergarten classes and in elementary and secondary schools shall be in French. Exceptions to this prescription may, however, be requested by parents of children who fall within the exceptions provided in the Charter: (1) Those whose father or mother received his or her elementary education in English in Quebec; (2) Those whose father or mother, domiciled in Quebec on August 26, 1977, received his or her elementary education in English outside Quebec; (3) Those who, in their last year of school in Quebec before August 26, 1977, were lawfully receiving their instruction in a public kindergarten class or elementary or secondary school; and (4) The younger brothers and sisters of the children described above. In addition, families from other parts of Canada and from
abroad who are planning to live temporarily in Quebec can send their children to English language schools for a three-year period. If they continue to live in Quebec, this option can be extended for another three years.

McCarney, supra note 78, at 562.

[FN93]. See Taylor, supra note 2, at 25-73 (stressing individuals' notions of "authenticity" and how they relate to continuous struggle of individuals' choices in between the public and "intimate spheres of recognition").

[FN94]. See id. at 125 ("A society with strong collective goals can be liberal provided it is also capable of respecting diversity, especially when this concerns those who do not share its goals, and provided it can offer adequate safeguards for fundamental rights."); see also Valdés, supra note 42, at 22 (1992) ("In fact, the rights that bear a direct relationship to the satisfaction of basic goods constitute an 'off-limits zone' for negotiations and majority decisions.").

[FN95]. Taylor would "call for the invariant defense of certain rights, of course. There would be no question of cultural differences determining the application of habeas corpus, for example." Taylor, supra note 2, at 61. Generally, "the rights in question are conceived to be the fundamental and crucial ones that have been recognized as such from the very beginning of the liberal tradition: rights to life, liberty, due process, free speech, free practice of religion, and so on." Id. at 59; see also Taylor, supra note 20, at 176 (comparing national accountability and recognition of minority culture through respect of inalienable rights afforded to individuals under American constitutional law). Yet, his model would distinguish "these fundamental rights from the broad range of immunities and presumptions of uniform treatment that have sprung up in modern cultures of judicial review." Taylor, supra note 2, at 61. It would be "willing to weight the importance of certain forms of uniform treatment against the importance of cultural survival, and opt sometimes in favor of the latter." Id.; see also Taylor, supra note 20, at 176 (noting critical importance of cultural preservation through particularized treatment of individuals subject to uniformity of modern criminal courts).

[FN96]. See generally Immanuel Kant, Foundations of the Metaphysics of Morals 75-79 (Lewis White Beck trans., Harold Weisberg ed., 1969) (proposing connection between morality and freedom as "the property of the will of all rational beings."). Kant offers that independence from foreign influence crystallizes an individual's idea of freedom. See id. at 76 (juxtaposing freedom of individual capacity to reason with moral notions of human dignity). This notion of freedom enables a human being's perspective and sensitivity to the world, thereby encouraging what Kant describes as "belonging" to the world of sense. See id. at 79 (distinguishing characteristics of world of sense versus world of understanding). Human dignity relies upon the individual's conscious participation in the world of understanding, no matter how minimal that participation may be. See id. at 79-80 (developing connection between belonging to "intellectual world," however slight).

[FN97]. See Arizonans for Official English v. Arizona, 520 U.S. 43, 48 (1997) (describing state constitutional amendment that instituted this kind of policy and describing cause of action). In Arizonans, a state employee claimed that her First Amendment rights to free speech became violated when Article XXVIII of the Arizona Constitution became law, which established English as the official language of the state. See id. at 44 (stating facts of case). Because the employee resigned before she brought her constitutional claim to court, the Supreme Court held that the employee did not have standing to warrant a decision by the court. See id. (discussing legal parameters to which petitioners must conform in order to have justiciable claims in United States Supreme Court). Thus, the court did not directly address whether the Arizona law passed United States constitutional muster. See id. at 69-72 (precluding decision as to constitutionality when mootness of petitioner's appearance in Court was at issue).


[FN100]. Buchanan, supra note 66, at 142.

[FN101]. Id.

[FN102]. See Kymlicka, supra note 3, at 111 ("[O]ne of the most important determinants of whether a culture survives is whether its language is the language of government--i.e., the language of public schooling, courts, legislatures, welfare agencies, health services, etc.").
I. Introduction

HUMAN rights law has redefined the concepts of sovereignty and citizenship. Just as transnationalization has weakened the hegemony of the political elites (corporate economic elites and domestic ruling classes) by strengthening citizenship claims of all persons, so, too, a globalized citizenship grounded on a human rights model will strengthen personhood by denationalizing states' claims on individuals' rights. The human rights narrative has been imagined, crafted and delivered by Northern/Western powers—the hegemon—however, for the human rights model to be of utility to the globalized citizen project, it must be reconstituted with an antisubordination agenda. It must include the voices of the marginalized—both persons outside Western cultures and subordinated persons within Western cultures—all women; racial, ethnic, religious, cultural and sexual minorities; the poor; and the differently abled. In sum, such a new vision of human rights refocuses the discourse and creates a globalized citizenship movement from below that embraces and empowers those currently in the periphery.

This essay will use the reconstituted human rights paradigm to explore the relationship between sovereignty, security and personhood. Part II engages the human rights model by recognizing how it first effected a change in the concept of sovereignty and suggest a reconstitution to render the human rights system truly pluralistic. As reconceived, the human rights system provides a rich and complex foundation for a globalized citizenship model that promotes and respects personhood, well-being and human flourishing. Part III explores the tension between human rights and security, acknowledging three significant realities: (1) the normative reality that in times of danger the sovereign can suppress certain human rights to maximize security protections for its citizens and others within its territory; (2) the corollary legal and moral reality that even in times of danger the sovereign cannot derogate from certain fundamental human rights; and (3) the practical reality that the ability of the sovereign to act in breach of the nonderogable obligations may be unassailable if the actor is a powerful world actor. In this context, the essay addresses the uneasy legacy of Nuremberg and its more recent delineation of the *1010 bounds of sovereignty—the addition of individual responsibility which means that states cannot escape accountability by doing indirectly (via individual actors) what they cannot do directly.

Part IV moves toward a new conceptualization of limits on sovereignty: a proposed globalized citizenship model that draws from traditional citizenship theory, uses the human rights structure as its foundation and places limits on the power of entities, including states and transnational and multinational organizations, associations or groups, to act if the consequence is a violation of human rights norms. This new conceptualization is different from the previous conceptualizations of the limits of sovereignty [FN1] because the affirmation emanates from the individual him/herself (and others similarly situated around the globe) who has suffered as a consequence of a
breach of norms regardless of whether the norm violator is a state actor. Finally, Part V applies the developed model to the post-9/11 condition of the captives held in Guantánamo Bay, Cuba.

II. Human Rights--Creating Limits to Sovereignty

The contemporary human rights regime was developed after World War II. However, even prior to that war, and in the absence of any legal doctrine that challenged full and absolute state sovereignty, states recognized that protection of humanity was the paramount goal of international law. Thus, sovereignty, although state-centered, was not seen as absolute. Under international law, sovereignty was always recognized as an instrument that should not be used to shield abuses against human beings. Indeed, well before World War II, Oppenheim recognized the supra-sovereign nature of human rights:

[T]here is no doubt that, should the state venture to treat its own subjects or part thereof with such cruelty as would stagger humanity, public opinion of the rest of the world would call upon the powers to exercise intervention with the purpose of compelling such state to establish a legal order of things within its boundaries sufficient to guarantee to its citizens an existence more adequate to the ideals of modern civilization. [FN2]

Oppenheim's statement about the limitations of state sovereignty was prescient. After World War II, in the Nuremberg Tribunal, [FN3] the world community punished German Nazis for committing atrocities against millions of innocent citizens, including those against German Jews on German soil. As a result, a state would no longer be insulated from sanction simply because the crimes committed were against its own nationals and within its geographic boundaries. The human rights idea challenged the notion of unfettered state sovereignty, much as in the 1980s globalization challenged the supremacy of the nation-state.

The human rights ideals can be traced to religion as well as natural law and contemporary moral values. The human rights movement recognizes those rights vital to an individual's existence--fundamental, inviolable, interdependent, indivisible and inalienable rights that are predicates to life as human beings and that concern the respect and dignity associated with personhood. Today, these include not only civil and political rights, but also social, economic and cultural rights, as well as solidarity rights--rights to peace and to a healthy environment.

The signing of the United Nations Charter [FN4] in 1945 marked the establishment of a system of comprehensive human rights protection for all individuals against various forms of injustice by a state--regardless of whether the abuse or injustice was committed by a foreign sovereign or the individual's own state of nationality, and, for the most part, irrespective of the existence of war. The Charter, the purpose of which is "to promot[e] and encourag[e] respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion," [FN5] expressly acknowledges "rights to which all human beings have been entitled since time immemorial and to which they will continue to be entitled as long as humanity survives" as rights of personhood. [FN6]

Numerous human rights instruments that followed the Charter further articulate and refine the nature and breadth of the human rights vision. These include, among others, [FN7] the Universal Declaration of Human Rights [FN8] (Declaration or Universal Declaration); International Covenant on Civil and Political Rights [FN9] (ICCPR); International Covenant on Economic, Social and Cultural Rights [FN10] (ICESCR);
Convention on the Elimination of All Forms of Discrimination Against Women; [FN11] International Convention on the Elimination of All Forms of Racial Discrimination; [FN12] Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment; [FN13] and the Convention on the Prevention and Punishment of the Crime of Genocide. [FN14] These instruments collectively protect civil and political rights initially pursued by the French and American revolutions--rights largely expanded to include not only the rights to equality for white men and to "life, liberty and the pursuit of happiness," but also the rights to self-determination; nondiscrimination; sex equality; life; freedom from torture, cruel, inhumane treatment or punishment; freedom from slavery, servitude, forced or compulsory labor; freedom of opinion and expression; freedom of speech and assembly; and free association. [FN15] They also provide a plethora of due process rights; ensure freedom of movement; protect family and marriage; recognize personhood; recognize freedom of thought, conscience and religion; and recognize the right to participate in government and to protect culture. [FN16] Significantly, these instruments also embrace the social, economic and cultural rights sought by the Mexican and Russian revolutions, thereby making the following rights part of the human rights framework: the rights to good working conditions; to receive fair wages; to form trade unions; to receive social security; to attain an adequate standard of living including *food, housing and clothing; to enjoy physical and mental health; to receive an education; and to participate in cultural life. [FN17] Most noteworthy, the documents, while acknowledging that the inherent dignity of people is the foundation for freedom, justice and peace in the world, also expressly recognize the interrelationship of civil and political rights with economic rights: "freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights as well as his economic, social and cultural rights." [FN18]

Notwithstanding the laudable and desirable ideal of universality of rights, the grounding of this articulation in Western philosophy has invited critique. The absence of linkages to the periphery [FN19] and claims that a system was being imposed on states that were not present or perhaps non-existent at the time of the system's formation challenged the authenticity of the system as lacking a broad-based cultural and ideological foundation. [FN20]

*1014 The reconfiguration and transformation of the human rights project into a truly inclusive and pluralistic paradigm of dignity and personhood is necessary ontologically prior to the development of a globalized citizenship model. A reconstitution of the human rights system must include perspectives and understandings from different cultures and economies in order to explore the boundaries of rights in a nonessentialist, antisubordination posture and to attain its liberatory potential so that all--from North and South, East and West alike--can share and enjoy full personhood.

Critical analysis exposes the structural flaws, biases and assumptions of applying a hegemonic version of human rights law. Existing international ideas and ideals were crafted within specific and narrow social, economic, historical and cultural spaces. The universalization of the system resulted in the effective imposition on many states of the perspectives, needs, desires, interests and experiences of a few powerful ones, and thus effectively silenced the subaltern, the poor and the subordinated; the core silenced the periphery. The coexistence of slavery and women's status as chattel, as well as the decimation and exploitation of indigenous populations, with the late eighteenth century political and social uprisings that sought to identify impermissible governmental intrusions into individual lives and to protect the rights to private property, life and liberty, represents intrinsic contradiction, the irreconciliative tension imbuing those revolutions.
Vestiges of foundational inequities are evident at the start of the twenty-first century. Women lack equal rights and benefits in every geography of the global community. Racial, sexual, and ethnic minorities in the first-world states, all people in third-world states and indigenous people in all states--North and South, East and West alike--experience a widespread pattern of inequality in participation in social, political and economic spheres.

One of the central aims of the human rights system is liberation and justice for the subordinated, the disempowered, the marginalized and subaltern persons and communities. These borderlands include not only all peoples (and particularly the non-elites) in the peripheral states--precisely the societies claiming exclusion from the standards-generating process--but also non-normative, outsider communities within core societies. The human rights paradigm, refocused and reconstituted, becomes a morally compelling tool that denounces all sovereign action derogating from or interfering with personhood.

III. Security and the Limits of Sovereignty

One of the central functions of any state, especially those states founded on civic republicanism as quintessentially expressed by the American *1015 and French Declarations, is to provide security for its citizens--one of those state functions that would be wholly unworkable if maintained in individual hands. Thus, the security of persons was one of the obligations conceptually delegated to the states by the people in the "social contract." [FN21]

In this context, it is important to explore the relationship of human rights to the state’s sovereign obligation to defend its citizens. The ICCPR expressly addresses this concern. Article 4(1) establishes six onerous conditions that predicate security concerns trumping rights of personhood: (1) a public emergency must exist; (2) it must threaten the life of the nation; (3) the public emergency must have been officially proclaimed; (4) the derogation of rights must be necessary vis-à-vis existing circumstances; (5) the measures taken that derogate from the protected rights cannot be inconsistent with other obligations of the state; and (6) under no circumstances can discrimination on the basis of race, color, sex, language, religion or social origin be the grounds for the derogation. [FN22] Beyond these listed requirements, article 4(2) of the ICCPR also expressly prohibits derogation from certain rights even during public emergencies that threaten the life of the nation. [FN23] Such nonderogable rights include: (1) the right to life; (2) the right to be free from torture or cruel, inhumane or degrading treatment or punishment, including the right not to be subjected to medical or scientific experimentation without consent; (3) the prohibition against slavery and servitude; (4) the prohibition against imprisonment merely on the ground of inability to fulfill a contractual obligation; (5) the prohibition against imposing criminal punishment based on ex post facto laws; (6) the right to personhood; and (7) the right to freedom of thought, conscience and religion. [FN24]

Thus, beyond the curtailment of the state's sovereign power effected by human rights norms generally, international norms also expressly constrain the state's sovereign power to derogate from individual rights--rights of personhood--for security reasons. To be sure, history is replete with examples of states that did not conform to the nonderogation principle. However, inconsistencies abound with respect to which states are condemned for such derogations. Criticism seems to be aimed more freely at weaker, rather than powerful, states. In all cases, honoring the norm in the breach does not negate the existence of the norm.
In scrutinizing the sovereign and security prerogatives of states, it is appropriate to examine the Nuremberg Tribunal, a watershed event for human rights. Nuremberg marks a historical moment in defining when a state's sovereignty veil may be pierced vis-à-vis its treatment of human beings (including its own citizens), outside and within its borders at a time of war when security interests are at a high water-mark. A critical analysis serves to problematize its procedural and substantive foundations.

The United Nations Charter, which first centered human rights in the international legal system, was a document setting out an ambitious but general plan. The Charter of the International Military Tribunal (Tribunal Charter), on the other hand, was concrete and specific to the circumstances providing for prosecutions, convictions and punishment of real people for real crimes. The Tribunal Charter resulted in trials of individuals for heinous crimes that were committed during the war years. The bases for these trials were, in part, grounded in existing international law such as the Hague Convention of 1907, which prohibited certain methods of waging war, and the 1928 Kellogg-Briand Pact, which renounced aggressive war and war as an instrument of national policy. Some concepts and norms designed for the prosecution, conviction and punishment of "war criminals," however, represented significant developments of the law and confirmed emerging fundamental international human rights norms.

A unique aspect of Nuremberg is that the trial and judgment process applied international law doctrines and concepts in order to impose criminal punishments on individuals for their commission of one of three types of crimes under international law: (1) crimes against peace; (2) war crimes; and (3) crimes against humanity. In dispensing justice, violations of previously existing international laws were analyzed. In the prewar days, there existed two "universal" crimes. One, piracy on the high seas, was based on the interests of all states to protect navigation against interference on the high seas outside the territory of any state. Because there existed no international criminal tribunal with jurisdiction over these matters, however, prosecutions were carried out in state courts. Second, breach of the humanitarian laws of war, was found in customary norms, treaties and concepts such as "just war." It was grounded on states' interests that combatants follow restrictive rules of war.

Yet at the time of the trials at Nuremberg, the concept of individual criminal responsibility had not been systematically developed except in the context of piracy. Certainly, the individual responsibility concept gained a new prominence and a clearer definition after Nuremberg, primarily through the Geneva Conventions of 1949 and their 1977 Protocols.

The Nuremberg Tribunal was possible because after World War II the prevailing Allied states were able to dictate policies aimed at Germans who were responsible for the war and for the barbarity of the acts perpetrated. The applicable policies were developed in various conferences and culminated in the London Agreement in which the victorious parties accorded constitution of an International Military Tribunal for the trial of war criminals. The Tribunal Charter provided for the composition and basic procedures for the tribunal. The Tribunal's structure itself is telling: Article 2 allowed for four judges, one from each of the victorious Allied powers--Britain, United States, France and Russia.

At the heart of the Tribunal Charter is the concept of the existence of international crimes for which there can be individual responsibility. The adopted definition went beyond traditional war crimes in two ways. First, it included war-related crimes against peace. Second, the notion that individuals could commit crimes
against humanity emerged. [FN39] Also, in the past, war crimes could be committed only by official combatants who represented the state. [FN40]

The substantive criminal provisions appeared in Articles 6 through 8 of the Tribunal Charter. Article 6 defined the actions for which there would be individual responsibility, including crimes against peace; war crimes, defined as "violations of the laws or customs of war;" and crimes against humanity, which included murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population or prosecutions on political, racial or religious grounds. [FN41] Article 7 provided that the official position of the defendants was irrelevant to ascertaining their responsibility or mitigation of punishment. [FN42] Article 8 provided that actions pursuant to the order of a government or a superior would not shield an individual actor from responsibility, but could be considered as mitigation in punishment. [FN43]

In this context, it is appropriate to analyze the challenges and objections--both procedural and substantive--to the Nuremberg Tribunal. One challenge invoked the fundamental principle of law that there could be no punishment of a crime without a preexisting law, noting that ex post facto punishment is abhorrent to the law of all civilized nations. Article 15 of the ICCPR later confirmed this norm: "[n]oe one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed." [FN44] Germans claimed that the Tribunal Charter's provisions violated the prohibition against passing ex post facto laws because no sovereign power had made aggressive war a crime at the time the alleged criminal acts were committed, no statute had defined aggressive war, no penalty had been fixed for the commission of aggressive war and no court had been created to try and punish offenders. [FN45] The German position arose from the Nazi conception of "total war" that renders everything subordinate to war. [FN46] The Nazis believed that prisoners of war could be ill-treated, tortured and murdered in disregard of international law and dictates of humanity because, under the concept of "total war," rules and regulations were trumped by the war. [FN47] Similarly, the fate suffered by civilian populations--deportation for slave labor, murder, plundering and pillaging of public and private property, and the wanton destruction without military justification or necessity of cities, towns and villages--were subordinated to the "total war" concept. [FN48] But while "some observers will contend that in 'total war' there can be no laws regulating military conduct . . .; international lawyers will point out that there is no such legal concept as 'total war' . . . [as] the laws of war apply without exception to all wars." [FN49]

Notwithstanding these objections, the Nuremberg Tribunal--perhaps not surprisingly as it was made up of only Tribunal Charter members--upheld the legality of both the creation of the Tribunal Charter and its application to the perpetrators. [FN50] First, the Nuremberg Tribunal noted that the creation of the Tribunal Charter constituted the proper "exercise of sovereign legislative power by countries to which the German Reich unconditionally surrendered." [FN51] The Nuremberg Tribunal did not interrogate or challenge the right of the victors to legislate for the occupied territories, but rather simply observed that such a right had been recognized by the civilized world and that "the maxim of nullum crimen sine lege is not a limitation of sovereignty, but . . . [rather] a principle of justice." [FN52]

Moreover, the Nuremberg Tribunal rejected the characterization of the Tribunal Charter as an arbitrary exercise of power on the part of the victorious nations, and embraced it as the expression of international law on aggressive war that already existed at the time of its creation. [FN53] Specifically, the Tribunal Charter cited to the Kellogg-Briand Pact--a treaty binding on sixty-three states, including Germany and Japan, when World War II broke out in 1939--and it noted that a state that signs a pact renouncing aggressive
war as an instrument of national policy and then engages in such aggressive war is in breach of the agreement. [FN54] The renunciation of war as an instrument of national policy renders such a war illegal under international law. [FN55]

The Nuremberg Tribunal concluded it was not unjust to punish those who attacked neighboring states without warning in defiance of treaties, because the attacker should have known that the attacker's actions were *1021 wrong and unlawful given existing treaties and norms. [FN56] Consequently, it would be incorrect and improper to allow such conduct to go unpunished. The Nuremberg Tribunal supported its conclusion by considering the existing international law on aggressive war. [FN57]

Further, to show that Germany's conduct in prosecuting its "total war" violated existing norms, the Nuremberg Tribunal also cited to the Hague Convention. [FN58] The Hague Convention prohibited certain methodologies in the waging of war, including inhumane treatment of prisoners, employment of poison weapons and improper use of flags. [FN59] The Nuremberg Tribunal noted that since 1907, not only had such actions constituted crimes punishable as offenses against the laws of war, but also that military tribunals had in the past tried and punished individuals who had violated rules of land warfare set out by the Hague Convention. [FN60] The Nuremberg Tribunal stated that those who waged aggressive war were doing something as illegal as, but more egregious than, acts that would constitute a breach of the Hague Convention. [FN61]

The Nuremberg Tribunal did not address the issue that some of the belligerents were not state parties to the Hague Convention. In this regard, it is appropriate to examine the role of custom in developing international law. It is clear that practice of states that is perceived as obligatory (i.e. custom) is one of the primary sources of public international law. [FN62] Custom, however, should not be judicially established by interpreting treaties in a manner in which it seeks to bind an actor for actions directly contrary to the claimed obligatory norm. Yet, the Nuremberg Tribunal simply observed that the Hague Convention was a revision of the general laws and customs of war that were already in existence. [FN63] Therefore, as a codification of existing customary norms, the Hague Convention was binding on all states, signatories and nonsignatories alike. The Nuremberg Tribunal emphasized that by 1939 the rules were "recognized by all civilized nations, and were regarded as being declaratory of *1022 the laws and customs of war" to which the Tribunal Charter referred. [FN64] The Nuremberg Tribunal also concluded that the matters included in the Tribunal Charter had been recognized as war crimes under the Hague Convention, as well as under the Geneva Conventions. [FN65]

Significantly, the Nuremberg Tribunal's conclusion accepts that the law of war is to be found in treaties and in states' customs and practices that have been universally recognized. The law of war also can be found in general principles of justice that jurists and military courts have applied. This conclusion is of moment because it is an acknowledgment that law is not static.

Perhaps most significant is the Nuremberg Tribunal's ruling that international law imposes duties and liabilities not only upon states but also upon individuals. [FN66] In a now oft-quoted statement, the Tribunal specifically provided that: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." [FN67] With this pronouncement, the Tribunal ruled that authors and perpetrators of internationally prohibited acts cannot shelter themselves behind their official positions to avoid punishment in appropriate proceedings. Rather, individuals have international duties that transcend national obligations. [FN68]
This finding of individual and state responsibility constituted the first massive erosion of sovereignty principles affected by human rights norms. In ascertaining the legality of a sovereign act, the question no longer would be whether a foreign sovereign acted within its territorial boundaries. Nor in ascertaining responsibility would the inquiry be whether the individual was following orders. Instead, the question now would be whether the acts committed by the sovereign, even within its territorial boundaries, violate higher norms of humanity. If so, the state and the individuals (if moral choice is possible) engaging in such acts would be internationally responsible for wrongdoing. With the reconceived question, the acts carried out by the Nazis on non-German and German citizens alike were war crimes, crimes against peace and crimes against humanity for which the perpetrators could properly be punished.

*C1023* Criticisms of the Tribunal Charter and the Nuremberg decision raise a patent tension permeating law, politics and power, which is important in the analysis of a globalized citizenship model. This tension has several implications. One, the tension renders clear that international legal principles allow states, within certain parameters, to derogate from individual rights at times of public emergencies. Two, international norms specifically impose limits on states’ ability to derogate from particular rights. Finally, however, as the Nuremberg decision shows, sometimes the lines between law and politics are blurred. When the rule of power and the rule of law collide, the acts of the powerful may have an impact on the exercise of rights. For example, the Nazis ran roughshod over "undesirables" and the Allied powers erected the necessary legal structures to render the Nazis accountable for such transgressions.

IV. Globalized Citizenship

Human rights and economic polarization, particularly as manifested in and exacerbated by the economic globalization of the last two decades, have transformed the liberal conception of citizenship. [FN69] These changes inspire the model for globalized citizenship. This model both borrows from and redesigns traditional ideas of citizenship.

Two different concepts of citizenship exist. One, the "legal status" model, emphasizes "full membership in a particular political community." [FN70] The other, the "desirable activity" model, in which "the extent and quality of one’s citizenship is a function of one’s participation in that community." [FN71]

The citizenship construct includes three elements or components: civil (rights), political (participation) and social (welfare, security, culture). [FN72] Early citizenship literature tended to fuse these three components. Today, citizenship is an idea that resonates and has both local and global impacts. [FN73]

*C1024* A classic conception of citizenship that shows the conflation of both models identifies citizenship as groups of persons with shared descent, language, culture and/or traditions. [FN74] Indeed, many believe that "democracy . . . requires a large measure of social and cultural homogeneity to function." [FN75] In this regard, "[c]itizenship . . . becomes less an entitlement than a definition . . . [for] [p]eople [who] want to know where they belong, and they want to belong to familiar and homogeneous groups." [FN76]

Essential in the formulation of a globalized citizenship model is the confrontation of the failure of the legal, social, political and economic versions of citizenship for subordinated and marginalized groups. As one commentator has suggested, for persons at the margins, citizenship "may not make much difference to one's life" as neither the "legal status" nor the "desirable activity" concepts of citizenship has enabled such persons to attain desired social justice and equality. [FN77] This failure of the current concepts of citizenship can be explained in a two-fold manner. First, because citizenship is narrowly
viewed as solely a political category, it fails to address its attendant, but separate, social and economic inequities. [FN78] Second, a model of citizenship that focuses on the complex of civil and political rights embraced in the French and American Declarations is more likely to be grounded on characteristics and interests of the dominant elites--the political and economic ruling classes--around the world. [FN79] Thus, it reinforces class stratification, as well as ethnic, racial and gender differences. [FN80]

*1025* Thus, contrary to the homogeneous conception of citizenship is the view that "[t]he true test of the strength of citizenship is heterogeneity [because] common respect for basic entitlements among people who are different in origin, culture and creed proves that combination of identity and variety which lies at the heart of civil and civilized society." [FN81] Far from the early liberal understanding of citizenship as limited to political activity, which some critics presently view as translating simply into the right to pursue individual economic interests in the market, [FN82] contemporary citizenship theories have a broad, flexible sense of participation in public life--a relational dimension. Indeed, since Marshall's conception of "the ideal of citizenship as full participation in the community," the relational aspect of citizenship has shifted from an individual vis-à-vis state model to an individual vis-à-vis society model. [FN83] As theories of citizenship evolved, they underwent "a double process of fusion and separation. The fusion was geographical, the separation functional." [FN84] Ostensibly following this model, many contemporary theorists insist that the concept of citizenship must embrace differences among persons--differences of race, sex, sexuality, ethnicity and religion, to name a few--and that a new conception of citizenship must be developed because as "originally defined by and for white men, [it] cannot accommodate the special needs of minority groups." [FN85] This latter idea is coherent both with the reconstitution of the human rights system proposed above and with the globalized citizenship idea proffered in this work.

To be sure, the notion of globalized citizenship that I will develop here is not without context, the idea has been discussed broadly in recent times and has given rise to complex and nuanced conversations. For example, Richard Falk, a prominent author in globalization and global governance discourses, has indicated the tension between the corporate-driven exercise of power by the financial elite: governments and markets/investors--globalization from above--and the grassroots response of citizens who focus on individual needs and react to the corporate/elite grab of power, money, and resources--globalization from below. Falk has developed the idea of a "citizen pilgrim" who is part of the globalization from below movement who works to resist the structures and conditions imposed by the powerful. [FN86] This "citizen pilgrim" strikes a balance between the spiritual and the material worlds; s/he focuses on equality and is not a fan of global governance. [FN87] This "citizen pilgrim" yearns to protect the world for today's inhabitants as well as for later generations, but does not view the state as the entity that can affect this goal; instead, the aspirations can be achieved only by collective action "from below."

In a similar vein, David Held, a renown theorist of globalization, explains humans' "interconnectedness and vulnerability" across the globe--and beyond national boundaries--as existing "overlapping communities of fate." [FN88] Like the "citizen pilgrim," this community cannot rely solely on the state, as it both surpasses and transgresses it, for justice. This community reflects a shift from the state to a complex of actors that includes national, subnational, supranational, international and regional locations of activity. [FN89] The community also reflects the political diversity of groups from both the developed and developing worlds, who nonetheless are concerned about particular issues such as the environment and the deleterious *1027* impact of economic globalization, capitalism, and neoliberalism. [FN90] This community insists that "unchecked economic power, exploding asymmetries of life chances, weak democratic governments, the self-interest of politicians and the threatened takeover of the public
domain by the priorities of big corporations—all violate our most elementary sense of
social justice and democracy." [FN91] Networks of social, economic and political
relations around the world, which seek to further justice and democracy—a globalization
from below—comprise the communities that search for justice. In order to succeed in
attaining justice "[a] bridge has to be built here between international economic law and
human rights law, between commercial law and environmental law, between state
sovereignty and transnational law." [FN92]

Globalization has affected the global expansion of "markets for goods, services and
finance [and] altered the political terrain." [FN93] It is identified with the "expansion of
markets, neoliberal deregulation and the abdication of politics." [FN94] As such, it has
created this overlapping community of fate with "growing aspirations for international
law and justice" of which the United Nations, the European Union and the human rights
system are prime examples. [FN95] "The principles of freedom, democracy and justice
are the basis for articulating and entrenching the equal liberty of all human beings,
wherever they were born or brought up." [FN96]

Given that persons already are members of various communities—social, economic,
political—to achieve global democracy, the notions of justice have to be extended
beyond territorial borders.

Democracy for the new millennium must allow citizens to gain access to, and render
accountable, the social, economic and political processes which cut across and transform
their traditional community boundaries in the larger world. The core of this project
involves re-conceiving legitimate political activity in a manner which disconnects it from
its traditional anchor in fixed borders and territories and, instead, articulates it as an
attribute of basic democratic arrangements in diverse associations—from cities and sub-
national regions, to nation-states, regions and global networks. The cosmopolitan
project, as [Held] call[s] it, *1028 is in favour of a radical extension of this process as
part of a commitment to a far-reaching cluster of democratic rights and duties. [FN97]

In short, in order to protect the communities of fate, it is necessary to have an
international democratic polity.

It is not surprising then that both Falk and Held support the creation of global structures
for the pursuit of the well-being of the "citizen pilgrim," of the community. Falk has
proposed the creation of a "Global Peoples Assembly" that permits an "ideological
dynamic of empowerment" for popular sovereignty, but threatens the notion of state
autonomy. [FN98] Held, on the other hand, more generally calls for the "build[ing of]
new political capacities, regionally, like the [European Union], and also globally." [FN99]
He signals the importance of creating or bettering:

new kinds of effective public assemblies at regional and global levels, to
complement those at local and national levels. . . . The creation of new global
governance structures with responsibility for addressing global poverty, welfare
and related issues are vital, to offset the power and influence of the
predominantly market-oriented agencies such as even a reformed [International
Monetary Fund] and [World Trade Organization]. [FN100]

In short, he wants a cosmopolitan democracy that places the "public domain" in the
hands of the public itself. [FN101] He maintains "that the narrative of expertise and top-
down government has run its course." [FN102]

Kwami Anthony Appiah invokes the idea of "citizens of the world." [FN103] Unlike other
citizenship ideas, this vision focuses on individual responsibility. Recognizing that world
citizens can find themselves anywhere on the globe, their obligation is to leave "that place better than we found it." [FN104] Such "cosmopolitan[ism] also celebrates the fact that there are different local ways of being human, while humanism is consistent with the *1029 desire for global homogeneity." [FN105] In sum, while we may all be different, we are all equally human and thus deserving of respect, dignity and well-being.

These ideas of citizen pilgrim, communities of fate and world citizens, which emphasize emancipation and growth for individuals, contrast with other conceptions of global citizenship that effectively signify and identify with the forces of capitalism, neoliberalism and the market. [FN106] One example is the burgeoning field of social corporate responsibility that is generated by the elite corporate power to soften and enliven their image. [FN107] Such global citizens are economic actors who have acquired rights solely because of their economic power, much like states have power because of their economic and military might. Under the guise of concern with economic rights, global corporate citizens instead use their economic power to exploit workers and even host states. [FN108] As economic globalization increases, the need to make these corporate "citizens" accountable to the people increases. [FN109] This conception of a global corporate citizen lies in stark contrast to the vision proffered in this piece.

The proposed globalized citizenship model also exists in contraindication to the liberal idea(l) of citizenship that embraces the notion that human beings are "atomistic, rational agents whose existence and interests are ontologically prior to society." [FN110] Rather, globalized citizenship is relational and promotes equality and pluralistic participation in all facets of civil existence. It deconstructs "the fiction of effective individual agency," which, in reinforcing the status quo, simply fortifies and bolsters the location of the powerful in social, political and economic circles and veils the disempowerment of the marginalized. [FN111]

The globalized citizenship construct addresses not only social, economic and political inequalities, but also accounts for varied cultural concerns*1030 and circumstances within which real people live their real existence. In this regard, the emancipatory potential of globalized citizenship lies not just in its embrace of individual rights, but also of culture, community and society. Unlike the liberal view of citizenship, globalized citizenship is not about individuals as isolated from social or political conditions, but rather as part of them--about humans' relational spaces. As such, a globalization from below model of globalized citizenship requires new ways of thinking about civil society. The either local or global dichotomy needs instead to become a third way in which we think and act globally--both locally and globally--so that interests and rights movements can connect across and within local and global lines.

Just as the un-reconstituted human rights model reflects Western values, [FN112] the popular market notion of globalization, which is effecting gross economic disparities and thus affecting the enjoyment of full citizenship rights, is one that reinforces and confirms the Western liberal preference for markets over state lines. [FN113] Ironically, this preference for deterritorialization of activity and denationalization of identity supports the erasure of the national borders constitutive of traditional claims of citizenship--a foundational concept that supports the connections engendered by the globalized citizenship idea. An erasure of territorial borderlands by market globalization creates a tension with the liberal view of the citizen as atomistic, individualistic and wedded to those transcended territorial borders. [FN114] Indeed, the deterritorialization of states effected by the globalization of markets, along with the impairment of sovereignty effected by human rights norms, effectively has blurred the notion of citizenship as a condition of membership specific to the nation-state and enabled the *1031 crafting of the globalized citizenship idea as a human counterbalance to economic market forces.
Powerful economic actors have a newfound claim in and control of the means of production and the flow of capital, formerly the province of state sovereigns. [FN115] First-world states have developed internal third-worlds consisting of inner cities, new under-classes, racial and ethnic minorities, politically disenfranchised and economically marginalized persons. Third-world states are increasingly dependent on the exportation of labor to the first-world or importation of industry into its territory—in both cases subjecting its peoples to substandard wages and exploitative working conditions. [FN116]

Significantly, the first-world’s opening and broadening of financial markets and industry in the third-world effect a cultural and economic "exim" (export/import) process in which the values and desires of the powerful North and West (mostly the United States) are implanted on the South and East. Such market expansion has an impact on individual lives and on human capabilities. If the economic globalization discourse adopted a critical perspective, existing narratives would be broadened to include stories beyond those about mass capital transfers. A critical chronicle would also expose the effects of social globalization—such as the transmigrations of customs, languages and religious and cultural practices that follow the flow of persons who follow the flow of money; the widening gap between the rich and poor and the erosion of cultures and families. [FN117]

The more persons, culture and capital travel and become diffused and no longer bound to territorial borderlands, membership in more than one community—even more than one political community—becomes inevitable. The migrations and relocalizations of members of national, ethnic, religious, sexual, racial and gender groups outside of clearly defined national territorial borders will result in international and transnational communities that exist without respect to nation-state boundaries, resulting in changing concepts and boundaries of accountability. Thus, social globalization, particularly the aspect of movement of persons across myriad borders, facilitates the formation of multiple alliances and perhaps broad political interconnections. As citizenship becomes an increasingly deterritorialized concept, its nexus to and communion with a nation-state will continue to erode.

As Boaventura de Sousa Santos says in reply to the question "who needs Cosmopolitanism? . . . Whoever is a victim of intolerance and discrimination needs tolerance, whoever is denied basic human dignity needs a community of human beings; whoever is a not-citizen needs world citizenship *1032 in any given community or nation." [FN118] A globalized citizenship model that emerges from a critical intervention into the human rights model shifts the concept of citizenship from a state-based model to a deterritorialized rights-, interests- and identity-based one. Such a construct provides a remedy to the moral flaw of sovereignty that allows a state to disregard its disempowered and marginalized citizens as well as to the myopic disingenuity of economic market globalization that is eroding equality and justice around the world and benefiting only corporate, official and even state elites. Thus, globalized citizenship can form part of a subaltern cosmopolitan legality that opens the door to emancipation by creating aspiration- and rights-based bonds, and thus collectives of interest, unbound by territorial lines or limitations.

Notions and forces of the new model of globalized citizenship are not synonymous with westernization, with the privileging of elites from the peripheral spaces, with the visible portions of global market economies or singularly with economic growth. Rather, the new globalized citizenship model embraces and incorporates the international human rights idea of personhood and dignity. Globalized citizenship is a paradigm based on attributes of human beings qua human beings, recognizing that the fulfillment of personhood is indivisibly connected to the enjoyment of civil, political, social, economic
and cultural rights of individuals; peace; and a healthy environment, as well as to individuals' participation in civil society. In short, globalized citizenship constitutes the proverbial bundle of sticks that belongs to persons because they are human beings.

This idea is both a construct and a methodology. It allows the evaluation of the tension between the weakening of the state and correlative erosion of sovereignty effected by the small-government-seeking, free-market-promoting, neoliberal policies effected by globalization on the one hand, and the need for a strong efficient state that can promote and protect human rights, including antipoverty measures, employment, education, justice and the rule of law as a primary responsibility of government on the other hand. Globalized citizenship provides the basis for a reconceptualization of policies, instruments and structures of international trade, investment and finance, as well as security, from the bottom up. The analytical framework centers the needs of the people.

To be sure, that the emergence of a global community has eroded sovereignty is beyond peradventure. One prime example is the development of international criminal responsibility. While the concept of individual accountability was first seen in the Nuremberg Tribunal, it recently reemerged with the International Criminal Tribunal for the Former Yugoslavia *1033 [FN119] (ICTY) and the International Criminal Tribunal for Rwanda [FN120] (ICTR) and culminated with the International Criminal Court [FN121] (ICC). It is also reflected in the unacceptability of unilateralism, plainly seen in the virtually universal condemnation of President Bush's Military Commission as a means to bring justice to the September 11 terrorists. [FN122]

Globalized citizenship is complementary to Westphalian citizenship. [FN123] It is part of a counter-hegemonic project that protects persons where the Westphalian state fails. [FN124] It is a citizenship pendent to our humanity that embraces an ethic of care [FN125] collectivity and commonality while recognizing and embracing our differences rather than an ethic of competition, adversity and conflict--concepts involved in both their actual and metaphoric significations.

In sum, globalized citizenship constitutes a politics of resistance to oppression and subordination. It uses the human rights structure to instrumentalize the state or civil society on behalf of social responsibility, eradication of poverty, education and sustainability. It organizes peripheral actors, regardless of geographic location, along coherent lines of rights, identities and interests across as well as within borders. The human rights structure enables and facilitates mobilization along these coherent lines.

*1034 As such, globalized citizenship makes possible human development and human flourishing, as well as participation and consent. It promotes real democracy by facilitating people's voices in cogent contexts. A globalized citizenship paradigm embraces human rights as indivisible and inalienable. It promotes justice by insisting on a pluralistic rule of law that is knowable and obeyable by all, that is transparent and in which there is true and ultimate accountability.

Globalized citizenship does for people what economic globalization did for corporate interests. It provides a deterritorialized location of empowerment and solidarity. Rather than free market and neoliberalism, human rights are its foundational policy. It provides a structure--a constitutive base--for the global civil society that seeks equality and justice. Globalized citizenship also demands that the state reenter the global conversations about resources, rights and people. These conversations have recently been monopolized by elite corporate actors and have excluded state actors. But like global governance, [FN126] globalized citizenship rejects a state-centric concept of world politics and of citizenship, focusing instead on the international human rights ideal.
These movements are by necessity "glocal"—both global and local—as they will often be based on local need shared throughout the globe. [FN127]

A globalized citizenship model centrally maps human rights, delimits sovereignty, redefines legitimacy of states under the rule of law and the concept of territoriality and revalorizes humanity irrespective of borders or boundaries. Such globalized citizenship marks the expansion of an international civil society. Although at present it may be a contested space, it represents a space where subaltern communities—within and without national borderlands—can gain visibility and protections as members of a newly constituted polity. The needs of individuals and groups who find themselves in the midst of a new world geography will not be defined exclusively within nation-state borders. As members of our own countries, of our varied communities and also of a transnational citizenry—workers, women, native/first peoples, ethnic, racial and sexual minorities, children, and subaltern groups—we can draw on international alliances to better their conditions, to ensure participation and to assure that a democratic principle of citizenship takes into account the varied cultural environments and circumstances in which people exist.

This global citizenship model can come to life by analyzing concrete examples of marginalization, oppression, subordination and disempowerment. *1035 As has been suggested, globalization can take the traditional route of the hegemonic first-world state exporting products and values, but it can also take form with the subaltern moving in and sharing the spaces formerly occupied by the hegemon.

V. The Guantánamo Case
The case of the prisoners in Guantánamo Bay's Camps X-Ray and Delta provides a vivid and disheartening example of how the rights of the powerless can be compromised by those in power. It also provides an opportunity to examine how the embrace of a globalized citizenship model that is deterritorialized, relational and identity-based can be of utility in engaging the problematic nature of unequal power relations. In Guantánamo Bay, the captives have entered into an asymmetric encounter with a dominant national culture—the United States, possessor of massive hegemonic power both domestically and internationally, locally and globally.

To be sure, the events of September 11, 2001 had a transformative effect on life and society in the United States and the world. [FN128] On that day, nineteen men, whose presence within U.S. territorial borders ranged from the illegal to the mysterious, armed themselves with box-cutters and hijacked four civilian aircraft. These men strategically turned the four planes into "human-controlled jet-fueled missiles of mass destruction" by flying two into the twin towers of the World Trade Center in New York City and one into the Pentagon, outside of Washington, D.C. [FN129] Although the hijacking of a fourth plane was successful, passengers thwarted the hijackers' efforts to use it as a weapon for mass destruction. These brave passengers made the plane crash in a field in Pennsylvania without taking casualties beyond the persons aboard.

The perpetrators were not state actors. Rather, they were members of Al Qaeda, a group that apparently worked with the Taliban, a rebel group that controlled about eighty percent of Afghanistan but was not recognized as its government by the global community except for Saudi Arabia, the United Arab Emirates, and Pakistan. These Al Qaeda criminals, some of whom trained as pilots in U.S. flight schools, were immediately and universally labeled as terrorists for their heinous acts.

An estimated 6,333 people were immediately missing and, eventually, almost 3,000 were declared dead, including foreign citizens from sixty-five countries. With these occurrences, the United States, the sole surviving superpower in the twenty-first
century, was transmogrified from a safe state to a besieged one--from a state where security and even invulnerability were presumed to one permeated by fright, incertitude and anxiety. The United States, promptly joined by the global community, labeled the events of September 11 as an act of war. This designation elides Al Qaeda's criminal acts with (possibly legally justifiable) acts of war--an elision that may carry legally problematic consequences as will be discussed below.

Global response to the attacks was fast and virtually uniformly expressed as solidarity with and support for the United States. For example, NATO invoked Article 5 of its founding treaty, a mutual defense clause stating that an armed attack against any of the allied nations in Europe or North America shall be considered an attack against all of them. The day after the attack, many governments of the world expressed both shared aims with the United States and against terrorism. Thus, the Bush Administration began an effort to form a coalition against terrorism. This endeavor received overwhelming support, including the support from such surprising sources as Pakistan, Saudi Arabia, North Korea, Egypt and Kazakhstan. Moreover, states that had recognized the Taliban as Afghanistan's legitimate government quickly severed their ties, thus ending recognition. By the end of September, 2001, even the Chinese government, who was originally seriously concerned about sovereignty issues, expressed strong support for the U.S. war on terrorism, and even for limited military strikes. Such cooperation, however, did not come without a price. For example, in order to obtain Russia's support, the United States ceased its open condemnation of Russia's massive human rights violations in Chechnya, including its armed incursions into territory that sought to be independent, ostensibly subordinating human rights to security needs possibly in violation of the Article 4 of the ICCPR.

On September 18, 2001, the Bush Administration advised a joint session of Congress that Al Qaeda was responsible for the attacks. On October 7, 2001 the war against terrorism took a significant turn when U.S. military forces launched Operation Enduring Freedom. This operation consisted of U.S.-led air strikes with British participation in Kabul, Afghanistan, which targeted forces associated with Al Qaeda or with the Taliban leadership under Mullah Muhammad Omar.

Yet, while the popular narrative is that September 11 transfigured life as we knew it in the United States, the reaction to those events reflects historical patterns of targeting "others." Both the domestic and international responses by the United States are of questionable legality, but nonetheless are being pursued and imposed because the United States has the power to do so. For example, the domestic legal response to these heinous acts has been, and continues to be, to unconstitutionally target immigrants based on their sex, national, racial, religious, ethnic and even political identities--specifically Muslim men of Middle Eastern descent, designations that also are patently illegal under international law. Even if this war against terror could legitimately be considered a war, and it certainly can be considered a state of public emergency, such targeting is in breach of the standards of derogation. As the ICCPR makes clear, rights cannot be derogated from "solely on the grounds of race, colour, sex, language, religion or social origin." 

On January 11, 2002, the United States transferred the first group of captives from Afghanistan to the U.S. naval base in Guantánamo Bay, Cuba. The Pentagon described the complex evaluation process used to ascertain which captives are sent to Guantánamo Bay. First, U.S.-led coalition soldiers, based on available information of direct combat, detain those posing a threat to the United States and coalition forces. Next, captured individuals are sent to a central holding area, where a military screening team reviews available information, including interviews with detainees. The military screening team assesses whether the detainee should continue in detention, or...
be transferred to Guantánamo Bay. A general officer then makes a third assessment of enemy combatants who are recommended for transfer, including assessing "the threat posed by the detainee, his seniority within hostile forces, and possible intelligence that may be gained from detainee through questioning . . . ." [FN134] Once that determination is made, U.S. Department of Defense (DOD) officials review the proposed transfer. An internal review panel passes the information and evaluates the propriety of the transfer. Upon the detainee's arrival at Guantánamo Bay, there is a "very detailed and elaborate process for gauging the threat posed by each detainee to determine whether, notwithstanding his status as an enemy combatant, he can be released or transferred to the custody of a foreign government consistent with [U.S.] security interests." [FN135] Each case is reviewed by a team and assessed according to the threat posed to U.S. national security interests. Information revealed during questioning is constantly reviewed and analyzed to assess reliability. The U.S. Southern Commander, or his/her designee, makes a recommendation on each case based on the threat posed. The recommendations are sent to the Pentagon, where a panel of experts collects information and makes recommendations on release, transfer to foreign government or continued detention. These recommendations are sent to an interagency expert group composed of members of the DOD, Department of Justice, including the Federal Bureau of Investigations, the Central Intelligence Agency, the Department of State, the Department of Homeland Security and the National Security Staff. Once there, each expert votes on the recommendation and the entire package is sent to the Secretary of Defense or his/her designee for review. The decision then finally is made as to release, transfer or continued detention. [FN136]

Despite this process, the images are troubling. Pictures of the transferred Taliban-Al Qaeda captives in shackles, either hooded or wearing black-out goggles, in prison jumpsuits and sometimes brought to their knees, generated protests from around the world and from within the United States. Over two years later, the prisoners, at least three of whom were minors, remain in chain-link cages and are allowed only twenty minutes of activity three times a week. They are limited in their communication with each other and the outside world. Such treatment, either viewed separately or collectively, conceivably constitutes violations of international law.

*1039 Notwithstanding these conditions, the United States insists that the captives are well cared for and have their physical and spiritual needs met. Despite these official assertions and even allowing for the necessary accommodation of religious practice, some reports suggest that prisoners are forced to stand, hooded, with arms raised and chained to the ceiling, their feet shackled, unable to move for long periods and sometimes naked. [FN137] Over six hundred persons from forty-two states currently held in Guantánamo Bay are approaching their second anniversary in captivity, without any trial. [FN138] Many have been found to have no ties to terrorism, Al Qaeda or the Taliban.

A global source of contention was President Bush's unilateral announcement on the status of the prisoners. Ignoring established procedure, President Bush declared that the third Geneva Convention [FN139] would apply to the Taliban, but not to the Al Qaeda detainees. [FN140] The President declared that neither group would be granted prisoner of war status. [FN141] Instead, he unilaterally has labeled the captured as unlawful combatants--a term unknown in international law--lacking protected status in international law. He has kept the prisoners incarcerated in Guantánamo Bay, all the while denying them the procedural and substantive rights to which they are ostensibly entitled under international law pursuant to the Geneva Conventions and other human rights instruments. Having made these unilateral designations, the United States has failed to hold hearings to determine the legal status of the detainees as required by the third Geneva Convention. [FN142] It is precisely because of possible ambiguities
concerning the status of a person captured during armed conflict that Article 5 of the third Geneva Convention specifically provides that:

[s]hould any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal. [FN143]

Holding persons in Guantánamo Bay without clarification of their status as required by the Geneva Conventions, and without any reasoned explanation, weakens international humanitarian law. [FN144]

The United States, no longer very credibly after the Abu Ghraib photos, [FN145] promises to treat captives humanely as it flouts accepted international norms and ignores the global demands for the captives to be treated according to the Geneva Conventions, which are binding not only under conventional law but also as customary norms. While disregarding the law, the United States also unilaterally claims the power of the law--seemingly becoming the sole arbiter of which accepted norms it will follow and which it will discount. The United States has asserted that it is entitled to hold the detainees without trial, even after acquittal, until the end of the war against terrorism--the international standard applicable to enemy combatants captured during the course of a war.

Some already have questioned the legality--both procedural and substantive--of the Guantánamo Bay detentions. For example, the United Nations Working Group on Arbitrary Detentions concluded that the U.S. failure to have an international body ascertain the captives' status and grant them a fair trial, as provided for under the third Geneva Convention, signified that the captive's detention was arbitrary. [FN146] The Working Group also noted that even if a competent tribunal invalidated prisoner-of-war status for the detainees, the guarantees of the ICCPR, which would automatically become effective, would be violated. [FN147]

It is noteworthy that the Inter-American Commission on Human Rights (IACHR), an organ of the Organization of American States of which the United States is a member, requested by letter dated March 12, 2002 that the United States "take the urgent measures necessary to have the legal status of the detainees at Guantánamo Bay determined by a competent Tribunal." [FN148] The United States responded by claiming that "the legal status of the detainees is clear, that the IACHR does not have jurisdictional competence to apply international humanitarian law, that the precautionary measures are neither necessary nor appropriate in this case, and that the Commission lacks authority to request precautionary measures of the United States." [FN149] In reply, the IACHR reasserted its authority to request precautionary measures citing Article 5 of the third Geneva Convention [FN150] and Article XVIII of the American Declaration of the Rights and Duties of Man. [FN151] The IACHR claimed the right of:

*1042 human rights supervisory bodies such as this Commission [to] raise doubts concerning the status of persons detained in the course of an armed conflict, as it has in the present matter, and require that such a status be clarified to the extent that such clarification is essential to determine whether their human rights are being respected. In light of the principle of efficacy, it is not sufficient for a detaining power to simply assert its view as to the status of a detainee to the exclusion of any proper or effectual procedure for verifying that status. [FN152]
Until recently, legal challenges to the U.S. Guantánamo Bay detentions have been unsuccessful. In Rasul v. Bush, [FN153] two British, one Australian and twelve Kuwaiti nationals who were captured in Afghanistan challenged their Guantánamo Bay detentions in United States federal district court. [FN154] The District Court dismissed the detainees' petition for habeas corpus, ruling that foreigners held by the United States outside of its sovereign territory could not seek habeas relief in U.S. courts because U.S. courts lack jurisdiction in foreign territories. Commentators have already shown the incoherence of denying jurisdiction in territory that is clearly under U.S. control. [FN155] Moreover, using the Nuremberg Tribunal's recognition of jurisdiction to prescribe, adjudicate, and enforce based on legal occupation, the U.S. ostensibly legal (although contested) occupation of Guantánamo Bay should suffice for the federal courts to exercise their jurisdiction to adjudicate with respect to persons detained there. [FN156]

Some answers as to the legitimacy of the U.S. Guantánamo Bay detentions are now available, although short on detail. The United States Supreme Court heard the cases of Rasul v. Bush [FN157] and Al Odah v. United *1043 States, [FN158] specifically asking "whether the habeas statute confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty.'" [FN159] Distinguishing precedent, the Court decided that U.S. courts have jurisdiction to adjudicate the constitutional and statutory legality of the continued U.S. detention of persons in Guantánamo Bay. [FN160]

Significantly, because the legacy of Nuremberg confirms that what a state does on its own soil to its own citizens matters, it is only apt that the U.S. Supreme Court also decided the cases of Hamdi v. Rumsfeld, [FN161] and Rumsfeld v. Padilla. [FN162] Hamdi concerned a U.S. citizen captured on the battlefield in Afghanistan, labeled an enemy combatant and detained in Navy brigs first in Norfolk, Virginia and later in Charleston, South Carolina. [FN163] Padilla concerned the so-called "dirty bomber," a U.S. citizen arrested in Chicago after returning from a trip to Pakistan, on the allegation that he planned to detonate a dirty bomb in the United States. [FN164] Padilla was designated an enemy combatant and held at a Navy brig in Charleston, South Carolina. [FN165]

In Hamdi, the Court asked "whether the Executive has the authority to detain citizens who qualify as 'enemy combatants.'" [FN166] In its holding, the Court concluded "that although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker." [FN167] The Court rejected the government's contention that the enemy combatant status "justifie[d] holding *1044 him in the United States indefinitely--without formal charges or proceedings." [FN168] The Court formally noted that "[i]t is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad." [FN169] Thus, a citizen being held as an "enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." [FN170]

In Padilla, the Court only reached the question of whether petitioner had filed for habeas in the appropriate district. [FN171] Because it concluded that he had not, the Court did not reach the issue of whether the President had authority to detain him indefinitely. [FN172] In his dissent, Justice Stevens, joined by Justices Souter, Ginsburg and Breyer, would have found jurisdiction. The dissent noted that "this case is singular not only
because it calls into question decisions made by the Secretary himself, but also because those decisions have created a unique and unprecedented threat to the freedom of every American citizen." [FN173] Considering the Secretary a proper custodian for habeas purposes, the dissent found that the petitioner properly filed for relief in the Southern District of New York. [FN174] The dissenting justices acknowledged that reasonable jurists might differ on whether Padilla is entitled to immediate release; however, they recognized that there is "only one possible answer to the question whether he is entitled to a hearing on the justification for his detention." [FN175] The dissent compellingly observed:

At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber. Access to counsel for the purpose of protecting the citizen from official mistakes and mistreatment is the hallmark of due process. [FN176]

In response to the Rasul decision, on July 7, 2004, the DOD issued an order establishing a Combatant Status Review Tribunal (CSRT) to provide the Guantánamo Bay detainees with notice of the grounds for their detention and an opportunity to contest their status as enemy combatants. [FN177] To be sure, the Court ruled that federal courts had jurisdiction to hear challenges of the Guantánamo Bay detentions; however, the DOD, relying on Justice O'Connor's statements in Hamdi that the fairly informal military tribunal processes established under Army Regulation 190-8 may suffice to satisfy due process requirements, [FN178] established the CSRT with similarly lax standards.

All of these decisions can be viewed as confirming the rule of law's separation of powers, and thus a curb on unfettered Executive power unilaterally to deprive persons--citizens and noncitizens alike--of any semblance of due process. Thus, it is encouraging that the Supreme Court exercised oversight of the Executive in hearing these detention cases because it is plain that foreign courts feel they lack power to rule on these matters even where their own citizens are concerned. For example, in Britain, the family of a British national, Feroz Ali Abbasi, who was captured by U.S. forces in Afghanistan and was transported to Guantánamo Bay, initiated proceedings based on the claim that one of his fundamental human rights, the right not to be arbitrarily detained, was being violated. [FN179] At the time of his hearing, Abbasi had been a captive in Guantánamo Bay for eight months without access to an attorney, court hearing or any other form of tribunal. [FN180] Although the British court refused to decide whether the United States, a foreign sovereign, was in breach of treaty obligations or in breach of public international law, it concluded that "in apparent contravention of fundamental principles recognized by both jurisdictions and by international law, Abbasi is at present arbitrarily detained in a 'legal black-hole.'" [FN181] Interestingly, since that decision, President Bush, in behind-the-scenes conversations with his British and Australian partners in Operation Iraqi Freedom, has apparently agreed that neither British nor Australian citizens incarcerated in Guantánamo Bay will be subject to imposition of the death penalty. [FN182]

Similarly dissatisfied with U.S. processes are Swedish authorities who have expressed to the United States their belief that Mehdi Ghezali, the only Swedish prisoner held in Guantánamo Bay, had no involvement with illegal behavior before his arrest. Notwithstanding the U.S. agreement with Sweden regarding Ghezali's activity, it refuses to release him for failure to cooperate with authorities. [FN183]
In a March 15, 2004 press release, the U.S. Department of Defense (DOD) announced it had transferred twenty-three Afghani and three Pakistani detainees from Guantánamo Bay for release. [FN184] A week earlier, on March 9, 2004, the DOD had announced that it transferred five British detainees from Guantánamo Bay to the British government. [FN185] The British government had agreed to accept the transfer of the detainees and take responsibility that they do not pose a threat to the security of the United States or its allies. Currently, 119 detainees have been released and 12 others transferred for continued detention (four to the Saudi Arabian government, one to the Spanish government, seven to the Russian government). As of March 15, 2004, there remain approximately 610 detainees in Guantánamo Bay. [FN186]

The freed British detainees have charged that they suffered inhumane treatment at the hands of their captors, including beatings and interrogations at gunpoint and other degrading treatments. The detainees claimed that after their capture they were taken to a detention center in Kandahar where "they were forced to kneel bent forwards for hours with their foreheads touching the ground." [FN187] Moreover, they leveled claims of guards kicking and punching detainees, and further alleged many captives were suffocated as a result of having been forced into lorry containers. Further, former detainees described instances of botched medical treatment, psychological torture and unreasonable confinement, such as being shackled for up to fifteen hours with the restraints cutting into their skin.

*1048 In addition, released detainees complained of the condition of detention--wire cages open to the elements in which the captives claimed that they were exposed to "rats, snakes and scorpions." [FN188] They further alleged that the diet provided consisted of "porridge and fruit," some of which was out of date for up to ten years, which resulted in malnourishment. [FN189] Finally, they raised claims of "U.S. soldiers bringing in prostitutes and parading them naked in front of Muslim prisoners." [FN190] The Pentagon dismisses the charges as "lies" and insists that all detainees are being, and will continue to be, treated humanely. [FN191] These dismissals post-Abu Ghraib and in light of the Gonzales memo on torture [FN192] are not, on their face, fully credible.

On November 13, 2001, President Bush, as Commander-in-Chief, issued a Military Order (Order) that created Military Commissions to try foreign nationals "for violations of the laws of war and other applicable laws" related to acts of international terrorism. [FN193] The Order applies to acts that have "adverse effects on the United States, its citizens, national security, foreign policy, or economy." [FN194] The Order imposes no time limit, and it originally contemplated that "the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts" would not apply. [FN195]

*1049 One prominent commentator has noted that "[i]n its present form and without appropriate congressional intervention, the Order will create military commissions that involve unavoidable violations of international law and raise serious constitutional challenges." [FN196] The President's power as Commander-in-Chief to set up such commissions is only applicable during "war within a war zone or relevant occupied territory [here, Afghanistan] and apparently ends when peace is finalized." [FN197] "However, outside of the occupied territory [of Afghanistan], . . . military commissions can only be constituted in an actual war zone and can only prosecute war crimes." [FN198] The Guantánamo Bay Naval Base in Cuba is neither a war zone nor occupied territory.

The Order, which provides only for review by a military panel and thereafter only by the President or Secretary of State, does not comport with the right of review as articulated
in the ICCPR that "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law." [FN199] Rejecting criticism from around the globe for noncompliance with international substantive and procedural requirements, it is the position of the United States, that "[t]he law of armed conflict makes no provision for judicial review of the detention of enemy combatants who are detained during hostilities solely to take them out of the fight." [FN200]

On a positive note, the criticisms have resulted in some changes to the procedures as originally contemplated. In July 2003, an international law scholar commented that the military tribunal process "take full account of modern standards of international humanitarian and human rights law." [FN201] This view, however, is not universally embraced; rather, it is highly contested.

To be sure, the rules now require a unanimous verdict by a seven-member panel for the death penalty, provide that a suspect is presumed innocent, require guilt to be established by proof beyond a reasonable doubt, allow the accused to have military lawyers at government expense or to hire their own civilian lawyers at their own expense and allow the *1050 press to cover most proceedings. [FN202] Nonetheless, questions still exist as to the Military Commissions' conformance with international and domestic substantive and procedural justice requirements. [FN203] For example, the applicable rules of evidence for military tribunals are less onerous than for either civilian trials or military courts-martial, where strict rules apply. Specifically, the Military Commissions allow evidence that "would have probative value to a reasonable person," thereby applying a much weaker standard. [FN204]

Except for death penalty cases, a finding of guilt can be established by the concurrence of two-thirds of the Military Commission panel, which is comprised of "at least three but no more than seven members." [FN205] This procedural standard follows the two-thirds vote requirement in noncapital cases and unanimous vote requirement in courts-martial, but the composition of courts-martial for "serious offenses"--arguably a description of all the offenses triable by the Military Commissions--require at least five military members. On the other hand, the Military Commissions' requirements are weaker than those in civilian federal courts, in which the jury is composed of twelve members of the community drawn at random and in which a unanimous decision is required to convict in all cases, including capital cases.

Other troubling aspects of the Military Commission trial structure persist. For instance, Military Commission Order No. 3 allows the monitoring*1051 of communications between detainees and their counsel "for security or intelligence purposes," [FN206] although supposedly the information could "not be used in proceedings against the individual who made or received the relevant communication." [FN207] In some cases, captives and their civilian lawyers may be denied access to evidence used in trial. Further, counsel may also be required to reveal information learned from clients concerning further criminal activity.

In addition, the reconfigured rules still do not provide any process for independent appeals, continue to deny habeas review and keep the entire process within the military. [FN208] Following the panel's delivery of a verdict and imposition of a sentence, the Appointing Authority conducts an administrative review of the record and may return the case to the Military Commission. [FN209] Thereafter, a three-member review panel of military officers, which may include civilians commissioned for such purposes, reviews the record for "material error of law." If such error exists, the case is sent to the Appointing Authority for further proceeding; if no material error of law exists, the review panel forwards the case to the Secretary of Defense with a recommendation as to disposition. In turn, the Secretary of Defense reviews the trial record and the panel's
recommendation and either returns the case for further proceedings or, absent a presidential designation granting the Secretary of Defense final decision-making powers, forwards the case to the President for his review and final decision. The final decision-maker--either the President or the Secretary of Defense as his designee--"may approve or disapprove findings, or change a finding of Guilty to a finding of Guilty to a lesser-included offense, or mitigate, commute, defer, or suspend the sentence imposed or any portion thereof." [FN210] It is significant to highlight that these Military Commission procedures fail to provide the safeguards of appeals that are available in courts-martial, which provide for an appeal to the Military Court of Criminal Appeals or the Court of Appeals for Armed Forces and then possibly the U.S. Supreme Court. [FN211]

With these rules in place, it appears that some captives will finally be brought to trial by the Military Commissions. On July 7, 2004, the DOD announced that the President determined that nine more enemy combatants would be subject to his November 13, 2001 military order, bringing the total to fifteen detainees eligible for trial by military tribunal. [FN212] On July 3, 2003, six detainees were determined to be subject to the military order. [FN213] Of the original six, charges were brought against only two of them. [FN214]

Unlike the limited definition of war crimes that existed at Nuremberg, the concept of crimes of war has expanded. The U.S. DOD Military Commission Instruction No. 2, a document created in April, 2003 to provide guidance with regard to the offenses (and the elements thereof) for which the detainees may be charged, lists eighteen offenses under a category titled "Substantive Offenses," which includes many of the crimes included in the Tribunal Charter [FN215] as well as in the ICTY, [FN216] ICTR [FN217] and ICC [FN218] statutes. Specifically, Instruction No. 2 lists the following as war crimes: willful killing of protected persons, attacking civilians, attacking civilian objects, attacking protected property, pillaging, denying quarter, taking hostages, employing poison or analogous weapons, using protected persons as shields, using protected property as shields, torture, causing serious injury, mutilation or maiming, use of treachery or perfidy, improper use of flag of truce, improper use of protective emblems, degrading treatment of a dead body and rape. [FN219] Moreover, Instruction No. 2 lists eight additional substantive offenses which are triable by the military commissions: highjacking or hazarding a vessel or aircraft, terrorism, murder by an unprivileged belligerent, destruction of property by an unprivileged, aiding the enemy, spying, perjury or false statement, and obstruction of justice related to military commissions. [FN220] Further, Instruction No. 2 lists seven offenses for which an individual may be held criminally liable, which include aiding and abetting, solicitation, command/superior responsibility--perpetrating, command/superior responsibility--misprison, accessory after the fact, conspiracy and attempt. [FN221]

Neither of the first--the only two--charged Guantánamo Bay detainees is charged with genocide or crimes against humanity. Rather, their charges are that they conspired and agreed to commit the following offenses: attacking civilians and attacking civilian objects--actions not identified as war crimes, perhaps to avoid the necessity of having the Military Commission decide on the applicability of the Geneva Conventions; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism. [FN222]

Moreover, the detainees may claim prisoner-of-war (POW) status that would entitle them to the protections of the Geneva Conventions. This is important in light of trial by Military Commission because Article 102 of the third Geneva Convention provides that POWs can only be sentenced by the same courts and using the same procedures as would be the case for members of the armed forces of the detaining authority, which in this case is the United States. [FN223] Significantly, as explained above, the Military
Commissions for foreigners do not provide the same safeguards that courts-martial would provide U.S. soldiers. POW designation is limited, however, to members of militias and other corps in the service of a state party to the conflict. Someone not in the service of a state party to the conflict must be commanded by someone responsible for subordinates, have distinctive signage, carry arms, and behave according to laws and customs of war. Al Qaeda members may not be able to qualify for such status absent some connection to a state, which, in this instance, is likely to be Afghanistan.

It is also noteworthy that on March 2, 2004, the Secretary of Defense published a draft of "Administrative Review Procedures for Enemy Combatants in the Custody of the Department of Defense at Guantánamo Bay Naval Base, Cuba." [FN224] These rules, it appears, are aimed at diffusing the strong criticism against the United States for holding detainees indefinitely without process. Establishing such rules reiterates the U.S. position that "[t]he law of war permits the detention of enemy combatants until the end of an armed conflict" [FN225]—a period that could be an indeterminate, if not interminable period, particularly in this context in which the enemy is elusive and the "war on terror" defies state boundaries and state actions. Lastly, the draft dictates that the process is wholly discretionary. Accordingly, a review board is established:

[To] reassess the need to continue to detain an enemy combatant at least annually during the course of hostilities. This process will operate in a manner that permits each enemy combatant in the custody of the Department of Defense at the Guantánamo Bay Naval Base to explain why he is no longer a threat to the United States and its allies in the ongoing armed conflict against al Qaeda and its affiliates and supporters or to explain why it is otherwise in the interest of the United States and its allies that he be released. [FN226]

*1055 VI. Conclusion: Power, the Rule of Law and Globalized Citizenship

In reviewing the September 11 attacks, and the ensuing war on terror, in the context of human rights, some staggering similarities between the (dismissed) objections to the Nuremberg International Military Tribunal and its Charter by Germany, on the one hand, and to the U.S. post-9/11 processes by the global community, on the other, emerge. The discussion of these similarities is intended not to undermine Nuremberg's legacy, but to acknowledge the elision of politics and law that took place and to suggest that centering globalized citizenship in the analysis would be of great utility to both individuals and the world community interested in its emancipatory potential. At the outset, one important distinction is warranted: sovereign power, whether exercised singularly or collectively, is justified to deliver security, safety, and a good life to people. Notwithstanding the reality that Nuremberg represented the exercise of power by the victors, that exercise was consistent with the underlying purposes of sovereignty. Its aim was to unite persons against the horrible acts that were committed and it served to strengthen international institutions. The U.S. Guantánamo Bay strategy, on the other hand, is polarizing and divisive of international affairs and the proposed Guantánamo Bay structure weakens international institutions of peace and justice. The U.S.-led coalition, in pursuing a military response to 9/11, where the enemy is a "globalized [terror] network rather than a territorial state, or even a political movement associated with a struggle for control or secession affecting a single state," [FN227] has elected not to prioritize the development of international law and United Nations institutional arrangements and not to emphasize the importance, desirability and necessity of building bridges between its global economic and political interests and goals of justice. [FN228]

In both the post-Second World War and the post-9/11 series of events, a victor's justice was imposed on the captives. For Germany, there was no precedent to piercing its sovereignty. With Al Qaeda and the Taliban, there was no sovereignty to pierce. But the
labeling of the post-9/11 events as a war on terror has created a patina of official action and has given nonstate actors a quasi-sovereign status—potentially with legal consequences and legitimizing effects. [FN229]

*1056 In Nuremberg, the Tribunal Charter created and defined the crimes after the fact. [FN230] The Court rationalized its judgment on these "new" crimes as legitimate because it concluded that the crimes had previously existed in some form. Similarly, the post-9/11 process has created a new crime by redefining the concept of war. Just as in Nuremberg, there were new crimes for which not only states, but also individuals would be held accountable—now we have a concept of war in which private persons, not state actors, can be responsible. As unlawful combatants, the captured are indeed in a legal black hole with the rule of power creating a new status in law.

The Military Order unilaterally decreed by President Bush is much like the Tribunal Charter, unilaterally drafted by the Allied powers. The Germans decried the Tribunal Charter—its law and process—claiming it violated the rule of law; [FN231] but as the defeated entity, it was without power to ignore or fend off the imposed system of justice. In a perverse twist, the global community, including the IACHR, a body charged with promoting and monitoring human rights, today decries the U.S. failure to follow the rule of law, but the United States possesses the power to ignore the norms to which it has consented. In this context, it is encouraging that the separation of powers and rule of law doctrines were resoundingly embraced by the Supreme Court in its recent Rasul decision. With this Supreme Court precedent as reinforcement, the globalized citizenship ideal, using both procedural challenges and substantive identity corrections, provides international objectors a location in which to unite their voices and create a network that seeks justice for the captives.

There is an ongoing concern that the trials will not be fair and that the U.S. Military Commission alternative will fail to satisfy international standards. The procedures crafted lack transparency and the exclusive military-dominated nature of the process undermines the U.S. commitment to civil liberties and the rule of law. In this regard, it is noteworthy that Pentagon officials have announced that representatives of human rights advocacy groups will not be able to witness the Military Commission trials at Guantánamo Bay, while more than eighty members of the U.S. and foreign press, as well as representatives of the ICRC, will have seats. [FN232] Consideration whether to grant seats to human rights organizations went beyond seating availability, including problems of security and limited housing and food. Nonetheless, "there would probably be arrangements for some members of Congress to attend the trials and perhaps for officials of organizations that represent victims of the Sept. 11 terrorist attacks." *1057 [FN233] This move works against those who would be inclined to use the globalized citizenship model to insist on justice.

As a highly regarded human rights scholar has urged

We must respond to the September 11 tragedy in the spirit of the laws: seeking justice, not vengeance; applying principle, not merely power. We must respond according to the values embodied in our domestic and international commitments to human rights and the rule of law. If we are at war, that war will affect our children's future, and that future—I submit—is far too important for us, as lawyers, to leave to the politicians and the generals. [FN234]

The question ultimately becomes: how can the captives in Guantánamo Bay benefit from a globalized citizenship model, grounded on human rights principles that refocus the human rights discourse to include the marginalized, the disempowered and the subaltern? A globalized citizenship model would focus on the marginalized and the disempowered, and would lead to more coherent and just results.
In the post-9/11 world, centering the marginalized would take two approaches. One, it would emphasize the ways in which the physical conditions and unilaterally established legal processes are depriving the captives of their ability to claim or enjoy their human rights. In the case of Afghan captives, it is especially critical as they effectively lack a government that can present their claims. Two, it would coordinate the efforts of others also marginalized, such as the global communities--states, nongovernmental organizations (NGOs), intergovernmental organizations (IGOs)--that condemn the United States' disregard of the rule of law.

Even if this were truly war, the United States cannot derogate from certain rights. For example, the imposition of the death penalty would deprive some of the Guantánamo Bay captives of their right to life, some conditions of their captivity could be deemed torturous and the monitoring of their communications with the family and counsel could be a violation of freedom of thought. A globalized citizenship model would draw together persons inside and outside Guantánamo Bay to clamor for the observance of the rights we all share, but which those in Guantánamo Bay are powerless to express.

The global citizenship idea can help with Guantánamo Bay because its foundational principle is one of a deterritorialized, relational, identity-based citizenship for individuals. That perspective allows for the formation of a global network of states, nongovernmental organizations (NGOs) and intergovernmental organizations (IGOs) that could unite to assist the captives in asserting their rights. The value of such a coalition is clear in events that have already transpired with respect to some Guantánamo Bay captives. For example, both Britain and Australia have apparently secured President Bush's agreement not to impose the death penalty in the military tribunals of their nationals, thereby assuring their right to life.

Also, the Center for Constitutional Rights (CCR) has brought the Rasul case before the U.S. Supreme Court. Although this type of case is not one that the CCR would typically litigate, the CCR clearly articulated its reasoning for filing the suit. First, "[t]he center's role is to take risks, legal and political risks, that other institutions are unwilling to take. . . . The Guantánamo Bay case was a high risk." Second, and perhaps of more importance, "the detention case involved a policy that, if left unchecked, . . . could undermine the core mission and traditional work of the CCR itself." Human Rights Watch (HRW) has similarly served as a protector of rights. Responding to the U.S. intent to engage in extreme measures when interrogating some of the detainees, HRW called upon the Bush Administration to "immediately explain who reviewed and approved a high-level classified Pentagon memorandum that sought to justify the use of torture." The HRW also has repeatedly called upon the United States to make public the results of their investigations into allegations of abuse in Afghanistan and into the deaths of three detainees--two Afghan detainees who died while in U.S. custody in 2002 and another who died in 2003.

*1058 Also noteworthy in the globalized citizenship paradigm are the efforts of the International Committee of the Red Cross (ICRC). Among its many functions, the ICRC "regularly assess[es] the conditions of detention, the treatment of detainees and respect of their fundamental judicial guarantees." Thereafter, reports of their assessments are provided to the state involved. As was learned from the Abu Ghraib situation, the ICRC's knowledge is often greater than that of the general public, although obviously the responsibility to treat the detainees in accordance with "international humanitarian law" standards remains solely the responsibility of the United States. In its Operational Update, dated May 14, 2004, the ICRC noted that it has visited detainees in Guantánamo Bay for over two years and helped detainees relay messages to and from family members--a service that is of significant importance to the
mental well-being of many of the detainees. [FN244] The ICRC's knowledge base can provide incentives for a state to observe accepted norms and bring much needed public attention to alleged violations.

To be sure, the response of organizations concerned with the treatment of Guantánamo Bay detainees, particularly significant in light of the recent allegations of abuse and torture of the prisoners held in Abu Ghraib which has lent new credence to the claims of similar types of treatment in Guantánamo Bay, has been swift. For example, in January of 2004, a new organization was created, Guantánamo Human Rights Commission (GHRC), the stated purpose of which is to "achieve an end to all *1060 forms of the internment without trial." [FN245] In an effort to achieve its goal, the organization, with the assistance of the American Civil Liberties Union, the CCR and the National Council of Churches, has taken steps to enable the families of European detainees to go to Washington. [FN246] In addition, GHRC has worked with the relatives of some detainees to petition for the investigation of reports of torture and "demand the immediate repatriation of the remaining four British citizens." [FN247]

Thus, as global networks coalesce around issues of justice to demand that internationally accepted processes be followed and that human rights be recognized, individuals deprived of these rights will derive the benefits of their global citizenship. For example, the IACHR demanded that their process be followed, the CCR brought about the Rasul decision and the ICRC used its access to the conditions in prison to create records. These actions constitute the first steps in an application of the globalized citizenship model that can result in the emancipation of Guantánamo Bay captives who find themselves in an asymmetric encounter with a dominant national culture.

A response to human rights violations, specifically the U.S. response to the heinous acts of September 11, is not only irresponsible but simply wrong if it serves to dehumanize others and to enable the commission of other crimes. The investigation and punishment of human rights violations, such as those of Al Qaeda, should be in the hands of an international coalition that will serve to bring the perpetrators to justice and avoid later crimes. It is true that during war, the courts that serve as the checks on abuses of power of the political branches tend to defer to the political branches on national security matters. It is this very reality, which militates against allowing a process that is unfair or unjust, that suggests it is of paramount importance to invoke an international, coalitional process.

To engage in warfare against sovereign states without a widely accepted basis in law and necessity would be profoundly destructive of prospects for a peaceful and stable world. It would also confirm the fears of many governments, including traditional friends and allies, and of a large segment of world public opinion, that our government acts on its own, that it has a militarist approach to global security, and that its wider project is to achieve global dominance. [FN248]

*1061 As James Madison stated in The Federalist No. 51, "[i]n framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." [FN249] This Madisonian paradox of power holds that "organized power is necessary to protect the liberty of citizens from the predations of their fellow citizens or others; but organized power itself poses dangers to liberty." [FN250]

In their recent elections, Spanish citizens demonstrated that democracy indeed works. The Spanish people opposed their leader's involvement in what they viewed as an illegal and illegitimate war, tenuously and disingenuously linked to 9/11, which exposed them to their own 3/11 Al Qaeda terrorist attack. They used their collective individual power to change the direction of their country's policies. They showed how globalized citizenship
can work in a local setting. This example, if followed across the globe, would have the salutary effect of the practice of globalized citizenship. The Spanish people's assertion of democracy as a tool of liberation provides a moving example of how global discontent with the war can unite citizens across the globe, opposed to the nebulous war on terror while still condemning terrorism, to ensure that terrorism is fought by means that respect and promote human rights.

Terrorist acts violate human rights, but the fight against terrorism should not engender human rights violations or violations of the international rule of law. Thus, the globalized citizenship idea could be of great utility in Guantánamo Bay in both a programmatic and an instrumental way. Programmatically, it would permit powerful countries to negotiate on behalf of the persons being held based on shared concerns for the rights violations that they are experiencing, whether based on religion, race or political belief. The current situation limits those powerful countries to negotiate only for their citizens. For example, we have seen Britain's and Australia's successes in negotiating on behalf of their citizens—both in regard to punishment to which their citizens may be subject and concerning their release. Relations based on traits other than territorial bonds could enable other captives to obtain guarantees of their right to life and perhaps even liberty.

Instrumentally, it can be used to form coalitions against injustice. If we are all global citizens, anyone seeking real justice for 9/11 (and 3/11), including those within U.S. borders, can join together to advocate on behalf of the persons being held in Guantánamo Bay. One of the ongoing themes that continues to resonate throughout this war is that if someone questions anything that the administration says or does, then that person is unpatriotic or, even worse, a traitor and a supporter of terrorists and terrorism. That is simply not true; it is only inflammatory rhetoric by the hegemon to instill fear and quash dissent. Rather than resort to such rhetorical tropes, a globalized citizenry can insist on free and open discourse, conversations and actions that are central to a claim of justice.

The treatment of the Guantánamo Bay prisoners is a matter of international, local and human concern. All who strive for justice and equality should demand adherence to the rule of law. Citizens around the world, regardless of territorial allegiances, share their humanity. They can use their voices locally, as the citizens of Spain did, in an impressive show of democratic spirit to demand adherence to the rule of law. Global citizens also can use their collective voices globally to demand similar accountability.

Globalized citizenship also could be instrumental in counterbalancing the U.S. hegemonic control of right and wrong, good and evil. Globalized citizenship as an analytical model deconstructs the U.S. view of the world as "you are either with us or you are against us"—a view that "exaggerates our goodness and our enemies' evil." [FN251] It challenges the U.S. attempt "to recast the world in our image, 'propagating democracy' and imposing our values and institutions on the third world" because the "we" becomes a different "we"—it becomes the globalized citizen, the citizens of the world. [FN252]

Footnotes:

[FNa1]. Levin, Mabie & Levin Professor of Law, University of Florida Levin College of Law. I wish to thank Claire Moore Dickerson, Jane Larson, Pedro Malavet, Bill Page and Sharon Rush for their comments on earlier drafts. I also need to recognize invaluable editorial assistance from Elizabeth M. Crowder (UF Law 2004) and Shelbi Day (UF Law 2002). Finally, mil gracias to Cindy Zimmerman for her editorial and word processing genius.

[FN1]. Specifically, the conceptualizations of the limits of sovereignty are that no state (first conceptualization) or individual (second conceptualization) can affirmatively harm a
citizen.


[FN3]. International Military Tribunal (Nuremberg), Judgment and Sentences: Judgment, October 1, 1946, 41 Am. J. Int'l L. 172 (1947) [hereinafter International Military Tribunal (Nuremberg)].


[FN5]. Id. art. 1, para. 3 (explaining purpose and function of Charter).


[FN13]. Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027, modified, 24 I.L.M. 535 (entered into force June 20, 1987) (recognizing that certain types of torture and other cruel, inhumane or degrading treatment or punishment are considered human rights violations).


[FN15]. See, e.g., ICCPR, supra note 9, art. 1 (self-determination); id. art. 2 (nondiscrimination); id. art. 3 (sex equality); id. art. 6(1) (life); id. art. 7 (freedom from torture, cruel, inhumane treatment or punishment); id. art. 8 (freedom from slavery,
servitude, forced or compulsory labor); id. art. 19 (freedom of opinion and expression); id. art. 21 (freedom of assembly); id. art. 22 (free association).

[FN16]. See, e.g., id. art. 9 (due process rights); id. art. 12 (freedom of movement); id. art. 23 (family and marriage); id. art. 10 (personhood); id. art. 18 (freedom of thought, conscience and religion); id. art. 25 (participation in government); id. art. 27 (protection of culture).

[FN17]. See, e.g., ICESCR, supra note 10, art. 7(a) (fair wages); id. art. 7(b) (safe and healthy working conditions); id. art. 8 (form trade unions); id. art. 9 (receive social security); id. art. 11 (adequate standard of living); id. art. 12 (enjoy physical and mental health); id. art. 13 (receive education); id. art. 15(1) (participation in cultural life).

[FN18]. ICCPR, supra note 9, Pmbl.


[FN22]. See ICCPR, supra note 9, art. 4(1).
[FN23]. Id. art. 4(2).

[FN24]. Id. (referring to articles 6, 7, 8(1), 8(2), 11, 15, 16 and 18).


[FN29]. See Tribunal Charter, supra note 26, art. 6(a) (“namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing”).

[FN30]. See id. art. 6(b). This article states: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity[.]

[FN31]. See id. art. 6(c). Article 6(c) states: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated[.]


[FN34]. Id. art. 1 ("There shall be established after consultation with the Control Council for Germany an International Military Tribunal for the trial of war criminals whose offenses have no particular geographical location whether they be accused individually or in their capacity as members of the organizations or groups or in both capacities."); id. art. 2 ("The constitution, jurisdiction and functions of the International Military Tribunal shall be those set in the Charter annexed to this Agreement, which Charter shall form an integral part of this Agreement."); see also Tribunal Charter, supra note 26, art. 6 ("The Tribunal established by the Agreement ... for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations ....").

[FN35]. See Tribunal Charter, supra note 26, passim.

[FN36]. See id. art. 2 ("The Tribunal shall consist of four members, each with an alternate. One member and one alternate shall be appointed by each of the Signatories.").

[FN37]. See id. art. 6. Article 6 states:
The Tribunal ... shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility .... Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.
Id.; see also id. art. 7 ("The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."); id. art. 8 ("The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.").

[FN38]. See id. art. 6(a). For a list of those crimes, see supra note 30 and accompanying text.

[FN39]. See Tribunal Charter, supra note 26, art. 6(c). For a discussion of the Geneva Conventions, see supra note 32 and accompanying text.

[FN40]. For the language of that requirement, see supra note 31 and accompanying text.

[FN41]. See Tribunal Charter, supra note 26, art. 6. For further discussion, see supra notes 30-32, 38 and accompanying text.

[FN42]. See Tribunal Charter, supra note 26, art. 7. For a discussion of the individual responsibility aspects, see supra note 37 and accompanying text.
See Tribunal Charter, supra note 26, art. 8. For further discussion, see supra note 38 and accompanying text.

[FN44]. ICCPR, supra note 9, art. 15(1).

[FN45]. See International Military Tribunal (Nuremberg), supra note 3, at 217 (citing Tribunal Charter, supra note 26).

[FN46]. See id. at 224.

[FN47]. See id.

[FN48]. See id.


[FN50]. See International Military Tribunal (Nuremberg), supra note 3, at 216 (citing Tribunal Charter, supra note 26).

[FN51]. Id.

[FN52]. Id. at 216-17.

[FN53]. See id. at 216 (noting view of Tribunal Charter in Nuremberg Tribunal).

[FN54]. See id. at 217 (discussing Pact which "condemned recourse to war for the future as an instrument of policy" and noting implications of signing Kellogg-Briand Pact).

[FN55]. See id. at 218 (describing war as illegal in international law with criminal consequences).

[FN56]. See id. (asserting war "has become throughout the entire world ... an illegal thing" because of Kellogg-Briand Pact; quoting Mr. Henry L. Stimson, Secretary of State of United States).


[FN58]. See id. (citing Hague Convention, supra note 27).

[FN59]. See id. (explaining that certain methods of warfare had been outlawed as early as 1907).

[FN60]. See id. (citing Hague Convention, supra note 27).

[FN61]. See id. at 218-19 (stating Tribunal's conclusion).

[FN62]. See id. at 219 ("The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition ..."); see also Statute of the International Court of Justice, June 26, 1945, art. 38 § 1(b), 59 Stat. 1055, 1060, 3 Bevans 1179, 1187 (listing "international custom" as source of law Court "shall apply").

[FN64]. Id. at 248-49.


[FN66]. See id. at 220 ("That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized.").

[FN67]. Id. at 221.

[FN68]. See id. (stating international duties of individuals and loss of protection behind official position).


[FN71]. Id. The authors note the danger of a "'theory of citizenship' that focuses on the identity and conduct of individual citizens, including their responsibilities, loyalties, and roles .... [The danger] arises because there are two different concepts which are sometimes conflated in these discussions ...." Id.


[FN74]. See Jürgen Habermas, Citizenship and National Identity, in The Condition of Citizenship 20, 22 (Bart van Steenbergen ed., 1994) (discussing Roman usage of term "nation" for "communities of people of the same descent").

[FN75]. Paul Hirst & David Held, Globalisation: The Argument of Our Time, Open Democracy, Jan. 22, 2002, § 8, at http://www.globalenvision.org/library/8/528/6 (observing "[m]odern democracy developed in sovereign territorial states that had made a huge effort to homogenise their populations, to create national languages, common traditions and shared institutions").

See Ann Phillips, Democracy and Difference 77 (1993) (commenting on possible indifference to citizenship). "One disadvantaged group after another fought lengthy battles to be included on the list [of citizens], only to find that social justice and equality still eluded them." Id.

See id. at 77-78 (discussing citizenship as "fundamentally a political category").

See Human Rights, supra note 21, at 24-26 (providing United States Bill of Rights in full); id. at 25-27 (providing France's Declaration of the Rights of Man and the Citizen in full).

See Phillips, supra note 77, at 78 (noting implications of class inequalities).

Dahrendorf, supra note 76, at 17.

See Mary G. Dietz, Context Is All: Feminism and Theories of Citizenship, Daedalus, Fall, 1, 5 (1987). Dietz explains:
What citizenship comes to mean in this liberal guise is something like equal membership in an economic and social sphere, more or less regulated by government and more or less dedicated to the assumption that the 'market maketh man'. [U]nder liberalism, citizenship becomes less a collective, political activity than an individual, economic activity--the right to pursue one's interests, without hindrance, in the market-place. Id. at 5; The Condition of Citizenship: An Introduction, in The Condition of Citizenship, supra note 74, at 1-2 [hereinafter Introduction to Condition] ("[T]he concept of citizenship seems to integrate the demands of justice and community membership.... Citizenship is intimately linked with ideas of individual entitlement on the one hand and attachment to a particular community on the other.").

See Introduction to Condition, supra note 82, at 1-2 (noting Marshall's definition of ideal of citizenship and discussing shift in focus of citizenship from state to individual).

Marshall, supra note 72, at 79.


See id. (describing how "citizen pilgrim rejects premises of materialism and believes that a sustainable community can only result from a combination of secular and spiritual energies").

See David Held, Violence and Justice in a Global Age, Open Democracy, Sept. 14,

[FN89]. See Hirst & Held, supra note 75, § 2 (contending "[a] reconfiguration of political power is taking place as significant as the changes in the underlying world economy").

[FN90]. See id. § 3 (noting reasons for unease of world-wide globalization protest movement).

[FN91]. Id.

[FN92]. Id. § 5 (setting out program for international collaboration).


[FN94]. Id.

[FN95]. See id. (naming other examples of growing aspirations for international law and justice to include: changes to law of war, entrenchment of human rights, emergence of international environmental regimes and International Criminal Court); Hirst & Held, supra note 75, § 8 (positing that international law should be balanced to economic globalization).


[FN97]. Hirst & Held, supra note 75, § 7 (offering "cosmopolitan democracy" as solution to democratic legitimacy in globalized world).


[FN99]. Hirst & Held, supra note 75, § 8 (noting that "the project of managing globalisation by strengthening the democratic basis of states, while important, is insufficient").

[FN100]. Id.

[FN101]. See id. (noting modern states' propensity to homogenize through culture, language and traditions).

[FN102]. Id.


[FN104]. Id.

[FN105]. Id. at 25.

Perspective for International Commerce, in Moral Imperialism, supra note 69, at 151 (discussing how norm of indifference facilitates human rights abuses).

[FN107]. See id. (discussing impact of supranational organizations and multinational enterprises on commercial and labor activity of repressed states); Sassen, supra note 69, at 135 (arguing economic globalization directly affects formation of rights associated with citizenship).

[FN108]. See Boaventura de Sousa Santos, Toward a New Common Sense: Law, Globalization and Emancipation 62-63 (2d ed. 2003) (discussing affect of social and political conditions on pragmatic transition); see also Fernández-Kelly, supra note 69, at 338 (noting lack of opportunity among minority groups despite increased strength of globalized economy); Sassen, supra note 69, at 139-40 (discussing effect of global market on states' social and economic policies).


[FN110]. Dietz, supra note 82, at 2 (citations omitted).

[FN111]. See Maria Lugones, Pilgrimates/Peregrinajes 210 (2003) (discussing fiction of individual agency).


[FN113]. See Richard Falk, Predatory Globalization: A Critique 50-51 (1999) (arguing dynamics of globalization subordinating states role to global markets); Introduction: Why Citizenship Constitutes a Theoretical Problem in the Last Decade of the Twentieth Century, in Theorizing Citizenship, supra note 85, at 1, 20 n.2 [hereinafter Introduction to Why Citizenship] ("[T]he Western liberal commitment to the primacy of universal markets over national borders necessarily undermines the claims of citizenship in the formation of economic policy."); Rajagopal, supra note 20 (noting relationship between resistance in international law and state); Sassen, supra note 69, at 141 (questioning whether power of global capital markets is threat to democratic electoral system and political accountability); Held, Violence and Justice, supra note 88, at 1.

[FN114]. See Introduction to Why Citizenship, supra note 113, at 20 n.2 (discussing modern developments relating to break down between national identity and citizenship); see also Dietz, supra note 82, at 2 ("[T]here is the notion that human beings are atomistic, rational agents whose existence and interests are ontologically prior to society.").

[FN115]. See Sassen, supra note 69, at 137-38 (discussing power and influence of private investors on social norms and citizenship).

[FN116]. See Fernández-Kelly, supra note 69.

[FN118]. See id. at 19.


[FN123]. See Falk, supra note 86, at 23 ("Regional citizenship is both competitive with and complementary to Westphalian citizenship. It is competitive in the fundamental sense of challenging the unitary and primary ideal of citizenship associated with the juridical/political construct of the nation-state, the backbone of the modern system of world order.").

[FN124]. See id. (stating regional citizenship allows for greater individual participation without "subordination to a dominant territorial nationalism").

[FN125]. See Carol Gilligan, In a Different Voice (1982); Kimberly Hutchings, Feminism and Global Citizenship, in Global Citizenship, supra note 86, at 53, 58.


[FN127]. See David Held, Cosmopolitanism: Ideas, Realities and Deficits, in Governing Globalization, supra note 126, at 305 (listing factors such as extensity, intensity and speed of trade as primary forces behind globalization of market economy affecting local communities).


[FN129]. Id.

While the political consensus is important, the NATO alliance has little to offer the United States militarily. Specifically, Article 5 provides as follows:

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all, and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually, and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area. Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

Id.

[FN131]. See ICCPR, supra note 9, art. 4. For further discussion, see supra notes 24-25 and accompanying text.

[FN132]. See, e.g., Custody Procedures, 66 Fed. Reg. 48,334 (Sept. 20, 2001) (amending 8 C.F.R. 287-3(d)) (interim rule providing that noncitizens can be detained for 48 hours without charge and, in "emergenc[ies] or other extraordinary circumstance ... [for] an additional reasonable period of time"); see also Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Justice (USA Patriot Act), Pub. L. No. 107-56, 115 Stat. 272 (2001) (granting Attorney General unprecedented powers, including ability to detain noncitizens upon "reasonable grounds" to believe "that they are involved in activity that endangers national security" and to deport or refuse entry to persons who "endorse or espouse terrorist activity," who persuade others to support terrorist activity or terrorist organization, or raise money for terrorist group); Monitoring of Communications with Attorneys to Deter Acts of Terrorism, 28 C.F.R. §§ 500, 501 (2001) (interim rule allowing prison authorities to monitor communications between inmates and their counsel in instances in which Attorney General certifies there is "reasonable suspicion" inmate is using such communications to facilitate acts of violence or terrorism); Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52,584 (Aug. 12, 2002); Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 67,766 (Nov. 6, 2002) (regulations requiring noncitizen young men from Arab and Muslim nations to register with government, and requiring men from twenty-two nations--Afghanistan, Algeria, Armenia, Bahrain, Eritrea, Iran, Iraq, Lebanon, Libya, Morocco, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates and Yemen--over age of sixteen to be interviewed, photographed and fingerprinted).

[FN133]. ICCPR, supra note 9, art. 4(1).


[FN135]. Id.

[FN136]. See id. (discussing U.S. protocol for detaining enemy combatants).


[FN139]. See Convention III, supra note 32.

[FN140]. See Memorandum from William H. Taft, IV, the Legal Adviser, United States Dep't of State, to Counsel to the President (Feb. 2, 2002) [hereinafter Taft Memo] (noting that "[t]he President should know that a decision that the Conventions do apply is consistent with the plain language of the Conventions and the unvaried practice of the United States in introducing its forces into conflict over fifty years" and providing that "[f]rom a policy standpoint, a decision that the Conventions apply provides the best legal basis for treating the al Qaeda and Taliban detainees in the way we intend to treat them").

[FN141]. The prisoner of war status would require certain treatment under the Geneva Conventions of 1949, and also would impede trial in the military tribunals set up by President Bush. One obstacle to designating these captives "prisoners of war" is that this status requires the captive to have been acting on behalf of a state, while the captives, as well as the actors in the September 11 attacks, were acting on behalf of Al Qaeda, which is not a state or a state representative. See Taft Memo, supra note 140.

[FN142]. Convention III, supra note 32 (requiring that countries hold hearings to determine status of detainees during war).

[FN143]. Id. art. V.


June 20, 2004, at A17 (noting various investigations and reporting deaths of thirty-two Iraqi and five Afghani prisoners).


[FN147]. See id. (contending even if prisoner-of-war status were dropped, United States would still be in violation of international law).


[FN150]. Convention III, supra note 32, art. V. Article V stated in pertinent part: The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation. Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Id.

[FN151]. See American Declaration of the Rights and Duties of Man, at Art. XVIII, available at http://www.cidh.oas.org/Basics/basic2.htm (last visited June 28, 2005) ("Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.").


[FN155]. See Paust, supra note 122, at 27-28 (criticizing inconsistencies limiting prosecution within jurisdiction of federal courts).

[FN156]. See Diane M. Amann, Guantánamo, 42 Col. Transnat'l L. 263, 263 (2004) (concluding that "U.S. courts have jurisdiction to scrutinize extraterritorial detention, and that the doctrine of deference ought to yield to judicial duty to protect individual rights").


[FN159]. Rasul, 124 S.Ct. at 2693 (citations omitted); see also Amann, supra note 156, at 347-48 (discussing issue in case).

[FN160]. See Rasul, 124 S. Ct. at 2693-95 (distinguishing case and noting "[p]etitioners in these cases differ from Eisentrager detainees in important respects"); id. at 2698-99 (holding "[section]2241 confers on the District Court jurisdiction" to hear habeas challenges to Guantánamo detentions and that there is no bar under 28 U.S.C. § 1331 (2002) (Federal Question Statute) or 28 U.S.C. § 1350 (2002) (Alien Tort Statute) because they "implicate the 'same category of laws listed in the habeas corpus statute'") (citation omitted).


[FN163]. See Hamdi, 124 S. Ct. at 2635-36 (reviewing factual findings of detainee's status).

[FN164]. See Face-Off: The Supreme Court and White House Are Facing a Showdown Over Enemy Combatants, Newsday, Jan. 13, 2004, at A26 (discussing upcoming enemy combatant case of "dirty bomber").

[FN165]. See Padilla, 124 S. Ct. at 2715-16 (recounting relevant facts leading to petitioner's detention).

[FN166]. Hamdi, 124 S. Ct. at 2639 (addressing threshold question in case).

[FN167]. Id. at 2635 (reviewing holding of court).

[FN168]. Id. at 2636. The case came about when Hamdi's father filed a habeas petition on Hamdi's behalf, challenging the government's detention "without access to legal counsel or notice of any charges pending against him." Id. (citations omitted). The District Court concluded that if Hamdi was an enemy combatant, the government's detention was lawful. See id. (discussing lower court's rationale for detention). The sole support for his detention was a declaration by someone described as a Special Advisor to the Under Secretary of Defense for Policy. See id. at 2636-37 (discussing facts leading to lower court's conclusion). While the District Court found this to be insufficient and ordered production of documents, the Fourth Circuit reversed this decision on appeal, thereby upholding the legal grounds for detention. See id. at 2637-38 (discussing facts leading up to Supreme Court grant of certiorari). The Court recognized, however, that detention may last no longer than active hostilities are ongoing. See id. at 2641 (stating rationale for upholding detention). Yet, it acknowledged that even when detention is legally authorized "there remains the question of what process is constitutionally due to a citizen who disputes his enemy-combatant status." Id. at 2643; see also id. at 2638 (noting existing debate regarding meaning of term "enemy combatant").

[FN169]. Id. at 2648 (highlighting historical context of case).

[FN170]. Id. The Court went on to add that while notice and right to be heard constitute rights, "the exigencies of the circumstances may demand that, aside from these core elements, enemy combatant proceedings may be tailored to alleviate their uncommon
potential to burden the Executive at a time of ongoing military conflict." Id. at 2649. The Court emphasized the importance of the separation of powers, but declined to accept the government's rationale that such powers permit "a heavily circumscribed role for the courts in such circumstances." Id. at 2650-51. Nevertheless, the Court noted that the standards for due process may be satisfied by a military tribunal. See id. at 2651-52 (noting adequate standards of criminal process afforded enemy combatants).


[FN172]. See id. (failing to reach substantive issue in case on procedural grounds). The Court of Appeals for the Second Circuit affirmed the District Court for the Southern District of New York's holding that it had jurisdiction over Secretary Rumsfeld and that the President lacked authority to detain Padilla militarily. See id. at 2717 (discussing facts of case). The Court recognized that because Commander Marr had custody of Padilla and the District Court did not have jurisdiction over her, the District Court lacked jurisdiction. See id. at 2719-20 (noting key facts leading to Court's decision).

[FN173]. Id. at 2732-33 (Stevens, J., dissenting) (recognizing uniqueness of attack on federal criminal convictions).

[FN174]. See id. at 2733-34 (Stevens, J., dissenting) (noting proper forum is not matter of federal subject-matter jurisdiction).

[FN175]. Id. at 2735 (Stevens, J., dissenting) (analyzing whether respondent is entitled to immediate release).

[FN176]. Id. (Stevens, J., dissenting) (footnote omitted).

[FN177]. See United States Dep't of Defense, Defense Department Background Briefing on the Combatant Status Review Tribunal (July 7, 2004), available at http://www.dod.mil/transcripts/2004/tr20040707-0981.html. The Combatant Status Review Tribunal (CSRT) is a "streamlined" and "expedited" process where detainees are notified of the opportunity to challenge their enemy combatant designation, consult with a non-lawyer military official who will serve as a personal representative in the proceedings, and be advised of the Supreme Court's decision that they are entitled to review of their detention in U.S. courts within ten days of the issuance of the order creating the tribunal. See id. (discussing procedures for enemy combatants). The tribunal itself is comprised of three neutral military officers who have not had prior involvement with the detainee. See id. (discussing procedures under CSRT). The government affords the detainee an interpreter to help with communications with the personal representative and an opportunity to present both documentary and testimonial evidence, depending on reasonable availability of witnesses. See id. (same). The detainee, however, cannot be compelled to testify against himself, but the government's evidence is given a rebuttable presumption of validity. See id. (same). The tribunal decides "whether a preponderance of the evidence supports the detention of the individual as an enemy combatant." Id. If the tribunal decides that the enemy combatant status is not warranted, "[t]he secretary of Defense will advise the Secretary of State, who will coordinate the transfer of the detainee for release to the detainee's country of citizenship as appropriate." Id.

[FN178]. See Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2635, 2651-52 (2004) (recognizing required standards may be met by "appropriately authorized and properly constituted military tribunal."). For a discussion of the Court's factual analysis, see supra notes 168-70 and accompanying text.

[FN179]. See Abbasi v. Sec'y of State for Foreign & Commonwealth Affairs, 2002 EWCA
1598 (discussing facts of case).

[FN180]. See id. (same).

[FN181]. See id. P 64 (noting court’s predicament in deciding Abassi’s fate).


[FN183]. See Munir Ahmad & Tommy Grandell, Eleven Pakistanis Freed from Guantánamo Bay After Two Years of Imprisonment, The Guardian, July 18, 2003 (discussing U.S. refusal to release Swedish enemy combatant). For an account of how one Iraqi national resident in Britain and one Jordanian national refugee found themselves in captivity in Guantánamo Bay, see Amnesty International UK, UK Government Must Act Now on Behalf of Guantánamo Detainees (July 11, 2003), at http://www.amnesty.org.uk/deliver?document=14723 (detailing account of four British residents arrested, questioned and threatened by United States and Gambia). While two of the British nationals were released, the remaining two were taken to Guantánamo Bay by way of Afghanistan and Britain refuses to take responsibility for them. See id. (discussing facts of British nationals detained in Guantánamo Bay).


[FN186]. See DOD 2004 No. 180-04, supra note 184 (estimating number of detainees remaining in Guantánamo Bay).


[FN188]. Id.

[FN189]. See id. (accusing U.S. military of psychologically and physically mistreating detainees).

[FN190]. See id. (detailing abusive activity of detainees).


specifically outlines self-defense justification for interrogating detained enemy combatants, noting while "an enemy combatant in detention does not himself present a threat of harm ... [he] may be hurt in an interrogation because [he is] part of the mechanism").

[FN193]. See 66 Fed. Reg. 57,833 § 1(e) (2001) [hereinafter Military Commissions Order] (establishing military tribunals for prosecution of foreign nationals). The recent Hamdi decision may provide a glimpse into the analysis concerning the validity of the military commissions. Although the commissions are only for trying foreign nationals, Justice O'Connor in Hamdi specifically observed that" [t]here remains the possibility that the [due process] standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal." Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2651 (2004). It seems fair to project that if such military tribunal ensures due process to a citizen captured in Afghanistan, it similarly will be deemed to ensure due process to foreign nationals.


[FN195]. Id. § 1(f).

[FN196]. See Paust, supra note 122, at 2.

[FN197]. Id. at 5 (defining scope of President's military judgment).

[FN198]. Id. at 9 (stating military commissions' jurisdiction limited to war crimes unless convened in occupied territory permitting other criminal prosecutions because of "a special competence conferred by the law of war").

[FN199]. See ICCPR, supra note 9, art. 14(5); see also Military Commissions Order, supra note 193 (outlining procedures for military tribunals).


[FN203]. See, e.g., ICCPR, supra note 9, art. 2. Article 2 requires: [e]ach State party ... undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status. Id.; see also id. art. 26 (providing "[a]ll persons are equal before the law and are entitled
without any discrimination to the equal protection of the law"). "In this respect, the law
shall prohibit any discrimination and guarantee to all persons equal and effective
protection against discrimination on any ground such as race, colour, sex, language,
religion, political or other opinion, national or social origin, property, birth, or other
status." Id.

[FN204]. United States Dep't of Defense, Military Commission Order No. 1: Procedures
for Trials by Military Commissions of Certain Non-United States Citizens in the War
Against Terrorism, § 6D(1) (Mar. 21, 2002), available at
MCO No. 1]; see also Seelye & Day, supra note 202 (noting that rules on introducing
evidence were looser than those in civilian courts). For example, hearsay is allowed, as
well as evidence that would be convincing to a "reasonable person." Id.

[FN205]. DOD 2002 MCO No. 1, supra note 204, § 4A(2).

[FN206]. United States Dep't of Defense, Military Commission Order No. 3: Special
Administrative Measures for Certain Commission Subject to Monitoring, § 4A (Feb. 5,
visited Oct. 25, 2004) (promulgating policy where certain communications may be
subject to monitoring by special administrative measures).

[FN207]. Id. § 4F. (designating policy regarding use and disclosure of monitored
communications).

[FN208]. The recent Rasul decision, however, provided that U.S. courts have jurisdiction
to hear habeas petitions, which effectively recognizes the right of persons in custody in
Guantánamo to have their conditions of detention reviewed. See Rasul v. Bush, 124 S.
Ct. 2686, 2692-99 (2004). In fact, the Court specifically noted that the habeas "statute
draws no distinction between Americans and aliens held in federal custody." Id. at 2696.

[FN209]. See United States Dep't of Defense, Military Commission Instruction No. 9:
procedure for reviewing Military Commission proceedings).

[FN210]. DOD 2002 MCO No. 1, supra note 204, § 6H(6).

[FN211]. See Seelye & Day, supra note 202 (recognizing rules do not provide process for
independent appeals to keep control of tribunals in military chain of command).

[FN212]. See United States Dep't of Defense, Presidential Military Order Applied to Nine
More Combatants, News Release (July 7, 2004), available at
Order, supra note 193).

[FN213]. Id.

[FN214]. See, e.g., Neil A. Lewis, Rights Groups Won't Get Seats at Guantánamo Base
Tribunals, N.Y. Times, Feb. 24, 2004, at A14 (observing President had designated six of
650 prisoners at Guantánamo Bay as eligible for trial); More Guantánamo Detainees
Freed, supra note 191. For a complete discussion of the charges, see United States v. Ali
Hamza Ahmad Sulayman Al Bahlul, available at http://
(outlining charge of conspiracy against detainee), and United States v. Ibrahim Ahmed
Mahmoud Al Qosi, available at http://

[FN215]. Tribunal Charter, supra note 26, art. 6.

[FN216]. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, at 36, available at http://daccessdds.un.org/doc/UNDOC/GEN/N93/248/35/IMG/N9324835.pdf?OpenElement (detailing offenses and procedures of ICTY); id. art. 2 (listing "[g]rave breaches of the Geneva Conventions of 1949," including "(b) torture or inhuman treatment ...; (c) wilfully causing great suffering or serious injury to body or health; ... (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial; (g) unlawful deportation or transfer or unlawful confinement of a civilian"); id. art. 3 (referring to violations of laws or customs of war); id. art. 4 (referring to genocide); id. art. 5 (referring to crimes against humanity, including "(e) imprisonment; (f) torture; ... (i) other inhumane acts").

[FN217]. ICTR, supra note 120, art. 2 (referring to genocide); id. art. 3 (referring to crimes against humanity); id. art. 4 (referring to violations of the Geneva Conventions of 1949 and of Protocol II, supra note 32, including:
a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; b) Collective punishments;... e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; ... h) Threats to commit any of the foregoing acts[)].

[FN218]. ICC, supra note 121, art. 5(1) (limiting jurisdiction "to the most serious crimes of concern to the international community as a whole ...: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression").


[FN220]. Id. § 12 (listing specific offenses and elements thereof).

[FN221]. Id. § 16 (providing examples of offenses and elements thereof).

[FN222]. See Frederic L. Kirgis, United States Charges and Proceedings Against Two Guantánamo Detainees for Conspiracy to Commit Crimes Associated with Armed Conflict, Am. Soc'y of Int'l L., March 2004, available at http://www.asil.org/insights/insigh126.htm (arguing that charges against detainees do not allege violation of any specific statutory or treaty provisions and referring to Al Qosi and Al Bahlul, where both defendants were charged with conspiracy).

[FN223]. Convention III, supra note 32, art. 102. This article provides: A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.

Id.

review procedures for enemy combatants in custody of DOD at Guantánamo Bay).

[FN225] Id.

[FN226] Id. (outlining role of review board).


[FN229] Significantly, recent decisions seem to apply the rules of conventional war to the war on terror. See, e.g., Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2641 (2004) (discussing "established principle of the law of war that detention may last no longer than active hostilities").


[FN232] See Lewis, supra note 214 (discussing deliberations by military officials regarding availability of seats in courtroom for possible military tribunals at Guantánamo Bay).

[FN233] Id. (acknowledging military officials' trial conclusions for seating arrangements).


[FN237] Id.; see also Nancy Chang & Alan Kabat, New Summary of Recent Court Rulings on Terrorism-Related Matters Having Civil Liberties Implications, Feb. 4, 2004, at http://www.ccr-ny.org/v2/reports/report.asp?ObjID=N7yKoAObvc&Content=324 (reasoning why, despite fact that representing detainees marks clear break with center's traditional representation, center chose to provide direct representation in detainee cases).


[FN240]. See International Committee of the Red Cross (ICRC), at http://www.icrc.org (last visited July 13, 2003). The Committee provides: [The ICRC] works around the world on a strictly neutral and impartial basis to protect and assist people affected by armed conflicts and internal disturbances. It is a humanitarian organization ... mandated by the international community to be the guardian of international humanitarian law .... While the ICRC maintains a constant dialogue with States, it insists at all times on its independence. Only if it is free to act independently of any government or other authority can the ICRC serve the interests of victims of conflict, which lie at the heart of its humanitarian mission.
Id.

[FN241]. Id. (outlining functions of ICRC).


[FN243]. The responsibility is outlined in the Geneva Conventions of 1949.


[FN246]. See id. (describing measures taken by Guantánamo Bay Rights Commission in conjunction with other organizations in implementing its plans to achieve goals).


[FN248]. Falk, supra note 227.

[FN249]. The Federalist No. 51 (James Madison) (referring to text entitled "The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments").

(criticizing Bush administration for disregard of international law, specifically U.S. detention of "enemy combatants" indefinitely without charge, counsel or meaningful review).


[FN252]. Id.
THIS paper distinguishes between two crucial issues in the contemporary debate on nationalism: the legitimacy of partiality towards co-nationals and the right to national self-determination. I offer an instrumentalist argument for the first issue and a perfectionist perspective for the second issue.

I. Partiality Towards Co-Nationals

The main distinction between nationalism supporters and radical human rights supporters is their view on justifying the nationalists' commitment to a moral and political partiality towards individuals of the same nation. Radical human rights supporters believe that established national borders constrain recognition of basic human rights. On the other hand, nationalism supporters believe in partiality toward one's co-nationals over foreigners.

Thus, we face the first problem raised by nationalism: the issue of partiality or of the establishment of special obligations towards co-nationals. Is it possible to legitimize partiality towards co-nationals? Is partiality incompatible with a perspective that supports the universal character of certain human rights? In order to answer these questions, I will first of all take recourse to David Miller's analysis of current arguments purporting to justify nationalist partiality. Further, I will question the plausibility of Miller's own argument for nationalism. Finally, I will reconsider a universalist argument, namely, the pragmatic or instrumental one in favor of the acknowledgement of special obligations owed to members of a same nation.

In David Miller's book On Nationality, [FN1] he offers a detailed discussion of the concepts of nation, national identity, justifications of nationalism and the political and ethical consequences of its acknowledgement. [FN2] He states that only a particularist moral perspective can reasonably support arguments in favor of nationalism. [FN3] In support of his proposition, Miller *1064 defines and distinguishes between the universalist and the particularist moral perspectives as well as their respective claims in favor of nationalism. [FN4]

The universalist moral perspective believes that the individual is only identified on the basis of general characteristics and capacities of human beings. [FN5] Miller states, 'because the principles are to be universal in form, only general facts about individuals can serve to determine my duties towards them.' [FN6] Conversely, Miller defines the particularist perspective as one that considers the individual as part of complex social relations and fundamental principles are directly linked to such relations. [FN7]

Miller highlights the relevant distinction between the particularist moral perspective and the universalist moral perspective--the metapsychology of the moral agent. In Miller's view, the universalist moral perspective believes that the moral agent is an
unencumbered subject of responsibilities and duties. [FN8] By disconnecting the moral agent from the social context where the agent's concrete beliefs and desires are formed, the universalist perspective is unable to respond to the motivational question. Accordingly, the argument rests on a metaphysical and abstract concept of a person or rational agent.

According to Miller, only a particularist moral perspective is able to fully acknowledge the structuring role of bonds among individuals in a national community. [FN9] This is because the particularist moral perspective conceives of communitarian links not merely as a matter of individual choices, but as a constitutive part of the moral agent his/herself. By directly deriving the obligations of the moral agent from his communitarian bonds, the particularist approach would be able to close any gap between moral obligations and moral motivation.

The metapsychology presupposed here does not conceive of the individual as a source of selfish interests that should be sacrificed for the moral conduct to be possible. Following the model of the obligations that we assume in our family and friendship relations, the duties towards the members of our national community would be inherent to the establishment of such communal relations. To fulfill these obligations is a way of self-fulfillment. It is necessary to reinforce our constitutive bonds and the way we want to be recognized.

1065 Looking at the above analysis between the particularist and universalist moral perspective, it is evident that Miller's critique of the universalist moral perspective, an attempt to justify the partiality towards co-nationals, is directly derived from his interpretation of the metapsychology of the moral agent presupposed by the universalist. Is the universalist, however, really committed to such metapsychology? In addition, if we start from Miller's preferred metapsychology, could not we reach different conclusions?

When invoked by universalists, the atemporal, unencumbered moral agent, whose desires are devoid of any social content, has never been more than a useful methodological caricature in an attempt to justify and better implement certain values cherished by virtually everyone--values such as respect for human beings and moral equality. What is intended by universalists, such as Kant, Rawls, Habermas, Tugendhat, Scanlon, Dworkin and others, is to assure, through certain procedures, that all individuals have their most basic needs met. Thus, they believe that an individual should be respected and recognized as a moral person, irrespective of the group to which he or she belongs. To be sure, universalists sometimes went beyond these rather modest methodological concerns. The metaphysics implied in the attempts to give moral principles an absolute, not merely methodological, foundation can be attributed to the traditional philosophers' arrogance and their speculative vices. This made them claim more about human nature than they are really able to do. Therefore, they assigned to reason everything that we, living in secularized societies, cannot attribute anymore to a provident God. If someone really does defend the abstract metapsychology characterized by Miller, then Miller's critique of universalism is well placed. For the target of Miller's critique would be a solipsist, a bad observer of human experiences or maybe someone who still believes that Descartes' isolation and introspection is the best guide to human experiences.

Whether we are universalists or particularists, there are certain premises we should accept in advance. First, human beings must establish communitarian bonds, must belong to groups and must be recognized as full members by other members of the group. It does not matter the size of the groups--or how tight the bonds are. Second, by establishing such bonds we feel naturally justified when adopting a partial attitude
towards those with whom we have special relationships. Whoever intends to dedicate to their friends the same attention that is owed to strangers will probably lose their friends. In general, a mother who is interested in the well-being of her children as much as in the well-being of humanity is considered a cold, irresponsible person. Our feelings, as well as our availability, are naturally finite. It would be implausible to deny that our concrete relationships with other people fix not only our attitudes, but also what we understand as right or wrong. It is reasonable to admit that there are different spheres of obligations and that, with different interpretations, morality goes through them. It would be absurd and naïve to think that universalists and defenders of human rights do not recognize the existence of special obligations and responsibilities between a mother and her children. Equally, it would be absurd to assume that particularists are unable to acknowledge an unacceptable level of privation for all human beings, irrespective of their social origins.

Miller's contention is that only against the background of an understanding of the moral agent, which differs from the one he imputes to the universalist, is it possible to see the relevance of national identity and its ensuing partiality. [FN10]

It is not difficult to accept this contention because the alternative (the metapsychology of the unencumbered self) seems to be quite indefensible. The relevant issue now is whether Miller's preferred metapsychology is sufficient to justify nationalist partiality. To address this issue, I will introduce the multiculturalist alternative and the notion of a complex identity. [FN11]

Multiculturalists are hard critics of homogeneous normative patterns and their purported impartiality and neutrality. [FN12] They insist on the recognition of differences, instead of their mere tolerance by the hegemonic social model. [FN13] According to multiculturalists, nationalism might be just an artifice in order to impose the supremacy of a group over the others. [FN14] Multiculturalists believe that differences in gender, race or sexual interests would be obliterated by the imposition of an artificial identity based on the ideology of the hegemonic group. [FN15]

Miller critiques multiculturalism, claiming it is rooted in a false contrast between a supposed authentic group identity and an artificial national identity. [FN16] Miller believes that both forms of identification are social constructions and there is no reason at all to take one as authentic and the other as artificial. [FN17] It is oft true that some members of specific groups do not desire public recognition of the characteristics that define the group to which they belong. An example, for Miller, would be that of some homosexuals who think that sexual preferences should remain private.

*1067 Miller's argument is at least partially correct. The building of an identity is always a social construction. Thus, it makes no sense to oppose artificial and natural identities. Moreover, national identity does not have to be seen as something that obliterates and excludes the recognition of other forms of identification. The crucial point is that there is no way to prove that one form of identity as such is more essential than others. The metapsychology endorsed here only stresses the necessity of belonging to groups and of being recognized by them.

From a realistic point of view, we do recognize ourselves as a bundle of diverse identifications. With respect to myself, I am a woman, a mother, a philosopher, a professor, a Latin American citizen and so on. All these aspects are inseparable from the way I see myself and the way I want to be recognized. In my daily life, these aspects make me closer to some persons than to others--in some cases, due to circumstances only indirectly related to my choices. Other aspects of my identity make me choose which persons live with me. Some affinities help to establish among us bonds of
friendship and solidarity. In sum, Miller’s preferred metapsychology does not permit him to favor one form of identification over the others. The notion of a complex identity is capable to congregate all these different aspects that link us to certain people, including the political and cultural links that connect us with co-nationals.

Because the recognition of a complex identity does not exclude the recognition of a national identity, now we can look for an argument to justify partiality or the existence of special obligations specifically towards co-nationals. The argument premised on the right metapsychology justifies the existence of special obligations in general. This implies that certain obligations are inherent to the establishment of special bonds with certain persons in a community. Denying the existence of these special obligations is tantamount to denying the way we live. There is nothing in this view, however, that makes the links among co-nationals more deep than other links.

Nevertheless, if the appeal to the metapsychology of the encumbered moral agent provides an argument capable of justifying neither partiality nor the existence of special obligations towards co-nationals, what can we say about the universalist argument toward partiality? Let us put aside the implausible metapsychology attributed to them and go straight to the arguments. Miller himself comments on two universalist arguments for national partiality. The first argument focuses on all human beings’ supposed needs. [FN18] Among these needs, we find the necessity to establish special relationships that generate special rights and duties for the individuals involved in these relationships. By recognizing the value of these relationships, universalists accept, as justified, the rights and duties originated in such contexts. [FN19] Once more, we have an argument capable of justifying the existence of special obligations, but not capable of justifying nationalism. Miller is right when he affirms that this way cannot guarantee the relevance of national identification.

The second universalist argument for national partiality examines the recognition of diversity, the extension of humans’ demands and humans’ aims to optimize their satisfaction. [FN20] In this connection, mere physical and/or cultural proximity would make possible the efficient satisfaction of human demands: ‘insiders’ are in a better position than ‘outsiders’ to identify and to provide for the needs of their communitarian fellows. [FN21] Thus, the second universalist argument would view national bonds as means to satisfy human demands in an efficient way.

Miller critiques the second universalist argument for two reasons. First, he states that the argument, even if it were sound, does not guarantee an intrinsic relevance to national identity. [FN22] Miller is quite right. But should national identity have an intrinsic relevance? Why can we not simply suppose that to be organized in a nation is no more than a way to make social life flourish and be more efficient? Why is Miller opposed to this instrumental view of nationality?

Second, he denies that cultural and/or territorial proximity is in fact an optimizer of our satisfactions. [FN23] We have no reason to believe that this group could more efficiently satisfy the basic demands of individuals from a specific group. As a general rule, it is quite so. We have only to look around to be assured that the wealthier countries in this world are in a much better position to meet the material needs of African communities than the Africans themselves.

Nevertheless, the universalist argument premised on the pragmatic value of proximity does not aim to establish absolutely general principles. It starts from a quite trivial consideration about the importance of living together and of cultural identity for the adequate identification of the real needs and the appropriate means to meet them.
Cultural and territorial proximity are of course contingent aspects, but I cannot see how they cannot be pragmatically relevant.

In sum, the second universalist argument for partiality aims specifically at the recognition of national identity. National identity is viewed as an instrument for the attaining of more general goals. Of course, national identity becomes important only when it is seen as a good/efficient means to achieve such goals. Miller finds this instrumental view of national identity not congenial, as it cannot accommodate any intrinsic value we might want to attribute to national identity. Nevertheless, I cannot see how any argument for the existence of special obligations owed to co-nationals may have a different character. As it is the case with all moral rules, such obligations are intended to promote the well-being of human beings. These rules lose their raison-d'être as soon as they do not respond to such a task. Moreover, this pragmatic or instrumentalist argument for nationalism has the great advantage of being put aside as soon as nationalism starts assuming morally condemned forms, for instance by presenting real threats to the well-being of other human beings.

II. The Right to National Self-Determination

Up to this point, I have been discussing nationalism with respect to the issue surrounding the legitimacy of partiality towards co-nationals. I intended to show that the best argument for the existence of special obligations that members of a nation owe to each other is the argument that recognizes these obligations as the best way to meet some basic human needs. I will now address another dimension of nationalism, namely, the problem of national self-determination. Here, I argue for self-determination as a sort of craving, manifested by certain cultural communities, to establish their own form of political representation. I will defend what we can call patriotism, that is, the identification with a particular form of political organization, distinct from other possible forms.

Given a certain metapsychology of the moral agent, I tried to defend the idea that the formation of our identity includes the identification with different communal aspects, with different groups, which turns our identity to a 'complex identity.' In our daily life, we choose, reinforce or reject some characteristics of our personality and we establish some strategies of action in order to achieve our own personal fulfillment. We assume as moral principles those strategies which we favor for reasons that we share with others. Once the contrast between the public and the private domains fades away, we try to create adequate conditions for the flourishing of our values. It is in this context that we have to recognize the demands of certain national groups for a form of political representation that is able to express their values.

It is possible that the craving for a form of political expression suitable to the values of a specific culture may be fulfilled perfectly inside multinational states. Federalism may be a good example of this possibility. What then would be the best alternative? It will always depend on the groups in question, on the concrete demands to be fulfilled and also on the state of the world community. It would not be reasonable to present one single alternative that could equally fit to Bascos, Quebecois, Palestinians, Kurds and Puerto Ricans. What is common and must be equally recognized is the will to find their own form of political expression.

A form of political expression is more than the mere warranty that certain typical aspects of a specific culture will survive. It is the only way--that individuals feel responsible for their decisions and for the flourishing of the State where they live. This applies to those who fight for the creation of a new State in the world community as well as those that already have a State of their own, but such that only a minority of its citizens can identify
themselves with it. What is lacking in many countries is not nationalism, but patriotism, that is, a deep identification with the form of political organization. This is what Habermas dubs 'constitutional patriotism.' [FN25]

The political structure of a nation must be able to express the most fundamental values of a community. It mirrors the form of representation of different segments of society and the distribution of rights in the basic structure of society. It establishes the legitimate mechanisms of repairing justice, including especially those invoked after usurpation of power by political representatives of a nation. It determines each nation's political profile, the form as it will be recognized by other states and its relations with other nations. A community without a political representation of its own or with a representation that does not adequately reflect its own values is excluded from the international dialogue. The protection of its values or the achievement of its most fundamental goals will depend on the benevolent, paternal or 'humanitarian' attitudes of other states.

If we acknowledge the existence of interests still more general, we should recognize as well the necessity of a wider forum of discussion. In this case, the right of self-determination must be understood as the right to mechanisms of legitimate participation in the international forum—not as the right to avoid international resolutions in the name of 'national interests.' The autonomy of each state is not a domestic issue, but something that concerns directly the relations with other autonomous nations. The constitution of a state by a national community is a form to guarantee its own representation, that is, to present its interests and to defend in the international forum the common values of a particular culture. This positive aspect of national self-determination does not threaten the international forum of discussion; it only tends to make it wider and a more authentic expression of the diversity of forms of human lives.

On the other hand, if the interpretation of nationalism presented here does not threaten the survival of minority cultures or the possibility of agreement among different nations, what would be the disadvantage of such a perspective? Many would think that it does not express truthfully nationalism itself. Why? One reason is that nationalism is often reactive, aggressive and an exclusivist form of expression. Such reactions, however, *1071 are not necessary for nationalism. The fact that some people react this way, individually or collectively, when they feel that their interests are threatened is something that we can only lament.

Another possible reason for thinking that the proposed interpretation does not capture the spirit of nationalism would be that nationalism is often seen as a less subtle expression of our emotional bonds on a par with primitive tribalism. Of course, this may be how some individuals conceive of their own nationalist feelings. Nevertheless, if we are really interested in going beyond the more phenomenological, superficial description of this issue, we have to consider normative arguments, not just analyze feelings. The fact that the phenomenon of nationalism is related to the expression of feelings that unite us to other people does not make it less rational or less understandable in the light of arguments. It just means that our considerations here rest on aspects related to the constitution of our own identity. In other words, nationalism, as any other form of identification, includes emotional aspects that can be evaluated in light of the beliefs and values of moral agents.

I tried to make it clear that the right to national self-determination may be understood as a legitimate expression of the desire, inherent to each community, to represent their own interests and values in the international forum. This way perhaps we may find what is common to Bascos, Quebecois, Palestinians, Kurds and Puerto Ricans. How close they are to achieving this right to self-determination and which mechanisms are more suitable for such achievement are questions that I will leave open here. Each case has unique history
and circumstances. In that sense, each community must develop its own resources in order to constitute its own identity in the most suitable way.

Footnotes:

[FN1]. Universidade Federal do Rio de Janeiro. I wrote this paper during my stay as a visiting professor at the Law School of the University of Connecticut. I would like to thank especially Angel Oquendo with whom I worked at the University of Connecticut. I also had the opportunity, for which I am grateful, to discuss the main issues presented here with my colleague Wilson Mendonça, during a postgraduate course that we gave together at the Federal University of Rio de Janeiro. Finally, I would like to express my thanks to Mário Nogueira for his valuable contributions to the English version of the present paper.


[FN3]. See generally id.

[FN4]. See id. at 79-80 (concluding preference for particularist view).

[FN5]. See id. at 65-80 (explaining distinction between particularist and universalist view).

[FN6]. See id. at 50.

[FN7]. Id. (‘[R]elations between persons are part of the basic subject-matter of ethics, so that fundamental principles may be attached directly to those relations.’).

[FN8]. See id. at 57 (stating basis of universalist view).

[FN9]. See id. at 65-73 (stating how particularist perspective acknowledges role of bonds between individuals in distinct communities).

[FN10]. See id. at 65-73 (stating moral relevance of nationality).


[FN12]. See Miller, supra note 1, at 131 (discussing multiculturalism and nationalism).

[FN13]. See id. at 130-33 (noting multiculturalism's focus on recognition of differences).

[FN14]. See id. at 132-33 (stating multiculturalist view that nationalism is method for dominant group to oppress minority groups).

[FN15]. See id. at 133 (stating that nationalism "requires that persons transform their sense of identity in order to assimilate").

[FN16]. See id. at 135 (arguing against false contrast between genuine or authentic identity and manufactured or imposed identity).

[FN17]. See id. at 133 (describing distinction as false contrast).
[FN18]. See id. at 52 (arguing from universalist perspective).

[FN19]. A good example, according to Miller, is the perspective defended in A. Gewirth, Ethical Universalism and Particularism, 85 J. Phil. 283 (1988). Another example that is well representative of this kind of argument is Yael Tamir, Liberal Nationalism (1995).

[FN20]. See Miller, supra note 1, at 51-52 (arguing from universalist perspective).

[FN21]. See id. at 52 n.3 (mentioning Peter Singer's article, Reconsidering the Famine Relief Argument, as good example of argument).

[FN22]. See id. at 61-62 (rejecting second universalist argument).

[FN23]. See id. at 63 (rejecting instrumental argument).

[FN24]. See id. at 64 (rejecting instrumental argument).

[FN25]. See id. at 162-63 (stating that Habermas and others use phrase 'constitutional patriotism').
**THE DEVIL WE KNOW: RACIAL SUBORDINATION AND NATIONAL SECURITY LAW**

Gil Gott [FN1]

SINCE September 11, Muslims, Arabs and South Asians in the United States have had to contend with disparate and abusive treatment, both within civil society and at the hands of state actors including security, law enforcement and prison officials. [FN1] It would seem a horrible exaggeration to say that post-September 11 has been a period of "open season" on these groups. To be sure, high-ranking officials have denounced hate crimes and hate speech, and law enforcement has arrested and tried perpetrators of these crimes. Private individuals and groups have shown solidarity with these communities. But, the countless reported incidents of abuse suffered by Muslims, Arabs and South Asians at the hands of state and private actors imbue such other tokens of executive and societal "tolerance" and concern with an air of hypocrisy. In such an environment it behooves us to consider how liberal democratic systems might evolve legal and other forms of group-based remedies and safeguards to counter the socially and politically pernicious effects of what may well be a new and enduring form of religiously-inflected, unbounded, all-or-nothing warfare.

This article asks the "subordination question" with regard to contemporary national security law and policy. [FN2] It will consider how our scholarship and institutions construct national security law and policy in ways that afford either greater or lesser degrees of analytical and normative primacy to the problems of racialized group-based social harms that commonly surround exercises of national security-related powers. The anti-subordinationist methodology deployed here foregrounds such problems and allows us more accurately to assess the real costs of "states of emergency" by moving beyond standard law-versus-security framings. By focusing on "enemy group" demonization we are also better able to grasp the identity-inflected basis of the constructed security horizon itself, in effect analytically opening up to contestation the statist "black box" of emergency construction. Finally, the normative pre-commitments of an anti-subordinationist perspective allow us to judge the merits and the desirability of national security law and policy from a perspective that resists resolving the law-security binarism into unrestrained political decisionism. [FN3]

Given an abundance of historical and contemporary evidence that national security rationales and measures are socially contingent in both conception and effect (reflecting at the bottom, societal pathologies such as racial and ethnic animus), it would seem likely that mainstream legal scholars would treat the resulting group-based harms as central to the post-September 11 national security law and policy debates. Indeed, the research I present in this article shows that it is not the case that liberal legal sensibilities wholly fail to apprehend the problems of group demonization in security crises. Legal liberalism, in fact, evinces due concern for state abuse of emergency powers and acknowledges the "distributional" inequalities inherent in such abusive practices, that is, the disproportionate burdening of "out-groups" in state security crises. The legal literature, however, typically orients itself around the narrow problem of how best to balance the conflicting demands of law--usually conceived of as minimalized individual civil liberties protections and/or institutional balancing--and state security. I
will show that legal liberalism has not effectively confronted the devil we know all too well—the subordination of racialized enemy groups, in this case, Arabs, Muslims or South Asians.

I look at two categories of post-September 11 liberal and progressive legal responses, accommodationist approaches [FN4] and more oppositional, albeit formalistic, civil liberties-based critiques. The first group of approaches seeks generally to accommodate law and justice to national security-related "necessity" and is animated in part by valorization and even identification with the state and its putative security needs. Alternatively, the formalistic civil liberties approaches would generally apply the Constitution in more or less the same way regardless of the state's perceived security dilemma. This "business as usual" approach distrusts hypertrophied governmental powers and uses civil liberties framings to critique *1075 security regimes, such as the one arising from the war on terrorism. [FN5] While I consider the work of civil liberties advocates to be courageous and crucial for the broader project of creating a more just national security culture, I will consider how both accommodationist and formalistic civil liberties approaches similarly may occlude key subordinationist dimensions of the war on terrorism.

Anti-subordinationist principles require taking more complete account of how enemy groups are racialized, and how they come to be constructed as outsiders and the kinds of harms that may befall them as such. Group-based status harms include those that have been inscribed in law and effectuated through state action, and those that arise within civil society, through social structures, institutions, culture and habitus. Familiarity with the processes of racialization is a necessary precondition for appreciating and remedying such injuries. Applying anti-subordinationist thinking to national security law and policy does not require arguing that only race-based effects matter, but does require affording significant analytical and normative weight to the problems of such status harms. Racial injuries require racial remedies.

Foregrounding anti-subordinationist principles in national security law and policy analysis departs significantly from traditional approaches in the field. Nonetheless, arguments based in history, political theory and pragmatism suggest that such a fundamental departure is warranted. Historically, emergency-induced "states of exception" [FN6] that have suspended legal protections against governmental abuses have tended to be identity-based in conception and implementation. [FN7] Viewed from the perspective of critical political theory, the constellation of current "security threats" rests on the epochal co-production of identity-based and market-driven *1076 global political antagonisms, referred to somewhat obliquely as civilization clashes or perhaps more forthrightly as American imperialism.

Pragmatically, it makes no sense to fight terrorism by alienating millions of Muslim, Arab and South Asian residents in the United States and hundreds of millions more abroad through abusive treatment and double standards operative in identity-based repression at home and in selective, preemptive U.S. militarism abroad. Such double standards undermine the democratic legitimacy of the United States both in its internal affairs and in its assertions of global leadership. Indeed, there seems to be no shortage of perspectives from which liberal legal institutions would be enjoined from embracing a philosophy of political decisionism precisely at the interface of law and security, an anomic frontier along which are likely to arise identity-based regimes of exception and evolving race-based forms of subordination.

Part I analyzes accommodationist approaches that variously incorporate security-inflected logic in truncating the regulative role law plays in national security contexts. I will seek to understand the accommodationist thrust of these interventions in light of the
authors' operative assumptions regarding the proper array of interests and exigencies to be balanced. I will argue that the interests of demonized "enemy groups" facing race-based status harm--Muslims, Arabs and South Asians in the United States--are ineffectively engaged through accommodationist frameworks. The decisionist impulse of these analyses, that is, the tendency to acquiesce in the outcomes of non-substantively constrained statist and/or majoritarian political process, results from an incomplete grasp of the racialization processes. In short, more race consciousness is needed in national security law and policy in order to cement substantive commitments and procedural safeguards against historical and ongoing race-based subordination through the racialization of "security threats."

Part II examines approaches that rely on formalistic understandings of civil liberties in critiquing the government's post-September 11 policies. These approaches also inadequately center subordinationist effects in their criticisms of the war on terrorism. In lieu of anti-subordinationist commitments, these approaches complicate the formal distinction between aliens or immigrants and citizens. While such critiques of alienage-based distinctions and other de jure nativisms increasingly define the parameters of civil liberties and social justice advocacy in immigration law, much of the critical force of such approaches remains cabined. First, they remain cabined within a particular argumentative frame determined by the limits of the "national imaginary" and, second, within an aspect of white normativity that analogizes between the experiences of European immigrants and immigrants of color.

Part III argues that September 11 represents a watershed in the racialization of Muslims, Arabs and South Asians as people of color in the United States. I brief the nature and magnitude of harms accruing to Muslims, Arabs and South Asians both through the government's policies in the war on terrorism and through societal dynamics. The evidence indicates that we are seeing not only legal but also social and political closures (and resistances) that typify racial formation processes in the United States. Those processes have both constructed and subordinated racialized minorities over many generations. Moreover, the current dynamic reflects an extension and acceleration of trends negatively impacting Muslims, Arabs and South Asians that were already in train well before September 11, 2001.

Parts I through III make the case that legal liberalism has responded ineffectively to the demonization and racialized subordination of Arabs, Muslims and South Asians in the United States. In Part IV, I will contextualize this failing by examining the international political system and the ways it structures current conceptualizations of state violence and state decisions on the exception in the war on terrorism. Status harms to Muslims, Arabs and South Asians are cases of a racialization of security that continues apace, made even more likely under post-modern international structures that operate at ever greater removes from the rationalist assumptions of the modern international system. Part V concludes by placing the current securitization of race in a historical and normative context that compels prioritization of the subordinationist devil we know in the war on terrorism, quite apart from the devils the state and state actors claim to know.

I. Reasonable Accommodation: Legal Liberalism and the War on Terrorism

September 11 has led to the most significant scholarly and public scrutiny of U.S. national security law and policy since the Vietnam era. The specter of large-scale violent attacks by so-called Islamist terrorists has prompted renewed debate about whether and how constitutional protections should apply in times of national emergencies, and what role the judiciary should play in overseeing the government's exercise of security powers. [FN8] Some view September 11 as having ended what we might call the Cold
War national security law equilibrium, that is, executive-legislative power sharing, tempered by the real possibility of judicial intervention either in the service of substantive protections of individual liberties or as referee and interpreter of power-sharing arrangements between the political branches. The model of a unilateralist "emergency executive," empowered *1078 to take swift and decisive action without having to be concerned with winning ex ante congressional authorization or ex post judicial approval, has returned as the symbolic counterpoise to the terrorist threat. The disciplinary center of gravity, however, is found in what I refer to as accommodationist approaches that seek, short of creating an "imperial presidency," to adjust liberal democratic norms and practices to fit the reconfigured national security environment.

Generally, accommodationist approaches provide important and sophisticated elaborations of positions that were staked out by Justice Jackson in his opinions in the Japanese internment cases and later in Youngstown Sheet & Tube v. Sawyer (the "Steel Seizure Case"). [FN9] The political and jurisprudential impulses retrieved from these now canonical twentieth century national security law opinions range from a posture of judicial deference or quietism, reliance on an institutional process-based balancing calculus, and a concern with the longer-term health and legitimacy of liberal rule of law systems and their judiciaries. In addition, today's accommodationists often follow Justice Jackson's dissent in Korematsu v. United States, [FN10] recognizing the potential for, if not the inevitability of, racialized group subordination occurring under the guise of national security necessity.

In this section, I assess two types of accommodationist approaches, asking whether and how effectively these approaches intervene to remedy race-based injuries accruing to "discrete and insular" minorities in the wake of the state's and society's reaction to the perceived threat from Islamist terrorists. The first approach I examine is premised on a model of social learning that generally cuts against concerns of civil libertarians regarding the repressive effects of the war on terrorism. The social learning model assures us that contemporary America's current state of social learning regarding the importance of civil liberties militates against the types of power abuses that occurred in the past in the name of national security. The social learning model generally counsels deference on the part of advocates, lawyers and judges toward the members of the political branch responsible for exercising the state's security function. Moreover, despite the social learning model's recognition that group demonization is a likely consequence of such exercises of the security function, the approach provides no remedy for the resulting racialized subordination. For demonized "enemy" groups the question arises: exactly what have "we" learned from the past and how does that social learning protect "us" from racialized harms in the future?

Second, I examine process-based approaches that see bilateral (executive and congressional) political review as the democratic floor below *1079 which exercises of national security power should not be allowed to slide. That floor is, at a minimum, quite "sticky," given the aversion such approaches have toward substantive commitments that could ameliorate the subordinationist effects of institutional politics and majoritarian democracy that such models rely upon. While certain of these approaches seem generally more open to contemplating race-based justice concerns and even incorporate some basic substantive protections, their narrower focus on problems of judicial legitimation prevents them from dealing effectively with the problems of racial subordination. Even if the courts avoid endorsing government abuses, thus preserving judicial legitimacy, subordinated groups may rightfully ask: through what means and to what end will that legitimacy have been retained?

A. Social Learning
In order to gain a sense at the outset of how subordinationist concerns remain peripheral to the mainstream of accommodationist thinking, it is instructive to consider briefly the work of scholars whose seeming embrace of the unilateralist executive places them somewhat outside legal liberalism's disciplinary mainstream. In their response to critics of the government's post-September 11 exercises of emergency powers, University of Chicago Professors Eric A. Posner and Adrian Vermeule identify what they see as civil libertarian critics' two main forms of argument--one based on the idea of a ratchet mechanism whereby civil liberties lose out to national security interests over time, and one based on the problem of fear-induced panic that causes government actors to overreact to perceived threats. Posner and Vermeule counter the latter "panic thesis" in a way that is striking for both its honesty and indifference regarding the destructive and distorting role racial animus can play in emergency-based exercise of state power. They write:

Fear generated by immediate threats, then, causes instinctive responses that are not rational in the cognitive sense, not always desirable, and not a good basis for public policy, but it is not this kind of fear that leads to restrictions of civil liberties during wartime. The internment of Japanese Americans during World War II may have been due to racial animus or to a mistaken assessment of the risks; it was not the direct result of panic; indeed, there was a delay of weeks before the policy was seriously considered. [FN11]

What is more remarkable to me than the authors' ostensible point regarding the relative insignificance of panic in policy formation during emergencies is their rather matter-of-fact attribution of problematic civil liberties restrictions to racial animus. [FN12] Posner and Vermeule do not explore further the impact of their observation concerning the determinative role played by racial animus and, thus, do not assess their own thinking on judicial deference in light of what they concede may be government actors' irrational decision-basis. This move, in effect if not in intent, normalizes by not assessing as "irrational" white fears of racialized Others in policy makers' decision-bases. Nevertheless, the authors' decision to not focus their analysis on racial animus as an irrational decision-basis, though such animus would seem pertinent to the panic-thesis that their article works at length to refute, can be explained by the fact that Posner and Vermeule obviously intended their article as a response to the types of arguments contemporary critics have mounted against enhanced state power in emergency contexts. Posner and Vermeule would have had to look beyond the "usual suspects" for critics who methodologically centered racial or ethnic animus in assessing the legal and social consequences of the government's war on terrorism.

This is not to say that the disciplinary mainstream is unaware that demonized and racialized Others suffer the brunt of power abuses in state security crises. Even those models that acknowledge the problem of group-based subordination fail to provide commensurate racial remedies. For example, progressive constitutional scholar Mark Tushnet's social learning thesis affords significant rhetorical weight to the problem that state security measures typically target constructed enemy "Others." [FN13] Tushnet offers a qualification of what he calls the Whig narrative regarding social learning, which posits that social learning over time has led to greater respect for civil liberties in emergencies, along lines that will sound familiar to anti-subordinationists:

The social learning process couples learning about exaggerated reactions to perceived threats with a persistent creation of an Other--today, the non-citizen--who is outside the scope of our concern. . . . The Whig version of social learning does identify a *1081 real process in which government policy in response to emergencies has a decreasingly small range, but a more pessimistic view would
direct our attention to the fact that the policy continues to focus on the Other. [FN14]

Tushnet identifies this distorting effect of "focus on the Other" as "the central issue in thinking about civil liberties in wartime." [FN15] Moreover, Tushnet understands that abuses of security powers, as a matter of historical fact, are often based on clear knowledge either that the threat was exaggerated or nonexistent, or that the chosen (abusive) policy response would be ineffective at curbing any real threat. He reminds us in this context of General John L. DeWitt, whose evidentiary basis for imprisoning some 120,000 innocent civilians was nothing more than a racist worldview regarding Japanese Americans.

In this light, Tushnet's "defense" of Korematsu is intentionally ironic and nuanced: "Korematsu was part of a process of social learning that both diminishes contemporary threats to civil liberties in our present situation and reproduces a framework of constitutionalism that ensures that such threats will be a permanent part of the constitutional landscape." [FN16] Tushnet's intervention seeks to combine the Whig narrative regarding social learning with a concern that courts might in fact unwittingly normalize executive assertions of unchecked emergency powers by, as the Korematsu Court did, subjecting abusive policies to pseudo-constitutional review. Because judges are likely, in Tushnet's view, to succumb to the security hysterias of the day, any constitutional review to which they subject the government's wartime policies will most likely amount to a mere rubber-stamping of those policies, creating bad precedent, if not encouragement, for future exercises of such executive power. [FN17]

Tushnet identifies three arrangements for negotiating the resulting tensions between state emergency powers and constitutional protections. In his final analysis, Tushnet declares his support for a form of judicial deference that places most exercises of emergency powers beyond real judicial review. Tushnet's preference reflects an assessment that the most pressing constitutional issue in emergency contexts is the problem of judicial legitimation of governmental overreach. [FN18] For Tushnet, the possibility *1082 of extra-constitutional validity for problematic governmental policies is "consistent with the persistence of the constitutional regime." [FN19] However one may feel about creating a new category of extra-constitutional validity, an idea that other writers endorse as a way of insuring against the constitutionalization of anti-democratic (Schmittean) states of exception, Tushnet does not extend his insight regarding the problem of the security state's focus on the other into his assessment of the approaches he contemplates for squaring state emergency powers with the values of constitutional democracy. [FN20]

Indeed, Tushnet fails to characterize as categorical civil liberties violations some of the most salient abuses of the war on terror. He mentions those policies that have targeted thousands and tens of thousands of Muslims and Arabs in the United States--Kafkaesque indefinite detentions, selective deportation for minor immigration infractions and intimidating interrogation by law enforcement officials--and grants that "in some instances, the actions taken might be true violations of civil liberties." [FN21] Tushnet concludes, nonetheless, that a meaningful distinction must be maintained between harm to citizens and harm to non-citizens. Because he does not elaborate, it is unclear exactly why or how those lines are or should be drawn, or when the distinction between citizens and non-citizens might become constitutionally problematic. But, one senses the familiar deployment of civil liberties formalism, rendering the status harms that accrue to racialized groups across the citizen/non-citizen divide irrelevant.

Tushnet's social learning hypothesis posits a public awareness that the government has exaggerated the existence of threats in the past and has dealt ineffectively with real
threats that existed. The public is thus less inclined to trust governmental claims regarding threats, and governmental actors who know of this social learning will limit the scope of their responses to such perceived threats. [FN22] Tushnet, however, also asserts a qualified defense of policymakers who he sees as facing ex ante decision contexts wherein exaggerations and overreactions are "entirely rational *1083 and ought not be criticized in retrospect." [FN23] He admonishes those who would constrain policymakers in such contexts, warning that "we should be careful not to constrain them because of our hindsight wisdom--unless we are confident that the constraints we put in place really do respond only to tendencies to exaggerate uncertain threats or to develop ineffective policy responses to real ones." [FN24] Tushnet, however, fails to consider how racism informs the "rational" exaggerations and overreactions of policy makers that he views as beyond critique.

In the end, Tushnet's social learning-based model promises little, if any, protection or remedy for demonized Others. Tushnet counsels too much caution for civil society actors who would otherwise presumably embody and operationalize social learning in their deployment of "hindsight wisdom" to challenge repressive security policies. Absent the use of such wisdom, however, it is hard to imagine how civil rights can be championed in the face of ex ante state monopoly over relevant information. [FN25] Moreover, Tushnet's reliance on the Whig version of social learning allows him to remove the judiciary from an active, let alone robust, role in overseeing security state actors. What we are left with is a historically unsupported faith that state actors will themselves have sufficiently internalized social learning to prevent abuses of the Other. In other words, Tushnet's offer to demonized groups amounts to little more than a form of political decisionism cloaked in the hope that social learning (among state actors) can stanch the negative synergy of hysteria and racism.

Deploying the notion of social learning from a critical race perspective, we might be able to take a more complete account of the subordinationist problem in state security power exercises and provide effective racial remedies. As opposed to a white-normative deployment of social learning, a critical race perspective would reject a Whig narrative that presents the internment as something that has been transcended, as a symbol of a redeemed/enlightened national identity. The concept of social learning, in this sense, would have to be refined substantially to focus on the more critical problem of "racial learning." What exactly has white America learned from the internment? To what extent have the state's culturally and demographically white security institutions and policymakers actually internalized critical race perspectives on group subordination, racial injury and racial remedy? Indeed, to what extent has the legal academy and the judiciary internalized these perspectives?

*1084 B. Process-Based Approaches

In their article, Samuel Issacharoff and Richard H. Pildes present the case from "positive law" for a version of the political-process-based approach to the courts' role in wartime. [FN26] The authors argue that U.S. courts have tended to reject the two extremes that characterize public discourse on civil liberties and national security during crises--neither subjecting national security policies to substantive review as would be consistent with the individual rights-based thinking of civil libertarians, nor having simply deferred to the President as executive unilateralists would desire. "Instead," Issacharoff and Pildes argue, "the courts have developed a process-based, institutionally-oriented (as opposed to rights-oriented) framework for examining the legality of governmental action in extreme security contexts." [FN27]

Outside national security law contexts there is, of course, a long history of pitting process-based approaches against the demands of substantive racial justice. [FN28]
Process-based approaches respond to the so-called counter-majoritarian dilemma that valorizes decisions of the political branches as more democratically legitimate than decisions of courts. [FN29] Barbara Flagg, however, shows that faith in process-based principles of judicial review, which putatively avoid application of "non-neutral" substantive norms, is a "transparently white" proposition. [FN30] The last half-century’s "enduring principle" of neutral process-based approaches to constitutional review for racial minorities has benefitted whites and disadvantaged people of color. Flagg’s critique reveals the types of substantive bias inherent in process-based approaches.

The pluralist interest impaired by process-oriented constitutional law is the interest in antisubordinationist modes of analysis. These days, all who enter the constitutional arena must speak the processual language of institutional concerns. However, because the process perspective systematically exerts pressure in the direction of the colorblindness interpretation of equality, the arena is not equally hospitable to all points of view. Those for whom matters other than institutional legitimacy take priority must nevertheless confront the substantive "tilt" associated with the process perspective. [FN31]

Adopting a process-based approach to the national security law context renders a similar "substantive tilt" insofar as concerns for institutional legitimation displace antisubordinationist principles that would prioritize remediation of group-based harms imposed on Muslims, Arabs, South Asians and other demonized minorities.

Issacharoff and Pildes developed their argument for the process-based approach by looking at Civil War era opinions in Ex parte Milligan, [FN32] the case that famously overturned President Lincoln's suspension of habeas corpus by ruling in favor of a detained individual's right to trial in a civilian court. Two positions emerge from their reading of Milligan. The majority opinion in the case represents an absolutist rights-oriented view for Issacharoff and Pildes that "transformed the case into a challenge to the power of the entire national government, even when acting in concert, to invoke emergency powers (such as suspension of habeas corpus) and re-calibrate the rights of individuals during wartime." [FN33] A concurring opinion signed by the remaining four judges contains what Issacharoff and Pildes see as the better, pragmatic approach that will become the dominant view. [FN34] Under the concurring opinion’s approach, "[t]he constitutional inquiry . . . started and finished with what authority Congress had given to President Lincoln." [FN35]

Issacharoff and Pildes read the history of national security law, up through the present war on terrorism, as the triumphant trajectory of political process-oriented judicial review of security-related exercises of state power. They then turn to normative concerns, looking at the slipperiness of process-based review and the willingness of courts to engage in dubious interpretive gymnastics in order to find congressional authorization for executive actions. [FN36] The authors also examine problems within the political process itself, such as the possibility that Congress might simply abdicate to the executive on matters of national security. The most notorious and daunting political problems of any process-based approach, the protection in the political process of discrete and insular minorities mentioned in Carolene Products’ famous Footnote Four, do not push Issacharoff and Pildes to qualify their faith in process-based institutional balancing. [FN37]

For example, the authors seek to attenuate civil liberties concerns by arguing that the executive branch may itself "internalize civil libertarian values." They base this argument in a comparison of the civil liberties records from World War I and World War II. [FN38] They conclude that protection of dissident speech was dramatically improved in World War II in large part because executive branch officials, like Attorney General Francis
Biddle, resisted the repressive impulses of the President. [FN39] Issacharoff and Pildes, however, do not discuss the Japanese internment during World War II as part of this comparison. Foregrounding the internment would undercut their hypothesis, illustrating the problems of relying on process-based approaches in contexts involving a political environment biased against a demonized and subordinated minority. Within the executive branch, individual members of the Justice Department, including Biddle, had indeed opposed the internment. [FN40] These would-be purveyors of the executive branch's "internalized civil libertarian values," however, were easily swept aside by the racist impulse that took hold of the political process. [FN41]

Issacharoff and Pildes present the Japanese internment as the by now familiar token of transcended/benighted past and a redeemed/enlightened present. They write: "[F]ar from legitimating repressive wartime policies, [Korematsu's] only doctrinal role has been as a symbol of what ought to be avoided in political practice and constitutional law." [FN42] The case of Ex parte Mitsuye Endo, [FN43] published the same day as Korematsu and providing the empty gesture of invalidating the then terminating internment of loyal Japanese American citizens, enjoys a certain position of privilege in such revisionist treatments of the internment. Endo is seen as a corrective to the rest of the internment jurisprudence. [FN44] Issacharoff and Pildes conclude that "the idea that Korematsu and its inherent racialism represent the full story about the judicial encounter with the World War II internment of the Japanese is a creation of the narrative American constitutional law has come to tell about this episode. That conventional account ignores [Endo]." [FN45]

Despite this relatively rosy assessment of the Court's role in the internment cases, Issacharoff and Pildes are willing to make no "historical/descriptive" case for a stronger judicial role in providing substantive constitutional oversight for political branch exercises of security powers. They conclude that "American courts have viewed the costs of putting judgment of these [substantive] questions into the hands of courts to outweigh the benefits of leaving these freighted questions in the joint hands of the legislature and executive." [FN46] The remaining structure of national security constitutionalism renders these exception decisions substantively unrestrained by providing only the guarantee of "bilateral review of claimed states of emergency." [FN47]

A different historical/descriptive case, however, can certainly be made even if one does not think that the Court performed admirably in the internment cases. That is, the Court's approach in the internment cases may not be as substantively hollowed-out as Issacharoff and Pildes indicate. Several of the Justices' opinions were, in fact, quite explicit in discussing the racist roots of the curfew, exclusion and detention orders. None of the opinions expressly sets aside as substantively irrelevant the acknowledged problems of the internment's racial injustices. It is true that by choosing to support political branch and military abuses the cases did not afford decisive weight to the substantive issues of racial injustice. But, it is a stretch to read the various opinions and conclude that Justices did not undertake substantive review of the internment. The Court's substantive baseline was indeed "infernal," [FN48] but seeing the internment cases as precedents for substantively unrestrained political decisionism really requires expunging the glaring racial dimensions of the Court's deliberations. It is more descriptively accurate to say that the Court simply constructed the particular norms it applied (due process, equal protection) in a way that allowed it to valorize the political branch narrative regarding the necessity of internment, regardless of how this burdened Japanese Americans.

At bottom, such readings of the internment cases acquiesce in the political branches' absolute right to decide the exception, even on racist grounds. Such readings
necessarily avoid engaging fully the racialized nature of the internment. Contrast these readings, however, with that offered by Jerry Kang who tempers any praise one might be tempted to extend to the Endo Court with the terse observation that Endo functioned mainly to absolve the political branches of any "sins" related to the internment. [FN49] Kang’s reading of Endo is integral to his critical understanding of the wartime Court as a "full participant in the internment machinery." The machinery metaphor Kang chooses is poignant, suggesting something systemic and heartless, perhaps also simultaneously "democratic" (as in autocratic "machine politics") in a uniquely American sense. It conjures an *1089 image that should trouble those using the internment to support process-based decisionism.

Kang’s socio-legal synthesis of the internment cases differs substantially from revisionist readings such as that offered by Isaacharoff and Pildes. Kang argues that the Court used judicial tactics and timing to allow the internment to proceed, while avoiding constitutionally sanctioning the indefinite detention of loyal citizens. Moreover, Endo itself was an "epic whitewash," providing rhetorical cover for the racist impulse at the heart of the internment. [FN50] "Notwithstanding the harsh and public reality of biased, negative racial meanings influencing the decision-making process of the political branches, the [Endo] Court explained that it could not possibly assume that this was so." [FN51]

Kang shows that rationalizations based on "minimalist virtues," principles that support judicial restraint, are inapplicable to the internment jurisprudence. [FN52] Minimalist virtues share, with process-based theories, the presumed advantages of furthering democratic accountability and avoiding either legitimation of unconstitutional practices or "unrealistic," politically inexpedient, judicial assertions of principle. Neither democratic accountability nor political expediency explains to Kang the Justices' failure to use judicial review decisively in negating the internment orders.

Kang shows that the Justices were not concerned with democratic accountability, [FN53] much less the protection of discrete and insular minorities in the democratic process. [FN54] The judicial approach to the internment cases "in no way promoted democratic decision making and accountability, especially if we understand democracy as more than simplistic maximization of majority preferences." [FN55] The Court also did not "dodge" the cases in a way that would be consistent with the political expediency prong of the minimalist virtues. The Court segmented, and then upheld the constitutionality of, various aspects of the internment. Indeed, Kang points out that the Court did not seek to avoid legitimating the internment for the simple reason that the Court may not have doubted the internment's constitutionality. [FN56]

*1090 In short, revisionist readings of the internment, which emphasize the Court's "principled" democratic process-based or minimalist approach, cannot redeem the internment as a model of national security law. The internment cases should be canonized, but not as monuments to principled judicial behavior in national security contexts in which political branch demonization and repression of racialized "enemy groups" has been a recurring problem. [FN57] What can redeem the internment disaster for legal liberalism is an appreciation of how either process-based approaches or judicial minimalist values must be subjected to an effects-oriented substantive baseline that provides the fullest possible protection from, and promise of remedy for, group-based harms that accrue to racially subordinated groups. [FN58] Kang invokes, for example, the deep principles of equal protection that do not allow for the trading of "outsiders" rights for the sake of benefits (including systemic legitimation) that accrue primarily to insiders. [FN59] Whether the Court in the internment cases followed a judicial minimalist or process-based script, it effectuated a transparently white jurisprudence.
legacy that cannot be transcended through revision, but which should instead sustain a non-negotiable anti-subordinationism at the core of U.S. national security law.

C. Sub-Constitutionalism: A Process-Based Hybrid

Bruce Ackerman proposes the creation of an "emergency constitution" as a way to manage the problem of security threats that do little to threaten the state's existence but which readily turn the government into the bane of civil liberties. [FN60] Ackerman believes that our biggest problem is not that government will be unable to withstand terrorist attacks, "but that it will be too strong in the long run." [FN61] Ackerman sees the present threat from terrorism as creating a powerful "distinctive interest" that compels the state to reassure its citizens that sovereignty is protected. Ackerman sets out to accommodate the legal system to this emerging state imperative, which he calls the "reassurance function." [FN62]

*1091 Ackerman, even more forcefully than other accommodationists, acknowledges the "distributional" problems his emergency constitution must face as a result of prevailing demonologies that will identify and unjustly target for abuse certain discriminated segments of the population. [FN63] The primary bulwark that Ackerman's emergency constitution erects against this kind of discrimination and abuse is a "supermajoritarian escalator"--a requirement that the state's emergency powers be temporally limited pending approval by larger legislative majorities. [FN64] This procedural centerpiece, in a model otherwise mostly devoid of judicially enforceable substantive anti-subordinationist protections, would presumably give significant "national minorities" a degree of voice and political recourse against abuse. [FN65]

Nonetheless, Ackerman seems resigned that minority demonization may be an insurmountable problem in emergency contexts, even for his supermajoritarian process. [FN66] He discusses two types of exemplary limit cases--the Japanese internment and Palestinian intifada--as situations in which both liberal judiciaries and supermajoritarian procedural safeguards might fail to insure fidelity to the principles of liberal democracy. [FN67] Ackerman believes that Korematsu and the internment illustrate the strengths and weaknesses of relying on judicial review to limit governmental abuse. Even an avowed libertarian like Justice Black succumbed to pressures in creating a paradigmatic case of the "permissive moment" in common law approaches to policing the law/security boundary. [FN68] "Decades of revisionist activity" were required for the common law method to redeem its mistake in Korematsu, and yet, Korematsu is still valid legal precedent. [FN69]

Ackerman doubts that the Court will have sufficiently internalized post-internment moral and legal revisionism to resist a future program to intern Arab-Americans in the war on terrorism. [FN70] Thus, sharing a concern with Tushnet and other accommodationists, Ackerman foresees that reliance on the courts is likely to create the "normalization of emergency conditions." *1092 [FN71] His emergency constitution is designed to avoid the impossible choice between a "lawless police state" (his characterization of the extra-legal approach suggested by Tushnet and Oren Gross) and "legally normalized oppression," which he believes results from common law's reliance on judges in national security contexts. [FN72]

Ackerman turns to the example of the Palestinian struggle to illustrate the limits of his own emergency constitution. [FN73] He surmises that the "repressive forces that may be unleashed by a Palestinian intifada that continues at its present intensity for years and years" will not be checked, even by his proposed emergency regime. [FN74] The Palestinian intifada thus marks the limit condition within which Ackerman's model can work. The recognition at the heart of Ackerman's understanding of Korematsu and the
Palestinian intifada is that the law-security distinction collapses into unprincipled decisionism, both for judges and Ackerman's temporally delimited supermajoritarian system, paradigmatically, at the intersection of race and subordination.

Ackerman's appreciation of identity-contingent limits on liberal democracy's capacity to sustain a working law-security distinction compels him to conceive of remedies for the resulting group-based injuries. Yet, like other accommodationists, Ackerman falls short of integrating the problem of group demonization and identity-based construction of security threats into his accommodation of the reassurance function as a source of state overreaching in times of crises. In other words, Ackerman neither assesses the reassurance function, nor tailors his response to it in light of his own anti-subordinationist analysis of liberal democracy's limited ability to sustain a meaningful law-security distinction. Ackerman's emergency constitution responds instead to a rather abstracted understanding of the state's reassurance function, foregoing critical engagement with the central subordinationist moment of extreme security-inflected exercises of state power.

Ackerman targets what he identifies as "bad" emergency-related legal structures. These are structures that "channel temporary needs for reassurance into permanent restrictions on liberty." Ackerman's model periodically and incrementally escalates to a maximum of eighty percent the legislative majority needed to reauthorize emergency powers. Failing such periodic reauthorization, the state's emergency powers--in particular its power of constitutionally unregulated detention--would lapse. Ackerman includes several basic substantive commitments in his model. For instance, states may not derogate, even in times of emergency, a few primary political rights and individual liberties that coincide with core international human rights protections, such as a ban on torture. Certainly, given the "discrete and insular" quality of societal minority groups demonized by majorities and states, a more carefully tailored program of "anti-demonization" protections is necessary.

Ackerman's model sets itself apart from other accommodationist models in one aspect. Ackerman eloquently articulates his understanding of the "crushing costs" that befall victims of unjust detentions. In addition, he sees the "callousness" with which governmental actors respond to "the hundreds or thousands of innocent men and women caught up in antiterrorist dragnets." His model, in contrast to some other accommodationist models, would provide mandatory monetary compensation for victims of national security power abuse. Ackerman extrapolates this remedy from the Constitution's principle of just compensation and argues for after-the-fact payment for "takings" of liberty. It is interesting to contemplate extending Ackerman's thinking on just compensation to losses of political or social capital. Applying a critical understanding of race-based subordination to the model of human capital that Ackerman adopts would allow for less literal or formalistic definition of the class of victims who warrant protection and remedy.

II. Progressive Legalism, Race and Formalism

David Cole's important book Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism ("Enemy Aliens") offers a valuable critique of the war on terrorism by blending libertarian commitments with an awareness of the political and social dimensions of "enemy" construction behind the government's security-based restrictions. Cole has been one of the most outspoken critics of the war on terrorism and is often characterized as a civil libertarian. Yet, his previous work on race and class in the criminal justice system places Cole in a unique relationship to civil liberties advocacy as someone committed to race-based critique. More strictly formalistic civil liberties advocacy, of the sort perhaps epitomized by the
American Civil Liberties Union, takes little to no account of the underlying political and social context in choosing and defending clients and causes. Debates over hate speech or pornography restriction have revealed deep fault lines between, on the one hand, more formalistic libertarian and, on the other, critical race and feminist projects. Cole's work embodies a progressive form of civil liberties advocacy, sharing certain forms of analysis with formalist approaches to civil liberties protection, while also seeking to take account of structural (social, economic and political) determinants of "unequal justice."

Were one to read but a single book on the legal problems arising from the war on terror, it should probably be Cole's Enemy Aliens. The book presents, in four parts, the argument against using national security powers to force a constitutional accommodation to what the state perceives or declares as necessary. First, Cole lays out the legal and policy changes brought by September 11 and how these changes primarily eroded the rights and liberties of non-citizens. Second, he uses both historical and contemporary evidence to show how security-related state overreaching, which begins as repression affecting only non-citizens, usually turns into across-the-board retrenchment affecting citizens and non-citizens alike. Third, Cole rebuts the consequentialist argument (that liberty restrictions make us more secure) by showing the ways that the double standards relied upon to strip "enemy" groups of their rights cause a legitimacy crisis. This crisis makes it harder to police the terrorist threats both at home and abroad. Fourth, he presents the moral and constitutional argument that our nation's liberal democratic commitments require us to extend basic rights to non-citizens, even in times of threats to national security.

*1095 Consider how Cole presents the problem of what he calls "spillover effects"; the process by which citizens' rights are negatively impacted by restrictions originally targeted at non-citizens. In a sense, Cole's argument is a learned elaboration on the famous speech by Reverend Martin Niemöller, which preaches the principle of solidarity with oppressed groups from a perspective of enlightened self-interest. This line of argument is an appeal to members of majorities, who may not be immediately or significantly affected by selective state exercises of security power, to beware lest their complacency in the face of others' civil liberties disasters lead them to ruin.

It is difficult to judge whether reliance on such an argument is, in the final analysis, proper to advocate for the interests of subordinated groups. Nevertheless, one can see why these arguments make attractive additions to the rhetorical arsenal of civil liberties defenders. In Reverend Niemöller's case, the poem had the virtue of tracking his experiences in Nazi Germany and thus did not sacrifice verisimilitude for moral force. The problem with arguments for self-interest, however, is that they do not provide the basis for critique or resistance where the state actually burdens outsider groups through exceptional exercises of security power. Self-interest arguments fail to elucidate the specifically racialized quality of such subordination, missing the tight articulation between security regimes and racial formation.

Cole looks at Japanese internment to show how anti-alien bias rationalizes political repression, and that such repression eventually extends from non-citizens to citizens. Cole concludes that the "internment marked the extension to U.S. citizens of practices long imposed on foreign nationals, as the citizen/non-citizen divide was bridged by racial animus." He shows that the non-citizen/citizen bridging device of racial animus is analogous to the bridging device of "politics" used during the anti-communist backlash of the McCarthy era, when "radical citizens were targeted in much the way that radical foreign nationals had been targeted earlier."
Cole's decision to cast anti-Japanese or anti-Asian racial animus in the role of a bridging device is necessitated by his focus on alienage (and the spillover effect into the category of citizen) as the operative category of analysis. Of course, another way of viewing the relationship is to see racism as the factor-making that made alienage all but irrelevant in the case of Japanese-Americans who were interned en masse. A more focused critical race analysis of the internment would be helpful, for example, if Cole were trying to make a cautionary argument about a "racial spillover effect" that could impact other racial minorities. [FN98] Instead, the analysis must effectively de-emphasize the racial contingency of the internment and emphasize the general problem of anti-immigrant sentiment in the United States. [FN99] Cole chose not to locate the roots of the internment in the century of intense and violent anti-Asian history, an especially prominent feature of the social formation of the western region states from which the internees were expelled. Instead, Cole argues that the roots of the internment go back to the period before the first wave of Asian immigrants arrived in the United States, to the post-American revolutionary period and the passage of the first in a series of anti-alien security laws, the Alien and Sedition Acts. [FN100]

Cole uses this long history of anti-alien security law to support his point about the easy bridgability of the non-citizen/citizen divide:

The Enemy Alien Act (in force at the time of the interment) is by definition predicated on a sharp distinction between citizens and foreign nationals; its very justification is the enemy alien's foreign nationality. Given the centrality of "alien-ness" to the concept, one might think that this power would pose little threat to the liberties of U.S. citizens. In World War II, however, the military extended the Act's philosophy to Japanese-Americans through the prism of race. [FN101]

It is certainly true that the military, especially the lawyers defending the internment, used racial stereotypes and racist propaganda to advocate *1097 the internment of Japanese Americans. [FN102] The lesson Cole draws from the internment about the easy slide from repression of non-citizens to repression of citizens overstates any role the formal citizen/non-citizen distinction played in the unfolding of events. Chief Justice Rehnquist has opined that the internment cases were soundly decided insofar as the government repression only targeted non-citizens. [FN103] The Chief Justice's line-drawing is, in reality, in the spirit of after-the-fact apologia. Moreover, it is part of his attempt to push United States national security law toward a more unilateral executive model, or at least toward a model of limited judicial review. [FN104] As Cole points out, at the time, the Court "made little reference to the fact that citizens' rights were at issue." [FN105]

In fact, the decisive line-drawing at the time of the interment was racial, as evidenced by the fact that none of the other non-racially demonized groups of enemy aliens (in particular Germans and Italians) faced the kind of group-based treatment that the Japanese faced. [FN106] Cole's desire to turn the internment into an objective lesson for citizens who may not be worried about the government's repressive policies in the war on terrorism brings him to the problematic theoretical interface of immigration and race. He concludes that a "close interrelationship between anti-Asian racism and anti-immigrant sentiment made the transition from enemy alien to enemy race disturbingly smooth." [FN107] Articulating the racial dimension of the interment as bound up in the general interrelationship between alienage and race elides the lesson of scholarship that has shown how Asians as a group have been specifically "raced" through an othering process that uniquely ties racial difference to permanent "foreign-ness." [FN108] This foreign-ness is not exhausted by, or subsumable to, the legal category of alienage with which Cole works. It is instead an aspect of racial formation; *1098 a distinct category of analysis that relates only orthogonally to the legal category of alienage.
The lesson Cole draws from what I refer to below as "the internment this time" [FN109] parallels the one he draws from the historical cases. Cole emphasizes that the government's targeting of innocent foreign national Arabs and Muslims on the basis of "ethnic stereotyping" has extended "anti-alien measures to U.S. citizens through the prisms of race and political association." [FN110] In sum, the argument Cole presents is designed to convince non-Arabs and non-Muslims ("citizens") that they should reject the government's racist double standards in the war on terrorism. This argument uses a formal, de-racialized and alienage-based understanding of the discrimination involved in the government's policies to depict the danger of a spillover effect that might eventually impact citizens.

Karen Engle has written a thoughtful article discussing how historical constructions of "good aliens" and "bad aliens," long operative in the semiotics of immigration law, have affected the war on terrorism. [FN111] Engle's article, like Cole's book, relies on alienage and signifying practices affecting immigrants generally to mount an argument about the manipulated legitimation of the war on terrorism. [FN112] Engle identifies three parameters by which bad aliens have been signified in the past: national origin, race/ethnicity and political identity. These categories are deployed by the state as part of a legitimating dynamic through which both citizens and aliens are constructed and disciplined to support the war on terrorism. [FN113]

Engle rejects the position forwarded by Leti Volpp and others who have supported a race-based critique of the war on terrorism and its effects on Muslims, Arabs and South Asians. Engle writes:

I maintain that individuals thought to occupy the category of Muslim or Arab are not automatically placed into the bad category . . . . Thus, the war on terrorism is not simply a war on Muslims, and it is not a holy war. To the contrary, it largely attains legitimacy by presuming and relying on the existence of a category of good Muslims, both within the United States and abroad. The United States of the twenty-first century maintains an identity as a multicultural, (neo)liberal and tolerant state. [FN114]

*1099 Engle's focus on the semiotics of war-on-terrorism legitimation centers the problem of explaining Islamophilic and Arab-friendly pronouncements made by many of those waging the war on terrorism. This centering, however, also leads to a certain leveling of the historical record regarding the nation's anti-immigrant discriminations. Engle posits a generalized process through which bad aliens are constructed, thus creating analytical equivalencies between race-based and other forms of anti-immigrant discrimination, othering or demonization. [FN115] Racial distinctions that more or less create closed categories based on biology, phenotype or culture are viewed together with more open-ended categorizations that allow for opting out by proving that a member of the otherwise suspect class can be trusted or assimilated. [FN116] Engle sees pervasive race-based profiling in the government's post-September 11 anti-terrorism campaign as only part of the story, maintaining that "today's profiling [of Arabs and Muslims] is both tolerated and even endorsed because it operates alongside an open offer to those identified with profiled groups to demonstrate that they are model members of their groups." [FN117]

Engle, like Cole but for reasons different from his, understands the war on terrorism from a similarly formal set of legal distinctions that analytically privileges categories of self and other resulting deductively from the territorialized logic of the nation-state. Citizens and immigrants/aliens are not categories that map linearly onto the discriminating logic of racial formation. Similarly to Cole, Engle posits the problem of
anti-Muslim or anti-Arab animus as a function of the spillover effect from the bad alien
category that now affects all Muslims and Arabs regardless of citizenship:

The perception of disloyal tendencies that define the bad alien categories has bled
over into the identification of bad citizens. The fear that [Muslim/Arab] terrorists
would naturalize in order to undermine the system is perhaps not as strongly felt
or expressed as it was in the 1950s. In fact, little distinction seems to have been
made between United States-born and naturalized citizens in the internal war on
terrorism. Rather, regardless of birth, Muslims and Arabs form most of the
suspect class. [FN118]

Engle's reliance on the formal categories of immigration law, aggregating aliens and
citizens, respectively, as classes even while impressively teasing out the different ways
good and bad aliens are constructed from within the same category, leads to a
displacement of the racial dimensions of the war on terrorism. What might be better
understood as an irreducible "*1100 racing" of Arabs and Muslims, accompanied by
rather transparent and bad-faith official recitation of a multicultural mantra, is
submerged analytically in the same way that the acceptance of alienage and nationality
categories in immigration law discussions generally may elide the racialized nature of
the immigration law regime. [FN119]

To be clear, neither Cole nor Engle is unaware or denies that racism operates to the
detriment of immigrants of color, or Arabs and Muslims (non-citizen or citizen). [FN120]
But for both, race is folded into a critique that draws conceptual and rhetorical force
from formal immigration and alienage law categorizations. It is clear that these
approaches are not as antithetical to group-based analyses (or remedies) as purely
formalistic understandings of civil liberties that often, in categorical fashion, exclude
underlying anti-subordinationist concerns involving group differentiation and group-
based power imbalances. Yet, in seeking, as perhaps in Cole's case, to appeal to the
relatively non-impacted group of white citizens, and in Engle's case, to explain the
apparent contradiction between the racist "walk" and multicultural "talk" of the war on
terrorism, formal categories of immigration law displace racial subordination as the
critical center of gravity.

III. The Internment This Time

Huey (reading from newspaper): Newsweek has confirmed through an exhaustive
national poll that Black Americans are no longer America's most hated group. The
results do not come as a surprise to many experts, who have observed a dramatic
change in Americans' profiling and discrimination patterns since September 11th. The
last ethnic groups to remove Black Americans from the top spot were the Japanese and
the Japanese-Americans, who had a brief but memorable run at the top in the early
1940s.

Caesar: I'm so proud . . . [FN121]

How does the post-September 11 treatment of Arabs, Muslims and South Asians in the
United States compare with the internment of the Japanese in World War II? Asking this
question obviously places the present discussion *1101 in a particularly compelling
comparative moral and historical perspective. Still, the question also suggests the
broader problem of comparatively assessing the racialization of Muslims, Arabs and
South Asians in the United States. Some may be quick to conclude that the historical
internment of Japanese Americans and the internment this time are categorically distinct
cases, notwithstanding the thousands of innocent Muslims, Arabs and South Asians who
have been detained in the war on terrorism. Yet, close observers, such as Hamid Khan
of the South Asian Network in Los Angeles, see the current trauma as evincing aspects of both an actual and a virtual internment. Kahn observes that, in addition to the actual detentions, Arabs, Muslims and South Asians are undergoing an internalized internment, resulting from a realistic fear of government repression and a sense of betrayal and besiegement as a despised minority group in U.S. society. Moreover, Khan believes that the internment this time, like the Japanese internment, must be understood in the context of a longer history of racialized subordination of the affected groups.

The analysis presented here is not intended to arrive at any "final" assessment on the status of Muslims, Arabs and South Asians in the United States. That the processes of racialization have affected these groups seems certain, but how to understand the groups' racial positionality relative to the other groups of color in the United States remains an open question. My goal in writing this section is modest. I want to suggest that group-based subordination of Muslims, Arabs and South Asians bears a strong enough family resemblance to other forms of race-based subordination to warrant "extraordinary consideration" in the national security law debate. Derrick Bell's famous Space Trader parable depicted members of the white establishment as having at least to acknowledge that their desire to trade African-Americans to the extraterrestrial invaders might run afoul of equal protection principles. Similarly, members of today's security law and policy intelligentsia should be constrained to square their anti-terrorism gambits with group-based justice considerations regarding the status of Muslims, Arabs and South Asians. Of course, the hope here is also that such considerations might render the trading away of these groups' interests less likely, a significant, if wishful, deviation from Bell's grim script.

A. Racialization of Muslims, Arabs and South Asians Before September 11

Scholarship prior to September 11 on the status of Muslims, Arabs and South Asians in the United States presented differing views on the fundamental question of whether these groups were "melting" into the mix of white ethnic groups, or whether a more permanent racialized outsider status was taking shape. The argument for applying what Omi and Winant refer to as the European "immigrant analogy" seemed warranted in light of the legal classification of Muslims, Arabs, and South Asians as white. As early as 1909, a federal judge declared that a Syrian/Arab applicant met the statutory requirement of whiteness for naturalization eligibility. In 1914, the Fourth Circuit reached a similar conclusion. Additionally, the census bureau classified Arabs and Muslims as white or Caucasian and the federal government has generally refused to include Arab or Muslim groups among those discriminated minorities considered eligible for affirmative action in contracting.

Nevertheless, the analogy between Muslims, Arabs and South Asians, on the one hand, and European immigrants, on the other, appears strained in light of evidence showing more ambiguous treatment afforded these groups under the law. In the context of naturalization, not all judges agreed that Muslims, Arabs and South Asians should be classified as white, and some judges refused them access to citizenship through naturalization. More recently, in at least one case, the Small Business Administration (SBA) recognized the discrimination claim of a Palestinian American contractor and included his company in the group of minority contractors eligible for affirmative action in federal contracting. In addition, in 1987, the Supreme Court held that ethnic groups, such as Arabs, could bring section 1981 civil actions for discrimination. Last, San Francisco included Arabs in the city's affirmative action program. Scholars familiar with such legal ambiguities and other mixed signals sent from U.S. society to Muslims, Arabs and South Asians adopted the term "invisible minority" to capture the groups' unique status.
Ambiguity of racial status, resulting from some degree of mixed classification under the law, has been reinforced by the different waves of immigration from the Middle East. Prior to World War II, for example, Arab immigrants to the United States were mostly Christians from Syria and Lebanon. Thereafter, immigrants came from North Africa and elsewhere in the Arab World, and many were Muslim, a racialized religion. Moreover, "external" politics have had a unique impact on the status of Arabs and Muslims in the United States. Fallout from the 1967 Arab-Israeli War was an early watershed. This led to ostracism of Arabs and Muslims in the United States but also provided the impetus toward those groups' formation of a sense of collective identity. Michael Suleiman traces the rise of "Arab-American pride" to the consequences of post-1967 Middle East politics and U.S. foreign policy in the region. He notes that many Arabs in the United States felt humiliated by the quick defeat of Arab armies and resentful of the partiality that the U.S. government and its people showed toward Israel. Arab-Americans responded by organizing to fight the negative stereotypes of Arabs that increasingly permeated U.S. media and to make U.S. foreign policy more balanced in the Middle East.

Thus, 1967 saw the creation of the Association of Arab-American University Graduates (AAUG), the first Arab American organization with "political-scholarly goals." This signaled the beginning of a new era of pan-Arab organizing in the United States. Other groups followed, including the National Association of Arab American and the American-Arab Anti-Discrimination Committee. Despite the creation of such advocacy organizations, negative images of Arabs and Muslims continued to dominate media representations, and many U.S. political figures, including leaders of the otherwise relatively pluralistic Democratic Party, distanced themselves from Arab and Muslim constituencies. Presidential candidates McGovern, Carter, Reagan and Mondale also disassociated themselves from Arab groups who offered support. Between forty and fifty-one percent of the respondents in a survey in 1981 agreed that Arabs were barbaric, cruel, treacherous, cunning, warlike, bloodthirsty, mostly anti-Christian and/or anti-Semitic, and that Arabs mistreated women. Such studies, along with the openness of anti-Arab or anti-Muslim bigotry, led observers to conclude that these groups are among the few that are acceptable to hate openly.

The 1980s brought new levels of repression and violence. The FBI, beginning with Nixon's Operation Boulder, had been spying on and intimidating Arab-Americans and their organizations since the 1967 Arab-Israeli War ended. Notwithstanding the onset of the United States' first war on terrorism under Ronald Reagan and the new phase of Palestinian activism in the occupied territories, the 1980s marked a period of heightened apprehension among Arabs and Muslims in the United States. The FBI's 1980s counter-terrorism campaigns harkened back to the abuses of its COINTELPRO programs that went far beyond law enforcement and effected an anti-democratic sabotage of the civil rights movement. In 1987, the case of the so-called Los Angeles Eight revealed stunning abuses of the political rights of Palestinians and supporters of the Palestinian movement. The legal case involved the deportation of a group of seven Palestinians and one Kenyan, who had been among the targets of a three-year FBI "anti-terrorism" investigation. A report of the investigation's findings showed that the FBI infiltrated and spied on the lawful, non-violent political activities of these supporters of the Palestinian cause. No unlawful activities were ever reported, but the FBI agents recorded their concern over the political opinions of those upon whom they spied. The report concluded that the Palestinian activists were "anti-United States," and "anti-Israel." At the criminal trial, officials from INS and the FBI both testified that the political beliefs of the defendants led to their arrest, and FBI Director William Webster testified that these political beliefs would have been protected if the defendants were U.S. citizens.
Susan Akram and Kevin Johnson discuss how the Palestinian Liberation Organization (PLO) has been singled out for harsher treatment under waiver of exclusion provisions in U.S. immigration law. [FN153] This selective withholding of relief from exclusion for people involved with the PLO, paired with the government's selective enforcement of deportation proceedings, (the L.A. Eight case is one example), reveals a systemic closure against the legal membership of Arabs and Muslims who support the Palestinian cause. Even after Congress eliminated ideological grounds for exclusion from the law in 1990, the INS continued selectively to seek removal of the L.A. Eight, now on grounds that they had engaged in "terrorist activity." [FN154] This concept was defined broadly enough to encompass the range of peaceful and otherwise legitimate political activities in which the defendants, as supporters of the Palestinian cause, had engaged. [FN155]

Such governmental abuse of Arab-American political freedoms occurred at the same time that the Alien Border Control Committee, a secret government task force, was discussing plans for the mass incarceration of "alien undesirables," mainly from Arab countries. There were even plans for a special detention facility for such prisoners in rural Louisiana. [FN156] Moreover, the FBI abuses were mirrored by a string of violent attacks targeting Arab activists in the mid-1980s, including the 1985 murder of Arab-American Defense Committee Regional Director Alex Odeh in Los Angeles, the 1986 double murder of renowned Islamic scholars and spouses Lois Lamya and Ismail al-Faruqi in Philadelphia and the severe beating of Moustafa Dabbas, publisher of the only Arabic-English newspaper in Philadelphia in 1986. [FN157] The combination of governmental abuses and acts of political violence had a chilling effect on Arab and Muslim political activity at exactly the time that these groups were most in need of public representation. [FN158]

The first Gulf War in 1991 only added to the dehumanization of Arabs and Muslims, as reflected in the comments of General Norman Schwartzkopf when he referred to Iraqis in Kuwait as not being part of the "same human race we are." [FN159] Racial epithets were used to goad U.S. troops forward in Iraq, and racist depictions of Iraqis appeared in U.S. newspapers. [FN160] Mosques were bombed and Muslim schools, organizations and businesses were vandalized. Hate crimes again surged against Arabs, and the FBI engaged in intimidating interviews of Arabs in the United States. [FN161] Sudden, event-related surges in hate crimes and anti-Arab and anti-Muslim media representations became a recurring theme in the 1990s. This theme repeated itself after the 1993 World Trade Center bombing and the 1995 Oklahoma City bombings. Thus, U.S. Arab and Muslim communities' well-being became closely linked to events and forces beyond their control. [FN162]

Akram and Johnson chronicled the government's discriminatory treatment of Arabs and Muslims in the context of immigration and refugee/asylum law during the post-1967 period. [FN163] This history demonstrates the ways certain extreme forms of court-sanctioned state power, declared available in immigration's unique environment of "plenary" congressional and executive power, operate selectively to the detriment of Arabs and Muslims. [FN164] Race, foreign policy and outsider status come together in shaping what amounts to one of the clearest examples of a legal regime of exception within U.S. law. The evidence shows how political and ethno-national factors shaped the legal system's treatment of Arabs and Palestinians and their supporters.

Since 1996, the INS has been empowered to use secret evidence in deportation cases. [FN165] Akram and Johnson were unable to locate any cases where the secret evidence power in deportation cases had been asserted against anyone other than Arabs and Muslims. [FN166] The secret evidence cases targeted some particularly high profile political figures including a Palestinian member of a University of South Florida academic
think-tank committed to addressing Middle East issues, and a democratically elected member of the deposed Algerian Parliament. [FN167] Repeatedly, the secret evidence cases have revealed the INS's tendency to exaggerate claims. Akram and Johnson state, "the government's claims in all of the cases evaporated. No case has included sufficient evidence of terrorism-related charges necessary to justify detention. Besides the individual loss of liberty, these cases have chilled Arab and Muslim speech." [FN168]

Prior to September 11, Natsu Saito reviewed the secret evidence cases involving detention, exclusion or deportation of Muslims or Arabs in the United States and, already at that time, identified elements of racialization in the disparate types of treatment Muslims and Arabs received in the post-1996 legal environment. [FN169] Saito compares the racialization of Arabs and Muslims to that of Asian Americans.

Just as Asian Americans have been "raced" as foreign, and from there as presumptively disloyal, Arab Americans and Muslims have been "raced" as "terrorists": foreign, disloyal, and imminently threatening. [FN170]

Saito's critical race-based reading of the legal record before September 11 shares theoretical space with the work of social scientists who have studied Arabs and Muslims from a similar racialization perspective.

The types of bigotry, violence and governmental abuse experienced by Arabs and Muslims after 1967 led social science scholars to reach different conclusions about the nature of the animus facing these groups. Nabeel Abraham identifies three different bases for the racism and violence affecting Arabs in the United States: ideology, nativism and jingoism. *1109 [ FN171] The first category, ideological or political racism, refers to the animus that attaches to Arab and Muslim support for the Palestinian cause. Abraham argues that zealous support for Israel in the United States has reinforced the perception that Arabs are terrorists, sowing fear and suspicion toward Arab Americans. [FN172] Xenophobia fuels a second form of racism, nativistic racism "based on perceived differences of race, culture, ethnicity, and religion." [FN173] This form is "homegrown" in the sense that it does not rely on the Israel-Palestinian conflict for fuel. [FN174] It is more in keeping with the anti-foreignness racism affecting Asian Americans, a mix of anti-immigrant and racist animus. Finally, jingoistic racism "is a curious blend of knee-jerk patriotism and homegrown white racism toward non-European, non-Christian dark skinned peoples. It is a racism spawned by political ignorance, false patriotism, and hyper ethnocentrism." [FN175] The latter is the type of racism that we observe when the United States government defines a culturally or racially identified other as the enemy and mobilizes the "nation" for war.

Over time, exclusionary actions had the effect of creating political and cultural identities that Louise Cainkar characterizes as "transnational." [FN176] Cainkar does not imply that Muslims and Arabs were able to develop a uniquely post-national set of identities that could be seen as an aspect of a broader, mostly positive trend toward the transcendence of the national boundaries and identities. Rather, Cainkar asserts that Muslims and Arabs developed transnational political and cultural identities in response to "exclusion and denigration in American society." [FN177] Cainkar's work traces a transition over time in the dominant identity-axis of these groups, from pan-Arab to nationalist to Muslim. This shift represents a departure from the so-called ethnicity paradigm that analogizes the Arab experience to white European experiences, which suggests the deepening racialization of Muslims and Arabs. These changes not only reflect the ongoing discrimination and exclusion from American society, but also the ways in which the international context, particularly aspects of U.S. foreign policy, have created conditions of racial subordination for Arabs and Muslims throughout the latter third of the twentieth century.
The result has been the formation within U.S. society of a racialized and subordinated sub-group that has moved toward forming a non-assimilated cultural and political identity in response to state and societal othering processes. Therese Salibi concluded:

*1110 The racial transformation of Arab identity within [the United States] has been influenced in large part by a second wave of [pan-Arab oriented] Arab-American immigration, by the formation of Arab-American political organizations beginning in the 1960s, and by a growing resistance among these groups to U.S. foreign policy in the Middle East. In the wake of the Persian Gulf War, Arab-Americans emerged as a semi-legitimate minority group. [FN178]

In ways that parallel the experiences of the "unmeltable" peoples of color in the United States, Muslims and Arabs do not have the same choices that are available to whites to opt in or out of ethnic identities. The boundary-marking differences that set these groups apart from whites evince an immutability that has been the hallmark of enduring forms of racialized group-based subordination. [FN179]

B. State Action in the Racialization of Muslims, Arabs and South Asians After September 11

Abundant evidence of post-September 11 racialization and abuse of Muslims, Arabs and South Asians exists. In the brief space of this article, I can only rehearse some of the most important points gleaned from the various data sets currently available, highlighting evidence that suggests a hardening of the diminished social and legal status of the affected groups. Generally, the record shows that the government quickly extended its pre-September 11 discrimination of Muslims, Arabs and South Asians through the most vulgar forms of racial profiling. Law enforcement officials immediately began apprehending racially profiled Muslim and Arabs. In early November 2001, the reported number of detainees had reached almost 700. [FN180] Subsequently, the Justice Department stopped reporting the detention numbers. [FN181] Though the Justice Department resisted shedding further light on its post-September 11 treatment of Arabs and Muslims, David Cole estimated that the number of detentions in the United States topped 5,000 by May 2003. [FN182] Given that these detentions resulted from racial profiling and programs like the selectively-targeted (anti-Arab and anti-Muslim) Absconder Apprehension Initiative and the National Security Entry-Exit Registration System ("NSEERS"), we may assume that nearly all of the detained persons have been Arabs, Muslims or South Asians living in the United States. [FN183]

*1111 The detention of thousands of racially-identified residents of the United States, which includes both citizens and non-citizens of Arab, Muslim or South Asian descent, represents the iceberg's tip in terms of state abuses affecting these resident communities. For example, the NSEERS program reportedly required more than 82,000 men and boys from countries with Muslim majorities to present themselves to the INS for special registration. [FN184] Of those who complied, 13,000 remain eligible for deportation for minor violations of immigration regulations. [FN185] The NSEERS program failed miserably as a tool to find terrorists. As a matter of common sense, it seems unlikely that anyone secretly planning a terrorist attack, and someone vulnerable to deportation or detection through the special registration program, would willingly show up at INS offices. Indeed, none of the tens of thousands of people who registered, including those charged with immigration violations, were charged with terrorism-related offenses. [FN186]

Even after the NSEERS was formally dismantled, it negatively impacted Arab, Muslim and South Asian communities. [FN187] Louise Cainkar placed NSEERS within a broader
context of society's failure to accommodate Islam as a minority religion in the United States and concluded that:

Instead of helping to weave Muslims into the fabric of the nation and garner their support in anti-terrorism efforts, recent government policies [such as NSEERS] have singled them out as a group that is dangerous and suspect, as potential subversives. By requiring Muslim community organizations to use their resources on self-defense--resources that have been substantially depleted by government closures of charitable institutions and community fears--programs focused on community building must be cut-back or sacrificed. (Not unlike the resource drain caused by the federal government's targeting of civil rights activists in the 1960's). [FN188]

The drain on community resources is especially significant in light of the heightened need for community development of "political capital" among the affected groups. [FN189] A negative synergy, with potentially devastating consequences, results from media and popular cultural demonization of Muslims, Arabs and South Asians when combined with government programs such as NSEERS that force communities into resource-draining defensive postures.

The devastation upon families and communities by indefinite detentions has been deepened by the government's insistence that names and locations of detainees be kept secret and by other abusive treatment of detainees, including physical and psychological coercion. [FN190] In a series of reports, the Office of the Inspector General of the United States Justice Department (OIG) documented a staggering array of abuses suffered by post-September 11 detainees, whose alleged wrong-doing amounted to nothing more than minor immigration infractions. For example, the OIG found that the processing of detainees (including issuance of charging documents) occurred in some cases no sooner than thirty days from the date of incarceration, despite INS's stated goal of 72 hours. [FN191] The delay prevented detainees from effectively retaining legal counsel, requesting a bond hearing or learning of the reasons for their incarceration. [FN192]

Delays were also common in the FBI's required clearance procedures before the release of post-September 11 detainees. The Justice Department's unwritten, though clearly understood, "hold until cleared" policy, combined with the low priority clearance proceedings, resulted in the average clearance proceeding taking 80 days. [FN193] Continued detention of persons who were otherwise subject to removal or "voluntary departure" was achieved through the Justice Department's "no bond" policy, which resulted in ongoing detentions that arguably violated even the minimal standards of immigration law. [FN194]

The OIG reported on conditions of confinement at the two facilities that received the majority of the post-September 11 detainees, Metropolitan Detention Center in Brooklyn, New York (MDC) and Passaic County Jail in Paterson, New Jersey (PCJ). In its original report, the OIG focused on a range of abuses at the two detention facilities. MDC, the more restrictive of the two facilities, classified post-September 11 detainees as Witness Security inmates, a classification which prevented families, friends and lawyers from obtaining crucial information regarding the location of their loved ones and clients. [FN195] The detainees could not use the telephone to secure effective legal representation because they were limited to just one weekly phone call and in some cases, not asked whether they wished to place their weekly call. [FN196] The detainees typically had not been able to retain counsel prior to their detention, and limited telephone access made it difficult to secure legal representation after being detained. [FN197]
Physical and verbal abuse of detainees, particularly at MDC, became the subject of a separate OIG report. [FN198] MDC created a special wing for the post-September 11 detainees that had the most restrictive detention permissible under the Federal Bureau of Prisons policy, including twenty-three hour a day lock-downs and constant cell illumination. [FN199] The OIG Report on the MDC investigated the detainees' allegations of physical abuse, including slamming them into walls, bending and twisting their arms, hands, wrists and fingers and inflicting pain by using restraints. [FN200] The OIG also reported allegations of racist and anti-Muslim verbal abuse. [FN201] The OIG investigation concluded that the allegations of physical and verbal abuse were credible and supported by videotape and other evidence, and, therefore, recommended administrative punishment of a number of the MDC staff members involved in the many instances of abuse. [FN202]

Government agents subjected other Muslims and Arabs to intimidation through so-called voluntary interviews. In 2001-2002 some 8,000 young men, almost all Arab and/or Muslim, were selected by the Justice Department for interviews. [FN203] The interviews were not compulsory, but upon receiving letters or being visited by law enforcement agents, many of whom were treated in a targeted individuals nonetheless felt compelled to cooperate. Over ninety percent of those contacted agreed to be interviewed. [FN204] Twenty of the interviewees were arrested on minor immigration charges. [FN205] The agents asked the men, among other things, about their own or their families' or friends' political beliefs. [FN206]

It is doubtful that the interviews accomplished anything other than the further alienation of the affected individuals and their communities from law enforcement. The American-Arab Anti-Discrimination Committee did not share Attorney General Ashcroft's positive assessment of the interview program, doubting the effectiveness and fairness of such ethnic dragnet techniques of investigation. [FN207] Nonetheless, the government conducted more voluntary interviews targeting Arab and Muslim communities in the summer of 2004. [FN208] Again, law enforcement officials asked interview subjects about their political views regarding, for example, the United States invasion of Iraq. [FN209] Members of the Arab and Muslim communities feared that the interviews signaled suspicion and targeting by the FBI that might have catastrophic consequences for innocent interviewees. [FN210] Mohammad Qazi, national coordinator for the America Muslim Alliance, described the chilling effect of the interviews, stating that those who feel targeted by the campaign "don't want to talk to reporters, they don't want to contribute money to any Muslim organization, they don't want to get involved politically in elections, they don't want to give their name or address out. People don't want to be visible anymore." [FN211]

The PATRIOT Act, which has been criticized in numerous articles and books for broadly eroding civil liberties, also enhanced the government's already hypertrophied power to attack Islamic charitable organizations that the government alleges support terrorist organizations. [FN212] In 2001-2002, the government froze the assets of the three largest Islamic charities in the United States, Global Relief Fund, Holy Land Foundation and Benevolence International. [FN213] The evidentiary basis for these moves is unclear because the PATRIOT Act allows the Treasury Department to freeze an organization's assets if an entity is under investigation for violating the International Emergency Economic Powers Act (IEEPA). [FN214] The PATRIOT Act allows the government, in defending its actions in court, to rely on secret evidence. [FN215] The three charities fought the freezing of their assets in court, but lost. [FN216] The Supreme Court refused to grant certiorari in the Holy Land Foundation case, effectively rubber-stamping a process which affords Islamic charities almost no chance to discover, let alone rebut, evidence that they support terrorism. [FN217]
The anti-Islamic charity cases affect Muslims both politically and culturally and the causes they support. Consider, for example, the closing of Holy Land Foundation, which the government claimed was a security threat because of its alleged association with Hamas. Holy Land Foundation is a group that says it sponsors humanitarian action in support of the Palestinian cause. The case against Holy Land Foundation, to the extent anyone can understand it in the face of the government’s reliance on secret evidence, seems premised more on the organization’s proximity to the Palestinian cause than anything else.\textsuperscript{[218]} The evidence that has been unclassified concerns "contacts" between Holy Land foundation and Hamas leaders at a conference in 1993, before Hamas had been designated as a terrorist organization.\textsuperscript{[219]} The government also alleges Holy Land Foundation paid for a Hamas leader to fly to the United States in 1990-1991, something the U.S. government itself did in 1997.\textsuperscript{[220]} Finally, Holy Land is accused of giving charitable contributions to a Hamas-controlled hospital, which, apparently also received funding from the Red Cross, Great Britain and even the United States Agency for International Development.\textsuperscript{[221]}

Many Muslims give to charities in fulfillment of their religious obligation, which may require 2.5 percent of a person’s income be given to charity.\textsuperscript{[222]} Many Muslims may choose to give money to support impoverished Palestinians or related humanitarian efforts as a way of supporting the Palestinian struggle more broadly. The targeting of Islamic charities in the war on terrorism has proven a strong disincentive among would-be donors, who now fear that the United States government may confiscate their donations or view them as criminals for having offered material support to "terrorists."\textsuperscript{[223]}

The use of the IEEPA and PATRIOT Acts to attack Islamic charities that have no meaningful chance to defend themselves against charges of supporting terrorism is, as David Cole argues, akin to the kinds of ideological witch hunts of the Cold War.\textsuperscript{[224]} The injury to the free speech and association rights of Muslims who wish to support political causes through charitable contributions, however, is ethnically selective in nature. Similar support from Irish Americans for the Irish Republican Army, or from Jewish Americans to support the illegal and violent extremism of so-called settler groups, did not fall victim to the same kinds of government repression.\textsuperscript{[225]} Muslim leaders in the United States have come together to make the unusual request that the U.S. government provide a list of approved charities that Muslims could give money to without fearing criminalization or confiscation.\textsuperscript{[226]} An FBI spokesman doubted such a list would be forthcoming, leaving Muslims to fear that their charitable acts, as interpreted by authorities through an anti-Muslim and anti-Arab lens, may loosen the wrath of law enforcement upon them.\textsuperscript{[227]}

C. Racialization of Muslims, Arabs and South Asians in Post-September 11 Society and Culture

The American-Arab Anti-Discrimination Committee reported some 700 violent incidents directed at "Arab Americans or those perceived to be Arab Americans," occurring in the first nine weeks after September 11.\textsuperscript{[228]} These violent incidents, including as many as eleven murders,\textsuperscript{[229]} alone fill nearly 35 pages of the ADC 2002 Report and cannot be summarized in detail here.\textsuperscript{[230]} One case the ADC reported symbolizes the racial nature of these attacks.

October 3- Noroco, CA:

An Arab-American businessman was beaten by two men in ski masks while he was closing his store. They shoved him to the back of the store, finally pushing his face into a mirror. They beat him, calling him "sand n***." The two men
then chained him as he tried to escape. They sprayed his face with black spray paint, saying they could "make him a n*****." They poured fire starter fluid on him and threw liter bottles at him until he lost consciousness. [FN231]

In another case in Bridgeview, a suburb of Chicago, a group carried a Confederate flag as it marched to a mosque chanting "kill the Arabs." [FN232] Such (literal and figurative) painting of Arab victims of hate violence as black, use of the "n-word" to fix the victims' place as in the racial hierarchy, and rallying under the symbol of the southern slave republic, indicate *1118 the deeper racialization processes at work in these "private" acts of violence. It seems as if the perpetrators of these attacks, needing to give meaning to their acts beyond a formal sense of patriotic defense of country, ground their violence in the images of racist dehumanization with which they are most familiar. Leti Volpp argues that "citizenship" operates against those who appear to be Middle Eastern, Arab or Muslim regardless of formal status. [FN233] "Citizenship as identity" can function along existing racial fault lines to create boundaries that vigilantes feel empowered to violently enforce. [FN234]

Hate crimes against Arabs, Muslims and South Asians did not, unfortunately, disappear after the immediate aftermath of September 11. Instead, the Council on American-Islamic Relations (CAIR) found that reported incidents of "harassment, violence and discriminatory treatment increased nearly 70 percent [in 2003] over 2002 (the year after the 9/11 terrorist attacks)." [FN235] Taken alone, violent attacks against Muslims increased by 121 percent between 2002 and 2003, the largest increase ever in that category. [FN236] CAIR attributed the rise in reported anti-Muslim incidents to a number of factors, including "[t]he war in Iraq and the atmosphere created by pro-war rhetoric" and "[t]he noticeable increase of anti-Muslim rhetoric, which often painted Muslims as followers of a false religion and as enemies of America." [FN237] Again, cultural (religious), racial (foreign-ness) and foreign policy (anti-war, pro-Palestinian) determinants combine in the construction of Arabs and Muslims as demonized and dehumanized outsiders, available to a hateful and fearful public as literal and figurative punching bags.

Employment and other forms of economic discrimination also increased sharply after September 11. The ADC reported a fourfold increase in complaints of employment discrimination after September 11. [FN238] The Equal Employment Opportunity Commission fielded over 700 "Process Type Z" charges of employment discrimination in the 15 months after September 11. [FN239] Process Type Z charges are a special category created specifically to deal with discrimination "related to the events of September 11, 2001, against individuals who are or are perceived to be Muslim, Arab, *1119 Afghani, Middle Eastern or South Asian or individuals alleging retaliation related to the events of September 11, 2001." [FN240] In addition, EEOC reported another 841 charges of discrimination against Muslims. [FN241] Many of these complaints were dismissed with no cause findings, but their sheer numbers give a sense of how members of the affected groups have processed their treatment in the workplace after September 11.

Perhaps the most poignant and telling form of anti-Arab and anti-Muslim violence, intimidation and discrimination is that affecting children in educational settings. ADC reported seventy-four cases of violence or threatened violence in educational settings in the first six months after September 11. [FN242] Employees reported another thirty-eight cases of harassment to the ADC. [FN243] Certainly, the reported cases of discrimination and violence in education settings are a fraction of the total, and the children who were targeted will carry the memory and psychological burden of the attacks for the rest of their lives. [FN244]
In a bitingly ironic article entitled "Terror-fied," Nadia Afghani poignantly articulates the effects of societal hostility and violence on the Orange County, California Muslim community:

Almost everyone at my mosque has experienced countless amounts of hatred during the past twenty-some years, and the majority of it seemed to be aimed at children: boys getting their faces smashed to unrecognizable pulps; girls pushed around and their scarves pulled off; students the target of college professors' racist remarks, not to mention the odd beer can, lit cigarette and trash thrown at them. Retaliation against Muslims created a fear that caused many to lock themselves in their houses and pray to one day see the salad-bowl analogies of this country transpire itself [sic] into myth. [FN245]

*1120* Afghani's ironic invocation of a desire to transcend the salad bowl analogy highlights the hypocrisy of a system that espouses pluralist principles and tolerance of difference and yet drives Muslims back into a state of private, "terror-fied" repose. Afghani's term, terror-fied, would seem an apt naming of the processes by which Muslim and Arab identities have been racially constructed throughout the 1980s and 90s, but especially after September 11. "Terror-fication" amounts to the projection of a particularly amorphous and potentially expansive form of security threat--terror--onto the cultural and ethnic "essence" of now permanently suspect classes: Muslims, Arabs and South Asians.

D. Political Identity and Racialization

The race-based civil rights movements of the mid-twentieth century brought about a "great transformation" in U.S. political culture. Omi and Winant identify the two elements of this transformation as the eclipse of the ethnicity paradigm, with its embrace of a misleading "immigrant analogy" that ignored structural disparities between the situations of white ethnic versus non-white racial groups, and the rise of new social movements that expanded the "concerns of politics to the social, to the terrain of everyday life." [FN246] Importantly, the transformation entailed the articulation of collective, race-based political identities that proved resilient enough to survive the demise of the civil rights movement and many of the policies that movement shaped. [FN247] Omi and Winant show how the notion of "interests" in politics expanded to include not just economic but also social and cultural dimensions, important areas of everyday life that powerfully structured racial inequality. [FN248] According to Omi and Winant, the civil rights movement's most permanent success lay in creating new racial subjects; race-based political identities that formed around the practices and possibilities of "collective opposition." [FN249]

In this section, I will briefly expand the analysis regarding the racial status of Muslims, Arabs and South Asians by working backwards, so to speak, from evidence of collective-pan-ethnic or racial--political identity formation among Muslims, Arabs and South Asians. Racialized collective identities are pragmatic in that they allow for effective group mobilization, but differ from more conventional interest-group formations in projecting a desire to confront the deeper social structures of racial subordination. [FN250] In modern United States history, racialized and collectively conscious political subjects stand as an unmistakable challenge to the equality *1121 claims of liberal democracy. The consolidation of such identities has corresponded with the great fault lines of social, political and legal closures that characterize the United States as a settler-colony. [FN251] Typically, such identities move collectivities beyond political advocacy of narrow material interests or attempts to reshape United States foreign policy in support of national causes abroad.
Racialization of political identities in the United States has entailed the bridging of national or ethnic differences through "pan-ethnic" formations. Evidence of such a trend among Muslims and Arabs existed well before September 11. As Karen Leonard's extensive survey of the research on Muslims in the United States has shown, a decade of intense political organization led to the creation in 1999 of the American Muslim Political Coordinating Council (AMPCC). The AMPCC was a coalition of Muslim political organizations that, together, represented multi-ethnic Muslim political leadership. The four organizations that came together to form AMPCC reflected a shift in Muslim-American political identity that resulted when the leadership in the 1980s moved away from a strictly outsider identity—one that valorized temporary residence in the United States—and instead began advocating acquisition of United States citizenship and involvement in mainstream political life. The result was the creation of a number of professional national Muslim political advocacy groups in the late 1980s and early 1990s that sought to politicize Muslims in the United States.

The American Muslim political organizations acted as lobbyists for Muslim interests and as recruitment vehicles to encourage Muslims to run for office. Just before the elections in 2000, a merger of organizations occurred that indicated the further consolidation of Muslim political organizations. Moreover, in the same year, a historic meeting brought together the four major Arab and five major Muslim organizations. This pan-ethnic group agreed to a common agenda involving the "future of Jerusalem, civil and human rights, participation in the electoral process, and inclusion in political structures," thus entailing a mix of foreign policy and domestic civil rights and political empowerment issues. Still, Leonard argues that foreign policy concerns channeled much of the political energy of these organizations and coalitions, including the decision by some Muslim organizations to push the Muslim vote to support George W. Bush in the presidential election. After September 11, however, Leonard observed that Muslim political organizations dramatically changed directions by emphasizing domestic policy concerns over foreign ones.

Hussein Ibish, Communications Director for the ADC, also wrote shortly after September 11 about the changes affecting "secular" Arab-American political organizations. Ibish's analysis tied pre-September 11 Arab-American civil rights activism back to problems created by United States foreign policy in the Middle East:

> It is ADC's belief that until there is a more rational American foreign policy, more of congruence of views about the United States stands for and why in the Middle East and how to interpret events in the Arab world, one cannot really address the discrimination that the community faces: barriers to full political participation, for example, or the kind of negative and hostile discourse in the news media and the kind of representations you get in film and television. Because of that ADC also focuses on foreign policy. This is integral to our civil rights effort. ADC sees a civil liberties or civil rights agenda as inseparable from a foreign policy agenda. Without the foreign policy agenda, it would be impossible to treat the causes of discrimination. It might be possible to patch the symptoms a little bit, but not the roots and the causes of discrimination.

* Asserting such linkages between ADC's domestic civil rights agenda and United States foreign policy is not unprecedented in United States racial formation history. Indeed, Ibish cites to a "long tradition of protests, vigils, and letter writing campaigns," along with boycotts and local protests by Arab-Americans all of which recalls the civil rights tactics of African American and other racialized minorities.
In the post-September 11 context, several important shifts have occurred that may augur in the direction of an even more sustained civil rights-based political identity for Muslims, Arabs and South Asians. One simple way of gauging the effect of post-September 11 repression on the political life of Muslims, Arabs and South Asians would be to observe how it might impact voting preferences. Press reports uniformly held that groups of Muslim and Arab voters in the 2000 presidential election supported the conservative candidate George W. Bush for President, perhaps even supplying the margin of victory in the disputed Florida race. [FN267] By summer 2004, the percentage surveyed who said they planned to vote for Bush in the 2004 election had dropped to as low as ten percent in some polls. [FN268]

The story about how this shift in electoral preferences has occurred is more complex than surface appearances might suggest, but it nonetheless signals a shift away from what many saw as a trend among Muslim and Arab voters supporting conservative candidates. [FN269] Political interests understood more narrowly and strictly as a function of certain pivotal foreign *1124 policy concerns may have fostered the possibility of electoral party-shopping among Muslims and Arabs in the United States. Neither major political party in the United States, for example, has unambiguously championed the rights of Palestinians. In 2000, a perception existed among Muslim American leaders that Bush/Cheney might be more supportive of Palestinians than Gore/Lieberman, leading Muslim voters in the United States to vote Republican. [FN270] Conversely, as more traditional civil rights concerns have come to the forefront after September 11, large numbers of Muslims and Arabs in the United States have shifted their support toward Democrats, the party more strongly associated with a traditional civil rights agenda. [FN271]

Studies have shown a marked increase in both religiosity and political ambition among Muslims since September 11. [FN272] Researchers draw a connection between the strengthening of Islamic ties among Muslims and an increased desire to participate in United States politics. Amaney Jamal shows such a correlation in her study of mosques attendance and political participation. [FN273] Interestingly, Jamal's work drew inspiration from the role played by Black churches in the creation of politicized group consciousness among African Americans. [FN274] Jamal found that for Arab Muslims, "mosques are directly linked to political activity, civic participation and group consciousness." [FN275] A sense of "common fate," a characteristic of the group consciousness for which Jamal tested, brings Arab Muslims to see "the injustice that occurs to one Muslim" as "an injustice that has befallen the entire Muslim community." [FN276] In light of Jamal's work, it would *1125 seem that the United States government's policy of targeting mosques for investigation and surveillance will only deepen mosque-goers' collective consciousness and politicization. [FN277]

The impact of Muslim and Arab politicization has been felt in many cities where Arab-American activists were instrumental in successful campaigns to pass resolutions condemning the PATRIOT Act, or denouncing the invasion of Iraq. [FN278] Most recently, Arab and Muslim organizations have coordinated efforts supporting a law that would rectify many of the abuses those communities have experienced at the hands of the federal government. The bill, called the Civil Liberties Restoration Act, would insure that all deportation hearings are open to the public, that detentions are limited to forty-eight hours before a bond hearing is provided, and that the NSEERS program is terminated. [FN279] These efforts mark a clear turn toward a more traditional civil rights-based political agenda and identity that seems capable of drawing together Muslims and Arabs from a range of ethnic and national backgrounds. [FN280]

Equally as impressive is the sustained and effective organization of Muslim and Arab political voices; not just through voter participation, but also through fielding candidates
in local, state and national elections. This trend began in the early 1990s and, though the number of Muslim and Arab candidates sometimes failed to meet the ambitious goals of organizers, continues through the current 2004 election cycle. [FN281] These electoral trends are paralleled by an active Muslim and Arab civil society, where organizations such as ADC and CAIR must be counted among some of the most effective and professional national civil rights organizations. The leaders of these groups vary in how they approach the question of political identity formation, but oppositional politics emanating from such *1126* groups in the post-September 11 context evinces a pronounced reliance on identity as a basis for gathering support.

E. Evaluation

Sucheng Chan's social history of Asian Americans provides some fundamental themes for understanding the processes by which "alien" outsiders are racialized and subordinated. [FN282] Chan's book presents Asian American history as shaped in significant part by a dialectical process involving movement between the poles of "hostility and conflict" and "resistance." Within this general schema, Chan shows how Asian Americans are viewed as both "perpetual foreigners" and a nonwhite racial minority group, insisting that both aspects are indispensable elements to understanding the group's history. [FN283] Chan's categorization of the various types of hostilities faced by Asian Americans reflects both anti-immigrant and racist dimensions of anti-Asian American hostility: "prejudice, economic discrimination, political disenfranchisement, physical violence, immigration exclusion, social segregation, and incarceration." [FN284]

The evidence presented here reveals that the status of Muslims, Arabs and South Asians in the United States society has been, and continues to be, shaped by forces similar to those Chan identifies in the Asian American context. [FN285] These forces, operating at the levels of the state, society and market, roughly fit the categories Chan induces from her research. Hostility and conflict, evincing cultural and racial but also ideological forms of animus, have been met with responses indicating the formation of racialized, group-based political identities. At the level of the state, policies affecting Muslims, Arabs and South Asians have included selective immigration and law enforcement actions, which, taken together with the stigmatization of Arabs or Muslims in the public sphere, have created conditions of political disenfranchisement. In the realm of social relations, prejudice and ethnic hatred toward Muslims, Arabs and South Asians have most notoriously been manifested in hate crimes, but also in exclusions from civil society organizations and in characteristically bigoted and stereotyping representation in popular culture and the media. Subordination in the market has been reflected in employment and other forms of economic discrimination. Finally, various forms of race-conscious resistance to such hostility and conflict are everywhere in evidence.

*1127* IV. The Racialization of Security and the Problem of "Post-Political" State Violence

The previous section makes two important points that should be taken into account in rethinking the problem of the security exception in American liberal democracy. First, Muslims, Arabs and South Asians are increasingly positioned as a racialized minority, marked by both legal and social forms of discrimination and subordination. Second, security in the war on terrorism is itself a racialized, and thus uniquely contested concept, characterized by ambiguity and line-blurring that accompanies romanticized renderings of threats and of the friend-enemy distinction. There is, in other words, both securitization of race, [FN286] as Muslims, Arabs and South Asians become racially and immutably constructed as enemy others (terror-fication), and racialization of security, [FN287] the process by which threat and conflict are conceptually stripped of their social
and political meanings as the products of interest divergences and rearticulated as racially psychologized anxieties over threatened security and national identity. [FN288]

In this section, I will briefly consider a theoretical re-contextualization of the problem of the exception by looking to the international system within which regimes of exception have paradigmatically arisen and operated. I will argue that the changing structure of the international political system within which states exercise their power over "bare life" has created a plethora of new openings for states to pursue problematic (irrational, ambiguous, arbitrary, racist, etc.) deployments of violence and regimes of exception. Such transformations of the international political structures conduce, generally, to the racialization of security. At a minimum, liberal legal assessments of the proper law/security tradeoff, particularly those tilting toward tolerance of political branch autonomy in the exercise of national security power, should account for such structural changes.

State violence, the seeming embodiment of the extra-legal Hobbesian or Schmittian moment, appears quite rational as an element of the modern international state system. This rationality is grounded in the territorial logic of the modern international political system by which violent acts of states are linked to national material interests. State violence of a pre-modern or irrational kind, "crusades" bent on imposing particular forms of cultural or political identity, ideologies or conceptions of "the good" on other states, for example, violate the logic of the modern system. [FN289] This rationalist understanding of state violence is what Clausewitz meant when he referred famously to war as politics pursued by other means. [FN290] Politics, viewed as the competitive pursuit of material interests, simply adopts in war forceful means in pursuit of rational ends.

Within this generalized system of legitimated state violence, democracies must additionally ground their deployments of violence and exception-creation in the consent, real or implied, of the constituting sovereign--the people. State violence occurring within a tightly structured modern international political system made up of territorially defined, rational, self interest-seeking states readily comports with the authorization story democracies must tell. The "national interest" may be said to stand in harmony with state violence and regimes of exception so long as certain basic territorial and rationalist assumptions hold. A broad range of violent acts may be "authorized" in this sense, ranging from international "preventive" uses of force to the creation domestically of states of exception that subordinate the interests and status of "enemy" groups to the interests of the state and the popular sovereignty it embodies. [FN291] This is, at bottom, the minimal authorizing story that liberal accommodationists must tell when they countenance exceptional security powers, relatively unchecked by substantive norms or judicial process.

Nevertheless, what if the world described by the model of the modern international political system has passed? Here, Samuel Huntington's notion of civilization clashes as the fundamental conflict form in the post-Cold War international system conveys a sense of the structural-historical transformations that make modern internationalist notions of politics and territory seem dated. As Rob Walker notes, even though we may find little to recommend Huntington's scholarship generally, his civilizations thesis usefully characterizes a "decisive transformation." [FN292] Hegemonic states operating in a world of truly clashing civilizations might behave as the United States does. But, this does not mean that Huntington's civilizations really exist or that such "entities" would be structurally destined to conflict as he suggests.

Instead, we might understand the conceptual shift to civilizations as part of a "snappy historical script" signaling a broader shift away from the modern international state
system and its assumption about states as the authors and objects of legitimate violence, the purveyors of rational politics. [FN293] Declaring war on terrorism makes sense within the logic of a civilizations clash, but not simply because so-called Islamist terrorists fall neatly into one of the ontologically anti-Western civilizational categories that Huntington proposes. The enemy in the war on terrorism shares with civilizations a disjointed relationship to the world of territorial states. As Walker suggests, the United States and its allies are positioned to deploy interventionary force globally in ways that are unpredictable, if not arbitrary, from the perspective of the old rules. [FN294]

The new game seems more akin to a "post-political" imperial system where sovereignty is a strictly hierarchical concept, no longer paired with equality (as in the modern political doctrinal coupling "sovereign equality"), and where violence is authorized according to a developmental narrative that makes of freedom and self-determination the type of hollow rhetorical compliment hypocrisy pays to virtue. Just as nineteenth century liberalism legitimated imperialism by creating anthropological pre-qualifications for the right to self-government, which colonized peoples, of course, mostly failed to meet, sovereign prerogative is today categorically denied to a wide range of non-Western, non-neoliberal forms of political and social organizations, categorized variously as barbaric, rogue, un-free or un-democratic. [FN295]

Walker links a fundamental shift in conceptions of sovereignty, politics and the exception with the way the war on terrorism is able rather arbitrarily to ascribe enemy status and unleash violence:

> The most striking feature of Bush's declarations of war has been that they have been understandable less in relation to a sovereign capacity to declare a state of emergency, a capacity to suspend all norms of everyday behavior, in relation to another sovereign state than in relation to an enemy that is essentially intangible and disconnected from any territorial state and which can be projected almost at will onto any convenient territories, bodies *1130 and peoples. This may be sovereignty, but it is not sovereignty as we are supposed to know it. [FN296]

Walker's observation suggests that conditions today are every bit as conducive to the racialization of security as in the days of the Japanese internment. [FN297] The openings in the international system created by the onset of the new "logic" are, unfortunately, openings onto the "irrational"--the atavisms by which the world is carved up along identity lines.

Certainly, it was also true that the old international system's logic of sovereign equality did not prevent racialized enemy groups from being constructed and violated. What has changed is that in the war on terrorism, the identities of demonized groups are decoupled from the logic of the international system of states. "Islam," "terrorists" and "Arabs" make no sense as enemies of the United States from the perspective of the modern international system. In this sense, racialization of security has become a process that is unbound by the constraints of territorialized political identity. In the Japanese internment, race made the citizenship distinctions between Japanese and Japanese Americans irrelevant. Today's racialized enemy groupings transcend the very system of territorialized politics, reminiscent of the way pirates were constructed as enemies of mankind.

If indeed we are witnessing the spread of irrational and "depoliticized" state violence, i.e., as decoupled from the logic of Clausewitzian politics and the international system of rational state violence, it seems worthwhile to contemplate a more robust role for substantive legal norms, legal process and reasoning. Liberal legal models emphasizing social learning or "ameliorative trends" in the culture of civil liberties as elements in a
more enlightened security state should not ignore the ways state action and actors respond to conditions that cut against the effectiveness of such social learning to liberalize the state's exercise of the security function. Accommodationist approaches, in particular process-based approaches, should grapple with the substantive questions regarding democratic authorization of state violence under reconfigured post-political and imperial forms of state sovereignty. The prevalence of conditions under which security may so easily become subject to irrational, ambiguous, arbitrary and racist line-drawing along the friend-enemy distinction renders decisions on the exception suspect and should open them to the widest possible outcomes-oriented scrutiny.

*1131 V. Conclusion: The Securitization of Race

"The tradition of the oppressed teaches us that the 'emergency situation' in which we live is the rule." [FN298] The Japanese internment constitutes a thematic common denominator in practically all post-September 11 legal analyses of state security powers. This is actually somewhat surprising since the internment jurisprudence had not been viewed as a precedential centerpiece in the sub-discipline of national security and foreign affairs prior to September 11. [FN299] The internment, however, has become important for the ways it symbolizes a trauma or an evil that the nation as a whole somehow acknowledges (as past), survives and transcends. [FN300] Viewing the internment as symbolic of a nationally transcended evil parallels the dominant constitutional "survivor story" that legal liberalism in the United States tells with regard to slavery. [FN301]

Such survivor stories, according to which everyone within the nation is equally a "victim" and survivor of the past evil, along with related regimes of "survivor justice," assume a strategic role in moving the "nation" forward in the aftermath of systemic evil, while also in purging the state of accountability. Unsurprisingly, the winners under conditions of survivor justice are not the real victims of the past or present evils, but rather those who benefit under the hegemonic conditions of such systemic injustice. [FN302] Under the logic of survivor justice, equal protection principles can be interpreted as being void of anti-subordinationist commitments such that would legitimate robust substantive and effects-based "victim justice." [FN303] Indeed, just as Lincoln viewed demonization of the defeated South as an evil in itself, attempts to rectify injustices at the expense of "innocent" beneficiaries-**1132 cum-victims of that injustice can be viewed as evil under survivor justice. [FN304]

In the immediate context of the war on terrorism, treating the internment as transcended/survived has the effect of de-historicizing the current repression of Muslims, Arabs and South Asians, disconnecting it from the ongoing related national traumas of racist psychologization of security and threat, reactionary assertions of white national identity and the attendant subjection of liberal democratic values to the paranoidic closures of the security state. [FN305] When the internment is instead taken to symbolize an imperative of political accountability toward racial injustices, it underwrites a model of constitutional justice as a continuation of the various justice struggles that Japanese Americans and their supporters have waged, from the "no-no" movement and other resistance efforts in the internment camps themselves, to the reparations and redress campaign of the 1980s and 90s. [FN306]

Viewing the "internment this time" as rooted in these ongoing traumas puts into play strategies and models of constitutional justice that form part of an unbroken chain--call it a constitutional solidarity--with anti-internment justice struggles. Under such models of justice the state--in distinction from the security state with its racialized friend-enemy logic, overweening assurance imperative, legitimation issues, etc.--links the present with the past, in Benjamin's terms, messianically. Accountability is insured in a present that is "shot through" with the traumatic past. Contemporary institutions and actions are rooted
in a-temporal solidarity with anti-subordinationist struggle. There can be no easy redemption through "transcendence" of past evil, a notion premised on a positivist view of history that Benjamin rejects. Past and present form a constellation, and grasping that constellation is a redemptive act that itself necessarily transcends positivist management of the past.

As ambitious as such an anti-subordinationist vision may sound under current conditions, it seems entirely in sync with the spirit of Justice William Brennan's pragmatic security jurisprudence, summed up in a speech he gave at the Law School of Hebrew University in 1987:

A jurisprudence capable of braving the overblown claims of national security must be forged in times of crisis by the sort of intimate familiarity with national security threats that tests their bases in fact, explores their relation to the exercise of civil freedoms, and probes the limits of their compass. This sort of true *1133 familiarity cannot be gained merely by abstract deduction, historical retrospection, or episodic exposure, but requires long-lasting experience with the struggle to preserve civil liberties in the face of a continuing national security threat. [FN307]

Though framed literally in the familiar terms of individual civil liberties, Brennan's jurisprudence entails a substantive and processual pre-commitment to combat security-induced injustices, especially in light of "overblown" national security claims. Brennan also incorporates a critical understanding of the constructedness of security threats themselves and an awareness of the complex linkages between the realm of national security and threat construction and the realm of social freedom.

Brennan's vision, then, comprises substantive and processual commitments as well as conceptual complexity in a way that appears wholly in accord with the primacy afforded here to group-based dimensions of state security overreach. The record from the new war on terror makes it abundantly clear that in order to be effective now our venerated liberal democratic tradition of resisting and containing state security overreach must be nurtured by our "long-lasting experience" and "intimate familiarity" with the subordinationist, group-based effects of national security law. Otherwise, we will fail to engage the central crisis of the time, involving at once the various devils the state tells us it knows and the sort of subordinationism that our society knows all too well.

Footnotes:

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[FN1]. For a discussion on the abuse of Muslims, Arabs and South Asians in the United States, see infra Part III.

[FN2]. I borrow the formulation from feminist methodology that posited "the woman question." For discussion of the woman question in the legal context, see Katherine T. Bartlett, Feminist Legal Methods, 103 Harv L. Rev. 829, 837 (1990) (explaining "'woman question,' which is designed to identify the gender implications of rules and practices which might otherwise appear to be neutral or objective").

[FN3]. Decisionism here connotes the exercise of raw political and state power, relatively unconstrained by law or ethics.

"countenance a certain degree of accommodation for the pressures exerted on the state in times of emergency, while, at the same time, maintaining normal legal principles and rules as much as possible"); Eric A. Posner & Adrian Vermeule, Accommodating Emergencies, 56 Stan. L. Rev. 605, 606 (2003) (defining accommodation view as view that "the Constitution should be relaxed or suspended during an emergency"). Accommodation also describes a political dynamic. For example, in the aftermath of September 11, academics were faced with the hard choice of either "accommodating" the more aggressive national security policies of the Bush administration or being dismissed as irrelevant to the serious business of defending the nation. Observers of the Washington scene have identified such a dynamic. See, e.g., Georgie Anne Geyer, Trading with a Currency of Fear, (Oct. 22, 2004), at http://opednews.orb6.com/stories/ucgg/20041022/tradingwithacurrencyoffear.php (discussing fear tactics used by Bush and Kerry in 2004 presidential campaigns).

[FN5]. See Gross, supra note 4, at 1044-45 (referring to these as "business as usual" approaches).

[FN6]. "The exception" refers throughout this paper to the problem liberal legal systems face when state actors declare emergencies that require suspension of the normal rules of law. Weimar legal theorist Carl Schmitt famously used the problem of the exception to critique liberal legal systems. See generally Oren Gross, The Normless and Exceptionless Exception: Carl Schmitt’s Theory of Emergency Powers and The "Norm-Exception" Dichotomy, 21 Cardozo L. Rev. 1825 (2000) (discussing Schmitt's theory of emergency powers). More recently, postmodern legal and political theorists have come to understand the exception as symbolic of the state's permanent and absolute dominion over "bare life," an aspect of law's basic structure that places in doubt the possibility of liberal and democratic impulses operating through "the rule of law." See Gil Gott, Identity and Crisis: The Critical Race Project and Postmodern Political Theory, 78 Denv. U. L. Rev. 817, 834-45 (2001) (discussing postmodern political theory and exception).

[FN7]. The Japanese internment is the obvious example. For a discussion analyzing accommodationist approaches that incorporate security-inflected logic in truncating the regulative role law plays in national security, see infra Part I; see also John Hayakawa Török, Ideological Deportation: The Case of Kwong Hai Chew (2004) (describing effect of ideological exclusion in immigration law on Chinese in America).

[FN8]. Various legal memoranda generated from within the Bush administration apparently viewed the "changed world" after September 11 as legitimating a new more unilateralist and "extra-legal" view of international and domestic security law questions. By contrast, the Oklahoma City bombing by white supremacists, for example, though catastrophic in its own right did not lead to an outpouring of scholarship in the field. The threat from specifically Muslim-identified terrorists attacking the United States has been the cause of the current spate of reform proposals.

[FN9]. 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring) (discussing three categories for executive actions).

[FN10]. 323 U.S. 214, 246 (1944) (Jackson, J., dissenting) (arguing that decision will lead to subordination of racial groups under guise of national security).


[FN12]. Presumably, based on what they wrote in the above quote, the authors would also agree that the existence of racial animus could be a significant factor in mistaken risk assessment.
[FN13]. See Mark Tushnet, Defending Korematsu?: Reflections on Civil Liberties in Wartime, 2003 Wis. L. Rev. 273 (2003) (discussing idea that every security crisis results in destruction of civil liberties, but United States has been unable to prevent itself from repeating their mistakes). Another article appearing around the time of Tushnet's, co-authored by Jack Goldsmith and Cass Sunstein, applies a similar analysis. See Jack Goldsmith & Cass Sunstein, Military Tribunals and Legal Culture: What a Difference Sixty Years Makes, 19 Const. Comment. 261 (2002) (discussing reasons why President Bush was criticized for enabling military commissions to try terrorists, but President Roosevelt was praised for creating a military commission to try Nazi saboteurs). While a similar thesis animates Goldsmith's and Sunstein's analysis, they do not necessarily advocate the same extra-constitutional validity model as Tushnet. Posner and Vermeule focus much of their critique on the ratchet thesis which they find at the base of both Tushnet's and Goldsmith's and Sunstein's arguments, a point I do not analyze in this article.

[FN14]. Tushnet, supra note 13, at 298.

[FN15]. Id. at 298.

[FN16]. Id. at 274; see also, Gil Gott, A Tale of New Precedents: Japanese American Internment as Foreign Affairs Law, 40 B.C. L. Rev. 179, 193 (1998) (proposing using internment cases as part of critical genealogy of foreign affairs law).

[FN17]. See Tushnet, supra note 13, at 282-83 (discussing author's belief that any wartime policy will be approved by courts). This recalls Justice Jackson's famous reference to the Korematsu decision as a "loaded weapon." See Korematsu v. United States, 323 U.S. 214, 246 (Jackson, J., dissenting) ("The principle [endorsed by the majority] then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.").

[FN18]. Tushnet's options include: (1) using the original constitution as the "sole guide"; (2) add to the constitution a process for declaring and administering an emergency regime, i.e., "constraining emergency powers by constitutionalizing them"; and (3) treating emergency powers as extra-constitutional but somehow valid, that is, having courts not endorse such exercises so that the exceptional nature of emergency-based policies is clear. See Tushnet, supra note 13, at 299-300 (discussing three options).

[FN19]. Id. at 306.

[FN20]. See Gross, supra note 5, at 1826-27. The Schmittean exception refers to Carl Schmitt's famous aphorism that he is sovereign who decides the exception, meaning to suspend the normal operation of the rule of law. See id.

[FN21]. Tushnet, supra note 13, at 297.

[FN22]. See id. at 283-84. Tushnet is also aware, however, that repressive policies evolve over time. See id. So, new policies might appear consistent with the social learning thesis, but the more things seem to change, the more repression may in fact stay the same. Thus, critics of governmental policies face the prospect of constantly fighting the last war, whereas the present war should be seen as involving new forms of overreach and repression.

[FN23]. Id. at 287.

[FN24]. Id. at 287-88.

[FN25]. The most egregious abuses of legal process in the internment cases revolved
precisely around attempts to shield policymakers from judicial scrutiny of their decision-bases. See Gott, supra note 16, at 225-45 (discussing government lawyers' attempts to get courts to take "judicial notice" of racist characterizations of Japanese Americans).

[FN26]. See Samuel Issacharoff & Richard H. Pildes, Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime, 5 Theoretical Inq. L. 1, 5 (2004) (discussing move to process-based, institutionally-oriented framework). Though I focus on Issacharoff and Pildes here, Oren Gross also offers a more fully articulated process-based approach, premised on a populist-democratic conception of political process. Gross's "extra-legal measures" model provides for governmental actors in emergencies going "outside the constitutional order," but being subjected, ex post, to a political process in which "the people decide" whether the extra-legal actions are acceptable. See Gross, supra note 4, at 1023. Gross's approach, like other process-based approaches, offers little by way of substantive or results-oriented protections for subordinated "enemy groups." Id. at 1134.

[FN27]. Issacharoff & Pildes, supra note 26, at 5.


[FN29]. See Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959) (providing one of most well known versions of argument for "neutral" process-based constitutional review in order to counter the counter-majoritarian difficulty).

[FN30]. See Flagg, supra note 28, at 975 (explaining that "transparently white" theory effects judicial review because "it has contributed to a climate of discourse in which processual analyses displace substantive constitutional interpretation"). By "transparently white," Flagg refers to the tendency for embedded white preferences to appear as neutral--whiteness being transparent or invisible as a racial identity to most whites. See id. 968-73.

[FN31]. Id. at 977 (footnote omitted).

[FN32]. 71 U.S. 2 (1866).

[FN33]. Issacharoff & Pildes, supra note 26, at 12.

[FN34]. Issacharoff and Pildes claim that the Milligan rights-oriented majority position was subsequently discredited by public reaction to the case. Their reading of this reaction skews in favor of their conclusions regarding the superiority of what they see as the more pragmatic process-based approach. They claim that public hostility toward Milligan was strictly a result of the decisive role the Court may have been reserving for itself in subsequently adjudicating Reconstruction laws that infringed on individual liberties. Had the Court adopted the concurrence's process-based approach, Issacharoff and Pildes argue, the public would not have reacted in outrage: "None of this [outrage] had been necessary, because had the Court taken the pragmatic, institutional-process approach of the concurrence, the decision would have been widely accepted." Id. at 14. Given the partisan basis of the public's outrage, generally, Southerners loved Milligan, Northerners did not, it seems unlikely that the choice of a theory of national security constitutionalism would have stemmed the critical tide. The Civil War-era Court is, in fact, an example of an institution trapped by what we today might place broadly into the category of identity politics. The partisan reactions to Milligan, and the divisions within the Court over which model to apply, suggest that the choice between individual rights-based absolutism and
the institutional-process approach is much more politically fraught than Issacharoff and Pildes would suggest. It is precisely in this political dimension that the process-based model requires further elaboration and substantive foundation.

[FN35]. Id. at 13.

[FN36]. See id. at 36-40 (noting, for example, that Congress tends to rubber stamp executive decisions and process-based review "turn[s] judicial review, which piggybacks onto the congressional role, also into a meaningless rubber stamp").


[FN38]. See, e.g., Issacharoff & Pildes, supra note 26, at 40-41 (using World War II examples of judicial resistance of executive actions to theorize that civil liberties can be protected).

[FN39]. See id. ("[T]he Attorney General, Francis Biddle, himself stepped in the civil liberties tradition, managed to resist most of President Roosevelt's insistent demands to 'indict the seditionists.'").

[FN40]. See Gott, supra note 16, at 224-35 (mentioning J. Edgar Hoover, John McCloy, Oscar Cox, Ben Cohen and Joseph Rauh as some originally opposed to internment).

[FN41]. See id. (articulating how severe racism and racialization helped cause shift in policy towards favoring internment).

[FN42]. Id. at 23 (citing Sternberg v. Carhart, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting)).


[FN45]. Issacharoff & Pildes, supra note 26, at 21. Issacharoff and Pildes refer in their work to Gudridge's revisionist essay on Endo that somewhat cryptically sees the case as depicting "a legal space within which the unconstitutional and the extraconstitutional are inexpressible." Gudridge, supra note 44, at 1967. Gudridge concludes that Korematsu must be viewed in light of his reading of Endo in order to comprehend the proper and minimalist way that constitutional law can operate in the face of "felt necessity." Endo/Korematsu signal for Gudridge a "doubled legal consciousness," a hopeful oscillation between "originating commitment," on the one hand, and necessity, on the other. Gudridge sees this way of appreciating Endo as necessary to keeping alive in exigent contexts "readable signs of the continuing impact of constitutional sensibility, of at least the elementary patterns of constitutional law." Id. at 1968. Gudridge does not endorse the institutionally-oriented process-based reading of Endo defended by Issacharoff and Pildes, but instead asserts that Endo "sounds in constitutional law." Id. at 1954.

[FN46]. Issacharoff & Pildes, supra note 26, at 25.

[FN47]. Id.

[FN48]. See Gudridge, supra note 44, at 1934 (setting forth term "informal baseline").

[FN49]. See Jerry Kang, Denying Prejudice: Internment, Redress, and Denial, 51 UCLA L. Rev. 933, 963 (2004) ("[T]he two political branches of the federal government were
absolved of any sins, and an obscure, long-since dissolved agency ended up holding the bag.

[FN50]. See id. at 961 ("But in Endo, this otherwise reasonable interpretive practice produced an epic whitewash.").

[FN51]. Id.

[FN52]. See id. at 965-75 (discussing "minimalist virtues"). "Minimalist virtues" is a result of Kang's conflation of Alexander Bickel's notion of "passive virtues" and Cass Sunstein's theory of "judicial minimalism." See id. at 965 (describing conflation of theories). Such theories of judicial restraint are akin to process-based approaches in prioritizing responses to the counter-majoritarian dilemma.

[FN53]. Kang points out that, "[a]t various points in the wartime cases, the Court was invited to strike down aspects of the internment on grounds that the military's actions had not been authorized by the President of Congress." Id. at 967-68.

[FN54]. Kang emphasizes that "the sort of democracy that was realistically in play [at the time of the internment] was tyranny of the majority." Id. at 969.

[FN55]. Id. at 970.

[FN56]. See id. at 971 ("Further, the Court did not avoid the merits entirely by employing some device such as standing, ripeness, mootness, or political question. Instead, it segmented off easier aspects of the case and incrementally affirmed their constitutionality.").

[FN57]. See Gott, supra note 16, at 269 (arguing for more fully racialized understanding of internment cases as important foreign affairs law precedent that would lead to prioritization of anti-subordinationist commitments in field).

[FN58]. Sunstein would include an injustice exception to his minimalist principle. See Kang, supra note 49, at 969.

[FN59]. See id. at 972 (explaining that systems which avoid legitimation "smacks almost entirely of political expediency and almost nothing of principle").


[FN61]. Id.

[FN62]. See id. ("Government will not disintegrate in the face of a terrorist threat, but politicians will have a powerful incentive to abuse the reassurance function.").

[FN63]. See id. at 1048-49 (discussing drawbacks of Ackerman's proposed emergency constitution).

[FN64]. See id. at 1047-49 (explaining theory of supermajoritarian escalator principle).

[FN65]. See id. at 1048-49 (explaining benefits of supermajoritarian escalator principle). Ackerman's model does include some basic substantive protections. See infra text accompanying notes 78-82.
[FN66]. See Ackman, supra note 60, at 1049 (explaining supermajoritarian escalator as playing "greater or smaller role in checking the abuses that such [ant-demonized minority] discrimination invites").

[FN67]. See id. at 1042-45 (providing examples of breakdown of constitution protections when terrorism is involved).

[FN68]. See id. at 1042-43 (finding Korematsu provides revealing examples of "both the strengths and limits of a judge-centered approach").

[FN69]. See id. (describing Korematsu as "very, very bad law").

[FN70]. See id. at 1043 (questioning what court's response would be "if Arab-Americans are herded into concentration camps").

[FN71]. See id. (explaining "normalization of emergency conditions as the creation of legal precedents that authorize oppressive measures without any end").

[FN72]. See id. at 1044-45 (discussing advantage of Ackerman's model over other approaches).

[FN73]. See id. at 1045 (discussing Palestinian Intifada).

[FN74]. See id. at 1045 (conceding drawback of proposed emergency constitution).

[FN75]. See infra text accompanying notes 76-82.

[FN76]. See Ackman, supra note 60, at 1045 (explaining "constitutional structures can perform a crucial channeling function").

[FN77]. See id. at 1047 (explaining framework of supermajoritarian escalator model).

[FN78]. See id. at 1047 (explaining that "state of emergency then should expire unless it gains majority approval").

[FN79]. See id. at 1058-59 (discussing necessary limitations of emergency powers).

[FN80]. See id. at 1062-63 (discussing issue of compensation of erroneously detained individuals).

[FN81]. Id. at 1062.

[FN82]. See id. at 1063 (summarizing Ackman's argument for providing monetary compensation to detainees).


[FN85]. See David Cole, No Equal Justice: Race and Class in the American Criminal Justice System 5 (1999) (arguing that administration of criminal law is "predicated on the exploitation of inequality").

[FN86]. See, e.g., Mari Matsuda et al., Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment 1 (Robert W. Gordon & Margaret Jane Rudin
eds., 1993) (discussing debate between civil rights community and civil liberties communities over First Amendment right to engage in hate speech).

[FN87] See Cole, supra note 83, at 7 (explaining that "central argument of this book is that trading foreign nationals' liberties for citizens' security should be resisted").

[FN88] Id. at 17-82 (noting that, while most expressed willingness to sacrifice liberties post-September 11, only seven percent of American citizens felt practical effect on rights).

[FN89] See id. at 85-179.

[FN90] See id. at 183-208.

[FN91] See id.

[FN92] See id. at 210-27.

[FN93] See id. at 75.

[FN94] See id. (invoking Niemöller speech in section titled "First They Came for the Aliens"). There are various versions of Niemöller's speech in circulation. The one quoted below is taken from historian Harold Marcuse's web page dedicated to reconstructing the "original" version of the speech. See Harold Marcuse, Martin Niemoller's Famous Quotation: 'First they came for the Communists ...', at http://www.history.ucsb.edu/faculty/marcuse/niem.htm #versions (last modified Sept. 17, 2004).

First they came for the socialists, and I did not speak out because I was not a socialist.
Then they came for the trade unionists, and I did not speak out because I was not a trade unionist.
Then they came for the Jews, and I did not speak out because I was not a Jew.
Then they came for me, and there was no one left to speak for me.
Id.


[FN96] Id. at 86.

[FN97] Id. at 86-87.

[FN98] See, e.g., Kevin R. Johnson, September 11 and Mexican Immigrants: Collateral Damage Comes Home, 52 DePaul L. Rev. 849, 851 (2003) (arguing that government's post-September 11 actions have aroused nativist passion, which has negatively impacted non-Arab groups of immigrants such as Latinos).


[FN100] See id. at 90.

[FN101] Id. at 95.

[FN103]. See William H. Rehnquist, All the Laws But One: Civil Liberties in Wartime 209-11 (1998) (explaining that distinctions between Japanese and other aliens were legally sufficient to support varied treatment of these alien groups during World War II).

[FN104]. See Rasul v. Bush, 124 S. Ct. 2686, 2707 (2004) (“From this point forward, federal courts will entertain petitions from these prisoners [foreign nationals in Guantanamo], and others like them around the world, challenging actions and events far away, and forcing the courts to oversee one aspect of the Executive's conduct of a foreign war.”).

[FN105]. Cole, supra note 83, at 97-98.

[FN106]. See id. at 95 (acknowledging that "[i]t is no accident that the enemy alien concept was extended only to Japanese-Americans. German-Americans and Italian-Americans were spared such treatment, although citizens of these backgrounds often had their loyalty challenged in less categorical ways. The justification for targeting only the Japanese was avowedly racist and had deep roots.").

[FN107]. Id. at 97.


[FN109]. For a further discussion of this reference, see infra Section III and accompanying footnotes regarding racialization of national security.

[FN110]. Cole, supra note 83, at 104.


[FN112]. See id. at 109 (arguing that patriotism of "Good Muslims" legitimizes war on terrorism).

[FN113]. See id. (explaining how" Muslims are disciplined into 'choosing' the good, thereby creating a population that supports the United States in its war against terrorism at home and abroad").

[FN114]. Id. at 62 (footnotes omitted).

[FN115]. See id. at 64 (discussing effect on immigration in creating bad aliens).

[FN116]. See id. at 87-88 ("Thus the war on terrorism oscillates between profiling justified by security concerns on one hand and insistence and reliance upon existence of Good Muslims on the other.").

[FN117]. Id. at 94.

[FN118]. Id. at 98.

[FN120]. See Engle, supra note 111, at 97 (noting different treatment received by three United States citizens). White "American Taliban" John Walker Lindh was quickly indicted and allowed to plea bargain out after his capture in Afghanistan; Saudi-born Yasser Hamdi has been held incommunicado since his capture and; Puerto Rican descended Jose Padilla has also been held incommunicado since his apprehension in Chicago. She indicates that the identity-based distinctions among the three men as the basis for their differential treatment are "difficult to ignore." See id. (discussing varied treatment of these three United States' citizens).


[FN123]. See id. (discussing treatment of Arabs, Muslims and South Asians in United States).

[FN124]. See id. (analogizing internal internment of Arabs, Muslims and South Asians to Japanese internment during World War II). Clearly, no "formula" strictly induced from the historical experiences of the groups of color in the United States is likely to prove an apt metric by which to assess either the harms currently being incurred by Muslims, Arabs and South Asians in the United States, or the nature of those groups' racialized status. Yet, Sucheng Chan's work on Asian Americans provides a useful template for understanding the racialization of outsider groups targeted with a combination of racial, xenophobic and ideological animus. See generally Sucheng Chan, Asian Americans: An Interpretive History (Thomas J. Archdeacon ed., 1991). See infra text accompanying notes 269-71.


[FN127]. See Omi & Winant, supra note 125, at 18 (describing how immigrant groups were "transformed, if hardly melted").

[FN128]. See id. at 17 (noting similar treatment of European immigrants and racial minorities).

[FN129]. See In re Najour, 174 F. 735 (N.D. Ga. 1909) (concluding that Syrians belong to "what the world recognizes, as the white race").

[FN130]. See In re Dow, 226 F. 145, 148 (4th Cir. 1915) (holding that term "white persons" includes Syrians, Armenians and Parsees); see also Ex parte Mohriez, 54 F. Supp. 941, 942 (D. Mass. 1944) (finding that "Arab passes muster as a white person").

(noting census bureau's pre-World War II treatment of Arabs).

[FN132]. See id. at 218-21 (stating that federal guidelines place Arabs and other persons with Middle Eastern origins in same "white category" as European majority).

[FN133]. See In re Ahmed Hassan, 48 F. Supp. 841, 845 (E.D. Mich. 1942) (holding that dark skinned Yemenite was ineligible for citizenship on grounds that he was "part of the Mohammedan [sic] world"); Ex parte Dow, 211 F. 486, 487-89 (E.D.S.C. 1914) (discussing grounds for finding that Syrians are not within class of "white persons" eligible for naturalization under statute); Ex parte Shahid, 205 F. 812, 816 (E.D.S.C. 1913) (holding that Syrian applicant did not meet racial definition of white under 1790 Naturalization Act).

[FN134]. See Samhan, supra note 131, at 219 (citing contractor's documentation of "specific economic disadvantages based on his national origin" as grounds for SBA's decision).


[FN138]. See Suad Joseph, Against the Grain of the Nation--the Arab, in Arabs in America, supra note 131, at 257-71, 259 (observing that most pre-1960s Arab immigrants were Christian); Michael W. Suleiman, Introduction: The Arab Immigrant Experience, in Arabs in America, supra note 131, at 1-21, 9 (1999) (discussing shift in immigrant population).

[FN139]. See Cainkar, supra note 137 (stating that many Arab-Americans responded to hostility from majority society by embracing Islamic identity); Joseph, supra note 138, at 265 (characterizing 1967 Arab-Israeli war as major influence in organization within Arab-American community); Suleiman, supra note 138, at 10-15 (describing ongoing development of cohesive Arab-American community).


[FN141]. See id. at 13 (describing Arab-American community's pro-active response to discrimination).

[FN142]. See Joseph, supra note 138, at 265 (characterizing development of Arab-American University Graduates (AAUG) as part of initiative to combat discriminatory representations of Arabs).
See Suleiman, supra note 138, at 13 (noting establishment of political groups devoted to defend Arab and Arab-American causes); see also Therese Saliba, Resisting Invisibility: Arab Americans in Academia and Activism, in Arabs in America, supra note 131, at 304-19, 306 (describing Pan-Arab nationalism as "a strategy of organizing diverse groups of Arabs against U.S. foreign policy in the Middle East and racist media images of Arabs").

See Joseph, supra note 138, at 265-66 (discussing groups dedicated to combating discrimination, including American-Arab Anti-Discrimination Committee (ADC), National Association of Arab American (NAAA) and Arab American Institute (AAI)).

For a discussion of the negative television images of Arabs from the mid-1970s through the mid-1980s, see generally Jack G. Shaheen, The TV Arab (1984).

See Joseph, supra note 138, at 266 (noting Democratic party's aversion to political affiliation with Arab-American organizations). There are numerous other examples of politicians returning donations from Arab or Muslim groups; see also Susan M. Akram & Kevin R. Johnson, Race, Civil Rights and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims, 58 N.Y.U. Ann. Surv. Am. L. 295, 310-11 (2002) (stating that many political figures feared political consequences of accepting contributions from Arab and Muslim American groups). In some cases, politicians alleged anti-Semitism on the part of the donors as the reason for returning contributions. See id. (noting allegations that contributor made anti-Semitic remarks). For a critical analysis of the politicization of charges of anti-Semitism, see Norman Finkelstein, Beyond Chutzpah: On the Misuse of Anti-Semitism and the Abuse of History (forthcoming).


See Majaj, supra note 147, at 321 (arguing that Arabs are still "safe to hate" (quoting Slade, supra note 147, at 147)).

See Cainkar, supra note 137 (arguing that media openly advocates "de facto criminalization" of both Muslim and Non-Muslim Arabs).


See id.

See Akram & Johnson, supra note 146, at 319 (relaying testimony of FBI Director William Webster).

See id. at 318 (noting that congress barred waiver of exclusion for PLO representatives and officials).

See id. at 320.

See id. (noting that "terrorist activity" is broadly defined as "any act which the actor knows, or should reasonably know, 'affords material support to any individual, organization, or government in conducting a terrorist activity at any time'") (citations omitted).


[FN158]. See Cainkar, supra note 137 (discussing Arab-American community's perception that government action was intended to ensure that Arabs in United States remain "politically voiceless").

[FN159]. R.W. Apple, Jr., Allies Destroy Iraqis' Main Force; Kuwait is Retaken After 7 Months, N.Y. Times, Feb. 28, 1991, at A1 (quoting General Norman Schwarzkopf); see also Joseph, supra note 138, at 267-68. Schwarzkopf's comments referred to Iraqis who he alleged were committing atrocities in Kuwait. Such allegations later proved to be part of a propaganda campaign orchestrated to gain public support for the war. See Susan L. Carruthers, The Media at War 41-43 (2000) (noting that Kuwait employed services of public relations firm to convey victimized image of Kuwait). But see id. (describing difficulty of verifying validity of accounts of atrocities committed by Iraqis).

[FN160]. See Joseph, supra note 138, at 268 (citing examples of racism against Arabs found in newspapers during Gulf War).


[FN162]. Cainkar shows, for example, how the Palestinian community in Chicago lost the cohering force of many of its local organizations coincident to the first Gulf War. See Louise Cainkar, Ethnic Safety Net Among Arab Immigrants in Chicago, in Arabs in America, supra note 131, at 192-206, 198 (relaying plight of Arab Americans in poverty in Chicago and lack of community organizations).


[FN164]. Akram & Johnson, supra note 146, at 329

[FN165]. See generally Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (authorizing use of secret evidence in immigration proceedings); see also Akram and Johnson, supra note 146, at 322-23 (reviewing provisions contained in Antiterrorism and Effective Death Penalty Act that create new procedures for detention and removal of "alien terrorists").

[FN166]. See Akram & Johnson, supra note 146, at 322 (arguing that INS applies secret evidence rule exclusively to Muslims and Arabs). For a fully detailed account of the secret evidence cases, see Akram, Scheherezade Meets Kafka, supra note 163, at 70-108 (providing case-by-case analysis of secret evidence cases).

[FN167]. See Akram & Johnson, supra note 146, at 324-25 (describing secret evidence
proceedings involving prominent Arab figures).

[FN168]. Id. at 326.


[FN170]. Id. at 12.

[FN171]. See Abraham, supra note 157, at 180-99.

[FN172]. See id. at 187-88.

[FN173]. Id. at 188.

[FN174]. See id. at 192-93.

[FN175]. Id. at 193.

[FN176]. Cainkar, supra note 137.

[FN177]. Id.

[FN178]. Saliba, supra note 143, at 310.

[FN179]. See Majaj, supra note 147, at 322-23 (noting that discrimination is primarily process of "maintaining boundaries between 'us' and 'them'").


[FN181]. See id.

[FN182]. See id.


[FN184]. See CAIR 2004 Report, supra note 183, at 4. Note that the National Security Entry-Exit Registration System ("NSEERS") also targeted North Koreans in the United States. See id. at 5.

[FN185]. See id.

[FN186]. See id.

[FN187]. See Edward Hegstrom, Living with Fear, Mistrust, Houston Chron., June 13, 2004 (describing lasting fear and mistrust created among Arabs, Muslims and South Asian in Houston by NSEERS, even after program's termination); Adam Saytanides, Selective 'Registration': INS Asks Terrorists to Turn Themselves in, In These Times, Mar. 3, 2003, at 4-5 (describing "pall" that NSEERS created over Pakistani community in Chicago). For a film documenting the human and community impacts of NSEERS, see Patriot Acts (Thirst Films 2004) (focusing on impact of NSEERS on South Asian families in Chicago).

[FN189]. See id. at 99.


[FN192]. See id. (explaining delay in charging documents).

[FN193]. See id. at 37-66 (describing "hold until cleared" policy, its implementation and effects).

[FN194]. See id. at 72-87 (describing "no bond" policy, its implementation and effects).

[FN195]. See id. at 111-18 (relaying MDC classification of detainees at "witness security" which prevented contact by detainees with others and allegations of abuse).

[FN196]. See id. at 130-41 (describing draconian restrictions on inmates contact with attorneys through phone calls).

[FN197]. See id. (recounting case studies that indicated difficulty in obtaining legal representation with MDC restrictions).


[FN199]. See id. at 3 (indicating conditions of incarceration of detainees at MDC).

[FN200]. See id. at 6 (reporting allegations by detainees of abuse by staff).

[FN201]. See id. at 28-29 (reporting allegations of verbal abuse including numerous death threats and warnings of reprisals for World Trade Center attacks).

[FN202]. See id. at 47 (concluding abuses took place and recommending administrative action against employees who committed abuses).

[FN203]. See ADC 2002 Report, supra note 190, at 36 (finding initially 5000, and then additional 3000, Arab non-citizens were selected to be investigated between November 2001 and early 2002); Cole, supra note 83, at 49.

[FN204]. See ADC 2002 Report, supra note 190, at 36 (finding ninety percent of those investigated voluntarily submitted to interviews).

[FN205]. See id. (indicating small number of interviews resulted in arrests for minor immigration violations).

[FN206]. See id. (dictating questions including inquires into political ideology).
See id. (concluding investigations were "ineffective" and "squandered time and efforts" and potentially increased distrust of government by Arabs).

See Mary Beth Sheridan, Interviews of Muslims to Broaden, Wash. Post, July 17, 2004, at A1 (reporting new interviews were being undertaken, but only those identified by intelligence or investigative information).

See id. (dictating questions which again include inquires into political ideology).

See id. (indicating how non-citizen Arabs were fearful of deportation similar to that which followed earlier investigations).

See Lisa Emmerich, Muslims Recoil at Revived Scrutiny: Local Agencies Say FBI Interviews Can Intimidate, Orlando Sentinel, July 19, 2004, at B1 (reporting comments of Muslim activist concerning retreat by Muslims from political and social activism out of fear of investigations).

See Cole, supra note 83, at 75-79 (discussing how existing provision of International Emergency Economic Powers Act were augmented by PATRIOT act and used to shut down Islamic charities).

In one high-profile case, Enaam Arnaout, the Director of Benevolence International Foundation, was arrested on so-called material support charges. A great deal of news coverage uncritically reported the government's allegations against Arnaout. Subsequently, the terrorism charges against Arnaout were dropped and he pled guilty to the non-terrorist offense of diverting funds for use in buying supplies for Bosnian and Chechen fighters in the 1990s. None of the groups Arnaout supported with the diverted funds were deemed terrorist by the U.S. government. See Council on American-Islamic Relations, The Status of Muslim Civil Rights in the United States 2003 4 (2003).

The International Emergency Economic Powers Act (IEEPA) is designed to allow the President to apply economic coercion against countries as part of the Executive's foreign affairs powers. Under both Presidents Clinton and G.W. Bush, the IEEPA was used to target special designated terrorist organizations, which included many organizations involved in the Palestinian movement. See Cole, supra note 83, at 76-77.

USA PATRIOT Act, §106, amending 50 U.S.C. §1702(a)(1)(b) and adding 50 U.S.C.A. §1702(c); see also Cole, supra note 83, at 78.


See id. ("[The Foundation] maintained that due process violations occurred as a result of the government's use of secret evidence and the breach of a federal evidentiary rule on summary judgment.").
[FN219]. See id. (relaying charity's ties to Hamas and its founders, some of which were denied by charity and others tacitly acknowledged, and finding government's case based on connections to Hamas unpersuasive).

[FN220]. See id. (pronouncing Holy Land Foundation paid for six trips to United States for Hamas founder, but noting at time of trips, Hamas was not designated terrorist organization).

[FN221]. See id. (chronicling support by various organizations of Hamas controlled hospital and relaying denial of support by charity of suicide bombers' families).


[FN223]. See id. at 50-51, 51 n.21 (citing sources discussing chilling effect).

[FN224]. See Cole, supra note 83, at 77.

[FN225]. See Aziz, supra note 222, at 90 (finding no restrictions on donations to Irish and Jewish groups).

[FN226]. See Ron Howell, Islamic Organizations Low on Funds, Newsday (New York), July 14, 2004, at A20 (stating that "Muslim leaders asked federal officials ... to come up with a seal of approval that would assure potential donors that a [charitable] group does not have ties to terrorism").

[FN227]. See id. (doubting that FBI would provide list of approved, non-terror supporting charities).

[FN228]. See ADC 2002 Report, supra note 190, at 47 (confirming over 700 violent acts and describing nature of attacks).

[FN229]. See id. at 69-70 (finding four confirmed and seven suspected hate crime murders against victims perceived to be Arab).

[FN230]. See id. at 49-84 (filling nearly one quarter of report with short excerpts from newspapers describing crimes).

[FN231]. Id. at 66.


[FN234]. See id. (concluding non-traditional citizens are outside identity of American "imagined community" and are thus denied citizenship as matter of rights).

See id. at 10.

See id. at 2.

See ADC 2002 Report, supra note 190, at 92 (detailing dramatic increase in all types of employment discrimination following September 11, 2001).


See id. (listing disposition of employment discrimination charges).


See id. at 107-12 (reporting chronologically, cases of educational discrimination, including death threats, vandalism and physical violence).

See id. at 112-16 (reporting non-violent discrimination including unfounded investigations of Arab students, insensitive comments and racially motivated dismissal of teachers).

Nonetheless, ADC singled out certain schools for praise in dealing with the post-September 11 fallout. School districts such as Washington D.C., which had functioning multicultural education units, were able to activate resources for the needed training of teachers who could then better face the problems facing Muslim, Arab and South Asian students in their schools. See id. at 105-07 (praising schools in Michigan and Washington D.C. with large Arab populations for relatively few incidents).


Omi & Winant, supra note 125, at 90.

See id. at 97 (describing necessary movement).

See id. at 98-99 (advocating political structure of interest groups that include race).

See id. at 100-11 (describing movement towards penetrating mainstream politics and other mass participation tactics).

See, e.g., Yen Le Espiritu, Asian American Pan-Ethnicity: Bridging Institutions and Identities (1992) (discussing theory of "reactive solidarity," whereby outside threat
may create conditions of solidarity across ethnic lines).


[FN254]. See id. (stating diversity of leadership among Muslim groups).

[FN255]. See id. (identifying four organizations: Muslim Public Affairs Council (Los Angeles), American Muslim Alliance (Oakland), American Muslim Council (Washington, D.C.) and Council on American-Islamic Relations (Washington, D.C.)).

[FN256]. See id. ("Further political shifts occurred at the end of the twentieth century as the national-origin communities reached out to other Muslims and the American public.").

[FN257]. See id. at 19 ("They engage in political lobbying and encourage Muslims to run for electoral office.").

[FN258]. See id. ("The then-head of the AMA [American Muslim Alliance] and AMPCC, Dr. Agha Saeed (2000) said the merger marked, 'the beginning of a new phase of American Muslim politics ....".").

[FN259]. See id. (noting merger of four Arab-American and five Muslim organizations).

[FN260]. Id. (stating goals of organization).

[FN261]. See id. at 20 (stating critical swing occurring when "Bush declared himself opposed to secret evidence in a debate with Gore in Michigan").

[FN262]. See id. at 23 (describing organizations' reasoning to concentrate on domestic political issues).


[FN264]. Id. at 2.


[FN266]. See Ibish, supra note 263, at 6 (discussing effectiveness of grassroots movements).

[FN267]. See Abdullah A. Al-Arian, Soul Survival: The Road to Muslim Political Empowerment, 23 Wash. Rep. on Middle E. Aff. 74, 81 (2004) (discussing survey of Muslim voters in Florida during 2000 election showing that, "[i]f taken to be representative ... 18,496 Muslims in Florida voted for Bush, while only 3,709 voted for Gore, a difference of 14,787 votes-- nearly 30 times the margin of victory").

[FN268]. See Deborah Horan, Muslims, Arabs Say Key Bush Vote May Swing Other Way, Chi. Trib., Jan. 18, 2004, at A3 (stating that according to one poll, "Arab-American Muslims rate Bush's overall performance 'unfavorable'").

[FN269]. See Leonard, supra note 253, at 20 (discussing shift after Bush-Gore Debate in Michigan); Al-Arian, supra note 267, at 80-81 (describing overarching desire among Muslim American leaders to impact election of one of candidates as way of demonstrating
Muslim electoral clout). It seems Hillary Clinton's decision to return a $50,000 check to the American Muslim Alliance may have played a significant role in creating the conditions behind Muslim Americans voting in a bloc for Bush, suggesting a strategic decision to bring Democrats in line with Muslim interests. Bush's public opposition to the use of secret evidence, as stated in one of the 2000 presidential debates, also played a large role. Generally, it seems leaders in the Muslim community wanted to demonstrate the existence of a Muslim voting bloc that would not allow itself to be taken for granted by putatively liberal candidates. See Leonard, supra note 253, at 20 (discussing American Muslim participation in 2000 election); Al-Arian, supra note 267, at 80-81 (discussing "Birth of the Muslim Bloc").


[FN271]. See William McKenzie, What's on Muslim Minds?: Bush Shouldn't Take This Vote for Granted, Dallas Morning News, July 6, 2004, at 15A (citing civil rights concerns among Muslim voters supporting John Kerry for president). It should be noted that the issue of secret evidence being used in deportation cases does sound in traditional civil rights conceptions of justice. See Al-Arian, supra note 267, at 80 (concluding that 2000 election was first time foreign policy issues were afforded secondary status).


[FN274]. See id. at 2 (stating that "politicized black churches foster a sense of group consciousness by collectivizing the interests of the sub-group in an effort to counter prejudice and discrimination from the mainstream theory").

[FN275]. Id. at 17.

[FN276]. See id. Jamal's study disaggregates Muslims in the United States into three groups: Arab Muslims, South Asian Muslims and African American Muslims. See id. (stating categories of Muslims used in research). Her findings on politicization and group consciousness apply most strongly to Arab Muslims, but not necessarily to the other two groups. See id. ("For Arab Muslims, mosque participation increase is linked to greater forms of political activity."). Jamal explains the different reactions of the Muslim groups to mosque involvement using pre-existing ethnic and cultural differences. See id. at 14-16 (discussing reasonsing for these variances).

[FN277]. See id. (describing United States government's focus on mosque attendance as "worrisome").

[FN278]. See Hillary Wundrow, Arab Americans on the Move: Anti-War and Civil Rights Resolutions, Arab American Institute, Mar. 24, 2003, at http:// www.aaiusa.org/anti-war_resolution.htm ("Civil rights organizations, constitutional experts and lawmakers have challenged these laws at all levels of government. These groups are leading the fight to repeal the laws and protect individual rights."). It is reported that 357 cities and towns have passed such ordinances. See Bill of Rights Defense Committee, at http:// www.bordc.org/index.html (last modified Nov. 12, 2004) (discussing ordinances).


[FN281]. See Al-Arian, supra note 267, at 80.


[FN283]. See id. at 187 ("[A]s people of nonwhite origins bearing distinct physical differences, they [Asians] have been perceived as 'perpetual foreigners' who can never be completely absorbed into American society and its body politic.").

[FN284]. Id. at 45 n.1.


[FN286]. See infra Part III (discussing securitization of race, speaking to ways that racial formation in United States relates to state's exercise of its security function and that we may be seeing new form of racialization).

[FN287]. The racialization of security refers to the various ways that threatening aspects of the external realm are racialized.

[FN288]. See Michael Rogin, Ronald Reagan, the Movie and Other Episodes in American Political Demonology 68-80 (Univ. of Cal. Press 1987) (1981) (discussing Cold War as third movement in history of counter-subversion). I extrapolate from Rogin, who was making a more general, non-race critical point about the "counter-subversive response" to Cold War challenges from communists and labor. Rogin argues that the psychologization of threat begat "exaggerated responses" that "narrowed the bounds of permissible political disagreement and generated a national-security state." Id. at 68.


[FN290]. See id. at 17-18 & n.5 ("He is most famous for the notion that war is the continuation of politics by other means ....").

[FN291]. The term "authorize" is used here simply to mean that preventive attacks of the sort contemplated in President Bush's National Security Strategy, which will in most cases violate international laws governing use of force, can be conceived as legitimate from the perspective of the ultimate sovereign, the people. See generally National Security Strategy of the United States of America (2002), available at http://www.whitehouse.gov/nsc/nss.pdf (discussing fear of terrorist attacks on United
States). Even the whipping up of patriotic fervor to goad the public into supporting state violence can claim a rational basis so long as the state's violent campaign can be construed to relate back through the territorial and rational model of the modern state in the modern state system to the interests of the people. Manipulated patriotism is just the means to achieve the rational end of mass mobilization in the people's interest. See Walker, supra note 289, at 15 (explaining that political mobilization and fear is disguised by patriotism).

[FN292]. See id. at 19 (discussing Huntington's theory).

[FN293]. See id. at 19-20 (articulating new distinctions between friends and enemies).

[FN294]. See id. at 19-21 (discussing likely tactics of United States and Great Britain in response to threat of terror).

[FN295]. See generally Uday Singh Mehta, Liberalism and Empire (1999).


[FN297]. It is hard, for example, even to imagine one non-racialized "enemy" of the United States in the post-Cold War era, unless we count the countries of Rumsfeld's "old Europe."


[FN299]. See Gott, supra note 16, at 194-202 (describing discipline's treatment of Curtiss-Wright and Youngstown cases as discipline's orienting precedents). On another level, of course, discussion of the internment seems quite natural in the post-September 11 context. Conditions facing Muslims, Arabs and South Asians recall the anti-Japanese racial animus of the World War II era, and the scholarship rightly focuses on the internment as symbolic of the nation's relationship to racialized subordination of "enemy minorities."

[FN300]. See generally Robert Meister, Two Concepts of Victimhood in Transitional Regime (1998). ("The point of survivor's justice, thus conceived, is to go forward on a common moral footing--not because the past has been forgiven or forgotten, but because continuing to struggle against an evil that is gone is no longer appropriate, and may be morally equivalent to reviving it.").

[FN301]. See Robert Meister, Sojourners and Survivors: Two Logics of Constitutional Protection, 3 U. Chi. L. Sch. Roundtable 121, 123 (1996) ("The figure of the sojourner was generalized to encompass the believer in an alien creed, the member of a marginal group, and eventually the bearer of an alternative conception of human normality. The figure of the slave was similarly generalized ....").

[FN302]. See id. at 170 (discussing that survival protections are typically afforded only after victimized groups survive).

[FN303]. See id. at 137-44 (emphasizing recognition and change to encourage unity rather than reparations for past actions that continue to discriminate).

[FN304]. See id. at 143-44 ("For Lincoln the central point is that, together, we survived an experience that almost killed us .... Lincoln's story of national survival is not reparations, but rather a new beginning--a new covenant between former victim and the
former perpetrator ....

[FN305]. See Rogin, supra note 288, at 76 (resulting in increased reactionary surveillance and FBI activities).

[FN306]. Again, I owe this framing to Robert Meister. For a further discussion of Meister’s position, see Meister, supra note 300 and accompanying text.

I. Introduction

FOR the ninth time in as many years, LatCritters [FN1] met in 2004 during the Cinco de Mayo weekend. We met not only to help recall the unjust events of that day a century and a half ago, but also to center and challenge its unjust legacies in law and society. [FN2] These legacies live on in many forms and many ways, of course. [FN3] Against this backdrop, the LatCrit *1136 IX conference theme beckoned the critical collective attention toward Countering Kulturkampf Politics Through Critique and Justice Pedagogy. [FN4] With this year's call and focus, the LatCrit IX conference invited all OutCrit scholars and friends to train attention on the retrogressively synergistic consequences of backlash kulturkampf on law and society. [FN5]

In response, the contributors to this symposium [FN6] have covered a range of issues regarding both the culture wars and the value of social justice pedagogies as an act of resistance to their ideological and political *1137 pressures. [FN7] Symposium authors have brought this new cross-disciplinary resource of substantive and pedagogical knowledge to counter the neocolonial cultural warfare that seeks to degrade LatCrit identities, communities, principles and, even, LatCrit work. This Afterword now closes this year's LatCrit symposium by focusing squarely on this sociolegal phenomenon: backlash kulturkampf. [FN8]

The liberty-privacy mini-case study sketched below illustrates how backers use judicial review in precisely the selective ways that they so denounce loudly. [FN9] It illustrates the struggle over the liberal legacies of the *1138 past century in law and society. It captures both the resilience of liberalism's legacies as well as the ambitions of backlash kulturkampf even as it depicts a key--and unfinished--constitutional skirmish in the ongoing culture wars. At the same time, as this symposium helps to illustrate, outsider scholars have continued to experiment with traditional and nontraditional methods of scholarship to elucidate a socially just society under the antisubordination principle. [FN10] OutCrits thereby provide a fundamentally *1139 different policy alternative to backlash and retrenchment--an alternative that will remain available to the nation when the furies of this kulturkampf have spent themselves, when the nation may once again resume its fitful march away from the identity-based structural injustices that punctuated its founding and have bedeviled it since. [FN11] As the LatCrit IX conference theme suggests, the culture wars of the past two decades provide a contemporary and concrete lens for an honest assessment of the choices effectuated through this latest effort to arrest the progress of law and society. [FN12]

*1140 This Afterword proceeds from a critical appreciation of the alternative accounts proffered elsewhere to help explain the jurisprudential maneuvers and outcomes of the culture war rulings issued by backlash judges. [FN13] Those accounts and the perspective presented below diverge in sometimes marked ways because other accounts often emphasize familiar aspects of legal indeterminacy and judicial discretion to explain
the patterns left in the jurisprudential wake of backlash adjudication. Conversely, the
account unfolded here aligns more closely with the recent research into the behavior of
individuals appointed to be judges. The research examines whether those behaviors
produce patterns of consistency between their personal ideological preferences, as
manifested in pre-appointment statements or actions, and their post-appointment
adjudicatory acts. This research has given rise to the"attitudinal model" for analyzing
and gauging the influence of personal predilection in formally judicial acts. It has
documented a clear and stunning consistency in the convergence of political ideology
and adjudicatory outcome. It depicts a convergence that effectively portrays a near-
complete collapse of the idealized distinction between law or principle and politics or
ideology, maintained under the "legal model" of analyzing the behavior of judicial
appointees. [FN14]

This Afterword proceeds also with a wry recognition of the dangers that accompany an
exposé of the human-civil rights subversion launched and orchestrated from the
Supreme Court bench by kulturkampf appointees installed into those positions during
the past two decades, expressly for this reactive purpose. [FN15] Yet, the benefits of
critical awareness, consciousness—raising and active resistance may outweigh the
fear of long term erosion of the federal judiciary's institutional legitimacy. Perhaps, the
feared dangers are due more to the increasingly blatant, difficult to ignore, gyrations of
backlash judges to reach their preferred results than to the public's observation of them.
The gyrations are drawing increasingly pointed critical attention. [FN16] Indeed the
feared dangers seem to be courted by the backlashers themselves. [FN17] In deference
to the feared nihilism, however, this Afterword distinguishes between the federal
judiciary as an institution and the individuals who currently wield its awesome powers
*1142 to wage backlash kulturkampf in the guise of constitutional adjudication and
interpretation—especially the literal handful of individuals who form the backlash bloc on
the current Supreme Court. [FN18]

II. Bowers, Glucksberg and Lawrence as Culture Wars Cases: A Sketch of Backlash
Patterns in Jurisprudential Identity Politics

While the term "kulturkampf" traditionally refers to various periods in different social
and political settings, in the United States at the turn of the millennium the term had
come to signify the coordination of national political efforts to retrench civil rights and
New Deal legacies in both social and legal terms. [FN19] These orchestrated efforts span
multiple categories of identity and policy. In addition to race and ethnicity, the culture
wars have focused inordinately on sex and sexuality and, conversely, on religion and
morality. [FN20] It is no coincidence, therefore, that twice in sexual regulation *1143
cases, Justice Antonin Scalia, has invoked the notion of "kulturkampf" to deride the
Court's decisions protecting a vulnerable group from social and legal subordination
through raw exercises of majoritarian might. Dissenting from Romer v. Evans, [FN21]
and again from Lawrence v. Texas, [FN22] he ridicules the majority's analysis and
holding as mere participation in the "culture wars" sweeping the United States during
the last quarter of the twentieth century. In doing so, Justice Scalia reminds us all of the
times in which we live, the context in which these cases have been litigated and
adjudicated, and the zeitgeist under which critical outsider jurisprudence came to be.

The rise of today's culture wars go back to the 1970s and 1980s, when the liberal
antidiscrimination initiatives of earlier decades became increasingly contested. [FN23]
But the moment of their official declaration occurred in 1992, from the podium of the
Republican National Convention, when presidential contender Patrick Buchanan declared
"cultural war" for the *1144 "soul of America." [FN24] Since then, the invocation of
"cultural war" to explain and motivate political action against anything labeled "liberal"
has taken place repeatedly. [FN25] This kulturkampf of backlash is not, however, a
simple case of rough-and-tumble politics as usual, wherein self-interested "factions" are
expected to jockey for social and economic goods. Rather, this multi-year phenomenon is a concerted and multi-pronged campaign expressly for the "soul" of the nation. [FN26] The named and targeted "enemy" consistently has been one or more of the nation's historically marginalized and still-vulnerable social groups: racial and ethnic minorities, women of the "feminist" type, poor persons of all colors, consumers, environmentalists, workers, queer communities and sexual minorities, immigrants from the South and East and others. [FN27] Indeed, the overarching pattern of backlash jurisprudence, as part and parcel of these culture wars, has been the pursuit of a self-subscribed "anti-antidiscrimination agenda" under the guise of principled adjudication. [FN28] In effect, this agenda amounts to a kind of "cultural cleansing" that, in the name of "history and tradition," will leave the purified society looking and feeling like the 1780s as much as politically and physically possible. [FN29]

*1146 In short, backlash kulturkampf--including its jurisprudential forms--combines identity politics with public policy. Backlash politics and jurisprudence aim to reconsolidate the formal and cultural hegemony of the original immigrants to these lands, and of their successors-in-interest. The nation's multiple diverse social outgroups are the prime targets of the backlash take-backs. In this overarching and variegated kulturkampf, sex and sexuality, along with religion, race, nationality and ethnicity, oftentimes have been at the epicenter of fury. The trinity of cases spanning the past three decades formed by Bowers v. Hardwick [FN30] in 1986, Washington v. Glucksberg [FN31] in 1997, and Lawrence in 2003 provide an abbreviated mini-case study for a critical deconstruction of some key patterns and basic politics that shape backlash jurisprudence. This trio of cases illustrates how today's judicial appointees wield the federal judicial power to turn backlash politics into backlash jurisprudence.


In this litigation Michael Hardwick and a cross-sexed couple challenged a Georgia statute criminalizing "any sexual act involving the sex organs of one person and the mouth or anus of another." [FN32] Foreshadowing the Supreme Court's belated self-correction in Lawrence, the Eleventh Circuit's ruling in Bowers correctly concluded that liberty-privacy rights do not turn on identities, marital status or procreational intent, a holding that followed existing precedent. [FN33] Yet, when the case arrived at the steps of the Supreme Court in the mid-1980s, the consequences of backlash kulturkampf in the politics of federal judicial appointments during the previous decade came sharply into view: four of the five justices in the bare Bowers majority were installed into power by politicians who explicitly voiced their use of judicial appointments to cabin civil rights and expand "states rights" through a strategic application of "strict construction" of federal powers in the protection of individual rights and liberties. [FN34]

Those appointments generated a scandalously unsound decision employing three principal maneuvers that converged backlash politics with constitutional jurisprudence: (1) re-framing the plaintiff's complaint to focus on "homosexual sodomy" despite the statute's application to cross-sex sodomy; (2) invoking history and tradition to preclude "judicial activism" in liberty-privacy jurisprudence; and (3) emphasizing the need for judicial deference to "democracy" and the "presumed" moral beliefs enacted into law through majoritarian politics. Along the way, the five justices who ruled the day in Bowers created the jurisprudential anomaly entrenching formal inequality based on sexual orientation (the same inequality that Lawrence formally rejected seventeen years later). [FN35] Under the Bowers anomaly, a relevant majority--the heterosexual majority--was positively licensed to deploy state power to outlaw selectively the similar conduct of the correlate minority; Bowers's equality anomaly effectively made sodomy laws of general application impossible. [FN36] Moreover, Bowers enabled and perhaps even encouraged heterosexist majorities to pass oppressive laws that constitutionally
could not reach them—even if the penalized conduct was otherwise similar, perhaps even identical, to that of their homosexual counterparts.

The majority opinion in Bowers was written by Justice White and joined by four other justices. The Court framed the case in two parts, both of which are key to the jurisprudence of backlash that Bowers helped set into motion. The first part centered on cultural notions of homosexual identity apparently harbored by the quintet of justices in the Bowers majority. These notions formed the core of the Court’s conclusion. The second part of the opinion focused attention on institutional concerns over judicial legitimacy in Constitutional interpretation in a society dedicated to democracy, and labors to provide additional rationale for their conclusions. The first part enabled the justices to bootstrap into law their social perceptions and prejudices along the identity-rooted fault lines of the culture wars while the second became a textbook example of, and precedent for, future jurisprudential plays of this sort in pursuit of backlash kulturkampf. [FN37] The first part of Bowers’s ruling focused on whether “the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy” while the second focused itself on “the limits of the Court’s role in carrying out its constitutional mandate.” [FN38]

*1149* Justice White’s majority opinion began by re-describing the Griswold v. Connecticut [FN39] line of liberty-privacy precedents, aiming specifically to “register disagreement” with the Eleventh Circuit’s understanding of those precedential cases. But the Court’s approach significantly differed from the due process cases: Meyer v. Nebraska, [FN40] Griswold, Eisenstadt v. Baird [FN41] and Carey v. Population Services International [FN42] all had explained due process as a coherent yet flexible doctrine that was based chiefly on constitutional language but never had attempted to delimit or mark the “outer limits” of liberty-privacy. By contrast, the Bowers majority summarily recast these cases, in brief descriptive capsules, as atomized examples of discrete “decisions” and “isolated points” (or “dots”)—in other words, merely an ad hoc and “flattened out collection” of acts—to which protections had somehow attached, perhaps through nothing more than mere judicial whim. [FN43] In a fairly aggressive effort to arrest the further development of liberty-privacy law, the Bowers quintet denied what these controlling rulings expressly and repeatedly had delineated. [FN44]

After that formal (and superficial) acknowledgement of precedent, Justice White’s opinion summarily (and disingenuously) asserted that:

>a]ccepting the decisions in these cases and the above description of them, we think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy . . . . No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated. . . . Moreover, any claim that these cases nevertheless stand for [this kind of] proposition . . . is unsupportable. [FN45]

In the paragraphs following these identity-inflected assertions, the Court generously sprinkled its opinion with other factually or substantively erroneous conclusions regarding history, tradition and precedent. [FN46] By the end of the opinion’s first part, the substantive issues presented by that case—at least as the quintet had selectively chosen to fix them in identity-*1150* based terms—had raised, in their view, ”at best, facetious” claims to equal privacy and liberty. [FN47]

To accomplish this outcome, the Bowers quintet proffered a strategic assertion that has come to characterize backlash jurisprudence: the Court claimed in the second part of the opinion that fears of institutional legitimacy also prevented their recognition of equal
privacy rights under the Fourteenth Amendment. The majority stated that "[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." [FN48] With this facile assertion, the Bowers justices strongly implied that liberty-privacy was an illegitimate judicial fabrication rather than an individual right rooted "in the language or design of the Constitution." [FN49] The Court characterized its ruling as an example of restrained and hence "principled" adjudication, presumably in contrast to the "liberal" precedents the Court inherited from its "activist" and unprincipled predecessors. Moreover, as if to make the identity politics underlying the Court's view perfectly clear, Chief Justice Burger not only joined the White opinion but also filed a separate concurrence "to underscore [his] view that in constitutional terms there is no such thing as a fundamental right to commit homosexual sodomy." [FN50] With the Bowers *1151 majority's decision in 1986, the meaning of "privacy" as a component of "liberty" was effectively thrown wide open to pave the way for a backlash reordering of jurisprudential developments that had begun in 1923.

As was clear to many observers back then, and has become even more so in the intervening years, those five justices used Bowers mainly to bootstrap their own prejudices into the annals of constitutional law. [FN51] The effect of this fiat was to engineer a roll back in the evolution of liberty-privacy jurisprudence specifically, and of civil rights law in general—as scholars pointed out immediately and Lawrence finally acknowledged. In Bowers, the Court asserted conveniently false "history" in its opinion to foist on posterity those five justices' personal predilections. [FN52] Rather than adjudicate justiciable issues as framed by the litigants and record before them, those five justices willfully reached out from their privileged perches to recycle homophobic superstitions from the witch-hunt days of our nation and its antecedents. Brushing aside precedents like Griswold and Carey, and claiming in conclusory fashion that Michael Hardwick's claim was "facetious" based on personal and societal prejudice, the Bowers quintet attempted*1152 to throw into permanent doctrinal disarray the steady and relatively consistent evolution of liberty-privacy jurisprudence that had progressed over the better part of the preceding century. [FN53] For nearly two decades, until the Lawrence repudiation, those justices managed to transmute their personal views and ideological values into the form of constitutional law in order to arrest the development of liberty-privacy in ways that can never be fully measured. A full decade later, with backlash kulturkampf ascending, the justices attempted to cement Bowers's anomalous and "flattened out" view of liberty-privacy. [FN54]

B. Glucksberg: Entrenching Bowers, Promoting Backlash

In 1997, backlash politics prevailed again in Glucksberg. This case involved a Washington statute that criminalized providing information or assistance to a competent but terminally ill adult who wished to expedite, rather than retard, his or her inevitable death. Physicians and terminally ill competent adults in the state challenged the statute under the Fourteenth Amendment's protection of liberty, claiming that individuals have a "right to control" their final encounter with life and to "choose a humane, dignified death" over more painful or prolonged options coerced formally or constructively by medical regimes or family preferences. [FN55] The District Court struck down the statute and the decision was affirmed en banc by the Ninth Circuit. [FN56] When the case reached the Supreme Court, the same bloc of five justices who banded together during the early-to-mid 1990s to implement backlash jurisprudence from that bench, joined in yet another five to four opinion that overturned the opinions below and once again scrambled familiar jurisprudential lines to delimit individual rights and liberties. Issued by Chief Justice Rehnquist, the Glucksberg opinion is a textbook rendition of backlash jurisprudence. It is instructive in understanding backlash jurisprudence both because it was Bowers's cousin in the key area of liberty-privacy and because it epitomizes the ways and means of jurisprudential kulturkampf.
Echoing backlash pronouncements in Bowers, the Glucksberg opinion declared:

The Court's established method of substantive-due-process analysis has two primary features: First, the Court has regularly observed *1153 that the Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition. . . . Second, the Court has required a "careful description" of the asserted fundamental liberty interest. [FN57]

This formulation is an exact replication of the scheme that Bowers endeavored in 1986 to substitute for earlier liberty-privacy rulings, including Griswold. This assertion aims to create the impression that Bowers, as opposed to Griswold and its progeny, represented the "established method" of substantive due process analysis in liberty-privacy cases. To do so, moreover, the Glucksberg quintet asserted the analytically untenable notion of a single "objectively" discernible history and tradition governing the claims framed by the plaintiffs in their pleadings. The Court's decision in this case, however, belied this supposed formal objectivity. After a journey of several pages purporting to dissect social and legal attitudes toward "suicide" (and assisted suicide) from medieval England and since, the majority concluded that history and tradition prevented judicial recognition of the right to die for those living today. [FN58] This deployment of history and tradition surrounding suicide in ostensibly neutral terms was, in effect, calculated to set into motion an analytical domino effect that predictably, if not certainly, would produce the outcome most compatible with backlash imperatives and agenda.

The Glucksberg opinion's insistence on framing the relevant history and tradition of attitudes surrounding suicide and assisted suicide, which was eerily reminiscent of the Bowers holding's one dimensional focus on "homosexual sodomy," willfully overrode the grievance voiced by the plaintiffs' in their pleadings. [FN59] It also sidestepped the analysis of the district court and en banc circuit court, which both arrived at uniform conclusions. This uniformity was at least in part due to the fact that the lower courts accepted the plaintiffs' framing of their case around the "right to die" humanely and with dignity by exercising personal "control of one's final days." [FN60] Framed as the plaintiffs' had, history and tradition surely could not bar an individual's interest in "choosing a humane and dignified death" over other possible deaths as an aspect of personal liberty. But reframing the claimed right as a decontextualized taste for "suicide," as the five Glucksberg justices did, foreclosed any real possibility of any outcome other than rejection of the reframed claim along the analytical lines laid down. [FN61] Having willfully interposed a reformulation of the claimed *1154 right to engineer their rejection of it, the Glucksberg five intoned not only history and tradition, but for good measure also added formal democracy and states' rights to conclude that they simply could not uphold the two rulings of the federal judges who had heard the case before them: implicitly casting the lower courts' rulings as illegitimate overreaching, the Glucksberg quintet concluded their opinion with the assertion that upholding the lower courts would require them to "reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State." [FN62]

Described in Glucksberg as a "restrained methodology" without any apparent sense of Orwellian irony, [FN63] this kind of analytical maneuvering thus is purportedly demanded by the need to discipline judicial will or "activism." [FN64] Akin to the same analytical maneuvers they undertook in Bowers a decade earlier, the backlash assertion here again was that unelected federal judges must defer to "tradition and history" and to the "presumed belief" of the majority--or risk institutional illegitimacy. [FN65] In Glucksberg, this assertion appears as follows: "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court . . . we have a tradition of carefully formulating the interest at stake in substantive
due process cases." [FN66] To soothe us further, the backlash bloc in their Glucksberg opinion also added, again with no apparent sense of Orwellian irony: "This approach tends to rein in the subjective elements that are necessarily present in due-process judicial review." [FN67] But, as with so many of the culture war rulings issued by the backlash bloc during the past decade or so, this somber assertion belied its own strategic selectivity. [FN68] When Lawrence was decided six terms later, in 2003, the same justices made plain that Bowers was, and always had been, flat-out *1155 wrong. By logical necessary extension—though they did not so intimate—so should be the backlash methodology that Bowers advocated and that Glucksberg sought to entrench.

C. Lawrence v. Texas: Expunging Bowers, Breaking Backlash?

In Lawrence, the justices invalidated Texas's sodomy statute, which, unlike Georgia's sodomy statute, textually singled out same-sexed intimacy for state suppression and criminal punishment but left untouched the same acts if performed by cross-sexed couplings. As in Bowers, the two men's intimacies took place in their own home. [FN69] In Lawrence, five of the current justices based their conclusion on the liberty text of the Fourteenth Amendment, as it had been interpreted for over eight decades by succeeding generations of Supreme Court appointees since the 1923 ruling in Meyer. [FN70] In doing so, the justices unequivocally repudiated Bowers and acknowledged that, not only was Bowers wrong by contemporary standards, but it was in fact wrong at its inception. To arrive at this substantive conclusion, the Court engaged a critical and realist approach to constitutional analysis that stands in marked contrast to the dictates and techniques of backlash jurisprudence, and that thereby may well help to deliver four enduring benefits: (1) helping to pierce the veils of formal democracy as automatic self-justification for exercises of public power; (2) downsizing the role of history and tradition specifically as a limitation on the scope of liberty-privacy under the Fourteenth Amendment; (3) reviving antisubordination values as substantive constitutional principle; and (4) centering critical realism as constitutional method. Because they help to counter several hallmark features of backlash jurisprudence and kulturkampf, each of these four potential benefits of the Lawrence ruling can work against backlash politics in the explication of constitutional law. These, therefore, are key points to keep in mind as OutCrit scholars prepare the groundwork for the day when the current fits of backlash can be relegated, finally, to yet another chapter of sorry legal history.

*1156 1. Closing Down Bowers's Reign of Tyranny: Majoritarian Moralisms and Nominal Democracy

As noted earlier, the Bowers justices attempted to enshrine "presumed" majoritarian moralism as a self-justifying basis for lawmaking: the Bowers majority proffered judicial deference to the "presumed belief of a majority of the electorate in Georgia" as an institutional rationale for upholding the selective application of sodomy statutes. [FN71] The implications of this interposition were potentially breathtaking: so long as a nominally democratic legislature enacted a statute imposing a "presumed belief" or "moral" view, it could be upheld as an expression of formal democratic lawmaking. Never before, apparently, had such a proposition based on majoritarian moralism been so bluntly asserted in the form of an opinion issued under the name of the Supreme Court. [FN72]

But the crucial immediate points that this strategic assertion conveniently overlooked were twofold. The first centers on precedent and method: the line of liberty-privacy rulings from Meyer in 1923 to Griswold in 1965 to Carey in 1977 demonstrated the contrary point, as they had consistently overturned acts of majoritarian moralism embodied in nominally democratic formal legislation in order to vindicate individual autonomy; this jurisprudential record hardly supported the belated assertions of the
backlash bloc in 1986 and 1997. [FN73] The second conveniently overlooked point goes to the crux of the substantive claim of effectively blind deference to majoritarian moralism as the preferred method of constitutional interpretation. The license to impose majoritarian moralisms in the regulation of human sexualities on entire populations could not, in fact, be applied or enforced against majority-identified sodomites who engaged in sodomy as "married couples." Moreover, as Carey illustrates, this license could not even be applied or enforced against unmarried, but heterosexually-identified sodomites, including persons classified as minors. This self-exemption from equal regulation creates the necessary structural conditions for a classic exercise of democratic despotism warned against by the framers in the debates that ultimately resulted in the drafting of our Constitution--the same Constitution that the backlashers purport to interpret *1157 with fidelity in cases such as these. [FN74] Thus, not only did established liberty-privacy precedents decided by multiple generations of judges during the twentieth century seem to foreclose this belated backlash attempt to self-justify whatever actions may be imputed by a judge to a "presumed belief" of a particular majority, but the original concerns regarding the "tyranny of the majority" that motivated and undergirded the design of the Constitution seemed to demand the very opposite.

In the state of affairs constructed by the joint operation of Bowers and Griswold's progeny--the state of affairs noted by Justice Stevens in his Bowers dissent and aptly described as an "equality anomaly"--state power to regulate "sodomy" could be targeted with confidence only against "homosexual sodomy" and homosexual sodomites. [FN75] In this way, Bowers's ostentatious bow to nominal democracy and formal legislation in the name of the judiciary's institutional legitimacy perversely excited one classic fear underlying the Constitution. [FN76] That fear was the danger of self-interested despotism, or the tyranny of shifting majorities, practiced typically in the form of nominally "democratic" electoral politics, to enact legislation that *1158 aims to "vex and oppress" minority or electorally-disempowered groups. [FN77] Indeed, there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation. [FN78]

With this move, then, the Bowers's justices constructed a constitutional straitjacket in which unjust or intrusive laws could be promulgated and enforced against disfavored "others" with a firm advance guarantee that the very same proscriptions would never burden or endanger the equivalent delights of the lawmaker and his/her "moral" majority. [FN79] A more apt example of "democratic" tyranny--and of invidious inequality --*1159 is difficult to find in the contemporary annals of constitutional law. [FN80] Lawrence, at the very least, demands a stop to this blatant double standard under the color of law.

2. Putting the Past in Its Place: "History and Tradition" in Constitutional Construction

An equally important set of post-backlash points that Lawrence clarifies in Fourteenth Amendment jurisprudence--and which also provides another of its potential benefits--is the legitimate role of history and tradition in the constitutional interpretation of the Fourteenth Amendment. Lawrence clarifies the use of history and tradition to interpret Fourteenth Amendment text in three key ways that span substance and method: [FN81] (1) it casts history and tradition as positive supplements, not stingy curbs, on liberty-privacy; (2) it views history and tradition as ongoing and evolving phenomena, rather than a finite or fixed point in time during the eighteenth century or thereabouts; and (3) it contextualizes national historical evolutions and trends in comparative, transnational
terms rather than in strictly insular or nationalistic frames. As with its rejection of majoritarian moralism, this clarification is intertwined with Bowers's repudiation. As with its repudiation of Bowers, this aspect of Lawrence potentially helps to undercut backlash jurisprudence more broadly on both substantive and methodological levels.

a. History and Tradition as Positive Supplement, Not Stingy Obstacle, to Rights Recognition

In the precedents from Griswold to Carey, history and tradition had been secondary sources of interpretation employed to buttress, not undercut, the textual provisions of the Fourteenth Amendment. Until Bowers, *1160 history and tradition had been used mainly as secondary sources of textual interpretation to bolster judicial protection of individual rights against majoritarian lawmaking in the name of moralism. During the second half of the past century, this function was true in Griswold, Eisenstadt, Roe v. Wade [FN83] and Carey; before then, during the century's first half, it was also true in Pierce v. Society of Sisters [FN84] and Meyer. [FN85] More on point, it was true in the Eleventh Circuit's understanding of Bowers's claim--in light of these precedents--and in the lower courts' rulings in Glucksberg. [FN86] It was apparently true all around until the five justices forming the bare Bowers and Glucksberg majorities weighed in, ostensibly relying on history and tradition to fix constitutional rights and liberties to a time when, by law, only white (propertied) men had the social opportunity to forge the practices and norms that, today, are retrospectively exalted as self-justifying "traditions" binding us all forever. [FN87] In this effort, backlash judges tell us that history and tradition dictate the modern-day oppression of sexual and other minorities or identities, and not the internalized homophobia of individuals *1161 with awesome power and names like Byron White, Warren Burger, William Rehnquist, Sandra Day O'Connor and others who chose to sign onto the infamous ruling in Bowers or its progeny. Bowers thus both illustrated and portended strategically rigid constructions of history and tradition conveniently tailored (though factually false) to deflect the quite foreseeable critiques of backlash rulings as mere products of their authors' cultural biases and ideological imperatives. This backlashing formulation attempted to constrict history and tradition into the most minute level of description that an active judicial imagination can concoct in order to block rights recognition. [FN88]

As Bowers illustrates and as Lawrence documents, the first problem with this bald and cavalier valorization of "history and tradition" is that uninformed judges, in this instance the backlashers, tend to confuse their personal *1162 prejudices for them with alarming ease and fixation. This tendency occurs even while claiming that history and tradition actually are "objective" and, therefore, salutary because they are self-disciplinary anchors that prevent judicial appointees from indulging themselves ideologically or politically in the name of the Constitution. [FN89] In addition, the structural problem with this transparent circularity is that it endeavors to cast the world, or at least this nation, in the image of the original immigrants, freezing in time all realistic aspirations for significant social change with fairly predictable social effects. This freeze has the effect of perpetuating the existing, neocolonial stratification of society. [FN90] Lawrence, however, makes plain that backlash insistence on using "specific" formulations of history and tradition with the effect (if not purpose) of diminishing individual rights to liberty-privacy is not countenanced by any source other than the self-serving assertions of backlashing judges. There is nothing in the text of the Constitution, nor in the modern liberty-privacy jurisprudence developed by generations of judges from different ideological persuasions, that dictates or even counsels such a rights-destructive choice by today's judicial appointees. [FN91] Lawrence thus provides an opportunity and call to remember that Bowers--now repudiated--catalyzed deployments of this source to diametrically opposed ends by ridiculing and rejecting as "facetious" Hardwick's claim to equal privacy under existing liberty-privacy precedents from Griswold to Carey, while also atomizing the prior cases to deprive liberty-privacy of its jurisprudential coherence.
Lawrence marks a timely opportunity, if not effective call, for the nation's legal culture to recall that, in liberty-privacy jurisprudence at least, history and tradition consistently have been cited to help supplement judicial recognition of text-based protections, not to undermine them. [FN92]

*1163 Lawrence, in sum, makes plain that history and tradition need not be reduced to the stingiest possible level of specificity to ensure that virtually no analogy ever will be found between modern life and 1787's practices. In doing so, Lawrence makes plain that Justice Scalia's litany of proclamations to the contrary in a host of culture war cases during the past decade or so are not binding on any of us. It makes plain that on this precise point--on the proper levels and uses of history and tradition as sources of constitutional interpretation--Justice Scalia opines loudly for himself and his backlashing cohorts, but not necessarily for the Court. [FN93] As such, this backlash dream should no longer be mistaken for formal constitutional law after Lawrence. At the very least, Lawrence makes strategic, superficial or self-serving deployments of history and tradition less plausible, providing much-needed relief to the Fourteenth Amendment's role in contemporary constitutionalism after decades of neglect and constriction under the sway of backlash jurisprudence.

b. History and Tradition as Experience and Evolution, Not as Frozen Time Capsule

Perhaps most significantly, Lawrence, by example, shows that history and tradition are not to be hallowed as holy artifacts of time frozen in the mold of 1787 and permanently limiting all future generations to the beliefs and habits that Western elites had adopted by then. Rather, Lawrence demonstrates how and why history and tradition are evolutionary concepts in constitutional interpretation. After Lawrence, history and tradition cannot be deemed to have stopped in 1787. Moreover, they cannot simply be reduced to the frequently self-serving descriptions passed down by dominant historians and mainstream storytellers.

On the contrary, Lawrence makes emphatically clear that these concepts must include the lived and living understanding of the past as comprehended by those living its legacies in the present. Lawrence makes it clear that the constitutional meaning of "liberty" in the Fourteenth Amendment is no more constrained by the notions of "liberty" in place by 1787 than is the meaning of "cruel and unusual" in the Eighth Amendment by the notions of "cruel and unusual" held back then. [FN94] Lawrence demonstrates, by example, that applications of history and tradition to elucidate Fourteenth Amendment text may, and perhaps even should, focus primarily on historical "trends" regarding contested practices or presumed *1164 beliefs, and on the inactions of the generations living in recent decades regarding those practices or beliefs, as opposed to fixating exclusively or principally on the most ancient, and increasingly most distant, practices, beliefs or generations. [FN95]

Thus, in the place of Bowers's strategic redeployment of ancient history and tradition (or superstitions) to short-circuit civil rights, Lawrence vindicates the view of history-as-evolution in a manner that, like the Griswold precedents, reinforced civil liberties in light of social experience and change. In this key way, Lawrence makes plain that the simple or conclusory intonation of "original" practices or antiquated cultural conceptions cannot be interposed in the course of constitutional analysis to block a contemporary recognition and implementation of the lessons accrued through social experience in the centuries since the Constitution's drafting. [FN96] In more common terms, Lawrence validates the seemingly endangered notion of a "living constitution" over the strategic demands of selectively "strict construction" that backslavers have tried to revive and impose during their years of ascendancy.
c. Comparative Normative Progression and "History" as the Sum of Shared Human Experience

Finally, this aspirational and evolutionary understanding of history and tradition includes taking judicial notice of experience and "progress" in analogous societies and legal systems: also by example, Lawrence shows how ongoing sociolegal evolutions in common law nations like England, or even those with civil law traditions but common cultural roots like other nations in Europe, illuminate the judicial search for contemporary discernment of the lessons to be drawn from invocations of the past. This combination of a comparative and evolutionary approach to history and tradition in Lawrence effectively provides an expanded normative baseline from which to measure the relevance of multiple local or regional histories, and of global trends or transnational trajectories, in the ongoing task of interpreting the Constitution in a constantly changing society. The final emancipatory potential benefit of history and tradition in Lawrence is the positive, evolutionary and globalized approach it embraces toward the use of history and tradition to make sense of constitutional text. [FN97]

*1165 More broadly, Lawrence makes plain that neither history nor tradition are conclusive or principal sources of constitutional interpretation that can be tossed out to trump all other considerations, canons or sources of construction. Instead of being selectively favored sources available for assertion whenever it suits the majority, history and tradition are two among many legitimate sources of guidance that, as recognized over the years by many judges regardless of ideology, may provide a "gloss" to express constitutional terms or text (such as the words "liberty" or "equality" or "cruel and unusual"). [FN98] Lawrence makes plain that such glosses do not presumptively nor conclusively override other sources or elements of constitutional law--including, in this particular instance, judicial recognition of the subordinating effects imposed on contemporary persons by nominally "democratic" legislation rooted in the identity biases that travel under the rubric of history and tradition, or that backlash ideology might regard as implicit in concepts of ordered liberty. [FN99] Indeed, as if to underscore this point, Lawrence confirms in express terms that the Stevens dissent in Bowers had been right all along, both on substance and on method, in observing that these basic points regarding Fourteenth Amendment interpretation had been made "abundantly clear" by 1986 via Griswold and progeny. [FN100]

By putting history and tradition in their place as sources of constitutional interpretation, and by clarifying the operative notions of history and tradition appropriate to Fourteenth Amendment analysis, Lawrence inflicts a serious blow to the legitimation of contrary uses urged by backlash jurisprudence and their patrons, especially since Bowers relied heavily on strategically skewed invocations of (factually false) history and tradition to justify injustice on purportedly neutral and principled grounds. [FN101] By so doing, Lawrence also helps point the way beyond backlash. The substantive and methodological clarifications of history and tradition as sources of Fourteenth Amendment jurisprudence outlined above consequently are a key aspect of the benefits that Lawrence proffers to the ongoing evolution of constitutional law and civil rights. These benefits, as noted, are closely related to the rejection of Bowers and its embrace of formal inequality. *1166 They also are related to Lawrence's substantive embrace of antisubordination values embedded in the Constitution generally, and in the Fourteenth Amendment specifically.

3. Antisubordination Values and Critical Realism: Toward a Working Constitution

In addition to overruling Bowers and putting history and tradition in their place, Lawrence also provides a salutary reminder of the antisubordination principle's central substantive role in constitutional analysis and law. [FN102] Simply put, the "antisubordination principle" stands for the proposition that law cannot be employed to
create or perpetuate social and economic castes. The substantive focus of antisubordination values consequently is fixed on actual social conditions and on their structural transformation, more so than on formal or surface reformation. The distinction between "antidiscrimination" and "antisubordination" therefore represents a shift in foundational principles and purposes in the formulation of law and policy from formal to substantive equality.

Significantly, antisubordination values are reflected in the Fourteenth Amendment's text and jurisprudence, and it therefore has been featured prominently in civil rights cases under the Equal Protection Clause. Perhaps more to the point, antisubordination values also are embodied in the great body of federal civil rights legislation enacted by Congress and signed into law by successive Presidents during the 1960s and 1970s. In short, antisubordination values are embedded in substantive law both as recent democratic public policy and also as original constitutional mandate.

*1167 Yet, in recent years, the backlash campaigns of the culture wars have attempted to shroud antisubordination values in neglect and disparagement. The neglect takes the form of an exceedingly thin and formalistic doctrinal preference for a backlash version of formal equality under the antidiscrimination principle. This sets into motion analyses that both social experience and critical scholarship show are likely to produce formal legal blindness that helps to sustain extant structures of identity- based subordination.

Under the rule of backlash jurisprudence, the antisubordination principle therefore rarely has been honored (except in the breach). Consequently, the structural and material stratification of society based on race, ethnicity, sex and other neocolonial fault lines correlated to familiar social groups and identities remain culturally pervasive and economically entrenched despite a half century of formal equality.

*1168 It thus is remarkable that Lawrence now centers antisubordination values as the normative linchpin of the analysis and holding. Yet Lawrence does indeed adopt the antisubordination principle as the standard of Fourteenth Amendment jurisprudence in no less than four key and inter-related ways. First, it vindicates the constitutionally protected "liberty" of all persons to be secure in their homes and in their identities against the intrusions or impositions of the state regardless of moralistic majoritarian preferences. Second, it vindicates the basic structural principle of the Fourteenth Amendment: that law and policy may not be deployed to "demean" or "control the destiny" of minority-identified persons and groups disfavored by majoritarian forces. Third, it affirms a related structural principle of the Fourteenth Amendment: that formal or nominal democracy--like direct democracy--cannot be bootstrapped into the construction of perpetual group supremacies and caste systems. Fourth, it recognizes the impact of criminal law in non-criminal venues of life, precisely (in this case) to "demean" and "control the destiny" of sexual minorities, thereby entrenching in apparent perpetuity a heterosexist supremacy.

In combination, these four inter-related features of the majority opinion champion long-standing, yet recently sidelined, antisubordination values over circular or self-justifying claims of neocolonial power and majoritarian privilege. As Lawrence itself displays, however, this possibility of substantive equality depends on the joinder of antisubordination normativity with critical realism as method.

Lawrence is reminiscent of the realist and critical traditions in law and legal analysis. In other words, Lawrence frankly recognizes and owns up to the obvious
interconnection of the formal to the social in this case. The majority, for example, unabashedly acknowledges the intent and effect of sodomy criminal sanctions and the pervasive societal subordination justified precisely on the presumed criminality of sexual minorities. [FN117] This realist/critical approach to constitutional categories permits the majority to "see" and explain in detail how sodomy statutes function socially. It permits the Court to discern and describe the interplay of "law" and "society" and of "criminal law" and "societal discrimination" and of "private" and "public" dimensions of human life. [FN118] Specifically, in Lawrence, the justices were able to detect that sodomy statutes, while nominally a proscription of ostensibly only specific conduct, in fact operated culturally and structurally to legalize and legitimate the systematic subjection of sexual minorities through the arbitrary denial of housing, employment and other social goods necessary to survival, much less success. [FN119]

Indeed, it was precisely the Court's willingness to acknowledge the functional linkages between formal and doctrinal categories that put on display why and how the "extent of the liberty interest at stake" went well beyond the act of "sodomy" as statutorily defined to include "control over personal relationships" and the "freedom [of all persons] to choose" their intimate associations without state punishment, branding or regimentation; [FN120] control, in other words, over the very composition of "personhood" and individuation. [FN121] Tethered to antisubordination values, this realist and critical approach positioned the Court to detect the intent and purpose behind the Texas statute and similar legislation in practical *1170 and actual terms. Ultimately, this joinder of antisubordination normativity and critical realism situated the Court to focus on the actual functioning of sodomy laws in contemporary society rather than on formalistic or abstracted expostulations. [FN122] More than a living Constitution, this joinder of antisubordination values and critical realism may portend the possibility of a working Constitution--a Constitution fit to work soundly in contemporary society. [FN123]

III. Conclusion

With few exceptions, today's backlashing judges continue to use every constitutional opportunity to redraw established or evolving lines of law and policy in favor of neocolonial elites. The liberty-privacy trinity that forms the illustrative case study here is but an exemplar of the patterns and politics of backlash kulturkampf and its jurisprudence. Despite the mounting victories of reaction and retrenchment in the political and policy battles of the North American culture wars of today, however, culture war cases like Lawrence show the pre-backlash heritage of the nation. The case study above thus illustrates both the tactics and techniques of backlash jurisprudence as well as some of the ways and means that LatCrit and OutCrit scholars will need to deploy and develop in order to repair the damage already done, or yet to be done, under the rule of backlash. In this context, and at this urgent historical juncture, this year's conference theme and symposium provide a welcome and needed contribution to the intellectual, political, educational and jurisprudential work that remains before this nation that may once again resume its fitful, and certainly unfinished, quest to overcome original and enduring evils.

Footnotes:

[FNa1]. Professor of Law and Co-Director, Center for Hispanic and Caribbean Legal Studies, University of Miami. I thank the organizers, sponsors and participants of the LatCrit IX conference, upon which this symposium is based, and in particular the symposium contributors and law review editors whose work has created a lasting record of that stupendous conference. In particular, I thank Matthew Goulding, Lauren Cates,
Thomas Lamprecht, Jaret Gronczewski and the other editors of the Villanova Law Review for their work and dedication to this project. This Afterword additionally is in part based, and builds, on previous efforts to analyze critically backlash kulturkampf as an overarching sociolegal phenomenon that necessarily frames the work of contemporary legal scholars. Finally, I dedicate this Afterword to Jerome Culp--friend and warrior--who passed away in February 2004; this LatCrit conference was the first he missed, and we in turn missed him dearly. As always, all errors are mine.


[FN4]. To view the LatCrit IX Call for Papers, please visit the LatCrit website at
OutCrit positionality is framed around the need to confront in collective and coordinated ways the mutually-reinforcing tenets and effects of two sociological macro-structures that currently operate both domestically and internationally: Euroheteropatriarchy and neoliberal globalization. For further discussion of this designation, see Francisco Valdes, **Outsider Scholars, Legal Theory and OutCrit Perspectivity: Postsubordination Vision as Jurisprudential Method**, 49 DePaul L. Rev. 831 (2000), [hereinafter Outsider Scholars] (discussing relationship between Euroheteropatriarchy and OutCrit theory and praxis). The term "outsider jurisprudence" was first used by Professor Mari J. Matsuda. See Mari J. Matsuda, **Public Response to Racist Speech: Considering the Victim's Story**, 87 Mich. L. Rev. 2320, 2323-24 (1989) (describing feminist and color based movements as "outsider jurisprudence"). As noted at infra note 27, LatCrit theory is one strand in outsider jurisprudence, along with critical race theory, critical race feminism, Asian American scholarship and Queer legal theory. See generally Francisco Valdes, Afterword: **Theorizing "OutCrit" Theories: Coalitional Method and Comparative Jurisprudential Experience --RaceCrits, QueerCrits and LatCrits**, 53 U. Miami L. Rev. 1265 (1999) (drawing LatCrit lessons from experiences of other outsider efforts, principally those of RaceCrits and QueerCrits).

The LatCrit IX symposium is a joint publication of the Villanova Law Review and the Seton Hall Law Review. Each journal is publishing different "clusters" of essays defined thematically based on the proceedings of the LatCrit IX conference. For a further discussion on presentations of past symposia, see supra notes 1-3 and visit the LatCrit website at www.latcrit.org.

These contributions include the uses of various familiar identity axes, such as race, gender, sexuality and class, to define and wage backlash kulturkampf. See, e.g., Tayyab Mahmud, **Limit Horizons & Critque: Seductions and Perils of the Nation**, 50 Vill. L. Rev. 939 (2005); Martha McCluskey, **How Equality Became Elitist: The Cultural Politics of Economics from the Court to the "Nanny Wars"**, 35 Seton Hall L. Rev. (forthcoming 2005); Carla Pratt, **Tribal Kulturkampf: The Role of Race Ideology in Constructing Native American Identity**, 35 Seton Hall L. Rev. (forthcoming 2005).

Looking to the outgroup communities from which we hale and for whom we labor, the symposium contributions also examine cultural warfare, as well as oppositional practices, in various local settings. See, e.g., Antonia Darder, **Schooling and the Empire of Capital: Unleashing the Contradictions**, 50 Vill. L. Rev. 847 (2005); Anita Revilla Raza Womyn Mujerstoria, 50 Vill. L. Rev. 799 (2005); Victor Romero, **Rethinking Minority Coalition Building: Valuing Self-Sacrifice, Stewardship, and Anti-Subordination**, 50 Vill. L. Rev. 823 (2005).

Looking beyond the United States, these accounts additionally include national as well as international and transnational analyses of cultural warfare in various sociolegal frameworks. See, e.g., Maria Clara Dias, **Moral Dimensions of Nationalism**, 50 Vill. L. Rev. 1063 (2005); Gil Gott, The Devil We Know: Racial Subordination and National Security Law, 50 Vill. L. Rev. 1073 (2005); Berta Esperanza Hernández-Truyol, **Globalized Citizenship: Sovereignty, Security and Soul**, 50 Vill. L. Rev. 1009 (2005); Angel Oquendo, National Culture in Post-National Societies, 50 Vill. L. Rev. 963 (2005).

Finally, looking into our own profession--the professorate--these accounts similarly delve into the academic culture wars, and their significance to our work. See, e.g., Fran Ansley & Cathy Cochran, **Going On-Line with Justice Pedagogy: Four Ways of Looking at a Web Site**, 50 Vill. L. Rev. 875 (2005); Sylvia Lazos, "Kulturkampf[s]" or "Fit[s] of Spite"? Taking the Academic Culture Wars Seriously, 35 Seton Hall L. Rev. (forthcoming 2005); Imani Perry, **Cultural Studies, Critical Race Theory and Some Reflections on Methods**, 50 Vill. L. Rev. 915 (2005); Mary Romero, Revisiting Outcrits with a Sociological Imagination, 50 Vill. L. Rev. 925 (2005); Nelson Soto, **Caring and Relationships: Developing a Pedagogy of Caring**, 50 Vill. L. Rev. 859 (2005).
This Afterword is limited to a presentation of a "mini-case study" that illustrates some basic but key recurring practices in one field of backlash activism: liberty-privacy case law. As noted below, this summary sketch builds on earlier works that collectively aim to make sense of the culture wars and their jurisprudential dimensions. For a further discussion summarizing this judicial front of the culture wars, see infra notes 9-13. See also Francisco Valdes, "We Are Now of the View": Backlash Kulturkampf, OutCrit Scholarship and Critical Legal Education (2005) (unpublished manuscript, on file with author) [hereinafter We Are Now of the View].


The antisubordination principle is generally associated with critical outsider jurisprudence, although its initial articulation originates with Owen Fiss. See Owen M. Fiss, Groups and the Equal Protection Clause, 5 Phil. & Pub. Aff. 107, 154-56 (1976) (finding perpetual subordination key element of discrimination). In both its original articulation and its OutCrit elaboration, the antisubordination principle is conceived as a
jurisprudential honing of the antidiscrimination principle in order to "get at" the social problems associated with domination and subjugation. See Paul Brest, Foreword: In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1, 1 (1976) (articulating principle and reviewing Supreme Court's elaboration and application). The antidiscrimination principle, as interpreted in the form of formal equality, was made "blind" to the social and conceptual asymmetries between domination and subjugation, and was likewise made to regard all kinds of "discrimination" as equal, and equally suspect. This construction of antidiscrimination as remedial law and policy failed to distinguish between remedial and invidious forms of "discrimination." This blindness in turn enabled notions of "reverse discrimination" that were used effectively to halt race-conscious remedial state actions tailored to similarly race-conscious acts of invidious discrimination. Under the antidiscrimination principle as applied, remedies to discrimination were transmuted into discrimination. The remedy became the problem because the problem was defined as "discrimination" and the cure "antidiscrimination" whereas the actual problem is subordination. To be effective, the cure must be tailored to antisubordination. See generally Jerome McCristal Culp, Jr. et al., Subject Unrest, 55 Stan. L. Rev. 2435 (2003) (discussing antidiscrimination and antisubordination).

[FN11]. This backlash kulturkampf has come to dominate law and policy during the past two decades, spawning the emergence and evolution of backlash jurisprudence to take command of Law as a key component of the ongoing culture wars. Moreover, this zeitgeist of backlash also has framed and informed the emergence and evolution of LatCrit theory during the past nine years, as well as that of critical outsider jurisprudence theories and efforts. Both OutCrit and backlash versions of post-liberal jurisprudence employ the liberal legacies of the latter part of the twentieth century. While both use the liberal legacy of formal equality as the point of departure, backlashers insist the legacy must be rolled back while OutCrits demand it be made more socially relevant. Of course, these twin jurisprudential developments have not met with the same reception: the past two decades or so have witnessed backlash scholars systematically plucked from the legal academy and other arenas by backlash politicians to enact their opinions into Law through the judicial power of the federal government. Notable backlash exemplars are Justice Antonin Scalia and Judge Robert Bork, plucked from the law faculties of the University of Chicago and Yale University, respectively, to become judicial appointees. The former remains perched on the Supreme Court while the latter was appointed to the key court of appeals in the nation's capital, where he enacted his opinions into law until his appointment to the Supreme Court under Reagan was defeated. Bork's defeated elevation was undertaken, and has been understood, as a key skirmish of the culture wars. See generally Norman Viera & Leonard Gross, Supreme Court Appointments: Judge Bork and the Politicization of Senate Confirmations (1998) (examining controversy surrounding President Reagan's nomination of Judge Bork to succeed Justice Powell on Supreme Court). On the other hand, outsider scholars continue to elaborate a post-subordination social vision, chiefly from within the legal academy. For a collection of examples, see Crossroads, Directions and a New Critical Race Theory 379 (Francisco Valdes et al. eds., 2002). See, e.g., supra notes 1-7; see also Francisco Valdes, Antidiscrimination, supra note 9, at 273-76 (discussing sociolegal legacies of twentieth century liberalisms).

[FN12]. This Afterword therefore should be read as one part of a larger work-in-progress elucidating backlash jurisprudence as part and parcel of the culture wars. See generally Valdes, Antidiscrimination, supra note 9 (focusing broadly on three theoretical perspectives--backlash jurisprudence, liberal legalisms and critical outsider jurisprudence--and comparing approaches to equality law and policy); Francisco Valdes, Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality and Responsibility in Social Justice Scholarship--Or, Legal Scholars as Cultural Warriors, 75 Denv. U. L. Rev. 1409 (1998) [hereinafter Cultural Warriors] (focusing on implications of cultural warfare for sexual orientation scholarship specifically and for all OutCrit
scholars generally); Francisco Valdes, Anomalies, Warts and All: Four Score of Liberty, Privacy and Equality, 65 Ohio St. L.J. 1341 (2005), [hereinafter Four Score] (focusing specifically on Lawrence v. Texas and generally on liberty-privacy as central doctrinal terrain of social and legal retrenchment); see also Valdes, We Are Now of the View, supra note 8.


[FN14]. For a more substantive description of this "attitudinal model" for the analysis of judicial opinions, see generally Valdes, Antidiscrimination, supra note 9. The basic conclusions of this field were more recently corroborated by a study of the cases argued during the 2002 Supreme Court term. See Theodore W. Ruger et al., The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking, 104 Colum. L. Rev. 1150, 1157 (2004) (describing model where Supreme Court Justices make decisions based on preconceived policy preferences).

[FN15]. See generally Owen Fiss, Another Equality: Issues in Scholarship, The Origins of Fate and Antisubordination Theory (2004), at http:// www.bepress.com/ils/iss2/art20. In this essay, Fiss critiques the use of narrative by critical race and other OutCrit theorists "as a substitute for the reasoned argument traditionally associated with the law." Narrativity as OutCrit method, Fiss believes, "is a way of subverting the authority of the Court [but] ... we should criticize the Court for what it says, not subvert its authority in a deliberate or flagrant way or mock its commitment to public reasons by responding to its decisions with stories. The Third Reconstruction will need the Court." Id. at 24. In this Afterword, the focus is on a substantive critique of the strategic maneuvers that pervade "what the Court says" and, more specifically, what the backlash bloc says in the name of the Court. In my view, the content of the opinions issued by this bloc in the name of the Court mock that institution's historic aspiration or "commitment to public reason" in increasingly flagrant ways that have prompted increasingly widespread recognition that the ideal of the "Rule of Law" in the United States has been put into serious question. See, e.g., infra note 17 and sources cited therein (including Justice Stevens's acknowledgment of this self-inflicted crisis, expressed publicly four years ago, shortly after bloc's 5-4 demand that halted all vote-counting in Florida in order to effectuate their selection of nation's next president).

[FN16]. Many scholars have pointed out the doctrinal or analytical oddities unveiled in backlash rulings. See Valdes, Antidiscrimination, supra note 9, at 287-89 and sources cited therein (providing bibliography of recent scholarship questioning substantive integrity of this jurisprudence). This skepticism mushroomed after the intervention of the five-member backlash bloc and their 5-4 demand that all vote counting be stopped in the 2000 presidential election. This move effectively claimed the power, for the first time in the nation's history, to select the executive. See also Bruce Ackerman, The Court Packs Itself, Am. Prospect, Feb 12, 2001, at 48 (noting that decision in Bush v. Gore litigation was "not the first time in history that the Supreme Court has made a decision that called its fundamental legitimacy into question" but that this time was unique because of direct meddling in electoral politics at highest level). According to one former Supreme Court clerk present during the early years of the culture wars, these charges fly between the justices themselves, as well as their chambers. See Edward Lazarus, Closed Chambers: The Rise, Fall and Future of the Modern Supreme Court 288-325 (1999) (noting that author clerked for Justice Blackmun in 1988 to 1989).

[FN17]. This is exemplified by the frontal assault on the integrity of "liberal" judges by

[FN18]. This retrenchment is the handiwork of many backlash judges, but a "bloc" of five currently on the Supreme Court have banded together during the past decade, joined by no other justice, to become "the most activist [Supreme Court bench] in history"--they have issued in the name of that tribunal more reversals of precedent per term than any other groups of Supreme Court appointees before them. See Thomas M. Keck, The Most Activist Supreme Court in History (2004). The jurisprudential hard core of this "backlash bloc" on the Supreme Court consists of Justices Antonin Scalia and Clarence Thomas, with the usually reliable complicity of Chief Justice William Rehnquist in firm control of the institutional powers and prerogatives as the Chief Justice. The bloc is completed by two vacillating members, Justices Sandra Day O'Connor and Anthony Kennedy, whose support is crucial to the operation of the bloc. Because their support vacillates, the bloc is unable to operate with the success and efficiency that the appointing executives had hoped to accomplish with each of these appointments. Nonetheless, each and every member of this bloc was appointed to power expressly as part of the backlashers' roll-back agenda. For further discussion of these, and related judicial appointments during the Nixon, Reagan and Bush administrations, see supra note 12. As their manifold five to four backlash opinions in the last decade of the twentieth century aptly illustrate, this quintet operates as a bloc often enough to single-handedly enact a constitutional "counter-revolution" congruent with the social and ideological agenda of the backlash politicians who installed them into power. See Valdes, We Are Now of the View, supra note 8.

Like LatCrit theory and other jurisprudential formations, however, backlashers do not constitute a monolithic camp that marches in perfect lockstep all the time, as illustrated by the unruly dynamics of the backlash bloc on the Supreme Court in cases like Lawrence. See infra notes 65-96 and accompanying text on the Lawrence opinions. Indeed, when vacillating members of the bloc deviate from the script, they are excoriated by the other members for doing so, as does Justice Scalia in his Lawrence dissent. See also Casey v. Planned Parenthood, 505 U.S. 883 (1992) (dissenting backlash in case that might have overturned Roe v. Wade).

Thus, as with LatCrit theory and other jurisprudential references throughout this Afterword, the description of backlash lawmaking, whether by judges or others, refers to the generally cognizable patterns and formally asserted positions associated with that camp. For further discussion of this point in connection with LatCrit scholars and Latinas/os in general, see supra note 9.

[FN19]. See Valdes, Cultural Warriors, supra note 12, at 1427 n.70 (defining term and describing phenomenon).

[FN20]. Illustrating this point, news accounts following the 2004 electoral cycle reported that "abortion has become a prime target" of "Democratic strategists and lawmakers quietly" as they "discuss how to straddle the nation's Red-Blue divide" and that they have concluded that the "issue and the message need to be completely rethought" because "along with gay marriage, abortion is at the epicenter of the culture wars, another example used by Republicans to highlight the Democrats' supposed moral relativism."
Debra Rosenberg, Anxiety Over Abortion: Pro-Choice Democrats Eye a More Restrictive Approach to Abortion as One Way to Gain Ground at the Polls, Newsweek, Dec. 20, 2004, at 38 (reporting conclusions of this reassessment were espoused and endorsed by that year's party standard-bearer, John Kerry); see also Richard Lacayo, Abortion: The Future Is Already Here, Time, May 4, 1992, at 27 (observing that more than decade ago much of formal constitutional right to reproductive choice had been eroded in practice by constant and multifarious backlash assaults aimed at Roe v. Wade). Whether or not these particular conclusions are sound, they serve to illustrate how sex and sexuality, along with race, nationality and ethnicity, have been positioned at the "epicenter" of backlash kulturkampf. See generally Charles P. Kindregan, Jr., Same-Sex Marriage: The Cultural Wars and the Lessons of Legal History, 38 Fam. L.Q. 427 (2004).

[FN21]. 517 U.S. 620, 636 (1996) (Scalia, J., dissenting). In Romer, the Court considered a constitutional amendment to the state charter adopted by direct statewide referendum only a few years earlier. The amendment had demarcated "sexual orientation" as an area of antidiscrimination lawmaking distinct from all other civil rights categories. Amendment Two preempted municipal and local governments from enacting local antidiscrimination laws that embraced sexual orientation, making it impossible to include sexual minorities in antidiscrimination legislation that covered other traditionally subordinated social groups on the basis of racial, ethnic, gendered, religious and other kinds of identities. Id. at 637. Under Amendment Two, advocates of civil rights laws based on minority sexual orientation faced unique political obstacles, prompting both the state and federal supreme courts to hold that a state majority cannot legislate a categorical exclusion of a minority and its interests from the mainstream of society based on the majority's "animosity toward the class of persons affected" or toward its perceived (or actual) way of life. Id. at 634.


[FN23]. See Valdes, Antidiscrimination, supra note 9, at 276-82 (comparing and contrasting these two jurisprudential camps and their positions vis-à-vis culture wars).


[FN25]. The term's usage in law and society thus marks and reflects the mounting pursuit and awareness of the backlash politics that animate this cultural warfare. In 1980, the term was used in public newspapers, magazines and related media four times; in 1990, seventy-six times; and in 1992, the year of formal declaration of a cultural war, 575 times. See Valdes, Antidiscrimination, supra note 9, at 283.

[FN26]. The dynamics of backlash kulturkampf point to three interactive and mutually-reinforcing "fronts" or "prongs" of attack: (1) training accumulated or entrenched resources to prevail in majoritarian contests and take control of public policy, both in the form of representative elections and "direct" referendum; (2) leveraging success in the
first prong additionally to pack the federal courts with ideological appointees committed
to reversing despised precedents, undoing "liberal" legislation, and shielding backlash policymaking from judicial scrutiny; and (3) turning to the spending power, which is used
in tandem with the other two prongs, to "starve" social lifelines to vulnerable groups,
especially when the first two prongs fail to undo or reverse "liberal" legacies. See Valdes,
Cultural Warriors, supra note 12, at 1434-43 (outlining these "prongs"). See generally Valdes, We Are Now of the View, supra note 8 (expanding on analysis).

[FN27]. Plainly, this kulturkampf of retrenchment seriously and detrimentally affects
many if not all outgroups. The culture wars find "different" groups positioned "differently"
vis-à-vis liberty-privacy and formal equality and vis-à-vis key thematic issues, such as
democracy and judicial review, or antidiscrimination and anti/federalism, and thus vis-à-
vis their formal and actual retrenchment through backlash. For instance, with sexual
minorities the tactic is refusal recognition of formal equality, whereas with racial or ethnic
minorities the tactic is the neutralization of formal equality to deny substantive or
functional equality. These differentials mean that the aspects or techniques of cultural
warfare have been tailored for and directed at "different" groups in group-specific ways.
Ways that account for each group's standing in relationship both to formal law and to
social reality. See, e.g., Nicolas Espiritu, (E)Racing Youth: The Racialized Construction of
California's Proposition 21 and the Development of Alternate Contestations, 52 Cleve. St.
L. Rev. 189 (2005) (focusing on cultural warfare against youth of color in California
through use of proposition system in that state); Ruben J. Garcia, Comment, Critical Race
Rev. 118, 122 (1995) (deconstruction racialized political dynamics of that early
Proposition); Kevin R. Johnson, An Essay on Immigration Politics, Popular Democracy,
and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race,
70 Wash. L. Rev. 629, 650-58 (1995) (analyzing racial rhetoric and politics of Proposition
187). See generally Kevin R. Johnson, Public Benefits and Immigration: The Intersection
of Immigration Status, Ethnicity, Gender and Class, 42 UCLA L. Rev. 1509 (1995)
(analyzing identity politics and social consequences of recent legal "reforms").

[FN28]. See Jeb Rubenfeld, The Anti-Antidiscrimination Agenda, 111 Yale L.J. 1141
(2002) (evaluating current judges' manipulation or disregard of precedent and canons of
interpretation in pursuit of their anti-antidiscrimination political agenda); see also Keith
Aoki, The Scholarship of Reconstruction and the Politics of Backlash, 81 Iowa L. Rev.
1467 (1996); Kimberlé W. Crenshaw, Race, Reform and Retrenchment: Transformation
and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331 (1988); Fiss, supra
note 9; Alan D. Freeman, Legitimizing Racial Discrimination Through Antidiscrimination
Law: A Critical Review of Supreme Court Doctrine, 62 Minn. L. Rev. 1049 (1978);
Kenneth L. Karst, Legislative Facts in Constitutional Litigation, 1960 Sup. Ct. Rev. 75;
Stephanie M. Wildman, The Legitimation of Sex Discrimination: A Critical Response to
Supreme Court Jurisprudence, 63 Or. L. Rev. 265 (1984). See generally Kevin M.
Clermont et al., How Employment-Discrimination Plaintiffs Fare in the Federal Courts of
Appeals, 7 Employee Rts. & Emp. Pol'y J. 547 (2003); Kevin M. Clermont & Theodore
Eisenberg, Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from
Court and Employment Discrimination Law in 1989: Judicial Retreat and Congressional
Response, 64 Tulane L. Rev. 1485 (1990) (focusing on retrenchment in that key term of
Supreme Court); Charles R. Lawrence, III, "Justice" or "Just Us": Racism and the Role of
Ideology, 35 Stan. L. Rev. 831 (1983) (focusing on race and white supremacy); Nancy
Levit, The Caseload Conundrum, Constitutional Restraints and the Manipulation of
Jurisdiction, 64 Notre Dame L. Rev. 321 (1989) (critiquing interposition of jurisdictional
and prudential barriers to deflect civil rights actions); Robert P. Smith, Explaining Judicial
manipulation of facts and doctrine); Keith Wingate, A Special Pleading Rule for Civil
(critiquing heightened rules of pleading that various federal judges had erected to rebuff civil rights claimants).

[FN29]. As illustrated by the mini-case study, backslackers' constrictive use of history and tradition is coupled with the intonations of majoritarian democracy that are often strategically employed in backlash jurisprudence. The line goes something like this: judges are ill-equipped to divine "new rights" and indeed "come closest to illegitimacy" when striving to do so. Thus, judges should leave in place the "presumed" policy preferences of the majority unless the judges are able to find specific constitutional text on point, or a specifically-framed history and tradition to fit the facts of the case. Because constitutional text is infamously brief, abstract and ambiguous, the backlash search for specific text is usually negative. By employing the most exacting approach to defining the relevant history or tradition, backlash judges help to ensure a negative outcome via this methodology. See infra notes 30-64 and accompanying text on Bowers and Glucksberg. Under this analytical scheme, nominally democratic acts of the relevant majority--in this instance the hetero/sexual majority--become automatically self-justifying. Using entrenched power, status and wealth amassed during the decades and generations of de jure patriarchy and white supremacy, the in-groups established by the original immigrants thus are able structurally to dominate both the contents of history and tradition as well as the potential for "democratic" departures from them. For a further discussion on history, tradition and majoritarianism, see infra notes 67-95 and accompanying text. Consequently, the social and cultural effects of this methodology serve to privilege "original" arrangements emplaced throughout society at large based on social identities and ownership of property. These arrangements of course favored the propertied white male elites of the colonial period, which, indeed, were "the people" permitted to participate fully in the political decision-making processes used during those times to impose the social, economic and political structures that, now, are hallowed strategically by backslackers as neutral kinds of history and tradition to wage cultural warfare against the "traditionally" subordinated groups of this country. See infra note 81 (discussing suffrage and political participation in country's formative years). Thus, history and tradition become code terms for past and self-serving choices regarding "values" that backslackers now say bind us all in perpetuity, both formally and structurally, regardless of the constitutional lessons that later generations might draw, as did the framers, from social experience or evolution. For a further discussion of framers' adaptation of views from the revolutionary to the "critical" period, which caused them to structure "democracy" in fundamentally different terms as a result of the lessons they drew from the latter period, see infra notes 72-76, 102 and accompanying text. Over time, the likely if not inevitable social and cultural consequences of backlash methodology is to reverse multiculturalism in the distribution of social and formal powers, and revert to a more homogenized structuring of power--an artificial homogeneity that, despite conclusory backlash claims to the contrary, are formally at odds with the original intent of key framers in favor of a heterogeneous society. For a further discussion on original federalist theories regarding the Constitution and system they were designing, see infra note 102.


[FN32]. Bowers, 478 U.S. at 188 n.1. The statute completely banned both homosexual and heterosexual versions of intimacy other than "traditional" sexual intercourse. For a widely noted account of this case, see generally Peter Irons, The Courage of Their Convictions: Sixteen Americans Who Fought Their Way to the Supreme Court 379-403 (1988) (relaying personal accounts of Bowers case).

[FN33]. See Valdes, Four Score, supra note 12. Perhaps the notion of "self correction" must be qualified, given the ways in which Lawrence and its predecessors exude
jurisprudential ambivalence, which in turn enables backlashing judges and politicians to attempt to cast liberty-privacy as a "flattened-out collection of protected acts" rather than a coherent demarcation of autonomy for individuals that majoritarian tastes cannot outlaw. See id.

[FN34]. The four were: Burger (Nixon), Rehnquist (Nixon), Powell (Nixon) and O'Connor (Reagan). For a review of judicial appointments and backlash kulturkampf, see Valdes, Cultural Warriors, supra note 12, at 1440-43 and sources cited therein (discussing impact of judicial appointments on kulturkampf); see also supra notes 9-12 and accompanying text (discussing same).

[FN35]. Because Bowers expressly purports to "accept" the Griswold line of precedents even as it works to confine them, the sum of the liberty-privacy precedents after Bowers could only mean that the relevant (heterosexual) majority now could impose its majoritarian sense of moralism on the sole minority group that Bowers excluded from the Constitution's protection--non-heterosexuals. Today, despite Lawrence, the heterosexist status quo blessed in Bowers continues to operate fully in law and society. See, e.g., Lofton v. Sec'y of Dep't of Children & Family, 358 F.3d 804, 816 (11th Cir. 2004) (citing Lawrence but nevertheless upholding outright ban on "homosexual" individuals' capacity to adopt children under Florida law); In Re Kandu, 315 B.R. 123, 138 (Bankr. W.D. Wash. 2004) (citing Lawrence but holding that Canadian same-sex marriage could be denied effect in United States bankruptcy proceedings); Kansas v. Limon, 83 P.3d 229, 234 (Kan. Ct. App. 2004) (citing Lawrence holding that Arkansas could impose differential punishment on minors for prohibited sexual relations on grounds that Lawrence did not extend to children). In each instance, the judges writing these opinions opted to emphasize the constrictive language in Lawrence rather than its expansive passages, or to distinguish the cases legally and factually. These cases vividly illustrate the ways in which Lawrence can be reduced to nothing despite its reasoning and outcome. This possibility of circumvention exists regardless of the eighty years of jurisprudence preceding Lawrence, beginning with Meyers in 1923. Indeed, the five justices in Bowers used that case to attempt a halt to, if not to incite a reversal of, liberty-privacy cases under the Fourteenth Amendment's Due Process Clause. See Valdes, Four Score, supra note 12 (tracing eighty years of liberty-privacy Supreme Court opinions from Meyers to Lawrence).

[FN36]. Without laws of general and equal application, the legal possibility--and constitutional requirement--of equal protection demanded by the Fourteenth Amendment is positively frustrated, ironically, by judicial fiat. See U.S. Const. amend. XIV, § 2 (stating Equal Protection Clause).

[FN37]. See supra notes 8-9, 12-13, 17-18, 20, 23-24 and accompanying text (explaining politics of culture war); see also infra notes 45-48 and accompanying text (criticizing identity-driven approach taken in Bowers's opinion).


[FN43]. See Bowers, 478 U.S. at 190 (summarizing superficially preceding case law addressing liberty-privacy issues under Fourteenth Amendment).
[FN44]. See Valdes, Four Score, supra note 12 (tracking this point through Meyers line of liberty-privacy line of cases).


[FN46]. For an early and notable example of legal scholarship documenting the historical errors asserted by the majority and the Burger concurrence, see Anne B. Goldstein, History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick, 97 Yale L.J. 1073 (1988).

[FN47]. Later in the opinion, the majority turns to privacy's spatial dimension as it occurred in that case--the invasion of the bedroom. Rebuffing the spatial dimensions of privacy with equal alacrity, the Bowers quintet casually rejected the relevance of Stanley v. Georgia, 394 U.S. 557 (1969), with the formalistic note that Stanley had been "firmly grounded in the First Amendment" whereas "homosexual sodomy" was not similarly grounded in the text or design of the Constitution because they themselves had just declared so a few paragraphs earlier in that remarkable opinion. See Bowers, 478 U.S. at 190 (distinguishing Bowers from Stanley). Thus, the only way that the spatial dimension of privacy under Bowers's facts could be sustained, the quintet asserted, was to confer special rights on homosexual at-home activity "by [judicial] fiat." Id. at 195. In their own words, and without any sense of irony, the opinion explained that, "it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home." Id. at 195-96. In so doing, the Bowers Court also overlooked the deeply rooted relevance of privacy's spatial dimension in United States law under both the Fourteenth and Fourth Amendments: landmark cases like Griswold explicitly relied on both. See Valdes, Four Score, supra note 12.


[FN49]. Id.

[FN50]. Id. at 196 (Burger, J., concurring). After much flipping and flopping, Justice Powell also concurred under the apparent sway of a Mormon clerk with an avid interest in the outcome of this case, but with a proviso that the Eighth Amendment's prohibition against cruel and unusual punishment might proscribe severe sentences for private, consensual acts of oral or anal sex. See id. at 197 (Powell, J., concurring). The clerk's interest and influence in the outcome of Michael Hardwick's case is recounted in Tribe, supra note 13, at 1953-55 (citing private memorandum between Powell and clerk); see also John C. Jeffries, Jr., Justice Lewis F. Powell, Jr. 521-24 (1994) (describing Powell's attitudinal oscillation before reaching conclusion in Bowers). The story concludes with Powell's courageous and candid post-retirement admission before a law student forum at New York University that he likely had erred in that fateful last-minute vote switch. See Anand Agneshwar, Powell on Sodomy: Ex-Justice Says He May Have Been Wrong, Nat'l. L.J. Nov. 5, 1990, at 3 (discussing Powell's statement that Bowers may have been wrongly decided); Aaron Epstein, Ex-Justice Says He Erred in '86 Gay Ruling, Miami Herald, Oct. 26, 1990, at 19A (recounting Justice Powell's doubt concerning correctness of ruling in Bowers); Ex-Justice Powell Regrets '86 Ruling on Gays, S.F. Chron., Oct. 30, 1990, at A4 (noting Powell's admitted regret over joining majority opinion in Bowers). The four remaining justices dissented through an opinion authored by Justice Blackmun. The dissent echoed the Eleventh Circuit's analysis and criticized the majority's single-minded obsession with social identities while gliding over the facially sweeping provisions of the statute. See Bowers, 478 U.S. at 199 (Blackmun, J., dissenting). Justice Stevens also filed a separate dissent on behalf of himself and Justices Brennan and Marshall. Stevens noted explicitly that Bowers's judicial approval of the selective application of this
facially sweeping criminal statute produced a serious equality anomaly under the Equal Protection Clause of the Fourteenth Amendment. Because privacy rights would henceforth be deemed formally unequal based on the sex or sexual orientation of the bodies involved in a coupling, the Stevens dissent presciently warned, Bowers created a glaring and logically untenable stratification of liberty-privacy rights already explicitly recognized for all "individuals" in Meyer, Griswold and progeny. This constituted an undue and belated jurisprudential anomaly in which identical acts are to be deemed constitutionally protected or not based solely on classifications like "heterosexual" or "homosexual." See id. at 214 (Stevens, J., dissenting).

[FN51] Specifically and notably, Justice Stevens spelled it out back in 1986. See supra note 50 (discussing Stevens's dissent in Bowers).

[FN52] See, e.g., Goldstein, supra note 46 (discussing Court's use of history to mask justices' personal prejudice). Embraced mostly by backlashers, the Bowers ruling had been greeted with overwhelming skepticism or worse for this and similar reasons, as the Lawrence majority expressly noted: "In the United States criticism of Bowers has been substantial and continuing, disapproving of its reasoning in all respects, not just as to its historical assumptions." Lawrence v. Texas, 539 U.S. 558, 576 (2003). For one such contemporaneous criticism, see generally Thomas B. Stoddard, Bowers v. Hardwick: Precedent by Personal Predilection, 54 U. Chi. L. Rev. 648 (1987) (attributing Bowers to personal predilections of justices comprising majority).

[FN53] In one of the institutional wounds that backlashers have inflicted on the Court's legitimacy, they also erected the equality anomaly that their predecessors and the Eleventh Circuit had averted--and that Stevens had explicitly identified for them in his Bowers dissent. See Valdes, Four Score, supra note 12 (elaborating "equality anomaly"); see also supra note 50 (discussing Justice Stevens's dissent in Bowers).

[FN54] See Tribe, supra note 13, at 1932 (contrasting Bowers's superficial consideration of privacy rights with previous cases that considered these rights as "reflections, in the lives of individuals and groups, of constitutional principles").

[FN55] Id. at 722.

[FN56] See id. at 709 (relating Ninth Circuit's en banc ruling).

[FN57] Id. at 703.

[FN58] Id. at 711 (stating that "for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisted suicide").

[FN59] See supra notes 55-58 and accompanying text.

[FN60] See Glucksberg, 521 U.S. at 722 (citing Ninth Circuit's opinion).

[FN61] In this strategic version of the Due Process Clause, the term "suicide" is deemed somehow more specific than "control over one's final days" and therefore the justices' preferred version of the plaintiff's actual claim was unilaterally substituted, at the very last stage of the litigation, for the substantive claim that was actually adjudicated by the courts in that case up to that moment. Of course, as an elementary point, judicial reframing of claims and issues at the final appellate stage of a case is improper; in this particular instance, it is not only because appellate judges are supposed to adjudicate claims as actually presented and litigated, rather than as they belatedly reinvent, but also because this use of history and tradition to deny Fourteenth Amendment protection of claimed liberty interests runs counter to the proper use of that source--as a positive
supplement to constitutional text--in the Meyer-Griswold line of cases that since 1923 have defined this area of constitutional law. See Valdes, Four Score, supra note 12 (tracing role of history and tradition in liberty-privacy Supreme Court opinions since 1920s).

[FN62]. Glucksberg, 521 U.S. at 723.

[FN63]. See id. at 721 (describing Due Process clause analysis and history and tradition).

[FN64]. See supra note 9 (describing backlash denunciations of judicial will and "liberal activism").

[FN65]. For a further discussion on Bowers and the underlying assumptions the justices held, see supra notes 30-54 and accompanying text.


[FN67]. Id. at 722.

[FN68]. And, as in the case of Bowers, the decision quickly generated much scholarly commentary. See id. at 722 n.17 (citing sources).

[FN69]. See Lawrence v. Texas, 539 U.S. 558, 562-63 (2003) (stating factual background of case). Justice Sandra Day O'Connor concurred in the result, but based her ruling on equal protection grounds, which would have left Bowers intact. Justice O'Connor formed part of the Bowers quintet and was apparently reluctant to admit error despite the conceptually untenable doctrinal anomaly that Bowers had created. See Valdes, Four Score, supra note 12. In this reluctance, O'Connor stands in stark contrast to the candor of another justice in that quintet, Lewis Powell. For a further discussion on Lewis Powell and his confession of probable error in casting the decisive fifth vote in 1986, see supra note 50 and sources cited therein.

[FN70]. See generally Daniel Gordon, Gay Rights, Dangerous Foreign Law, and American Civil Procedure, 35 McGeorge L. Rev. 685, 687-91 (providing brief historical overview of liberty concept in relation to Fourteenth Amendment and Lawrence).


[FN73]. See Valdes, Four Score, supra note 12 (discussing these cases and their holdings).

[FN74]. For a further discussion on the framers' concerns over majoritarian or democratic tyranny, see infra notes 72-76 and accompanying text.

[FN75]. For a further discussion on Bowers's imposition of de jure inequality, see supra notes 34-35 and accompanying text.
This focus on institutional legitimacy, of course, combines actual institutional history, especially the 1930s activist campaign against the New Deal, with longstanding theoretical concerns over the role of judicial review in a democracy. For a further discussion on judicial activism in the 1930s and in the present, see supra notes 9, 19-29 and accompanying text. But the backlasher's formulation twists the relationship between the two: federal judges are unelected and receive lifetime appointments precisely to create an independent check on majoritarian lawmakering, especially when the majority enacts burdens that apply exclusively or disproportionately to minorities. See infra note 78 and accompanying text (quoting Justice Jackson on this point). Such abuses of formal democracy were envisioned by the original framers of the Constitution, who responded to the threat in two ways: first, with a system of checks and balances designed to create a structural set of mechanisms preventing all factions from gaining perpetual supremacy and, second, with a substantive Bill of Rights precluding majorities from impinging on individuals or minorities. For a further discussion on antisubordination as democratic choice and constitutional mandate, see infra notes 95-105 and accompanying text. More to the point, majoritarian abuses of formal democracy are prohibited by the Equal Protection Clause of the Fourteenth Amendment, which helps to ensure that majoritarian lawmakering is not selectively applied. As Romer has made recently clear, judges are not supposed to bless abuses of power when veiled as nominal democracy. For a further discussion of Romer, see supra note 21 (discussing Court's holding in Romer). In Bowers, however, the majority reversed the two, posing the spectre of antidemocratic judicial interference with the selective application, specifically against "homosexuals," of the "presumed belief" of a long dead majority in Georgia that all "sodomy" is immoral. Thus, in addition to history and tradition, the Bowers justices claimed institutional legitimacy demanded judicial deference to "democratic" lawmakering. For a further discussion on Bowers and the facially neutral statute upheld there as applied, see supra notes 38-50 and accompanying text.

For a further discussion of how this specific formulation of the majoritarianism problem that the Constitution is designed to check is Madisonian, see infra note 102.


Bowers thereby not only signaled open season on sexual minorities and our social justice quests, but also proclaimed open season on the very notion of "fundamental rights" or liberties that constitutionally protects all individuals from the caprice of shifting generations and majorities. Not surprising to any alert observer, including no doubt the backlashing judges who rendered these opinions, this rather undemocratic and decidedly anti-constitutional phenomenon is precisely what followed during Bowers's sixteen-year reign. In Bowers's wake backlash politicians increasingly sought to target sexual minorities for discrimination in all the vital venues of the "private" and "public" spheres: employment, housing, family, public service and educational opportunities. See Patricia A. Cain, Same-Sex Couples and the Federal Tax Laws, 1 Law & Sexuality 97, 111-29 (1991) (describing tax code disparities based on formal exclusion from marriage); see also Developments in the Law --Sexual Orientation and the Law, 102 Harv. L. Rev. 1508 (1990) (compiling historical--and current--vulnerability of members of sexual minorities to de jure discrimination). See generally Barbara J. Cox, Alternative Families: Obtaining Traditional Family Benefits Through Litigation, Legislation and Collective Bargaining, 2 Wis. Women's L.J. 1 (1986) (elaborating early effort to dismantle web of detriments flowing from formal exclusion from marriage). When challenged, homophobic backlashers repeatedly--even routinely--cited Bowers, which in time became the bedrock of this de jure edifice. The standard judicial line to de jure discrimination during the Bowers period is illustrated by the infamous opinion in Padula v. Webster, an equal protection challenge to the FBI's anti-gay personnel policies. See generally Padula v. Webster, 822 F.2d 97
Referring to Bowers's blessing of Georgia's sodomy statute as applied to Michael Hardwick, an appellate panel declared in this case that, "there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal." Id. at 103. If the Bowers's justices were willing to bless the most "palpable discrimination" possible against sexual minorities, how could lower court judges do any less? Thus, Bowers's blessing of homophobic criminal statutes under substantive due process became a justification for blessing homophobic policies and practices under equal protection.

[FN80]. See supra note 78 and accompanying text (quoting Justice Jackson on this point).

[FN81]. The distinction between "substance" and "method" is of course elusive and perilous. Thus, here "method" refers to the deployment of critical realism in the majority opinion to pierce through the blinding formalisms that often prompt judges to write opinions riotously at odds with lived experience. For examples of this phenomenon, see Francisco Valdes, Queers, Sissies, Dykes and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society, 83 Cal. L. Rev. 1, 20-23 (analyzing this kind of doctrine-reality disjuncture in statutory and constitutional civil rights litigation). For a further discussion on critical realism in Lawrence, see infra notes 106-117 and accompanying text. Importantly, this avoidance of formalism ultimately enabled the application--and vindication--of the antisubordination principle in this case. For a further discussion on the fusion of critical realism and antisubordination normativity in Lawrence, see infra notes 96-117.

[FN82]. In "modern" times, this view was most forcibly articulated in Arthur Goldberg's concurrence for three of the justices in Griswold, which combined the Ninth Amendment's express protection of unenumerated constitutional rights "retained by the people" with "traditions and conscience" to help judges discern the contours of such unenumerated rights. See Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring). This same basic and positive approach, however, is also reflected in the opinions of numerous judges adjudicating privacy cases. See Valdes, Four Score, supra note 12. Of them all, perhaps the Harlan concurrence in Griswold is most illuminating. There, Harlan forcefully invoked history and tradition both as a tether of judicial interpretations of the Fourteenth Amendment as well as a means of liberating privacy from the specific provisions of the Bill of Rights and their incorporation into the Fourteenth Amendment via the Due Process Clause. See Griswold, 381 U.S. at 499 (Harlan, J., concurring). In the Harlan concurrence, the dangers of rights constriction against the individual flow from the vagaries of textual interpretation, and history and tradition serve to guard against this dangerous potential for a judicial text-based constriction of liberty-privacy. See id. Under either account, history and tradition properly operate in conjunction with text-based concepts to protect, not constrict, individual rights through judicial action. For the original and widely noted articulation of this basically expansive approach to liberty-privacy, see Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 195 (1890) (explaining that "[t]his development of the law" due to "the advance of civilization through "thoughts, emotions, and sensations and the beauty and capacity for growth enabled the judges to afford the requisite protection, without the interposition of the legislature"). For a contemporary review and analysis, presented nearly a century later, see generally Jed Rubenfeld, The Right of Privacy, 102 Harv. L. Rev. 737 (1989) (elaborating notion of personhood in relationship to privacy doctrine).


See Valdes, Four Score, supra note 12 (surveying cases from Meyer to Pierce to Bowers).

See supra notes 30-54 and accompanying text (discussing Bowers).

See A. Leon Higginbotham, Jr., In the Matter of Color: Race and the American Legal Process: The Colonial Period (1978) (surveying property-and-identity based structures of inclusion or exclusion that limited exercise of political rights in formative years of this country and legal system); Robert J. Steinfeld, Property and Suffrage in the Early American Republic, 41 Stan. L. Rev. 335 (1989) (same); see also supra note 29 (discussing property and its relation to Constitution). For a further discussion on the backlashers' use of history and tradition to recycle the prevalent biases of that era in perpetuity as formal constitutional doctrine, see supra notes 47-50 and accompanying text.

This key backlash gambit was brought into the open--and expressly rejected by a majority of the justices--in the remarkable dispute on this point recorded in the various opinions in Michael H. v. Gerald D., 491 U.S. 110 (1989). In a plurality opinion joined only by Justice William Rehnquist, Justice Scalia embraced and cited the Bowers ruling, now repudiated wholly by Lawrence, to assert that history and tradition in backlash analysis should be reduced to the "most specific level ... [that] can be identified." Id. at 127 n.6. Justice William Brennan observed that the assertion projected an approach to constitutional interpretation that was descriptively "novel" and prescriptively "misguided." Id. at 139-40. Though otherwise joining that plurality opinion, Justices Sandra Day O'Connor and Anthony Kennedy explicitly rejected that assertion, similarly observing that Justice Scalia's assertion "may be somewhat inconsistent with our past decisions in this area." Id. at 132. Citing Griswold and Eisenstadt, Justices O'Connor and Kennedy noted that, "[o]n occasion the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be 'the most specific level' available" to the judges. Id.

Notably, this type of strained or "strict" approach to constitutional interpretation had been forcefully and specifically rejected during the nation's formative years, as exemplified in McCulloch v. Maryland, See 17 U.S. (4 Wheat.) 316 (1819). In McCulloch, the Supreme Court upheld federal legislation chartering a federal bank even though the text of the Constitution does not expressly enumerate the power to charter corporations among those vested in the federal legislature. In a unanimous opinion, authored by Justice John Marshall, the Court juxtaposed two basic approaches to constitutional interpretation: the "just" or "sound" approach versus the "narrow" or "strict" approach. Opting for the former, those justices reasoned that the former would entail a "baneful influence" on the nation due to the "absolute impracticality of maintaining it, without rendering the government incompetent to its great objects." Id. at 417-18. This rendering has been precisely the goal of every advocate who interposed these arguments in North American constitutional history. It likewise is the goal of cultural warfare and backlash activism: disabling the government from its capacity to reform entrenched social hierarchies established in part by force of law in eras of formal subordination based on race, ethnicity, gender, sexual orientation and other forms of social stratification, and that now are structurally entrenched culturally and materially in law and society. Historically dominant groups now waging backlash kulturkampf calculate, correctly, that their privilege and dominance vis-à-vis historically subordinated groups is best preserved, and perhaps amplified, by disabling the possibility of federal power to reform historic injustices that have enriched and empowered them. See Valdes, We Are Now of the View, supra note 8 (discussing federal powers employed historically to disrupt locally entrenched monopolies of power).

For a further discussion on the Bowers quintet's misuse of history and tradition, see supra notes 45-47, 49 and accompanying text.
[FN90]. See generally Valdes, Outsider Scholars, supra note 5 (discussing Euro-heteropatriarchy theory).

[FN91]. This debate over history and tradition echoes similar concerns over "natural law" and constitutional interpretation, and raises the same kinds of institutional issues: the resort to natural law, like the resort to history and tradition, enables individual judges to insert their personal views and political values into constitutional analysis by exaggerating or fabricating convenient history and by ignoring or deflecting inconvenient aspects of the documented past. See generally Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) (debating proper uses of natural law in constitutional interpretation and reflecting on similar concerns). As this mini-case study indicates, these tactics of exaggeration, fabrication or deflection sometimes are practiced through the manipulation of descriptions and of their levels of generality and specificity--in the judges' words, by "careful description" of rights claims that in effect, if not on purpose, are repeatedly drawn in ways designed for ultimate rejection. See supra note 88 (discussing Michael H. and vigorous dispute recorded in those opinions over appropriate levels of description to guide judicial invocations of history and tradition in constitutional interpretation).

[FN92]. For a further discussion on the uses of history and tradition before and in Bowers, see supra notes 45-54 and accompanying text.

[FN93]. See supra note 88 (commenting on express rejection of this position by seven of nine justices in 1989 case of Michael H. and more generally by entire Court in 1803 Marbury case).

[FN94]. See Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849, 861-62 (1989) (noting that principled interpretation of Eighth Amendment based on history and tradition would make maiming constitutionally permissible form of criminal punishment today because in 1780s it was practiced, thus today could not be "cruel and unusual punishment," nevertheless professed "originalist" as pure as he would become "faint-hearted" at that point, ruling contrary to conclusion that history and tradition compel).

[FN95]. See generally id. (discussing contrasting theories of constitutional interpretation of originalism and nonoriginalism).


[FN98]. In his concurring opinion, Justice Frankfurter stated:

Deeply embedded ways of conducting government cannot supplant the Constitution or legislation, but they can give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J.)
concurring) (invalidating executive seizure of steel mills to maintain military supplies for Korean War operations).

[FN99]. Indeed, this very kind of majoritarian action is precisely what the Griswold line of cases and Romer overturned. See supra notes 33 and 76 and accompanying text.


[FN101]. See supra note 45 and accompanying text.


[FN103]. For a further discussion of antisubordination and its distinction from antidiscrimination, see supra note 10 and sources cited therein.

[FN104]. Since its early articulation, and especially in recent years, this shift from antidiscrimination to antisubordination has been championed perhaps most consistently and vocally by scholars associated with critical outsider jurisprudence. See Valdes, Antidisimination, supra note 9, at 271-73.

[FN105]. See Culp et al., supra note 10, at 2446-51.


[FN108]. Notably, key framers of the Constitution explained their work-product to their own generation by presenting it as a system of checks and balances designed to ensure that no political, social or identity-based "faction" would ever be able to "vex and oppress"---in other words, to subordinate---others in perpetuity; though the most salient social groups in the minds of the Framers were religiously based, they expressed the concern in terms of social groups or "fractions" constructed by identity, geography, property or industry. See The Federalist No. 10 (James Madison). As a matter of design, structure and theory, the antisubordination principle now vindicated in Lawrence stands as original constitutional intent and policy. The curious thing about this arousal of antisubordination in Lawrence, therefore, is not that it took place, but that it did so in a time otherwise enveloped by the subordinating politics of backlash kulturkampf.


[FN110]. See supra note 75 and accompanying text on Georgia's sweeping definition of sodomy in the Bowers statute. Ironically, this disparagement in the name of democracy takes place alongside the judicial dismantlement of democratic lawmaking, as illustrated
by backlathers' retrenchment of voting rights legislation and other civil rights statutes of the twentieth century, in the culture war cases of the past two decades. See, e.g., Issacharoff & Karlan, supra note 107, at 24-32 (explaining antisubordination policy objectives that underlie federal civil rights legislation, including voting rights laws).


[FN113]. See id. at 564-67.

[FN114]. See id. at 566-70.

[FN115]. See id. at 575-76.


[FN117]. See Lawrence, 539 U.S. at 572-77 (discussing "stigma" attached to homosexuals by sodomy statute).

[FN118]. It also bears note that feminist and other scholars have amply demonstrated that the distinction between "public" and "private" spheres of law and society oftentimes is a tool to justify the subordination of women as a social group. See, e.g., Catharine A. MacKinnon, Reflections on Sex Equality Under Law, 100 Yale L.J. 1281 (1991) (critiquing


[FN120]. This approach also enabled the Court to see and elaborate the interplay and interconnection of liberty, privacy and equality as doctrinal categories. See Valdes, Four Score, supra note 12.

[FN121]. See Rubenfeld, supra note 82 (discussing liberty-privacy and personhood).

[FN122]. The remarkably diverse array of amicus briefs submitted to the Court reflects the long years of hard work in coalition-building that took place in the seventeen years separating Bowers and Lawrence. Those briefs, cited by the Lawrence majority, and the sectors of society that they represented, made it more difficult than usual for insulated judges to opt for the comforts of formalistic distance to blind themselves to the lived realities presented by the cases. See supra note 10 and sources cited therein (discussing formal legal blindness).